

The Supreme Court of South Carolina

Centex International, Inc and Affiliates, Appellant,

v

South Carolina Department of Revenue, Respondent

Appellate Case No 2011-196887

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this appeal is hereby certified for review by the South Carolina Supreme Court

Upon receipt of this order, the Court of Appeals is hereby directed to forward the case file, all records and briefs and any exhibits on file to this Court

IT IS SO ORDERED



C J
FOR THE COURT

Columbia, South Carolina

July 25, 2012

cc

Milton Gary Kimpson

Adam Nicholas Marinelli

Harry A Hancock

Burnet Rhett Maybank, III

The Honorable Jenny Kitchings

Burnet R. Maybank, III
Member
Admitted in SC

February 16, 2012

VIA HAND DELIVERY

The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

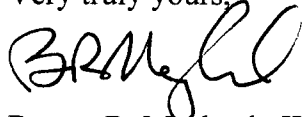
Re Centex International, Inc. & Affiliates v. South Carolina Department
of Revenue, Case No. 09-ALJ-17-0532-CC
Case Tracking No. 2011196887

Dear Ms. Gee:

Enclosed for filing with the Court is an original and one (1) copy of the Proof
of Service of the Record on Appeal in regards to this case. Please return the clocked-
in copy to me via our courier.

Please contact me if you have any questions or need any additional
information.

Very truly yours,



Burnet R. Maybank, III

BRM/JPR

Enclosures

cc Adam N. Marinelli, Esquire (via U.S. Mail)

RECEIVED
FEB 16 2012
SC Court of Appeals



The South Carolina Court of Appeals

TANYA A GEE
CLFRK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

January 30, 2012

Burnet R Maybank, III, Esquire
Nexsen Pruet, LLC
P O Drawer 2426
Columbia, SC 29202

Adam Marinelli, Esquire
Counsel for Litigation
Sc Dept of Revenue
Columbia, SC 29211

Re Centex International v SCDOR
Case Tracking # 2011196887

Dear Counsel

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address 1205 Pendleton Street, Columbia, S C 29201. Thank you for your attention to this.

If you have any questions, please do not hesitate to contact this office.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D McLeod, Administrative Law Judge

Case No 09-ALJ-17-0532-CC

Centex International, Inc & Affiliates

Appellant,

v

South Carolina Department of Revenue

Respondent

INITIAL REPLY BRIEF OF APPELLANT

Burnet R Maybank, III
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202-2426
PHONE 803 771 8900
FACSIMILE 803 253 8277
bmaybank@nexsenpruet.com

Attorney for Appellant Centex International, Inc &
Affiliates

January 17, 2012
Columbia, South Carolina

RECEIVED

JAN 17 2012

SC Court of Appeals

ORIGINAL

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	11
ARGUMENTS	2
I THE ALC ERRED AS A MATTER OF LAW BY CONCLUDING THAT THE CORPORATE AFFILIATES OF APPELLANT WERE NOT ELIGIBLE TO CLAIM THE INFRASTRUCTURE TAX CREDIT AS PARTNERS OF THE CENTEX HOMES PARTNERSHIP	2
A The Clear and Plain Language of the Statute Allows the Corporate Affiliates of Centex to Claim the Infrastructure Tax Credit	2
B “A” versus “The”	6
C Eiusdem Generis	12
II THE ALC ERRED IN DETERMINING THAT THE APPELLANT’S PARTNERSHIP SUBSIDIARY DID NOT QUALIFY FOR THE INFRASTRUCTURE CREDIT PURSUANT TO THE PASS-THROUGH PROVISIONS OF S C CODE ANN §12-6-3310 (SUPP 2010) AND IRC	14
A Pass Through Statute – Credits	14
B Limited Liability Companies – Pass Through of Credits	17
C Partnership Rules – Qualifying Expenditures	22
D Rath	22

TABLE OF AUTHORITIES

Page

CASES

<i>Anonymous Corp v South Carolina Department of Revenue</i> 98-ALJ-17-0533 (S C Admin Law Judge Div 1999)	11
<i>CFRE LLC v Greenville County Assessor</i> , 395 S C 67, 716 S E 2d 877 (2011)	6
<i>Emerson Electric Co v Wasson</i> 287 S C 394, 339 S E 2d 118 (1986)	10
<i>Grimsley v SLED</i> , __S C __, __ S E 2d__ (Opin No 27085 (2012)	2
<i>Media General Communications Inc v South Carolina Department of Revenue</i> , 388 S C 138, 694 S E 2d 525 (2010)	9
<i>Rath v Commissioner</i> , 101 T C 196 (1993)	22
<i>State v Patterson</i> , 261 S C 362, 200 S E 2d 68 (1973)	12
<i>State v Wilson</i> , 274 S C 352, 264 S E 2d 414 (1980)	12
<i>U S v Alpers</i> , 338 U S 680 (1950) and <i>State v Southern Farm Bureau Life Ins Co</i> , 265 S C 402, 410-411, 219 S E 2d 80, 84 (1975)	14

STATUTES

Section 16-302	12, 13
Section 12-6-30	3
Section 12-6-530	4, 8, 16, 19
§ 12-6-3420	7, 10, 13, 18
§ 12-6-3420(A)(1)	7
12-6-3310	1, 3, 4, 6, 12, 14, 16, 17, 18, 19, 21
IRC Sections 701	21
IRC Section 702(a)	21, 22
IRC Sections 703	21
IRC Sections 704	21
IRC 1244	22, 23, 24
IRC 1363(b)	23, 24
IRC 1366(b)	23
IRC 1371(a)(2)	24
Section 12-11-20	4, 8
Section 12-20-50	4
Section 12-6-3310	3, 6, 19, 21
Section 12-6-3360	8
Section 12-6-3420	2, 3, 8, 10
Section 12-6-3620	4, 6, 9, 16, 18, 19
Section 12-6-6320	5

TABLE OF AUTHORITIES
CONTINUED

	Page
Section 12-7-20(1)	9, 10
Section 12-20-100-105(D) & (G)	11

OTHER AUTHORITIES

Commission Decision 93-78 (993 WL 461306)(1993)	9
Commission Decision I-D-283 (1980)	9
SCDOR PLR #11-6	4, 5, 9, 12, 16, 18, 20, 24
South Carolina Tax Incentives for Economic Development Winter Edition 2009	17

REGULATIONS

Treasury Section 1 1244(a) 1(b)(2)	23
Treasury Regulation 1 702-1(a)	21, 22

ARGUMENTS

I THE ALC ERRED AS A MATTER OF LAW BY CONCLUDING THAT THE CORPORATE AFFILIATES OF APPELLANT WERE NOT ELIGIBLE TO CLAIM THE INFRASTRUCTURE TAX CREDIT AS PARTNERS OF THE CENTEX HOMES PARTNERSHIP

A The Clear and Plain Language of the Statute Allows the Corporate Affiliates of Centex to Claim the Infrastructure Tax Credit

As the South Carolina Supreme Court very recently stated in *Grimsley v SLED*, __ S C __, __ S E 2d __ (Opin No 27085 (2012))

The cardinal Rule of Statutory interpretation is to ascertain and effectuate the intent of the legislature *Sloan v Hardee*, 371 S C 495, 498, 640 S E 2d 457, 459 (2007), “As such, a court must abide by the plain meaning of the words of a statute When interpreting the plain meaning of a Statute, courts should not resort to subtle or forced construction to limit or expand the statute’s operation” *State v Jacobs* 393 S C 584, 587, 713 S E 2d 621, 622 (2011) (internal citations omitted) But “[w]here the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has not right to impose another meaning” *Hodges v Rainey*, 341 S C 79, 85, 533 S E 2d 578, 581 (2000)

Under the plain language of the statute, Section 12-6-3420 (“The Infrastructure Credit Statute”) allows a credit to be claimed on a corporate income tax return if expenses or contributions are made on behalf of or to a governmental entity in building or improving an infrastructure project

Accordingly, there are two simple questions to be answered before the infrastructure credit may be claimed First, were infrastructure expenditures or contributions made for the benefit of South Carolina? Second, was the infrastructure tax credit claimed against the corporate income tax? In our case the Appellant Corporation claimed the credit for infrastructure expenses paid by a general partnership whose

partners were corporations included in a consolidated tax return

Plain and simple, Appellant claimed the credit in the manner prescribed by law and incurred approximately \$68 million of infrastructure costs (e g , sewer lines, water lines and roads) for the benefit of the State as prescribed by law. Clearly, Appellant has done what was intended by the General Assembly and has properly applied the law as it was intended and drafted by the General Assembly, however, the DOR has tried to give the appearance of a complicated tax case with incorrect and inconsistent interpretations of the tax law.

Specifically, the DOR asserts that the plain language of Section 12-6-3420 does not allow a partnership to earn and, then, pass through the infrastructure tax credit to be claimed by a corporate partner. In reaching this conclusion, the DOR makes the following primary arguments:

- 1 The statutory definition of “taxpayer”, which includes partnerships, as provided in Section 12-6-30 does not apply when interpreting the credit statute.
- 2 Instead, “taxpayer” means corporation because earlier language used in the credit statute contained the term “corporation” and thus there’s a restriction as to which (type of) entity may “earn” the credit.
- 3 A “corporation” (not just any “taxpayer”) must directly make the infrastructure expenditures because the terms “claim” and “earn” are synonymous.
- 4 The Infrastructure Credit Statute is controlling and Section 12-6-3310 (“The Pass Through Statute”) is irrelevant and inapplicable unless the Infrastructure

Credit Statute expressly addresses flow through entities as far as the type of taxpayer that qualifies to earn the credit

Before addressing each of the above individually, Appellant would like the Court to consider new guidance from the DOR in Letter Ruling #11-6 (November 4, 2011), which was published on the day Appellant filed its initial brief and is not only inconsistent, but completely opposite with its interpretation in this case

This recent ruling relates to Section 12-6-3620 (“Biomass Credit Statute”), which has language nearly identical to the Infrastructure Credit Statute, and is important to this case because it addresses the same issues, as faced in this case (e g , the definition of “taxpayer” and the ability of a non-corporate entity to “earn” and Pass-through a credit pursuant to Section 12-6-3310(B)

The language in both statutes is intended to induce taxpayers to incur certain costs while restricting the “use” of the credit to corporate income taxes and, thus, written in a very similar manner as follows

Biomass Credit Statute “ there is *allowed* a credit against the *income tax imposed pursuant to Section 12-6-530* or license fees imposed pursuant to Section 12-20-50, or both, for 25% of the *costs incurred by a taxpayer* ”

Infrastructure Credit Statute “A *corporation may claim* a credit for the construction or improvement of an infrastructure project against taxes due *under Section 12-6-530* or Section 12-11-20 for (1) *expenses paid or accrued by the taxpayer* ”

In both credit statutes, the term “taxpayer” is preceded by a corporate income tax qualifier with respect to claiming the tax credit In other words, a taxpayer that is required to file a corporate income tax return in order to claim the credit is by definition a corporation for income tax purposes Additionally, neither corporate credit statute

specifically addresses flow through entities. The plain language of both statutes is almost identical and clearly the context of both credit statutes is the same, therefore, they should be interpreted in the same manner.

In Letter Ruling #11-6, the relevant issue addressed by the DOR was

May ABC, a limited liability company taxed as a partnership, pass through the biomass credit to Member A?

As indicated above, the DOR concluded that a limited liability company may pass through the biomass credit to its member, which is then able to claim the credit on its tax return. In reaching its conclusion, the DOR takes a very detailed and methodical approach in addressing the same issues before the Court, which are addressed as follows:

Arguments #1 and #2. Since the language in the credit statute refers to claiming a corporate income tax and then uses the term “taxpayer” with respect to incurring costs or expenditures in the context of earning the credit, is a taxpayer other than a corporation allowed to earn such credit? The answer provided in the ruling was

“Code Section 12-6-6320 provides that the biomass credit is equal to 25% of the costs incurred by a *taxpayer* for the purchase and installation of eligible equipment and a *taxpayer* may use up to \$650,000 of credit for a single taxable year.”

“Under Code Section 12-6-30(1) the definition of “Taxpayer” includes an individual, trust, estate, *partnership*, association, company, corporation, or any other entity subject to the tax imposed by this chapter *or required to file a return*” [emphasis added]. While ABC, a limited liability company taxed as a partnership, is not subject to tax, it is required to file a return so it is considered a taxpayer.”

“When dealing with a flow through entity, both the flow through entity itself and the individual members, shareholders or partners of the entity may be taxpayers.”

Based upon the above excerpts from Letter Ruling #11-6, p 6, the statutory definition of taxpayer should be used to interpret the Infrastructure Credit Statute as the plain language indicates and the context of which is identical to that of the Biomass Credit Statute

Arguments #3 and 4 If the credit statute does not explicitly permit nor prohibit a flow through entity from earning the credit through incurring the costs or expenditures, as specified with the statute, may a corporation claim the credit through application of the Pass Through Statute and, thus, indirectly earn the credit? The answer provided in the ruling was

“Code Section 12-6-3620 does not address the pass through of credits by flow through entities. However, Code Section 12-6-3310(B) provides general rules relating to the pass through of credits by flow through entities. Under Code Section 12-6-3310(B)(1) “Unless specifically prohibited, an “ *S corporation limited liability company taxed as a partnership*, or partnership that qualifies for a credit pursuant to this article may pass the credit earned to each *shareholder of the S corporation member of the limited liability company*, or partner of the partnership ”

* * *

“The biomass statute, Code Section 12-6-3620, is not the statute that allows ABC to pass through the credit. That statute is Code Section 12-6-3310 ”

* * *

“Therefore, if the credit is passed through to a corporate member, partner, or shareholder, it is clear that the corporate member, partner, or shareholder would be able to use the credit against its corporate income tax ”

B “A” versus “The”

Blissfully ignoring the Supreme Court’s recent admonition in *CFRE LLC v Greenville County Assessor*, 395 S C 67, 716 S E 2d 877 (2011) that “we must read the

statute so “that *no word* clause, sentence, provision, or part shall be rendered surplusage, or superfluous,” (emphasis added) the DOR argues that “when § 12-6-3420(A)(1) is read in its entirety, it is clear that “the taxpayer” in subsection (A)(1) is limited to the “corporation” attempting to claim the credit,” and that “The word *the* is a word of limitation ” The DOR further asserts that if the Legislature had intended the term “taxpayer” in subsection (A)(1) to mean all entities defined under § 12-6-30(1), it would have used the indefinite article ‘a’ ”

The DOR makes a similar “a” vs “the” argument regarding the pass through statute Pg 19 of Respondent’s initial brief similarly states

“The infrastructure credit includes no language that indicates pass-through entities could qualify, nor does it begin with the more common phrase “[a] taxpayer may claim ” The use of that indefinite article, which would broaden the range of possible claimants, is used in *every other credit statute* that does provide for pass-through entities Such is not the case for § 12-6-3420 ” (Emphasis in original)

In comparing the plain language of the Biomass and Infrastructures Credit Statutes, both are restrictive in nature as far as an offset to corporate income tax for certain qualifying costs or expenses Specifically, the Infrastructure Credit Statute states that a corporation may claim a credit for qualifying expenses paid or accrued by the taxpayer and the Biomass Resource Credit Statute states that a corporate income tax credit is allowed for qualifying costs incurred by a taxpayer The fact that one statute uses the word “the” and another one uses “a” should not result in different interpretations, where both words come before a statutorily defined term “taxpayer” in the context of limiting the use of a credit against the corporate income tax

The precise language within the Infrastructure Credit Statute as it pertains to a

qualified private entity in subsections (C) and (F) demonstrates that the General Assembly knows how to preclude taxpayers from claiming the Section 12-6-3420 credit. Had the General Assembly wanted to limit the entities or taxpayers that “qualify” for the credit to just corporations, then they could have (and would have) used the term “corporation” in Section 12-6-3420 such that it would read as follows

A corporation may claim a credit for the construction or improvement of an infrastructure project against taxes due under Section 12-6-530 or Section 12-11-20 for expenses paid or accrued by the ~~taxpayer~~ corporation

Unfortunately Westlaw does not have the ability to search “the taxpayer” in Title 12¹. Title 12, Chapter 6, Article 25 contains most of the tax credit provisions. A cursory manual search - - which was halted about halfway through Article 25 - - reveals 35 tax credit statutes which use the term “the taxpayer”.

Specifically, the state’s major income tax credit (certainly the one with the largest fiscal impact) is the Job Tax Credit. It is found in Section 12-6-3360. As referenced in the respondent’s quote above, it contains explicit pass-through treatment, see Section 12-6-3360(K). Contrary to the Appellant’s assertion (in bold that no other credit statute uses the term “the taxpayer,”), it uses the term “the taxpayer” nine times. This section uses the term “taxpayer” as follows

<u>Term</u>	<u>No. of Usage</u>
“Taxpayers”	7
“A Taxpayer”	12
“The Taxpayer”	9
“That Taxpayer”	2

Indeed, in subsection (A) alone, the term “the taxpayer” is used once, “a

¹ Westlaw disregards the word “the” even when enclosed in parenthesis.

taxpayer” is used once, and “taxpayers” is used twice

The DOR next argues that given the specific reference to “corporation” in (A)(1), it is improper to invoke the definition of “taxpayer” contained in Section 12-6-30. The DOR has repeatedly argued to the contrary, most recently in the *Media General Communications Inc v South Carolina Department of Revenue*, 388 S C 138, 694 S E 2d 525 (2010). The Supreme Court summarized the DOR’s argument in that case as follows

The Department disagrees and argues section 12-6-2320(A)(4) should not be construed to allow the combined entity apportionment method based on the legislative intent expressed in the corporate tax statutes requiring the filing of tax returns by a single entity. Specifically the South Carolina Code defines ‘taxpayer’ as including “an individual, trust, estate, partnership, association, company, corporation, or any other entity subject to the tax imposed by this chapter or required to file a return.” S C Code Ann §12-6-30 (1) (200) (emphasis added). The Department notes the definition refers to a single corporation as a taxpayer and thus to separate filing requirements for each entity. Consequently, this definition must be used for the meaning of “taxpayer” as it appears in Section 12-6-2320(A) and it limits the statute’s application to a separate entity. 694 S E 2d at 530 (Emphasis added.)

Indeed, in the very recent DOR PLR# 11-6, as previously stated, the DOR asserted the definition of “taxpayer” contained in Section 12-6-30(1) to allow a corporate income tax credit provided in Section 12-6-3620 to be earned by a pass through entity.

The DOR also invoked the statutory definition of “taxpayer” contained in the predecessor statute, Section 12-7-20(1) in two Tax Commission decisions dealing with consolidated corporate income tax returns, Commission Decision 93-78 (1993 WL

461306)(1993) and I-D-283 (1980) Commission Dec 93-78 involved the Job Tax Credit, which at that time was limited (like the infrastructure tax credit) to corporations. The Tax Commission held that the definition of “taxpayer” contained in Section 12-7-20(1) prevented the corporate taxpayer from using the Job Tax Credit in a corporate consolidated return basis in the manner sought by the taxpayer. *See also Emerson Electric Co v Wasson* 287 S C 394, 339 S E 2d 118 (1986) in which the Department made similar arguments.

The Respondent also argues that subsections 12-6-3420 (G),(H) and (I) of the Infrastructure Tax Credit “leave no doubt that §12-6-3420 refer only to corporations.” Subsection (G) is an add back provision which is applicable where a taxpayer (1) constructs a road, (2) donates it to the SCDOT or county, (3) a corporation takes the infrastructure tax credit, and (4) the SCDOT or county *subsequently* refuses the donation or returns the donated road. (For example, the SCDOT might discover the road was not built to applicable standards, or no longer wished to incur the maintenance expenses.) Given that the corporation had previously taken the Infrastructure Tax Credit - - both Appellant and Respondent agree, only corporations may do so - - obviously the corporation (and not the taxpayer) would add back the since it was the entity that had previously claimed the credit.

Subsection (H) refers to the treatment of the credit on a consolidated corporate income tax return, and (I) refers to the treatment of the credit in a merger or acquisition of the original corporation which took the credit. It bears repeating - - Appellant and Respondent agree, only corporations may take the credit - - so obviously both sections would only include corporations.

The basic thrust of the DOR's argument is that "the taxpayer" and "the corporation" are by definition the same entity. The statute, however, refers to three possible entities: (1) the corporation, (2) the taxpayer, and (3) a "qualifying private entity."

Who is this qualifying private entity? According to the Code Commissioner, see Sections 12-20-100-105(D) & (G), it includes utility coops, which do not pay corporate income taxes. A qualifying private entity, such as the for-profit corporation in the above example, which incurs expenses on public infrastructure which it does not own, manage or, operate is allowed the credit. Given that coops pay no corporate income taxes, the limitation is entirely superfluous – unless the coop is part of a business organization, and one of its partners is a corporation which does pay corporate income taxes.

In addition, as discussed at length in Appellant's initial brief, the only published decision dealing with the Infrastructure Tax Credit is *Anonymous Corp v South Carolina Department of Revenue* 98-ALJ-17-0533 (S C Admin Law Judge Div 1999). The ALC noted in its Finding of Facts:

The taxpayer is a conglomerate which files a consolidated corporate tax return annually with the State of South Carolina.

At all times relevant to this case, *one of the taxpayer's subsidiaries* was in the business of developing real estate for profit. This business was included in the taxpayer's consolidated return filings. *For purposes of this contested case this business shall also be referenced as Taxpayer.* Id (emphasis added)

Accordingly, it is clear that the entities making the infrastructure expenditures were not the parent corporation filing the return. The DOR did not challenge this issue.

before the ALC. In fact, as discussed above, the DOR has published guidance stating that where a credit statute does not address the pass through of credits by flow through entities, Section 12-6-3310 is applied, which allows a flow through entity to pass through such credit to its owners. See PLR #11-6 (Nov. 4, 2011).

C. Ejusdem Generis

The DOR attempts to complicate this case by applying the doctrine of *Ejusdem Generis*. The DOR asserts that the statute should be read as if it stated "a corporation may claim a credit only for expenses that the corporation accrued." However, this is not what the statute says, and the Legislature could quite easily have stated this and Appellant submits would have so stated if such a result had been intended. In further support of its position, DOR points to the doctrine of *ejusdem generis*, which ordinarily provides that "where general words follow the enumeration of particular classes or subjects, the general words should be construed as limited only to those of the general nature or class enumerated." *State v. Wilson*, 274 S.C. 352, 264 S.E.2d 414 (1980). The classic example is a laundry list of items followed by a phrase like "and any other [fill in the blank]." Under the doctrine, "and any other [fill in the blank]" would be construed to be of like or similar kind to the items specifically enumerated before or after it. *Id.* (explaining how doctrine might be applied to phrase "and any other" in statute at issue).

Respondent cites as authority for the imposition of *ejusdem generis* in this case *State v. Patterson*, 261 S.C. 362, 200 S.E.2d 68 (1973) in which two individuals were indicted for violation of former code Section 16-302, the burglary tool statute. The tools named in the indictment were preprinted checks, fake I.D. cards and credit cards. As noted in the DOR's brief, the Supreme Court indeed dismissed the indictment under the doctrine of *Ejusdem generis*. The Court held that the items enumerated in the statute "are

obviously suitable for use where force is needed to break and enter burglariously,” 200 S E 2d at 69, whereas it could not be forcefully argued that forged checks, I D cards and credit cards are used for a like purpose

A comparison for *ejusdem generis* purposes between former Section 16-302 and the Infrastructure Tax Credit statute is illustrative

WORDS OF SPECIFICATION
(Enumerated Classes)

<u>§ 16-302</u>	<u>12-6-3420</u>
Engine	Corporation
Machine	
Tool	
False Key	
Picklock	
Bit	
Nippers	
Nitroglycerine	
Dynamite Cap	
Coil or Fuse	
Steel Wedge	
Drill	
Tap-pin	

GENERAL WORDS

<u>§ 16-302</u>	<u>12-6-3420</u>
Other implement or thing adapted, designed or commonly used for the commission of burglary, larceny or safecracking	Taxpayer

WORDS CLAIMED TO VIOLATE
EJUSDEM GENERIS DOCTRINE

<u>§ 16-302</u>	<u>12-6-3420</u>
Forged Checks, Fake IDs and Credit Cards	Taxpayer (statutory definition)

In addition, this rule of statutory construction is only to be applied as an aid in ascertaining intent and has no application if doing so would defeat the clear purpose of the statute. See *U S v Alpers*, 338 U S 680 (1950) and *State v Southern Farm Bureau Life Ins Co*, 265 S C 402, 410-411, 219 S E 2d 80, 84 (1975) (refusing to apply doctrine of *ejusdem generis* where doing so would defeat clear purpose of the statute)

II THE ALC ERRED IN DETERMINING THAT THE APPELLANT'S PARTNERSHIP SUBSIDIARY DID NOT QUALIFY FOR THE INFRASTRUCTURE CREDIT PURSUANT TO THE PASS-THROUGH PROVISIONS OF S C CODE ANN §12-6-3310 (SUPP 2010) AND IRC

Appellant would submit that even if the Court were to determine that the Legislature intended "taxpayer" to refer only to corporations, that does not end the inquiry in this case. As discussed more fully below, the federal and South Carolina partnership rules, add another hurdle for the DOR to overcome in denying an otherwise qualifying taxpayer (e g , a corporation), which owns a pass-through entity, the right to claim the infrastructure tax credit.

A Pass Through Statute – Credits

As the Respondent's Brief notes, one exception to the general rule, which would allow an avenue for indirect expenditures to create access to tax credits, is contained within §12-6-3310(B)(1). The pass-through provisions of that section state that "[u]nless specifically prohibited, and 'S' corporation, limited liability company taxed as a partnership, or partnership that qualifies for a credit pursuant to this article may pass through the credit earned to each shareholder of the 'S' corporation, member of the limited liability company, or partner of the partnership." (Emphasis added). The

Respondent's brief states that "Income tax is generally assessed on a single taxpayer², and concurrently, tax credits and refunds are generally conferred upon the taxpayer that originally generated the credit. Absent a statutory provision stating otherwise, the general rule is that tax benefits may only be claimed by the taxpayer that generated that benefit." Respondent cites no authority - - statute, regulation, case law, or treatise in support of its statements.

The Respondent correctly notes that the pass-through statute requires a partnership to qualify for a credit before it may pass it on. The Infrastructure Tax Credit somewhat uniquely bifurcates the credit process. A corporation *claims* a credit against expenses *incurred* by the taxpayer. The expenses in this case were incurred by a general partnership whose partners were corporations. Respondent argues that claiming the credit and generating the credit are synonymous. Read literally, however, the credit is generated and earned when infrastructure expenses are paid or accrued by the taxpayer (and the infrastructure is properly donated). The credit is subsequently claimed by the filing of a corporate income tax return which includes the proper amount of the credit.

Indeed, this is the exact view expressed by the Auditor of Appellant in an e-mail to his supervisor:

This is regards to the Infrastructure credit I'm working for Centex International, Inc & Affiliates. *The credits were earned by the Partnership Centex Homes.* The Partnership is owned by three different Corporate affiliates of Centex International.

AAA Holdings, Inc (owns 80% of the partnership), Nomas Corp (owns 18% of the partnership), Centex Real Estate Corporation (owns 2% of the Corporation). The Partnership not the corporations would have paid the infrastructure expenses. Would the Corporations be able to claim *credits earned by the partnership* since the partners pro rata share of the

² The DOR ignores the 500,000 or so joint individual income tax returns which are filed on an annual basis.

partnership's income flows to the corporations or does the infrastructure expenses have to be paid by a corporation before any resulting infrastructure credits can be claimed? Below is the Section of law dealing with infrastructure credits, it's not clear to me (Ex C to Appellant's Summary Judgment Motion, R at p __) (Emphasis added)

The very recent SCDOR PLR #11-6 is illustrative of the breadth of the pass through statute The Biomass Tax Credit Statute, Section 12-6-3620, is a corporate income tax credit Utilizing Section 12-6-3310, the pass through statute, and the definition of "taxpayer" contained in Section 12-6-30(1), the DOR held that an LLC taxed as a partnership was able to earn and pass through a corporate income tax credit to its member (an S Corporation), which in turn passed the credit through to its individual (natural persons) shareholders, for inclusion on their individual income tax returns "even though the biomass statute seems to restrict the use of the credit to corporate income tax liability"' (Id)

The PLR Also states

The second part of the question posed by ABC concerns the use of the credit by an individual or corporate taxpayer On its face, Code Section 12-6-3620 appears to preclude the use of the credit against individual income taxes since individual income taxes are imposed under Code Section 12-6-510 while Code Section 12-6-530, the section imposing corporate income taxes, is referenced in the biomass credit statute *Therefore if the credit is passed through to a corporate member, partner, or shareholder it is clear that the corporate member partner, or shareholder would be able to use the credit against its corporate income tax However, on the face of the biomass credit statute if the credit is earned by a pass-through entity, such as ABC or Member A, the credit may be able to be passed through to an individual shareholder, member or partner, but would not be able to be used to offset the individual income tax of that individual* (Emphasis added)

This paragraph makes clear that claiming and generating a credit are not synonymous. The PLR clearly distinguishes between (1) generating, (2) earning, (3) passing through, and (4) actually being able to claim a tax credit.

B Limited Liability Companies – Pass Through of Credits

The DOR argues that limited liability companies taxed as partnerships must be distinguished from partnerships with respect to applying and interpreting the Pass Through Statute as it applies to the infrastructure credit. That is, the DOR argues that the Pass Through Statute is turned off with respect to partnerships, but not limited liability companies taxed as partnerships for purposes of earning and, then, claiming the infrastructure tax credit. Appellant agrees that additional benefits have been extended, but only to the extent of individual member-partners. That is, subsection (C) does not change the tax treatment otherwise provided in subsection (B) of the Pass Through Statute, which allows corporate partners of partnerships and limited liabilities companies taxed as partnerships to claim the credit.

The DOR publication, South Carolina Tax Incentives for Economic Development Winter Edition 2009 at pg. 22, specifically discusses limited liability companies as follows:

South Carolina Code § 12-6-3310(C) contains special provisions concerning the qualification and use of credits by limited liability companies that are not organized as a legal entity that expressly qualifies for a credit in Article 25 of Chapter 6, Title 12. Note. These special provisions do not apply to credits in other Articles or Titles of the South Carolina Code, such as Chapter 14 of Title 12 containing the economic impact zone credit, or Chapter 65 of Title 12 containing the textile revitalization credit. The rules include:

Limited Liability Company Taxed as a Partnership

Individual Member The limited liability company may earn and pass through any credits allowed by Article 25. The individual member will

use any credits against individual income taxes imposed under South Carolina Code §12-6-510

Corporate Member The limited liability company may earn and pass through any credits allowed by Article 25 *The corporate member will use any credits against corporate income taxes imposed under South Carolina Code §12-6-530*

Note South Carolina Code § 12-6-3310(c) controls over the statutory language of a particular tax credit For example the infrastructure credit in South Carolina Code § 12-6-3420 specifically states that the credit is claimed against corporate income taxes imposed under South Carolina Code § 12-6-530 or bank taxes imposed under South Carolina Code § 12-11-20 however an individual member of a limited liability company taxed as a partnership can use the credit against individual income taxes imposed under South Carolina Code § 12-6-510

Accordingly, the DOR makes it clear that with respect to the infrastructure tax credit, the special provisions under subsection (C) allow an individual member-partner to claim a corporate income tax credit that was not otherwise available Therefore, the only benefit extended by subsection (C) with respect to limited liability companies taxed as partnerships is the additional ability to “claim” the infrastructure credit for individuals

This conclusion is consistent with the DOR’s responses to Centex’s Requests for Admission regarding the 2008 amendment to the Pass Through Statute, which specifically addressed the right of a limited liability company to pass through a credit earned by it to a member The DOR’s policy section advised the taxpayer who was lobbying for this amendment that the amendment was unnecessary because the statute’s existing language already allowed a limited liability company (an entity other than a “corporation”) to qualify, earn and pass through to be claimed by its members

Most recently, as previously discussed in detail, the DOR issued Letter Ruling #11-6 with respect to the biomass tax credit, which similar to the infrastructure tax credit is a corporate tax credit with no specific language addressing flow through entities In

rendering its ruling, the DOR made the following statements

“Code Section 12-6-3620 does not address the pass through of credits by flow through entities. However, Code Section 12-6-3310(B) provides general rules relating to the pass through of credits by flow through entities. Under Code Section 12-6-3310(B)(1) “Unless specifically prohibited, an *“S corporation limited liability company taxed as a partnership*, or partnership that qualifies for a credit pursuant to this article may pass the credit earned to each *shareholder of the S corporation member of the limited liability company*, or partner of the partnership. Under (B)(2) *for an S corporation owing corporate level tax a credit must first be used at the entity level with only the remaining credit passing through to the shareholders of the S corporation*. This provision allows the pass through of the credit by ABC to Member A. It also allows the pass through of the biomass credit from Member A on to the individual shareholders of Member A.”

“The second part of the question posed by ABC concerns the use of the credit by an individual or corporate taxpayer. On its face, Code Section 12-6-3620 appears to preclude the use of the credit against individual income taxes since individual income taxes are imposed under Code Section 12-6-510 while Code Section 12-6-530, the section imposing corporate income taxes, is referenced in the biomass credit statute. *Therefore if the credit is passed through to a corporate member partner or shareholder it is clear that the corporate member partner or shareholder would be able to use the credit against its corporate income tax.* However, on the face of the biomass credit statute, if the credit is earned by a passthrough entity, such as ABC or Member A, *the credit may be able to be passed through to an individual shareholder member or partner but would not be able to be used to offset the individual income tax of that individual.* However, under Code Section 12-6-3310(C) a limited liability company not organized as a legal entity which is a taxpayer expressly specified as qualifying for the credits allowed pursuant to this article nevertheless qualifies for such credits and the limited liability company may *earn and pass through* the credits to an individual member who may then apply them against his individual income tax under Section 12-6-510. This statute allows ABC to pass through the biomass credit to an individual member and would allow that member to use the

credit against his individual income tax, even though the biomass statute seems to restrict the use of the credit to corporate income tax liability ”

If the statutory definition is not applied and means corporation, as asserted by the DOR, then only a corporation as specified in the Infrastructure Credit Statute may claim the credit. Thus, what other way is there for a limited liability company taxed as a partnership to qualify for the credit, which the DOR has clearly interpreted to be the case (as discussed above)? To be consistent with Letter Ruling #11-6, we must apply a two-step approach including (1) determine if subsection (B) of the Pass Through Statute applies with respect to allowing flow through entities to earn the credit, and (2) apply both the general “claim” rules under Subsection (B) and the special “claim” rules under subsection (C) for certain limited liability companies. Since the Infrastructure Credit Statute does not specifically prohibit a flow through entity from earning the credit, the Pass Through Statute subsection (B) is applicable allowing an “S” corporation, limited liability company taxed as a partnership, or partnership to earn the credit. Under the general subsection (B) rules, only a corporate partner or member-partner of a partnership or limited liability company taxed as a partnership may claim the credit. Also, individual shareholders of an S-Corporation may claim the credit. Under the special subsection (C) rules, individual member-partners (whether through direct ownership or through another flow through entity) of a limited liability company taxed as a partnership may claim the credit. Also under this interpretation, the type of taxpayers able to claim the credit fall within the legislative intent of the Infrastructure Credit and Pass Through Statutes subsection (B) and (C) (i.e., corporations and individuals – only if members of a limited liability company or shareholders of an s-corporation). Either way, it is clear the

corporate partners of a partnership may claim the infrastructure tax credit

The DOR argues that the treatment of limited liability companies taxed as partnerships is irrelevant to our case because the amendment to the Pass Through Statute addressing limited liability companies was enacted in 2008 (three years after the tax periods at issue in this case). However, this argument is misplaced since our case does not necessarily need and/or rely upon Section 12-6-3310(C). As shown above, the portion of the Pass Through Statute that applies in this case is Section 12-6-3310(B)(1), which was enacted on June 18, 2003.

As of 2003, it is clear that a partnership may earn and, then, pass through the infrastructure credit to be claimed by a corporate partner. How about tax years before 2003 when there was no Pass Through Statute dealing with tax credits?

The federal partnership rules allow the infrastructure tax credit to be earned by Centex Homes and, then, claimed by its corporate partners for tax years preceding the 2003 enactment date of the Pass Through Statute. In 1985, South Carolina adopted all the partnership provisions of the IRC including the check-the-box election. A partnership including a limited liability company taxed as a partnership shall determine the amount, character, and timing of the income, deductions, gains, losses, and credits generated by its activities, generally without regard to the identity, or tax characteristics, of its partners. See IRC Section 702(a) and (b), Treasury Regulation 1.702-1(a). Then, each partner reports an allocable share of all partnership items, combined, as appropriate, with items of the partner's other tax significant transactions for the year to be reported on their own tax returns. See IRC Sections 701, 703 and 704. Under federal tax rules, it is clear that the infrastructure tax credit passes through from Centex Homes to its partners in the same

manner as the qualifying infrastructure expenditures generating the credit

Accordingly, prior to the enactment of the Pass Through Statute in 2003, tax credits pass through under the federal rules, which allow credits to be earned by partnerships and passed through to partners unless specifically stated otherwise in the credit statute. In such cases, the qualified expenditures or costs incurred are reported to the partner, who in turn determines whether or not it qualifies for such credit as if the qualifying expenditures were made directly by such partner. See IRC Section 702(a), and Treasury Regulation 1.702-1(a) regarding separately stated items.

C Partnership Rules – Qualifying Expenditures

The Infrastructure Tax Credit somewhat uniquely bifurcates the credit process. A corporation may *claim* a credit against expenses *incurred* by the taxpayer. The expenses in this case were incurred by a general partnership whose partners were corporations. The DOR argues that the Pass Through Statute is not triggered or is “turned off” with respect to the tax credit. However, that does not mean the infrastructure expenditures do not pass through to the corporate partners. As a matter of federal partnership law and, thus South Carolina through adoption of the IRC, the infrastructure expenditures pass through as if directly accrued by the corporate partners and, thus, they may claim the infrastructure tax credit.

D Rath

The ALC and DOR’s reliance on *Rath v. Commissioner*, 101 T.C. 196 (1993) is misplaced. In *Rath* an S corporation sold securities for a loss. The individual shareholders of the S corporation reported the loss as an ordinary loss on their individual income tax returns. Normally individuals who sell stock for a loss are required to report a capital loss, which is not as advantageous from a tax perspective as an ordinary loss.

Congress enacted section 1244 of the IRC as exception to this general rule in order to "aid and encourage" investments by individuals. The ordinary loss exception afforded by section 1244, however, is only available to individuals and partnerships. In *Rath* the stock was sold for a loss by a corporation – not an individual or partnership, and the IRS regulation on point, section 1.1244(a)-1(b)(2) explicitly prohibited sales of stock by a corporation from ordinary loss treatment.

The taxpayers in *Rath* made three arguments in favor of 1244 ordinary loss flow-through. First, they argued that section 1366(b) of the Code, regarding the character pass-through in S corporations, required character (ordinary v. capital) to be determined as if the individual shareholders, not the S corporation, sold the 1244 stock. Secondly, the taxpayers argued "that the legislative history demonstrates that Congress intends for the character of items passing through to S corporation shareholders to be determined under the same rules applicable to partnerships." Thirdly, taxpayers in *Rath* argued that the language of section 1363(b) of the Code, "the taxable income of an S corporation shall be computed in the same manner as in the case of an individual," as "individual" in section 1244 includes S corporations.

In *Rath* the court rejected each of the taxpayers' arguments. First, the court held that character is determined at the S corporation level. Secondly, the court held that the legislative history did not indicate a Congressional intent to amend section 1244(a) to allow S corporations to qualify for ordinary loss flow-through to their shareholders. The court required "unequivocal evidence of legislative purpose" to overcome the "plain meaning" of section 1244(a), which states that the 1244 stock issued to an "individual" or "partnership" can qualify for ordinary loss treatment.

Specifically the Court stated

We likewise reject petitioner's argument that the legislative history of section 1366(b) supports their position. While the legislative history indicates that Congress intended for the income tax to generally apply to S corporations in the same manner as it applies to partnerships, there is no indication that Congress intended to amend section 1244(a) to extend relief to S corporations.

Thirdly, the court held that "individual" in section 1244(a) did not include S corporations, despite section 1363(b). The court cited section 1371(a)(2) of the Code, where the dividends received deduction, available to corporations, is specifically denied to S corporations. With regard to the taxpayer's third argument, the Tax Court stated

For the same general reasons, we cannot agree with petitioners that section 1363(b) helps their cause. While the latter provision provides that the taxable income of an S corporation is to be computed in the same manner as an individual, an S corporation is not included within the definition of the term "individual" set forth in section 1244(d)(4).

The basis for the ALC's reliance on *Rath* is not readily apparent. Section 1244 explicitly allows a partnership like Centex to receive ordinary loss treatment. The Deduction Statute in *Rath* specifically prohibits an S corporation from characterizing a deduction as an ordinary loss (i.e., stock must be issued directly to an individual or partnership), whereas the Infrastructure Credit Statute does not have such a prohibition and, in fact, explicitly allows partnerships to earn and, then, pass through the credit, which the DOR has explained and illustrated with its interpretation as the Biomass Resource Credit (i.e., a credit statute with language that is almost identical). See PLR #11-6 (Nov. 4, 2011). The remainder of the case dealt with conduit treatment of Subchapter S corporations under two federal Subchapter S statutes, neither of which are relevant here. Lastly, an IRS Regulation, prohibiting corporations from receiving

ordinary loss treatment, was directly on point

January 17, 2012



Burnet R. Maybank, III
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202-2426
PHONE 803 771 8900
FACSIMILE 803 253 8277
bmaybank@nexsenpruet.com

Attorney for Appellant Centex
International, Inc & Affiliates

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D McLeod, Administrative Law Judge

Case No 09-ALJ-17-0532-CC

Centex International Inc & Affiliates,

Appellant,

v

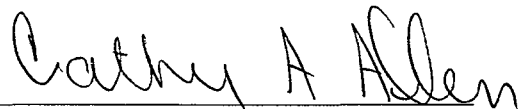
South Carolina Department of Revenue

Respondent

PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellants to be Included in the Record of Appeal on the South Carolina Department of Revenue by mailing a copy of it, on January 17, 2012, to their attorney of record, Adam Marinelli, SC Department of Revenue, 301 Gervais Street, Columbia, SC 29201

January 17, 2012



Cathy A Allen
Nexsen Pruet, LLC
1230 Main Street, Suite 700
P O Drawer 2426
Columbia, South Carolina 29201
(803) 771-8900

RECEIVED

JAN 17 2012

SC Court of Appeals

NEXSEN|PRUET

Burnet R. Maybank III
Member
Admitted in SC

January 17, 2012

VIA HAND DELIVERY

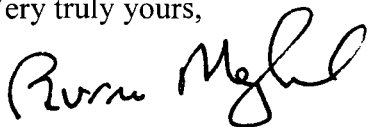
The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re Centex International, Inc. & Affiliates v. South Carolina Department
of Revenue, Case No. 09-ALJ-17-0532-CC
Case Tracking No. 2011196887

Dear Ms. Gee:

Enclosed for filing with the Court, is an original of the Initial Reply Brief of
Appellant in the above-referenced matter. Please return a clocked-in copy to me via
our courier.

Very truly yours,


Burnet R. Maybank, III

BRM/JPR

Enclosures

cc Adam N. Marinelli, Esquire

RECEIVED
JAN 17 2012
SC Court of Appeals

1230 Main Street
Suite 700 (29201)
PO Drawer 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803 540 2048
F 803 727 1472
E BMaybank@nexsenpruet.com
Nexsen Pruet LLC
Attorneys and Counselors at Law

STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable John D McLeod
Administrative Law Judge

Case No 09-ALJ-17-0532-CC

Centex International, Inc & Affiliates,

Appellant,

v

South Carolina Department of Revenue,

Respondent

INITIAL BRIEF OF RESPONDENT

Adam N Marinelli (Bar No 79031)
Counsel for Litigation
Harry A Hancock (Bar No 065233)
Managing Counsel for Litigation
Milton G Kimpson (Bar No 7917)
General Counsel for Litigation
PO Box 12265
Columbia, SC 29211
803-898-5153
803-898-5147 (Fax)
Attorneys for Respondent

RECEIVED

JAN 04 2012

SC Court of Appeals

TABLE OF CONTENTS

	Page
Table of Authorities	111
Statement of Issues on Appeal	1
Statement of the Case	2
Statement of the Facts	3
Arguments	
I THE ALC WAS CORRECT IN FINDING THAT THE APPELLANT DID NOT QUALIFY FOR AN INFRASTRUCTURE TAX CREDIT UNDER THE PLAIN LANGUAGE OF S C CODE ANN § 12-6-3420 (SUPP 2010) FOR INDIRECT EXPENDITURES MADE BY CORPORATE AFFILIATES OPERATING AS A PARTNERSHIP	7
A The Plain Language Of § 12-6-3420 Does Not allow A Partnership To Earn The Tax Credit	7
B The Appellant's Arguments Concerning Economic Incentives Are Without Merit	11
C The Appellant's Arguments Relating To The License Tax Credit Pursuant To S C Code Ann § 12-20-105 (Supp 2010) Are Without Merit	12
II THE ALC WAS CORRECT IN DETERMINING THAT THE APPELLANT'S PARTNERSHIP SUBSIDIARY DID NOT QUALITY FOR THE INFRASTRUCTURE PURSUANT TO THE PASS-THROUGH PROVISIONS OF S C CODE ANN § 12-6-3310 (SUPP 2010)	14
A The Pass-Through Provisions of § 12-6-3310 Are not Triggered By The Partnership's Expenditures	14
B The Appellant's Arguments Concerning <i>In Pari Materia</i> Are Without Merit	18

C	The Appellant's Interpretation Of The Applicable Case Law Is Incorrect	20
D	The Appellant's Argument Concerning Limited Liability Companies Is Without Merit	29
III	THE ALC DID NOT ERR IN ITS APPLICATION OF THE AGGREGATE AND ENTITY THEORIES AND ITS DETERMINATION THAT SUCH THEORIES DID NOT CREATE ACCESS TO THE INFRASTRUCTURE CREDIT FOR A PARTNERSHIP	30
IV	THE ALC DID NOT ERR IN DETERMINING THAT THE FILING OF A CONSOLIDATED RETURN BY THE APPELLANT DID NOT GRANT ACCESS TO THE INFRASTRUCTURE CREDIT FOR THE PARTNERSHIP	31
	Conclusion	32

TABLE OF AUTHORITIES

<u>CASES</u>	Page
<u>Allied Corp v S C Tax Comm’n</u> 288 S C 197, 341 S E 2d 139 (1986)	6
<u>Anderson v City of Bessemer</u> 470 U S 564 (1985)	5
<u>Bell Atlantic Nynex Mobile, Inc v Comm’r of Revenue Services</u> 273 Conn 240, 869 A 2d 611 (2005)	20, 21, 22, 23
<u>Bordon Chemicals and Plastics, LP v Zehender</u> 313 Ill App 3d 35, 726 N E 2d 73 (2000)	26, 27
<u>Brown v S C Dep’t of Health & Envtl Control</u> 348 S C 507, 560 S E 2d 410 (2002)	6
<u>Clark v Aiken County Gov’t</u> 366 S C 102, 620 S E 2d 99 (Ct App 2005)	4
<u>Creech v S C Public Service Commission</u> 200 S C 127, 20 S E 2d 645 (1942)	6
<u>DaimlerChrysler Services N Am , LLC v Ariz Dep’t of Revenue</u> 210 Ariz 297, 110 P 3d 1031 (Ct App 2005)	15
<u>DaimlerChrysler Services N Am , LLC v State Tax Assessor</u> 817 A 2d 862 (Me 2003)	15
<u>Dalton v S C Tax Commission</u> 295 S C 174, 367 S E 2d (1988)	29
<u>Dunton v S C Bd Of Examin’rs in Optometry</u> 291 S C 221, 353 S E 2d 132 (1987)	6
<u>Ellis v S C Tax Commission</u> 280 S C 65, 309 S E 2d 761 (1983)	27, 28, 29
<u>Georgia-Carolina Bail Bonds, Inc v County of Aiken</u> 354 S C 18, 579 S E 2d 334 (Ct App 2003)	5
<u>Hitachi Data Sys Corp v Leatherman</u> 309 S C 174, 420 S E 2d 843 (1992)	5

<u>Hyder v Jones</u>	
271 S C 85, 245 S E 2d 123 (1978)	30
<u>In Re Decker</u>	
322 S C 215, 471 S E 2d 462 (1995)	10
<u>I'On v Town of Mt Pleasant</u>	
338 S C 406, 526 S E 2d 716 (2000)	32
<u>L & W Construction Co v Wis , Dept of Revenue</u>	
149 Wis 2d 684, 439 N W 2d 619 (Ct App 1989)	23, 24
<u>Miller v Blumenthal Mills, Inc</u>	
365 S C 204, 616 S E 2d 722 (Ct App 2005)	5
<u>Nucor Steel v S C Pub Serv Comm'n</u>	
310 S C 539, 426 S E 2d 319 (1992)	6
<u>Olson v S C Dep't of Health & Envtl Control</u>	
379 S C 57, 663 S E 2d 497 (Ct Ap 2008)	4
<u>People v Enlow</u>	
135 Colo 249, 310 P 2d 539 (1957)	8
<u>Rath v Comm'r</u>	
101 T C 196 (1993)	18, 24, 25
<u>S C Dept of Revenue v Rosemary Coin Machines, Inc</u>	
339 S C 25, 528 S E 2d 416 (2000)	30
<u>S Mutual Church Ins Co v S Carolina Windstorm & Hail Underwriting Ass'n</u>	
306 S C 339, 412 S E 2d 377 (1991)	6
<u>South Carolina Coastal Council v South Carolina State Ethics Comm'n</u>	
306 S C 41, 410 S E 2d 245 (1991)	6
<u>State v Four Video Slot Machines</u>	
317 S C 397, 453 S E 2d 896 (1995)	7
<u>State v Huntley</u>	
349 S C 1, 562 S E 2d 472 (2002)	13
<u>State v Patterson</u>	
261 S C 362, 200 S E 2d 68 (1973)	7

<u>State v Sweat</u>	
386 S C 339, 688 S E 2d 569 (2010)	10
<u>Turner v S C Dep't of Health & Envtl Control</u>	
377 S C 540, 661 S E 2d 118 (Ct App 2008)	4
<u>Unison Ins Co v Schmidt</u>	
339 S C 362, 529 S E 2d 280 (2000)	10
<u>United States v Basye</u>	
410 U S 441 (1973)	28, 31
<u>United States v Brockamp</u>	
519 U S 347 (1997)	17
<u>United States v Hudson</u>	
65 F 68, (W D Ark 1894)	8

STATUTES

S C Code Ann § 1-23-610 (2005)	4
S C Code Ann § 2-13-60 (1986)	13
S C Code Ann § 12-6-30 (2000)	8, 10
S C Code Ann § 12-6-40 (Supp 2010)	17
S C Code Ann § 12-6-50 (Supp 2010)	17
S C Code Ann § 12-6-530 (2000)	15
S C Code Ann § 12-6-600 (Supp 2010)	17
S C Code Ann § 12-6-3310 (Supp 2010)	Passim
S C Code Ann § 12-6-3340 (2000)	15
S C Code Ann § 12-6-3370 (2000)	15
S C Code Ann § 12-6-3420 (Supp 2010)	Passim
S C Code Ann § 12-6-3560 (2000)	15
S C Code Ann § 12-6-5020 (Supp 2010)	31
S C Code Ann § 12-20-105 (Supp 2010)	12, 13
S C Code Ann § 12-60-460 (Supp 2010)	2

S C Code Ann § 12-60-470 (Supp 2010)	2
C G S A § 12-217t	20, 21
C G S A § 12-213	20
I R C § 702	Passim
I R C § 1366	24, 25

OTHER AUTHORITIES

73 Am Jur 2d <u>Statutes</u> § 213 (1974)	6
New York Tax Law § 210 12(a)	26
Rule 56(c), SCRCP	4
Rule 59(e), SCRCP	3

STATEMENT OF ISSUES ON APPEAL

- I WAS THE ALC CORRECT IN FINDING THAT THE APPELLANT DID NOT QUALIFY FOR AN INFRASTRUCTURE TAX CREDIT UNDER S C CODE ANN § 12-6-3420 (SUPP 2010) FOR EXPENDITURES MADE BY A GENERAL PARTNERSHIP?**

- II WAS THE ALC CORRECT IN FINDING THAT THE CORPORATE PARTNERS OF CENTEX HOMES ARE NOT ENTITLED TO CLAIM THE INFRASTRUCTURE TAX CREDIT BY WAY OF THE FLOW THROUGH PROVISIONS OF S C CODE ANN § 12-6-3310(B)(1) (SUPP 2010) BECAUSE A GENERAL PARTNERSHIP IS NOT ENTITLED TO EARN THE INFRASTRUCTURE TAX CREDIT?**

- III DID THE APPELLANT RAISE NEW LEGAL ARGUMENTS IN ITS POST-TRIAL FILINGS THAT ARE OUTSIDE OF THE RECORD AND THEREFORE NOT PROPERLY PRESERVED FOR REVIEW?**

- IV DID THE ALC ERR IN DETERMINING THAT THE FILING OF A CONSOLIDATED RETURN BY THE APPELLANT DID NOT GRANT ACCESS TO THE INFRASTRUCTURE CREDIT FOR THE PARTNERSHIP?**

STATEMENT OF THE CASE

This matter came before the Administrative Law Court (ALC) pursuant to S C Code Ann §§ 12-60-460 and 12-60-470 (Supp 2010). This action began when the Centex International Inc & Affiliates (Appellant or taxpayer) filed amended returns in 2007 adjusting the apportionment ratio for its income from the sale of bundled mortgages for the 2002-2005 tax years. The amended returns also claimed infrastructure tax credits based upon the expenditures made by subsidiaries of the Appellant, operating in South Carolina as a general partnership. The South Carolina Department of Revenue (Respondent or Department) determined the taxpayer was not entitled to the apportionment adjustments, or the claim for infrastructure tax credits made therein, on the basis that the infrastructure expenses were incurred by an unqualified affiliate of the taxpayer, a general partnership, rather than the taxpayer directly. On July 25, 2007, the Department disallowed the adjustments made on the Appellant's amended returns for the 2002-2005 tax years, issued a notice of proposed assessment, and denied the claim for credits. On October 23, 2007, the Appellant wrote the Department appealing the denial of the credits and the notice of proposed assessment. The Department issued its Department Determination on December 4, 2009, setting forth the legal basis for its adjustments and denial of the claim for credits. On December 7, 2009, the Appellant requested a contested case hearing before the ALC to dispute the Department Determination. Prior to a hearing on the merits, the Department filed a Motion for Partial Summary Judgment on the infrastructure credit question, to which the Appellant responded with a Cross-Motion for Summary Judgment on the same issue. A hearing was held before The Honorable John D McLeod on March 31, 2011, and the

Department's motion was subsequently granted. Appellant timely filed a Motion for Reconsideration pursuant to Rule 59(e), SCRPC, on June 13, 2011. The Department filed a Reply in Opposition on June 16, 2011, and a hearing on that motion was held at the offices of the ALC on July 7, 2011. The Appellant's motion was subsequently denied, and this appeal followed.

STATEMENT OF THE FACTS

This action was brought by the Appellant to challenge the Department's denial of its request for a refund for approximately \$5,100,000,¹ based upon a disallowed infrastructure tax credit for the 2002-2005 income tax years. The infrastructure tax credit claimed by the taxpayer is based on an attempted flow-through of the expenses incurred by Centex Homes, a general partnership that is wholly owned by three corporate affiliates of Centex International. It purchases, develops, sells land or lots, and constructs and sells single family homes in South Carolina and many other states. As part of its business in this State, the partnership incurred expenses from constructing or improving the infrastructure within certain developments, more specifically roads, sewers, and water lines.

For tax years 2002-2005, the parent company - Centex International & Affiliates filed amended corporate income tax returns, which included amended partnership returns for Centex Homes, claiming tax credits pursuant to S.C. Code Ann. § 12-6-3420 (Supp. 2010) for expenses that the partnership, Centex Homes, incurred in constructing or

¹In the event that the ALC's decision is overturned, determining the actual amount of the refund due will require a further audit of the infrastructure projects and the taxpayer's tax returns, as the amount was never fully ascertained once the Department's interpretation of the statutory language was deemed proper by legal counsel.

improving infrastructure in those areas that the partnership developed Upon audit, these credits were denied by the Department

ARGUMENTS

In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the appropriate standard of review Olson v S C Dep't of Health & Env'tl Control, 379 S C 57, 63, 663 S E 2d 497, 500-501 (Ct App 2008), Turner v S C Dep't of Health & Env'tl Control, 377 S C 540, 544, 661 S E 2d 118, 120 (Ct App 2008), Clark v Aiken County Gov't, 366 S C 102, 107, 620 S E 2d 99, 101 (Ct App 2005) S C Code Ann § 1-23-610(D) (2005) provides the applicable standard

(D) The review of the administrative law judge's order must be confined to the record The reviewing tribunal may affirm the decision or remand the case for further proceedings, or it may reverse or modify the decision if the substantive rights of the Appellant has been prejudiced because of the finding, conclusion, or decision is

- (a) in violation of constitutional or statutory provisions,
- (b) in excess of the statutory authority of the agency,
- (c) made upon unlawful procedure,
- (d) affected by other error of law,
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP summary judgment is proper when there is no genuine issue as to any material fact and

the moving party is entitled to judgment as a matter of law Miller v Blumenthal Mills, Inc., 365 S C 204, 219, 616 S E 2d 722, 729 (Ct App 2005)

An interesting addition to the Appellant's proposed standard of review includes a call for lower deference, due to the adoption of the Department's proposed order by the ALC (Appellant's Initial Br 6) In support of this proposition, the Appellant cites Anderson v City of Bessemer, 470 U S 564, 572-73 (1985) A cursory review of that case and the remaining string citations reveal that the Supreme Court's decision was based upon a lower court's adoption of the disputed facts in a litigant's proposed order As such, the Bessemer holding should have no bearing upon an action where the facts are not at issue, as is the case here This Court's review is one of the law, and although the legal arguments to be considered should be confined to the record, a *de novo* review requires no deference to the ALC This argument, therefore, has no bearing upon this case

When construing a statute, the cardinal rule is to ascertain the intent of the Legislature Georgia-Carolina Bail Bonds, Inc v County of Aiken, 354 S C 18, 22, 579 S E 2d 334, 336 (Ct App 2003) "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute " Id at 23, 579 S E 2d at 336 The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation Hitachi Data Sys Corp v Leatherman, 309 S C 174, 178, 420 S E 2d 843, 846 (1992) Furthermore, "[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration

and will not be overruled absent compelling reasons ” Brown v S C Dep't of Health & Envtl Control, 348 S C 507, 515, 560 S E 2d 410, 414 (2002) (quoting Dunton v S C Bd of Examin'rs in Optometry, 291 S C 221, 223, 353 S E 2d 132, 133 (1987)), see also Nucor Steel v S C Pub Serv Comm'n, 310 S C 539, 543, 426 S E 2d 319, 321 (1992) (recognizing that where an agency is charged with the execution of a statute, the agency's interpretation should not be overruled without cogent reason)

Most important to this case is the proposition that a court should not consider a particular clause being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law South Carolina Coastal Council v South Carolina State Ethics Comm'n, 306 S C 41, 44, 410 S E 2d 245, 247 (1991) According to the doctrine of *noscitur a sociis* the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute 73 Am Jur 2d Statutes § 213 (1974) “The Court may not, in order to give affect [sic] to particular words, virtually destroy the meaning of the entire context, that is, give the particular words a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent” S Mut Church Ins Co v S Carolina Windstorm & Hail Underwriting Ass'n, 306 S C 339, 342, 412 S E 2d 377, 379 (1991) (citing Creech v S C Public Service Commission, 200 S C 127, 138, 20 S E 2d 645, 649 (1942))

Furthermore, it is well established that tax credits and deductions from gross income are not a matter of right They are a matter of legislative grace, and a taxpayer claiming one must bring himself squarely within the terms of a statute expressly authorizing it Allied Corp v S C Tax Comm'n, 288 S C 197, 199, 341 S E 2d 139,

141 (1986)

I THE ALC WAS CORRECT IN FINDING THAT THE APPELLANT DID NOT QUALIFY FOR AN INFRASTRUCTURE TAX CREDIT UNDER THE PLAIN LANGUAGE OF S C CODE ANN § 12-6-3420 (SUPP 2010) FOR EXPENDITURES MADE BY A GENERAL PARTNERSHIP

A The Plain Language Of § 12-6-3420 Does Not Allow A Partnership To Earn The Tax Credit

Quite simply, a general partnership is not entitled to an infrastructure tax credit that is expressly limited to corporations. Section 12-6-3420 unambiguously states

(A) A **corporation** may claim a credit for the construction or improvement of an infrastructure project against taxes due under Section 12-6-530 or Section 12-11-20 for

- (1) expenses paid or accrued by the taxpayer,
- (2) contributions made to a governmental entity, or
- (3) contributions made to a qualified private entity in the case of water or sewer lines and their related facilities in areas served by a private water and sewer company

(Emphasis added) The Department's clearly founded application of this provision is that it extends only to expenses incurred by corporations, not general partnerships. This interpretation is fundamentally grounded in the plain wording of the statutory language and the doctrine of *ejusdem generis*. Under that doctrine, the meaning of general words (in this case, taxpayer) may be restricted by words of specification which precede them (corporation) on the theory that, had the Legislature intended the general words be used in their unrestricted sense, there would have been no mention of the particular class. State v. Four Video Slot Machines, 317 S C 397, 400, 453 S E 2d 896, 898 (1995) (citing State v. Patterson, 261 S C 362, 200 S E 2d 68 (1973)).

The Appellant has attempted to claim this credit by asserting that the general partnership is a “taxpayer,” as defined by the language in the definitional section of Chapter 6, pursuant to S C Code Ann § 12-6-30(1) (2000) (Appellant’s Initial Br 14) This section enumerates the types of entities taxed under Title 12 The Appellant argues that since its disregarded subsidiaries (for tax purposes) are corporations that have indirectly accrued expenses to create or improve infrastructure as members of the general partnership, it somehow qualifies for the infrastructure tax credit in § 12-6-3420(A)(1) Id This interpretation is unfounded and fails to place the taxpayer squarely within the terms of the statute, as it conflates the entity that is claiming the credit with the unqualified entity that generated it

As noted above, when § 12-6-3420(A)(1) is read in its entirety, it is clear that “**the** taxpayer” in subsection (A)(1) is limited to the “corporation” attempting to claim the credit against taxes due in subsection (A) (Emphasis added) “The word ‘*the*’ is a word of limitation – a word used before nouns, with a specifying or particularizing effect, [as] opposed to the indefinite or generalizing force of ‘a’ or ‘an ’” People v Enlow, 135 Colo 249, 262-63, 310 P 2d 539, 546 (1957) (citing United States v Hudson, 65 F 68 (W D Ark 1894)) If the Legislature had intended the term “taxpayer” in subsection (A)(1) to mean all entities defined under § 12-6-30(1), it would have used the indefinite article “a” The use of the definite article “the” is a clear and unambiguous choice of language to relate back to the specific corporate limitation contained in the first line of the credit statute Creatively, the Appellant argues that because the corporate partners contributed to the general partnership’s activities in South Carolina, there is no conflict with allowing the corporate parent company from claiming this credit However, as will be discussed in

greater detail in relation to the pass-through statute, such maneuvering disregards the essential law surrounding business associations, choice of entity, and basic partnership tax treatment. Because a partnership directly incurred these expenses, (not **the taxpayer** attempting to claim it) no credit was ever earned in the first place, and the partners have no legal right to claim it here.

Moreover, if taxpayer was intended to be read without limitation, as the Appellant believes, two separate absurdities become apparent. First, subsections (A)(2) and (A)(3) remain devoid of a reference to any type of entity, leaving a relation back to corporation as the only proper conclusion. To argue that expenditures under those two subsections should be made by corporations only, but the qualifying expenses under subsection (A)(1) opens the infrastructure credit to all forms of taxpayers is patently illogical. Second, the definitional section invoked by the Appellant for the term “taxpayer” includes copious entities that have no application here. Indeed, the ALJ properly determined that the definitional statute’s version of taxpayer was not meant to be applied

These entities include individuals, trusts, estates, partnerships, associations, companies, corporations, “or any other entity subject to the tax imposed by this chapter or required to file a return” Section 12-6-30(1). However, in order for this Court to apply the definition of § 12-6-30(1) to the infrastructure credit’s inclusion of the word “taxpayer,” each of the entities enumerated therein must be a feasible substitution.²

² Inserting “individual” or “trust” for the word taxpayer, for example, presents an unworkable disjunction between subsection (A) and (A)(1).

(R at ____) The Appellant insists that the Court should interpret taxpayer broadly, as defined by the definitional section of Title 12, but then refutes the ALJ’s conclusion

above by arguing that the other enumerated entities are merely superfluous and could not invoke the credit statute in the first place (Appellant's Initial Br 19) Not surprisingly, this logic mirrors the fundamental basis for the Department's interpretation, insofar as the plain language of the statute simply does not afford non-corporate entities the opportunity to generate the infrastructure credit The Appellant does not want the full range of "taxpayer" to be inserted, but rather, "corporations and partnerships," and there is no legal basis to do so This flies in the face of well settled jurisprudence concerning statutory construction Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention State v Sweat, 386 S C 339, 351, 688 S E 2d 569, 575 (2010) (citing Unisun Ins Co v Schmidt, 339 S C 362, 368, 529 S E 2d 280, 283 (2000)) If "the taxpayer" in subsection (A)(1) is interpreted as the broad definition found in § 12-6-30, it produces a large amount of inapplicable and unworkable disjunctions This is improper, as our Supreme Court has clearly held, "[a] statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous " Id (citing In re Decker, 322 S C 215, 219, 471 S E 2d 462, 463 (1995) (citation omitted))

Furthermore, § 12-6-3420(G), (H), and (I), all make references that leave no doubt that § 12-6-3420 refers only to corporations when read as a whole in context, viz

(G) If a road qualifying for the credit is subsequently removed from the state highway or public road system, the amount of the credit allowed for the construction of the road must be added to any **corporate income tax due from the taxpayer** in the first taxable year following the removal of the road from public use The department may

implement the provisions of this subsection by rules or regulation

(H) A **corporation** which files or is required to file a consolidated return is entitled to the income tax credit allowed by this section on a consolidated basis. The tax credit may be determined on a consolidated basis regardless of whether or not **the corporation entitled to the credit** contributed to the tax liability of the consolidated group

(I) The merger, consolidation, or reorganization of a **corporation** where tax attributes survive does not create new eligibility in a succeeding **corporation** but unused credits may be transferred and continued by the succeeding **corporation**. In addition, a **corporation** may assign its rights to its unused credit to another **corporation** if it transfers all, or substantially all, of the assets of the **corporation** or all, or substantially all, of the assets of a trade or business or operating division of a **corporation** to another corporation. (Emphasis added)

Thus, the limitation found in subsection (A) mandates that a corporation must be the entity which incurs the expenses that generate the tax credit. Because the expenses in question were directly incurred by a general partnership (an unqualified entity that fails to generate this credit), the corporate partner cannot then place the proverbial “cart before the horse” and claim the credit based upon its indirect involvement in the partnership’s business activity.

B The Appellant’s Arguments Concerning Economic Incentives Are Without Merit

In defense of its tenuous position of reading the credit statute disjunctively, the Appellant presents a number of tangential arguments. This veritable smoke screen is presented to draw attention away from the simple and central flaw of its case – the fact that a general partnership cannot earn a corporate credit, and therefore, cannot pass it on to its partners as part of its distributive shares.

The Appellant paints a vibrant picture of the purpose of this credit, economic development incentives, and then argues that the Department's application controverts what the Legislature intended to encourage (Appellant's Initial Br 8-14) As the ALC properly determined, however,

While I agree that this is indeed an economic incentive statute, I am not persuaded that applying the unambiguous corporate limitation included in subsection (A) defeats the encouragement of such investments Evaluating the efficacy or validity of the Legislature's prerogative to limit such incentives to a particular type of business entity rests not with this Court, and the policy decisions to encourage corporate activity need not be examined here

(R at __) The Department's application of the infrastructure credit does not undermine the encouragement of investments in this State by the entities that properly qualify for it in the first place, as proscribed by the plain language of the statute The Appellant, as a sophisticated legal entity, chose to operate in this State as a partnership, and that critical decision carries significant benefits and some possible disadvantages To be certain, access to corporate tax credits is undeniably one of those disadvantages for a partnership

C The Appellant's Arguments Relating To The License Tax Credit Pursuant To S C Code Ann § 12-20-105 (Supp 2010) Are Without Merit

The Appellant attempts to expand the scope of the infrastructure credit's language by cross-referencing another credit statute for license taxes, § 12-20-105, with § 12-6-3420 (Appellant's Initial Br 14) Appellant mistakenly states that subsection (F) of § 12-6-3420 includes electrical cooperatives as a "qualified private entity" that may claim the infrastructure credit Id With a mere cursory reading of the statute, however, one should easily discern that this contention is simply incorrect Subsections (A)(3) and

(C)(1)(c) outline the fact that water and sewer lines deeded to a “qualified private entity” that maintain the infrastructure are acceptable “projects” that are eligible for the credit. It does not include qualified private non-corporate entities as possible claimants. Subsection (C)(2) then defines a “qualified private entity” as properly licensed utilities to which such a project is deeded, and no mention of an electric cooperative is included. In fact, there is no mention of any infrastructure related to electricity in any portion of the infrastructure credit statute. Furthermore, Form SC SCH TC 6, which corporate taxpayers must fill out and attach to their income tax return to claim this credit, also further illuminates that this credit is only for water lines, sewer lines, and roads. (R at ____)

While the Appellant is correct that the license tax credit found in § 12-20-105 includes utility companies and electric cooperatives, as well as a cross reference to the infrastructure credit to prevent double dipping, the inclusion of both those entities in an annotated reference note was likely an oversight by the Code Commissioner and has no binding legislative value. Both entities pay license taxes, but only corporate utility companies would qualify for the infrastructure credit. One duty of the Code Commissioner is to “[c]ompile the public statutes of the State.” S.C. Code Ann. § 2-13-60(1) (1986). Part of this duty includes preparing indices to the statutes, noting court decisions under appropriate statutory sections, and adding references to new acts and joint resolutions. § 2-13-60(2), (3), and (6). The Code Commissioner is only authorized to “[c]orrect typographical and clerical errors.” State v. Huntley, 349 S.C. 1, 4, 562 S.E.2d 472, 473 (2002) (citing § 2-13-60(10)). He is not authorized to expand, delete, or alter statutes. Id. While utility companies are typically incorporated entities, and fit

within the limitation of subsection (A)(1), electric cooperatives are not eligible to claim the infrastructure credit, and such an assertion to expand the corporate limitation of § 12-6-3420 is completely unfounded. As such, this argument is meritless and also has no bearing upon a partnership's inability to earn a corporate tax credit.

II THE ALC WAS CORRECT IN DETERMINING THAT THE APPELLANT'S PARTNERSHIP SUBSIDIARY DID NOT QUALIFY FOR THE INFRASTRUCTURE PURSUANT TO THE PASS-THROUGH PROVISIONS OF S C CODE ANN § 12-6-3310 (SUPP 2010)

A The Pass-Through Provisions Of § 12-6-3310 Are Not Triggered By The Partnership's Expenditures

One exception to the general rule, which would allow an avenue for indirect expenditures to create access to tax credits, is contained within § 12-6-3310(B)(1). The pass-through provisions of that section state that “[u]nless specifically prohibited, an 'S' corporation, limited liability company taxed as a partnership, or **partnership that qualifies for a credit** pursuant to this article may pass through the credit earned to each shareholder of the 'S' corporation, member of the limited liability company, or partner of the partnership.” (Emphasis added). To that extent, a tax credit may only be passed through to individual partners after the partnership itself **qualifies** for the tax credit. Section 12-6-3310 does not create unfettered access to tax credits for pass-through entities. As noted above, the tax credit the Appellant is seeking to pass through its partnership is exclusively limited to corporations by the General Assembly, as § 12-6-3420 plainly states that only a “corporation may claim [the credit] against taxes due under Section 12-6-530 ”. The intent of the Legislature to limit the eligibility for this credit solely to corporations is unambiguous and clear from the plain language. This application of § 12-6-3420 is further supported by the Legislature's reference to S C

Code Ann § 12-6-530 (2000), which is South Carolina's corporate income tax statute. During oral arguments at the ALC, counsel for Respondent presented several examples of tax credits² that incorporated express language for the applicability of the pass-through provisions of § 12-6-3310 (R at __). No such language is present within the language of the credit at issue, nor is there ever a reference to any specific entities other than corporations. It is important to note, that the infrastructure credit was amended after the enactment of the pass-through statute, and no language referencing pass-through entities was included.

The Appellant contends that the use of the word "claim" in § 12-6-3420(A) should be read as separate from the act of generating the credit, and therefore, any corporate member of the Centex Homes partnership that indirectly incurred some of the infrastructure expenses should be able to claim the credit. This argument is also without merit. Tax credits are conferred by legislative grace and are not assignable in the absence of either explicit contractual or statutory language. DaimlerChrysler Services N Am, LLC v Ariz Dep't of Revenue, 210 Ariz 297, 304, 110 P 3d 1031, 1038 (Ct App 2005) (quoting DaimlerChrysler Services N Am, LLC v State Tax Assessor, 817 A 2d 862, 866 (Me 2003)). Income tax is generally assessed on a single taxpayer, and concurrently, tax credits and refunds are generally conferred upon the taxpayer that originally generated the credit. Absent a statutory provision stating otherwise, the general rule is that tax benefits may only be claimed by the taxpayer that generated that

²See, S C Code Ann §§ 12-6-3340 - Renewable Energy Credit, 12-6-3370 - Water Control Structure Credit, 12-6-3560 - Motion Picture and Advertisement Company Credit (2000) (The Motion Picture credit expressly provides for corporate partners generating the credit through indirect expenditures in a general partnership.)

benefit. While entertaining, the Appellant's assertion that the Department promulgated this general premise as a "secret" interagency rule is specious at best. (Appellant's Initial Br. 24). It logically follows that the general rule is that the entity generating the credit must be the entity that claims it, for if it was not, exceptions written directly into individual credit statutes (i.e., the consolidated return portion of the credit at issue in subsection (H)) and the pass-through provisions of § 12-6-3310 would have been completely unnecessary. Our Legislature included the "qualified claimant prerequisite" in the flow-through provisions of § 12-6-3310(B)(1), on the basis of this general rule. In fact, pass-through entities would have access to all credits without this restriction, and it essentially mandates that the pass-through entity is statutorily permitted to stand in the shoes of the entities allowed to generate such credits. As stated earlier, tax credits are not a matter of right, but legislative grace, and taxpayers that did not earn a credit themselves may not claim it without express legislative permission.

It is upon this sound logical application of our code that the Department interpreted the infrastructure credit to read "**the** taxpayer" generating it as synonymous with the corporation claiming it. In order for the flow-through provisions of § 12-6-3310 to remain consistent with the corporate limitation of § 12-6-3420, the word "claim" must be interpreted as synonymous with "generate." And, in order for the doctrine of *in pari materia* to truly be upheld, the word "qualify" must be interpreted as something much more than simply making the qualified expenditures, as the Appellant attempts to argue (Appellant's Initial Br. 22). The Appellant points out that all three state witnesses admitted that the Department had no policy, written or otherwise, regarding the infrastructure credit and pass-through entities. (Id. at 24). The insinuations made by this

observation are easily cast aside, as the Department has never allowed or even been asked to allow a non-corporate entity's claim for the corporate infrastructure credit. As such, no internal policy or publication was ever necessary, and certainly would have been a waste of taxpayer resources by a state agency. The pass-through statute is simply not triggered when there is an express limitation that disqualifies a partnership from being eligible for a credit, such as the corporate limitation of § 12-6-3420. Consequentially, because the partnership is not qualified to claim the infrastructure credit in the first place, none of its corporate partners may do so under the pass-through provisions of § 12-6-3310(B)(1).

The Appellant further argues that South Carolina's adoption of the Internal Revenue Code provisions for partnerships, specifically S.C. Code Ann. §§ 12-6-40, 12-6-50, and 12-6-600 (Supp. 2010), dictates that the tax credit be treated as if the individual corporate partners generated credits directly under a modified "aggregate theory"³ (Appellant's Initial Br. 43). This contention is tenuous at best. I.R.C. § 702(b), states in relevant part

The character of any item of income, gain, loss, deduction, or **credit** included in a partner's distributive share under paragraphs (1) through (7) of subsection (a) shall be determined as if such item were realized directly **from the source from which realized by the partnership or**

³The Appellant essentially argues from an equity standpoint that it is unfair to deny the corporate partners the tax credits when they spent over 64 million dollars on infrastructure and have to pay corporate income taxes on their distributive share from the partnership. However, equitable considerations would not serve the Appellant well. As a sophisticated business entity, the ramifications of choosing to operate as a partnership, including tax implications, should have been part of that decision making process. See also United States v. Brockamp, 519 U.S. 347, 352 (1997) (holding that tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities).

incurred in the same manner as incurred by the partnership

(Emphasis added)

The Appellant's assertion that I R C § 702(b) allows the individual partners to realize all the general gains, losses, deductions, and credits that the partnership realized is absolutely correct. This does not, however, give the individual partners the ability to extend the reach that the partnership has in regards to its **eligibility** for tax credits with specific limitations. "It is well settled that [Internal Revenue Code] § 702(b) reflects a 'conduit' approach whereby the character of an item of income, gain, loss, deduction, or credit **is determined at the entity or partnership level before the item is passed through** to the partners." Rath v. Comm'r, 101 T.C. 196, 203 (1993) (emphasis added). Therefore, in order for any sort of pass through to take place, the initial entity through which the credit is being transferred must have been eligible in the first place. Here, the partnership is simply not entitled to the infrastructure credit, and in that regard, it has nothing to pass through to its partners.

B The Appellant's Arguments Concerning *In Pari Materia* Are Without Merit

The Appellant asserts that the word "qualify" within the pass-through provisions pertaining to partnerships in § 12-6-3310 should be interpreted to merely mean "make the qualifying expenditures" (Appellant's Initial Br. 22). This argument is predicated upon the simple fact that partnerships have no income tax liability, and ostensibly would never use a credit, in the most basic sense of the word. However, partnerships are required to file informational returns that include the distributive shares of income, losses, deductions and credits to each partner, and therefore this depiction of partnerships as

ethereal entities that have no legal purpose or ramifications in the realm of taxation is erroneous. Partnerships do, in fact, claim credits. It is only the method of claiming that differs from other taxpayers. To illustrate, there are many examples of credits (See supra note 3) that contain express instructions for pass-through entities seeking to claim those credits, including how to allocate the credit among partners after it is claimed. While a partnership claiming an allocable credit does not offset an aggregate tax liability for the group, it can qualify for and pass through credits – and this is the method by which partnerships “use” credits. The credit must first be accessible to a partnership, however, and the mere making of expenditures that mirror the type expenses a corporation must incur to claim it does not expand the scope of the credit’s possible claimants which “qualify.”

The fundamental fallacy in the Appellant’s logic appears within the first three words of the pass-through statute, which states “[u]nless specifically prohibited.” The express corporate limitation of § 12-6-3420(A) is, in fact, a quite specific prohibition. This direct statutory mandate firmly undercuts the partnership’s ability to ever **qualify** for the credit, and therefore, the credit cannot be claimed and passed through to the partners. The infrastructure credit includes no language that indicates pass-through entities could qualify, nor does it begin with the more common phrase “[a] taxpayer may claim.” The use of that indefinite article, which would broaden the range of possible claimants, is used in **every other credit statute** that does provide for pass-through entities. Such is not the case for § 12-6-3420.

The doctrine of *in pari materia* is not disturbed by the Department’s application of the infrastructure credit statute. There remains a harmonious result between the pass-

through provisions of § 12-6-3310 and the infrastructure statute. Because the corporate limitation of the credit is clear and unambiguous, the partnership in this case is not considered a “qualifying” entity and therefore the pass-through statute is simply not triggered.

C The Appellant’s Interpretation Of The Applicable Case Law Is Incorrect

The Appellant erroneously states that the ALC relied primarily upon Bell Atlantic Nynex Mobile, Inc. v. Comm’r of Revenue Services, 273 Conn. 240, 869 A.2d 611 (2005) to make its decision (Appellant’s Initial Br. 25). While the ALC clearly relied upon the plain language of § 12-6-3420, the Court did entertain the instructive holdings of three important cases from other states. In the first, Bell Atlantic, the Supreme Court of Connecticut addressed the applicability of a credit provision by which corporate partners of a partnership attempted to claim a tax credit under C.G.S.A. § 12-217t for payment of personal property taxes on electronic data processing equipment. The language in § 12-217t, similar to the infrastructure credit at issue here, provided a property tax credit for “taxpayers.” In its analysis of the controlling statute, the Court observed “[a]s the payer of the property tax on the electronic data equipment, [the partnership] qualifies as a ‘taxpayer’ as that term is generally understood. This general understanding of the meaning of ‘taxpayer’ does not control the term’s usage in § 12-217t, however, because § 12-213 contains the statutory definition of the term.” Id. at 256, 869 A.2d at 621. C.G.S.A. § 12-213(a)(1) defines “taxpayer” to mean

[A]ny corporation, foreign municipal electric utility, as defined in section 12-59, electric distribution company, as defined in section 16-1, electric supplier, as defined in section 16-1, generation entity or affiliate, as defined in

section 16-1, joint stock company or association or any fiduciary thereof and any dissolved corporation which continues to conduct business but does not include a passive investment company or municipal utility, as defined in section 12-265[]

Because “partnership” was absent from the entities qualifying as taxpayers, the partnership was precluded from claiming a credit under § 12-217t Id. Therefore, the court concluded that “[the partnership] has not used and, indeed cannot use the tax credit against taxes paid under either the corporation business tax or other chapters specified in § 12-217t as required by the statute because, as a partnership, it has no income tax liability under those chapters ” Id at 257, 869 A 2d at 621

The Appellant has attempted to discount this decision’s applicability based upon the presence of a limiting definition of taxpayer in the Connecticut statute (Appellant’s Initial Br 25) However, it is quite clear that the plain language of our infrastructure credit also contains a specific limitation for corporations, and as such the analogous nature of these two credit statutes should be quite apparent Just like the partnership in Bell Atlantic, the Centex Homes partnership is simply not eligible to claim a corporate credit

After the plain language argument failed, remaining undaunted the partnership in Bell Atlantic then asserted that the corporate partners were entitled to claim the credit under a conduit approach **exactly** as the Appellant argues here Id at 261, 869 A 2d at 624 The Court again disallowed the credit, stating

Establishing that corporation business tax attributes pass through the partnership to the partners with the same character that they had at the partnership level does not suffice to establish that [the partnership’s] payment of the municipal property tax resulted in a credit that can be

attributed to the partners. Under the conduit approach, ‘the character of [the tax attribute] is determined **at the entity or partnership level** before the item is passed through to the partners.’ In the present case, [the partnership’s] payment of the municipal property tax was just that, a payment, not a tax credit. Not every action taken by the partnership passes through to the partners as if they performed the act. Section 702(b) of the Internal Revenue Code provides that ‘[t]he character of any item of income, gain, loss, deduction, or credit included in a partner’s distributive share shall be determined as if such item were realized directly from the source from which realized by the partnership, or incurred in the same manner as incurred by the partnership.’ This provision does pass credits through a partnership to its partners. It does not, however, create credits. *[The partnership’s] payment of the municipal property tax did not result in a tax credit because, under the Connecticut tax statute, it cannot be said that [the partnership] was plainly and unambiguously eligible to receive such a credit.*

Id. at 264-65, 869 A.2d at 625-26 (internal citations omitted) (emphasis added)

Finally, the corporate partners of the partnership asserted that an unjust result would occur if the Court disallowed the tax credit, nearly identical to claims of the taxpayer here. The Court addressed this argument and declared

Finally, the plaintiffs argue that an interpretation of § 12-217(t) that does not permit the partners to use the tax credit leads to an absurd result because it denies two corporations acting through a partnership a benefit that each party could obtain if it acted on its own. All parties agree that, had the plaintiffs operated as thirteen separate corporations, instead of through a partnership, and had those corporations collectively paid the same taxes on the same equipment, each corporation would fall within the definition of “taxpayer” and would be able to use the associated tax credit to offset its tax liability under the corporation business tax, as the plaintiffs seek to do in the present case. **The plaintiffs, however, chose to operate through a partnership, not as separate corporations. Sophisticated business entities recognize selection of a business form as a critical decision that carries with it certain legal**

consequences, including tax implications The legislature's decision to grant a tax credit to certain business forms while denying it to others does not constitute an absurd result. The fairness of such decisions remains within the prerogative of the legislature, not of this court.

Id. at 265, 869 A.2d at 626 (emphasis added)

Here, the Appellant chose the form of its business organization. Such a choice carries with it the exact implications as described by the Supreme Court of Connecticut, and the Appellant must accept the benefits and costs of its decision to organize in such a fashion.

The second case to which the ALC lent credence was from the Court of Appeals of Wisconsin, which came to an identical conclusion regarding corporate tax credit eligibility for partnerships who sought to claim “ a tax reduction credit pursuant to sec. 71.043(2), Stats., based on its distributive share of the sales and use taxes paid by [the general partnerships] ” L & W Construction Co. v. Wisc. Dep’t of Revenue, 149 Wis. 2d 684, 687, 439 N.W.2d 619, 620 (Ct. App. 1989). The relevant portion of that statute stated:

(2) The tax imposed upon or measured by corporation net income may be reduced by an amount equal to the sales and use tax under ch. 77 paid by the corporation in such taxable year on fuel and electricity consumed in manufacturing tangible personal property in this state.

Id. Upon consideration of the statute, the Court stated that if “ a different entity owned by the corporation actually pays the sales and use taxes, there is no statutory provision for a tax credit to the corporation ” Id. at 689, 439 N.W.2d at 621. The Court construed the tax credit strictly against the taxpayer and found that “[b]ecause L & W did not directly pay the partnerships’ costs of fuel and electricity, nor the resultant sales and

use tax, it ha[d] not met the burden of showing that it [was] clearly within the terms of the credit statute” and therefore was “ not entitled to the sec 71 043(2), Stats , income tax reduction for the sales and use tax paid by the partnerships ” Id at 691, 439 N W 2d at 621

The Appellant’s only distinguishing characteristic of this holding is that the statute in L&W states “expenses paid by the corporation” as opposed to “paid by **the taxpayer**” which is found in our infrastructure credit (Appellant’s Initial Br 26) This difference in wording is entirely irrelevant to the applicability of the logic in that case It is undisputed that the plain language of our infrastructure credit clearly limits the credit to corporate claimants and its applicability to corporate taxes With this limitation in place, the specific phrase “the taxpayer” has no other possible meaning other than **the** corporation that pays those corporate taxes Centex Homes, the Appellant’s partnership which incurred the infrastructure expenses is simply not “**the taxpayer**” that the credit statute specifically mandates to incur the expenditures

Finally, the Appellant attempts to argue that the Rath decision supports its position, which the ALC relied upon in holding for the Department (Appellant’s Initial Br 28) However, the Appellant’s logic presented to reach this conclusion is flawed The holding in Rath is important to this case, not because the deduction statute at issue in that case was akin to our infrastructure credit (it was not), but rather because in applying I R C §§ 1366(a) and 702(b) the Rath court echoed the Department’s position here – that the character of every item of income, loss, deduction or credit retains its character before a pass-through to its partners This holding directly contradicts the Appellant’s claims that a partnership should be treated as an amorphous non-entity when it comes to tax

credits. In Rath, despite the fact that the initial entity was precluded from claiming the ordinary loss deduction, the shareholders of the S corporation argued that they were entitled to report the loss on the sale of the stock on their federal income tax returns pursuant to a flow-through provision in I R C § 1366(b), which states in pertinent part

(b) Character Passed Thru The character of any item included in a shareholder's pro rata share under paragraph (1) of subsection (a) shall be determined as if such item were realized directly from the source from which realized by the corporation, or incurred in the same manner as incurred by the corporation

The Rath court found that the shareholders' reliance on the flow-through provision was misplaced, and applied the conduit approach used in I R C § 702(b) to find that although the "Petitioners read section 1366(b) as requiring an S corporation shareholder to step into the shoes of the corporation for purposes of determining the character of a loss incurred on a sale of section 1244 stock section 1366(a) and (b) requires the character of the loss to be determined from the viewpoint of the S corporation rather than from the viewpoint of its individual shareholders." Id. at 204. The claimed loss was therefore denied. Applying this holding to our case, before the infrastructure credit can be "incurred in the same manner as" the partnership, the partnership must be deemed eligible to incur the credit in the first place. Such is not the case here, and therefore the Rath decision is certainly useful when considering the Appellant's unfounded attempts to invoke the pass-through provisions of § 12-6-3310.

Although these three decisions are not binding on South Carolina jurisprudence, they are highly instructive and support the Respondent's position that a flow through of the infrastructure tax credit may take place only when the initial entity is qualified to

claim it in the first place. Simply put, Centex Homes does not qualify for the corporate tax credits because it is a general partnership. Because Centex Homes is not eligible for the infrastructure tax credits, it cannot pass through these credits to its individual corporate partners.

To counter the logic found in these holdings, the Appellant first presents a New York Department of Taxation Advisory Opinion and a case from the Appellate Court of Illinois (Appellant's Initial Br. 29). The Advisory Opinion can be swiftly dealt with, as the credit at issue in that case had no limitation and read "a taxpayer is allowed a credit." See New York Tax Law § 210.12(a). This broadly accessible credit was properly determined to allow a pass-through entity to qualify and then pass it on to its partners within the constraints of I.R.C. § 702(b). Unfortunately, such sweeping language is not found in South Carolina's infrastructure credit, and as noted above, the express corporate limitation bars a partnership from earning it and therefore no pass through can occur.

The second authority the Appellant presents is Bordon Chemicals and Plastics, LP v. Zehender, 312 Ill. App. 3d 35, 726 N.E.2d 73 (2000), in which the First District of the Illinois Appellate Court determined that a partnership was allowed to pass through an investment credit to its partners. The issue at bar in that case was as follows:

As in effect during the tax years in issue, section 201(e) did not explicitly provide whether pass through of the investment credit from partnerships to partners was allowed or disallowed, nor did the statute expressly prohibit pass through. The statute was silent. In 1997, the statute was amended to explicitly allow the credit to pass through to a partner. Thus, the threshold issue is whether the amendment applies to the instant case.

Id., 312 Ill. App. 3d at 46, 726 N.E.2d at 82. The Illinois Appellate Court, in considering whether the amendment allowing the pass-through was dispositive, determined that

the better approach is the ‘vested rights’ approach, in which a court does not engage in the examination of legislative intent, but instead applies the general rule that a court should apply the law as it exists at the time of the appeal, unless doing so would interfere with a vested right

Id., 312 Ill App 3d at 47, 726 N E 2d at 83 Once it was concluded that no vested rights would be trampled by employing the amended version of the credit, it was determined proper to allow the pass through to take place

This case fails to support the Appellant’s position on two fundamental grounds First and foremost, there is absolutely no mention of pass-through options within the language of § 12-6-3420 Second, the infrastructure credit was amended in 2006, well after the passage of the pass-through provision of § 12-6-3310, and the Legislature did not add any language to indicate that pass-through entities have access to it Unlike the credit in Bordon, our infrastructure credit has been around since 1988, amended, recodified, and never been altered to include language to support the Appellant’s interpretation As noted above, many of our credits have, and the Department would posit that this indicates the lack of any legislative intent to allow it See supra note 3

The Appellant then resubmits two South Carolina cases that the ALC properly determined supported the Department’s position The first, Ellis v S C Tax Commission, 280 S C 65, 309 S E 2d 761 (1983), dealt with the disallowance of individual income deductions for expenses incurred on out-of-state real estate by a partnership the individuals had invested in The Appellant argues vigorously that Ellis supports its position for a complete disregard of the partnership entity and for each individual partner to realize every item of income, loss, deduction, and credit as if acting independently (Appellant’s Initial Br 33-34) This is simply not correct It is important

to first note that the United States Supreme Court has weighed in on the legal recognition of partnerships, when it held

Thus, while the partnership itself pays no taxes, 26 U S C § 701, it must report the income it generates and such income must be calculated in largely the same manner as an individual computes his personal income. For this purpose, then, the partnership is regarded as an independently recognizable entity apart from the aggregate of its partners

United States v Basye, 410 U S 441, 448 (1973) While the aggregate theory is applied in Ellis, the deductions for out-of-state losses against in-state income were properly denied in Ellis by the Court's recognition of the "conduit theory" approach, which simply means that every item of income, loss, credit, or deduction **retains its character** before being passed through to the partners. The holding in Ellis affirms the Respondent's position that the character of the infrastructure credit should be retained before it can be passed through to Centex's partners. To that extent, the Appellant is mistaken in its application of aggregate theory, as it begs the question on whether or not the partnership earned the credit in the first place. Upon examination of the same quotation proffered by the Appellant with slightly different emphasis added, it becomes clear that the Ellis Court understood that premise

The "pass through" rule is equally applicable to limited partnerships. Section 12-7-300 makes no distinction between a general or limited partnership. By reason of the "pass through" rule, **the character of any item of income, gain, loss deduction or credit included in a partner's distributive share of gains and losses shall be the same as if such item was realized directly from the source from which realized or incurred by the partnership.** In other words, each item of income, gain, loss, deduction or credit is treated as if it were realized or incurred by the partner directly from the source without ever having passed through the partnership. If this were not the case, then

partners in real estate or other business ventures could not take advantage of depreciation write-offs and other operating expenses or losses

Ellis, at 68, 309 S E 2d at 762-63 (emphasis added) The Appellant's argument, as noted above, puts the proverbial cart before the horse in presupposing that the partnership ever actually realized the corporate infrastructure credit Before the partnership entity is disregarded and an individual partner can realize a credit, take a deduction, or pay tax on income that is part of its distributive share, the **partnership must have earned that credit, taken deductible losses, or made taxable gains in the first place** The three corporate partners of Centex Homes are certainly entitled to their distributive shares of reportable income and the deductions for losses incurred through the operation of the partnership They are not, however, entitled extraordinary reach to tax credits that were simply not accessible by a partnership before such distributive shares were calculated

The same logic is easily applied to the nearly identical decision of Dalton v S C Tax Commission, 295 S C 174, 367 S E 2d (1988), where the Court again recognized that character of every item of gain, loss, deduction and credit is retained before the pass through takes place To condense this type of tax treatment down to its most elementary form, the square peg of the corporate infrastructure credit cannot be forced through the round hole of a partnership

D The Appellant's Argument Concerning Limited Liability Companies Is Without Merit

The Appellant mistakenly points to the addition of sweeping language regarding LLC's that was added to the pass-through statute in a 2008 amendment found in subsection (C) of the current version, as the basis for a general partnership's claim for a corporate tax credit (Appellant's Initial Br 40) While this amendment is unequivocally

inapplicable, it is important to note that this amendment was enacted three years after the tax periods at issue in this case, and is therefore wholly irrelevant on that basis alone. In the construction of statutes, there is a presumption that statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision in the enactment or clear legislative intent to the contrary. See S.C. Dept. of Revenue v. Rosemary Coin Machines, Inc., 339 S.C. 25, 28, 528 S.E.2d 416, 418 (2000) (citing Hyder v. Jones, 271 S.C. 85, 245 S.E.2d 123 (1978)).

Regardless of the temporal inapplicability of this amendment to § 12-6-3310, the underlying legal application has no bearing here as well. LLC's have been granted a wide berth by the Legislature in regards to tax credits, as the amendment found in subsection (C) reads, "[a] limited liability company not organized as a business entity expressly qualified for the credits allowed pursuant to this article nevertheless qualifies for such credits." While LLC's can elect to be taxed as a partnership under Title 12, the entity remains organized as an LLC. The argument that the Legislature's grant of access to this type of business entity somehow opens the door to credits for general partnerships is a complete *non sequitur*. The choice of the Legislature to limit credits for specific types of entities is a policy question not fit for judicial review, and although seemingly arbitrary, such choices are simply outside of the purview of the issues presented to this Court.

III THE ALC DID NOT ERR IN ITS APPLICATION OF THE AGGREGATE AND ENTITY THEORIES AND ITS DETERMINATION THAT SUCH THEORIES DID NOT CREATE ACCESS TO THE INFRASTRUCTURE CREDIT FOR A PARTNERSHIP

The Appellant, at all stages of this litigation has attempted to argue that based upon the aggregate and entity theories, the individual partners may generate corporate credits based upon indirect expenditures made through the general partnership. As noted above in Point Heading II (B) and (C), this is the incorrect application of these theories, and the ALC properly held that the character of the corporate infrastructure credit bars a partnership from generating it or distributing it as allocable shares to its partners. With respect to brevity, the Respondent reiterates the arguments noted above in regards to Appellant's Point Heading II.

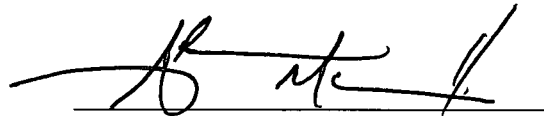
IV THE ALC DID NOT ERR IN DETERMINING THAT THE FILING OF A CONSOLIDATED RETURN BY THE APPELLANT DID NOT GRANT ACCESS TO THE INFRASTRUCTURE CREDIT FOR THE PARTNERSHIP

The Appellant points to subsection (H) of § 12-6-3420 as an indication that the credit statute was intended to be broadly construed for "taxpayers" (Appellant's Initial Br. 48). Paraphrased, this provision allows a consolidated group of corporations that include one corporation that was entitled to the credit to use it for the group's consolidated liability. While the Appellant is correct that its consolidated group is treated as a single taxpayer, it is important to note that Centex Homes, as a partnership, is not included on that consolidated return. The partnership files its own separate return, and as the Supreme Court of the United States recognized, it is a distinguishable and independent entity. United States v. Basye, 410 U.S. at 448. Interestingly enough, S.C. Code Ann. § 12-6-5020(F) (Supp. 2010) describes the application of tax credits to a consolidated group with an unmistakable caveat – "[i]f a corporation which files or is required to file a consolidated return is entitled to one or more income tax credits."

(Emphasis added) The Appellant's belief that single taxpayer treatment for a group of consolidated corporations bypasses the tax treatment of the partnership and allows the corporate group extraordinary reach in regard to tax credits is completely unfounded

CONCLUSION

This Court may affirm a lower court's order based on any ground appearing in the record See I'On v Town of Mt Pleasant, 338 S C 406, 420, 526 S E 2d 716, 723 (2000) Based on the record in this case and the foregoing arguments, the Department respectfully requests that this Court affirm the Order and Decision of the ALC, granting the Department Motion for Partial Summary Judgment and denying the Appellant's refund request



Adam N. Marinelli (Bar No 79031)
Counsel for Litigation
Harry Hancock (Bar No 065233)
Managing Counsel for Litigation
Milton G. Kimpson (Bar No 7917)
General Counsel for Litigation
PO Box 12265
Columbia, SC 29211
803-898-5153
803-898-5147 (Fax)
Attorneys for Respondent

Columbia, South Carolina
January 4, 2012

STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable John D. McLeod
Administrative Law Judge

Case No 09-ALJ-17-0532-CC

Centex International, Inc. & Affiliates,

Appellant,

v

South Carolina Department of Revenue,

Respondent

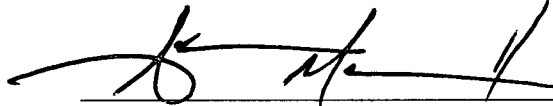
**DESIGNATION OF MATTER TO BE INCLUDED
IN THE RECORD ON APPEAL**

Respondent, South Carolina Department of Revenue, has no objection to the Appellant's proposed designations, and would add the following for the Record on Appeal

1 Centex International's Responses to Department's First Requests for Admission

2 Form SC SCH TC 6 - Infrastructure Credit Attachment for Corporate Returns

I certify that this designation contains no matter that is irrelevant to this appeal



Adam N. Marinelli (Bar No. 79031)

Counsel for Litigation

Harry A. Hancock (Bar No. 065233)

Managing Counsel for Litigation

Milton G. Kimpson (Bar No. 791)

General Counsel for Litigation

RECEIVED

JAN 04 2012

SC Court of Appeals

PO Box 12265
Columbia, SC 29211
803-898-5153
803-898-5147 (Fax)
Attorneys for Respondent

Columbia, South Carolina
January 4, 2012

STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable John D McLeod
Administrative Law Judge

Case No 09-ALJ-17-0532-CC

Centex International, Inc & Affiliates,

Appellant,

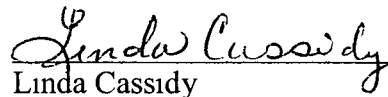
v

South Carolina Department of Revenue,

Respondent

PROOF OF SERVICE

I, Linda Cassidy, hereby certify that I have caused to be mailed, postage prepaid, a copy of the South Carolina Department of Revenue's Brief of Respondent and Designation of Matter regarding the above-referenced case to Burnet R Maybank, III, Esq , Nexsen Pruet, LLC, PO Drawer 2426, Columbia, SC 29202-2426, on this 4th of January 2012


Linda Cassidy

RECEIVED

JAN 04 2012

SC Court of Appeals

State of South Carolina
Department of Revenue
Office of General Counsel for Litigation
301 Gervais Street, P O Box 12265, Columbia, South Carolina 29211
Telephone (803) 898 5153 Telecopier (803) 898 5147

January 4, 2012

The Honorable Tanya A Gee
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re Centex International, Inc. & Affiliates v
South Carolina Department of Revenue
Case No 09-ALJ-17-0532-CC

Dear Ms Gee

Enclosed please find the South Carolina Department of Revenue's Initial Brief of Respondent regarding the above-referenced matter Also enclosed are the Designation of Matter and Proof of Service

Yours truly,

OFFICE OF GENERAL COUNSEL FOR LITIGATION



Adam N Marinelli (Bar No 79031)
Counsel for Litigation

ANM wcg
Enclosures

c Burnet R Maybank, III, Esquire

RECEIVED

JAN 04 2012

SC Court of Appeals

The South Carolina Court of Appeals

Centx International, Inc and Affiliates, Appellant,

v

South Carolina Department of
Revenue,

Respondent

The Honorable John McLeod
Richland County
Trial Court Case No 2009-AL-17-00532

ORDER

For good cause having been shown, the time for serving and filing the Respondent's Initial Brief and Designation of Matter in the above entitled matter is hereby extended until January 4, 2011

IT IS SO ORDERED

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY V. Claude Allen, Deputy
CLERK

Columbia, South Carolina

cc John von Lehe, Jr , Esquire
Bryson M Geer, Esquire
Adam Marinelli, Esquire

FILED
Anter 12/15/11

State of South Carolina
Department of Revenue
Office of General Counsel for Litigation
301 Gervais Street, P O Box 12265, Columbia, South Carolina 29211
Telephone (803) 898 5153 Telecopier (803) 898 5147

November 30, 2011

The Honorable Tanya A Gee
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re Centex International, Inc & Affiliates v
South Carolina Department of Revenue
Case No 09-ALJ-17-0532-CC
Case Tracking No 2011196887

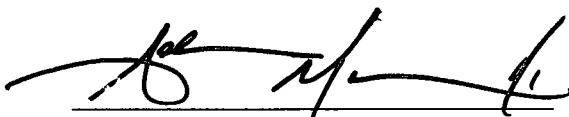
Dear Ms Gee

The South Carolina Department of Revenue respectfully requests a thirty (30) day extension of time to file its Initial Brief in this matter. The brief is currently due on December 7, 2011, the new due date would be January 5, 2012. We are making this request because of the delays caused by holidays and the complexity of issues on appeal.

Thank you for your consideration in this matter and please do not hesitate to contact me at MarineA@sctax.org or 898-5153

OFFICE OF GENERAL COUNSEL FOR LITIGATION

With kind regards,



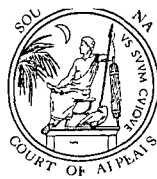
Adam N. Marinelli (Bar No. 79031)
Counsel for Litigation

ANM:jmo

c Burnet R. Maybank, III, Esquire

RECEIVED
DEC 05 2011
SC Court of Appeals

10-5-11
11-4-11
181



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 116 9
COLUMBIA SOUTH CAROLINA 29 11
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 9 01
TELEPHONE (803) 734 1890
FAX (803) 7 4 1839
www.sccourts.org

November 17, 2011

John von Lehe, Jr, Esquire
Bryson M Geer, Esquire
Nelson Mullins Riley
& Scarborough
P O Box 1806
Charleston, SC 29402

Re Centex International v SCDOR
Case Tracking # 2011196887

Dear Counsel

The following Order has been endorsed on your "Notice of Motion and Motion to Withdraw as Counsel for Appellant" in the above entitled case on appeal

"Granted

John Cannon Few C J
For the Court

By s/ V Claire Allen
Deputy Clerk

November 17, 2011 "

Please be advised that our records have been updated to show that Burnet Maybank, Esquire and Nexsen Pruet, LLC, will be listed as counsel for the Appellant in this matter. The Court also acknowledges receipt of the Appellant's Initial Brief and Designation of Matter filed by Mr Maybank.

Mr Maybank, we are returning the "exhibits" that you attached to your brief. Please review Rule 210, SCACR, for guidance on the appropriate way to present this information to the Court. Attachments to briefs are not permitted.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec

cc Burnet R Maybank, III, Esquire
Adam Marinelli, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D McLeod, Administrative Law Judge

Case No 09-ALJ-17-0532-CC

Centex International, Inc & Affiliates

Appellant,

v

South Carolina Department of Revenue

Respondent

INITIAL BRIEF OF APPELLANT

RECEIVED
NOV 04 2011
SC Court of Appeals

Burnet R Maybank, III
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202-2426
PHONE 803 771 8900
FACSIMILE 803 253 8277
bmaybank@nexsenpruet.com

Attorney for Appellant Centex International, Inc &
Affiliates

November 4, 2011
Columbia, South Carolina

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	1
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	3
STANDARD OF REVIEW	5
ARGUMENTS	6
I THE ALC ERRED AS A MATTER OF LAW BY CONCLUDING THAT THE CORPORATE AFFILIATES OF CENTEX WERE NOT ELIGIBLE TO CLAIM THE INFRASTRUCTURE TAX CREDIT AS PARTNERS OF THE CENTEX HOMES PARTNERSHIP	6
A The Clear and Plain Language of the Statute Allows the Corporate Affiliates of Centex to Claim the Infrastructure Tax Credit	6
B The Corporate Partners of Centex are Entitled to the Infrastructure Tax Credit Based on the Application of South Carolina’s Pass Through Statutes	31
II THE ALC ERRED IN ITS APPLICATION AND INTERPRETATION OF THE AGGREGATE AND ENTITY THEORIES OF PARTNERSHIP TAXATION BY CONCLUDING THAT THE INFRASTRUCTURE EXPENDITURES AND CONTRIBUTIONS MADE BY CENTEX REAL ESTATE CORPORATION (CREC), AS MANAGING GENERAL PARTNER OF CENTEX HOMES, REMAIN ATTRIBUTABLE TO THE PARTNERSHIP	43
A The Partners’ Expenditures at Issue Meet the Definition of “Qualifying Infrastructure Expenditures” According to the Infrastructure Tax Credit	43
B The Corporate Partners were Directly Involved in the Contribution of Qualifying Infrastructure Projects and Thus Qualify for the Infrastructure Tax Credit	46
III THE ALC ERRED IN ITS CONCLUSION THAT CENTEX INTERNATIONAL, INC AND AFFILIATES ARE NOT A SINGLE TAXPAYER AND MAY NOT CLAIM THE INFRASTRUCTURE CREDIT ON ITS CONSOLIDATED RETURN	48

TABLE OF CONTENTS
(continued)

CONCLUSION	Page 49
------------	-------------------

TABLE OF AUTHORITIES

	Page
CASES	
<i>Amoena Corp v Strickland</i> , 283 S E 2d 894 (Ga 1981)	8
<i>Anderson v City of Bessemer</i> , 470 U S 564 (1985)	6
<i>Anon Corp v S C Dep t of Rev</i> , 98-ALJ-17-0533 (1999)	13-14, 15-16
<i>Anon Corp v S C Dep t of Rev</i> 99 ALJ-17-0153 (1999)	9
<i>Arizona v Capitol Castings Inc</i> , 88 P 3d 159 (Ariz 2004)	8
<i>Bell Atlantic Nynex Mobile Inc v Comm r of Rev Servs</i> 273 Conn 240, 869 A 2d 611 (2005)	24-25
<i>Bordon Chems & Plastics LP v Zehnder</i> , 726 N E 2d 73 (2000)	29, 30
<i>Bright v Westmoreland Cnty</i> , 380 F 3d 729 (3d Cir 2004)	6
<i>Brown v Bi-Lo Inc</i> 354 S C 436, 581 S E 2d 836 (2003)	24
<i>Brown v Martin</i> , 203 S C 84, 26 S E 2d 317, 320 (1943)	7
<i>CFRE LLC v Greenville Cnty Assessor</i> , 2011 WL 3804517 (S C 2011)	6, 7, 17
<i>City of Rock Hill v Harris</i> , 391 S C 149, 705 S E 2d 53 (2011)	6
<i>Clarendon Cnty Mem l Hosp v S C Dep t of Health & Env'tl Control</i> , 2006 WL 1430090 (S C Admin Law Judge Div 2006)	25
<i>Clark v S C Tax Comm n</i> , 259 S C 161, 191 S E 2d 23 (1972)	7
<i>Coastal Conservation League v S C Dep t of Health & Env'tl Control</i> 363 S C 67, 610 S E 2d 482 (2005)	25
<i>Crafts v Ray</i> , 22 R I 179, 46 A 1043 (1900)	10
<i>Dalton v S C Tax Comm n</i> , 295 S C 174, 367 S E 2d 459 (1988)	34, 35, 49
<i>Duke Power Co v Bell</i> , 156 S C 299, 152 S E 865 (1930)	9, 10
<i>Ellis v S C Tax Comm n</i> 280 S C 65, 309 S E 2d 761 (1983)	34, 44, 45, 49

TABLE OF AUTHORITIES
(continued)

	Page
<i>Flowers v Crouch-Walker Corp</i> , 552 F 2d 1277 (7th Cir 1977)	6
<i>Grant v City of Folly Beach</i> , 346 S C 74, 551 S E 2d 229 (2001)	21
<i>Hadden v S C Tax Comm n</i> , 183 S C 38, 190 S E 249 (1937)	7
<i>Hercules Contractors & Engineers v S C Tax Comm n</i> , 280 S C 426, 313 S E 2d 300 (Ct App 1984)	9
<i>Hodges v Rainey</i> , 341 S C 79, 533 S E 2d 578 (2000)	20
<i>Holsey v Armour & Co</i> , 683 F 2d 864 (4th Cir 1982)	6
<i>Idaho St Tax Comm n v Haener Bros</i> 828 P 2d 304 (Idaho 1992)	8
<i>Long Cove Home Owners Ass n v Beaufort Co Tax Equalization Bd</i> , 327 S C 135, 488 S E 2d 857 (1997)	5
<i>L&W Constr Co Inc v Wis Dep t of Rev</i> 149 Wis 2d 684, 439 N W 2d 619 (1989)	26
<i>Media General v S C Dep t of Rev</i> , 388 S C 138, 694 S E 2d 525 (2010)	5, 6, 20-21
<i>M Lowenstein & Sons Inc v S C Tax Comm n</i> 277 S C 561, 290 S E 2d 812 (1982)	7
<i>Rath v Comm r</i> , 101 T C 196 (1993)	26, 27
<i>Seigfried v S C Dep t of Rev</i> 2003 WL 24004736 (S C Admin Law Judge Div 2003)	24-25
<i>S C Dep t of Motor Vehicles v Lajuenesse</i> , 2008 WL 1740063 (S C Admin Law Judge Div 2008)	25
<i>Sharp v Tyler Pipe Indus Inc</i> 919 S W 2d 157, 161 (Ct App Tex 1996)	8
<i>Southeastern-Kusan Inc v S C Tax Comm n</i> , 276 S C 487, 280 S E 2d 57 (1981)	9
<i>State v Sweat</i> , 379 S C 367, 665 S E 2d 645 (Ct App 2008)	7

TABLE OF AUTHORITIES
(continued)

	Page
<i>United States v Marine Bancorporation Inc</i> , 418 U S 602 (1974)	6

STATUTES

26 U S C §1366 (1986)	26
26 U S C § 1244 (1986)	28
26 U S C § 701 (1986)	31-32, 43
26 U S C § 702 (1986)	32, 33, 45
26 U S C § 703 (1986)	32
26 U S C § 704 (1986)	32
26 U S C § 7701 (1986)	30
S C Code Ann § 1-23-380 (Supp 2010)	5
S C Code Ann § 12-2-25 (Supp 2010)	41
S C Code Ann § 12-6-30 (2000)	16, 19, 20, 30
S C Code Ann § 12-6-40 (2000 & Supp 2010)	32
S C Code Ann § 12-6-50 (2000 & Supp 2010)	32
S C Code Ann § 12-6-530 (2000)	19, 23, 49
S C Code Ann § 12-6-600 (2000)	31, 32, 34, 49
S C Code Ann § 12-6-2320 (2000)	21
S C Code Ann § 12-6-3310 (Supp 2008)	16, 23, 28, 36, 37-38, 39, 40-41, 50
S C Code Ann § 12-6-3340 (1976)	28
S C Code Ann § 12-6-3360 (1976)	16, 36
S C Code Ann § 12-6-3370 (1976)	2

TABLE OF AUTHORITIES
(continued)

	Page
S C Code Ann § 12-6-3420 (1976)	3, 11-13, 14, 15, 16-17, 18-19, 23, 28, 43, 44, 46, 48
S C Code Ann § 12-6-3560 (Supp 2008)	28
S C Code Ann § 12-6-5020 (1976)	48
S C Code Ann § 12-11-20 (1976)	19
S C Code Ann § 12-14-60 (1976)	20
S C Code Ann § 12-20-100 (1976)	10
S C Code Ann § 12-20-105 (1976)	10, 15
S C Code Ann § 33-41-10 (1976)	47
S C Code Ann § 33-41-310 (1976)	47
S C Code Ann § 33-41-370 (1976)	47
S C Code Ann § 33-41-510 (1976)	47
S C Code Ann § 33-41-730 (1976)	47
S C Code Ann § 33-45-10 (1976)	15

OTHER AUTHORITIES

1995 S C Act No 76	28
2000 S C Act No 399	28
2003 S C Act No 69	28, 36
2004 S C Act No 299	28
Black's Law Dictionary (9 th ed 2009)	38
Corporate Income Tax, http //www sctax org/Tax+Information/Corporate+Income+Tax/corpinfo htm	35
D Hughes & E Fader, <i>Pass-Through Entities and Tax Credits Don t Lose the Opportunity</i> , J Multistate Tax'n & Incentives, June 1999	35, 37

TABLE OF AUTHORITIES
(continued)

	Page
Internal Revenue Service, Partnership - Audit Technique Guide – Overview (December 2002), <i>available at</i> http //www irs gov/businesses/partnerships/ article/0,,id=134689,00 html	44
J Hellerstein & W Hellerstein, <i>State Taxation</i> (3d Ed 2003) § 20 08	36
J Shaughnessy, <i>2004 and 2005 Connecticut Tax Law Developments</i> , 79 Conn B J 67 (2005)	25-26
New York Department of Taxation Advisory Opinion, Petition No C850528A	29
S Barnes, J Burkhardt, R Handle, B Maybank, M McWilliams & D Merline, <i>South Carolina Limited Liability Companies and Limited Liability Partnerships</i> (S C Bar 3d ed)	32
S C Private Letter Ruling 95-3	10, 21
S C Rev Rul 96-11	10, 11
S C Rev Rul 97-7	33
S C Rev Rul 97-8	20
S C Rev Rul 98-11	41
S C Technical Advice Memorandum 89-14	8-9
S C Tax Commission Decision 93-78	24, 45-46
S C Tax Commission Decision 94-90	24
South Carolina Department of Revenue, <i>South Carolina Tax Incentives for Economic Development Winter Edition 2009</i>	23-24, 32, 38-39, 40, 42
Sutherland Statutory Construction § 66 1 (6th ed)	7
Webster’s II New College Dictionary (2d ed 2001)	38

STATEMENT OF ISSUES ON APPEAL

- I DID THE ALC ERR AS A MATTER OF LAW BY CONCLUDING THAT THE CORPORATE AFFILIATES OF CENTEX WERE NOT ELIGIBLE TO CLAIM THE INFRASTRUCTURE TAX CREDIT UNDER S C CODE ANN § 12-6-3420 AS PARTNERS OF THE CENTEX HOMES PARTNERSHIP?**
- II DID THE ALC ERR IN ITS APPLICATION AND INTERPRETATION OF THE AGGREGATE AND ENTITY THEORIES OF PARTNERSHIP TAXATION BY CONCLUDING THAT THE INFRASTRUCTURE EXPENDITURES AND CONTRIBUTIONS MADE BY CENTEX REAL ESTATE CORPORATION (CREC) AS MANAGING GENERAL PARTNER OF CENTEX HOMES REMAINS ATTRIBUTABLE TO THE PARTNERSHIP?**
- III DID THE ALC ERR IN ITS CONCLUSION THAT CENTEX INTERNATIONAL, INC AND AFFILIATES ARE NOT A SINGLE TAXPAYER AND MAY NOT CLAIM THE INFRASTRUCTURE CREDIT ON ITS CONSOLIDATED TAX RETURN?**

STATEMENT OF THE CASE

This case originated when Centex International, Inc and Affiliates (hereinafter “Centex” or “Appellant”) filed amended 2002 through 2004 South Carolina corporate tax returns in December 2005 and subsequently filed its 2005 tax return claiming infrastructure tax credits totaling in all \$5 1 million. The infrastructure credits claimed for those tax years were based upon the expenditures of \$68 million made by three corporate subsidiaries of Centex, operating in South Carolina as general partners of Centex Homes. The Department of Revenue (“SCDOR”) determined that the Appellant was not entitled to claim infrastructure tax credits on the basis that the qualifying infrastructure expenses were incurred by the general partnership, rather than the Appellant directly, and disallowed the credits in a notice of proposed assessment dated

July 25, 2007 On October 23, 2007, the Appellant appealed the denial of the credit and the notice of the proposed assessment

The SCDOR issued its Final Determination on December 4, 2009, setting forth the legal basis for its denial of the claim for credits On December 7, 2009, the Appellant requested a contested case hearing before the Administrative Law Court (“ALC”) to dispute the SCDOR’s Determination The SCDOR filed a Motion for Partial Summary Judgment on the infrastructure tax credit question, to which the Appellant responded with a Cross-Motion for Summary Judgment on the same issue With both parties stipulating that no issue of fact remained on the infrastructure credit issue, a hearing was held before the Honorable John D McLeod of the ALC on March 31, 2011

On June 2, 2011, Judge McLeod granted the SCDOR’s Motion for Summary Judgment and denied Appellant’s Cross-Motion for Summary Judgment Appellant timely filed a Motion to Reconsider and/or Alter or Amend pursuant to Rule 59, SCRCP The SCDOR filed a Reply in Opposition, and a hearing was held before Judge McLeod On July 11, 2011, Judge McLeod denied Appellant’s Motion for Reconsideration and Motion to Alter or Amend

On August 3, 2011, Appellant timely filed and served its Notice of Appeal to the Court of Appeals Appellant also filed a Motion to Substitute Counsel on October 26, 2011

The relief sought by the Appellant is the issuance of an Order by the court finding that the ALC erred (1) in granting an Order ruling in favor of the Respondent’s Motion for Summary Judgment, and (2) in failing to grant the Appellant’s Cross Motion for Summary Judgment

STATEMENT OF FACTS

The facts are not in dispute in this matter. Centex Homes is a builder and developer that acquires and develops land used primarily for the purpose of developing communities and constructing new homes throughout the country. Centex Homes constructs significant infrastructure to support the areas in which it is building homes and developing communities. South Carolina has an infrastructure tax credit statute at S.C. Code Ann. § 12-6-3420 (1976) (the “Infrastructure Credit Statute”) under which taxpayers may claim a credit for certain infrastructure expenses, such as roads, water lines and sewer lines, made by taxpayers that benefit the State and its residents where that infrastructure does not exclusively benefit the taxpayer, built to applicable standards, and dedicated to public use.

During fiscal years ending March 31st of 2002 through 2005, the audit years at issue in this matter (the “Audit Years”), Centex Homes spent approximately \$68 million in South Carolina developments on roads and water and sewer lines. Specifically, Centex spent approximately \$11,533,645 on water lines, \$33,028,002 on sewer lines and \$23,440,223 on roads. (Raines affidavit at Par. 7, R. at p. __). Centex Homes was one of the largest homebuilders in South Carolina during the Audit Years. (*Id.* at Par. 5). Upon completion of the developments, Centex Real Estate Corporation (“CREC”), the managing general partner of Centex Homes, dedicated the infrastructure to public use by contributing the properties to local municipalities and counties in South Carolina (at no cost to them) thus becoming public property for the benefit of this State's residents and communities.

The Appellant is a corporation subject to the South Carolina corporate income tax. Centex Homes is a general partnership with three corporate partners. All three corporations are wholly owned subsidiaries of Appellant. (SCDOR's Final Agency Determination (FAD) at Par 11, R at p __) Although Centex Homes is considered a "taxpayer" as it files both a federal and state (South Carolina) partnership return, these partnership returns are for informational purposes only and Centex Homes pays no income tax. Rather, the income, deductions, and credits pass through to its corporate partners and are reflected as income, deductions, and credits on Appellant's consolidated federal and state income tax returns.

Accordingly, Appellant's South Carolina corporate tax return, filed on a consolidated basis, included the infrastructure credit for the audit years. (*Id.* at Par 12, R at pp __) After reviewing Appellant's claim, one of SCDOR's most experienced auditors (Donovan depo, p 10 22-3, R at p __), Orville Sharpe, consulted his supervisor via an email. The e-mail precisely states the issue as follows:

This is regarding the Infrastructure credit I'm working for Centex International, Inc. & Affiliates. The credits were earned by the Partnership Centex Homes. The Partnership is owned by three different Corporate affiliates of Centex International:

AAA Holdings, Inc. (owns 80% of the partnership), Nomas Corp. (owns 18% of the partnership), Centex Real Estate Corporation (owns 2% of the Corporation). The Partnership not the corporations would have paid the infrastructure expenses. Would the Corporations be able to claim credits earned by the partnership since the partners pro rata share of the partnership's income flows to the corporations or does the infrastructure expenses have to be paid by a corporation before any resulting infrastructure credits can be claimed? Below is the Section of law dealing with infrastructure credits, it's not clear to me. (Ex C to Appellant's Summary Judgment Motion, R at p __)

The auditor and his supervisor then consulted with SCDOR's legal department, and SCDOR subsequently denied the credits. This dispute followed

STANDARD OF REVIEW

Tax appeals to the ALC are subject to the Administrative Procedures Act. *Long Cove Home Owners Ass'n v. Beaufort Cnty. Tax Equalization Bd.*, 327 S.C. 135, 139, 488 S.E.2d 857, 860 (1997). Accordingly, review of the ALC decision is governed by S.C. Code Ann. § 1-23-380(5) (Supp. 2010), which states

The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are

(a) in violation of constitutional or statutory provisions,

* * *

(d) affected by other error of law,

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion

As the South Carolina Supreme Court recently stated in *Media General v. South Carolina Department of Revenue*, 388 S.C. 138, 144, 694 S.E.2d 525, 27-28 (2010)

Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP, *see also* ALC Rule 68 (stating the South Carolina Rules of Civil Procedure may be applied in proceedings before the ALC to resolve questions not addressed by the ALC rules). A reviewing court may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law. S.C. Code Ann. § 1-23-610(B)(a), (d) (Supp. 2009)

Questions of statutory interpretation are questions of law, which the appellate

court may decide without any deference to the court below *CFRE LLC v Greenville Co Assessor*, 2011 WL 3804517 (S C 2011) (citing *City of Rock Hill v Harris*, 391 S C 149, 152, 705 S E 2d 53, 54 (2011))

In addition, except for the reordering of several paragraphs, the ALC adopted the SCDOR's proposed order practically verbatim (*Compare* SCDOR's Proposed Order, R at pp __ with ALC Order R at pp __) When a lower court adopts the prevailing party's proposed order verbatim, that order is entitled to lower deference and may be subjected to increased scrutiny on appeal *See Anderson v City of Bessemer*, 470 U S 564, 572-73 (1985), *United States v Marine Bancorporation Inc* 418 U S 602, 615, n 13 (1974), *Flowers v Crouch-Walker Corp* 552 F 2d 1277, 1284 (7th Cir 1977), *Bright v Westmoreland Cnty*, 380 F 3d 729, 731-2, (3d Cir 2004), and *Holsey v Armour & Co*, 683 F 2d 864, 866 (4th Cir 1982)

ARGUMENTS

I THE ALC ERRED AS A MATTER OF LAW BY CONCLUDING THAT THE CORPORATE AFFILIATES OF CENTEX WERE NOT ELIGIBLE TO CLAIM THE INFRASTRUCTURE TAX CREDIT AS PARTNERS OF THE CENTEX HOMES PARTNERSHIP

A The Clear and Plain Language of the Statute Allows the Corporate Affiliates of Centex to Claim the Infrastructure Tax Credit

1 In General

As the Supreme Court recently stated in *Media General*,

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature" "The determination of legislative intent is a matter of law" "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning" The best evidence of intent is in the statute itself "What legislature says in the text of the statute is considered the best evidence of the legislative intent or will Therefore, the courts are bound to give effect to the expressed intent of the legislature"

388 S C at 147-48, 694 S E 2d at 529 (citations omitted) Additionally, where the Legislature defines statutory terms, those definitions “are generally binding on the court and should prevail ” *Brown v Martin*, 203 S C 84, 26 S E 2d 317, 320 (1943)

In the context of a tax statute, it is a settled rule that ambiguities are resolved “against the government and in favor of the taxpayer ” *See Hadden v S C Tax Comm n*, 183 S C 38, 46-47, 190 S E 249, 251 (1937) (noting that “where a tax statute is ambiguous or is reasonably susceptible of an interpretation that would exclude the person or subject sought to be taxed, any substantial doubt must be resolved against the government in favor of the taxpayer”), *see also Clark v S C Tax Comm n*, 259 S C 161, 169, 191 S E 2d 23, 26 (1972) (“Revenue laws are generally construed in favor of the taxpayer and against the taxing authority ”), and *Sutherland Statutory Construction* § 66 1 (6th ed)

Admittedly, the general rule is that tax credits and exemptions are a matter of legislative grace and are strictly construed against the taxpayer *M Lowenstein & Sons Inc v S C Tax Comm n* 277 S C 561 290 S E 2d 812 (1982) However, as the Supreme Court recently stated in *CFRE*

“This rule of strict construction simply means that constitutional and statutory language will not be strained or liberally construed in the taxpayer’s favor It does not mean that we will search for an interpretation in [the SCDOR]’s favor where the plain and unambiguous language leaves no room for construction ” It is “[o]nly when the literal application of the statute produces an absurd result will we consider a different meaning ”

2011 WL at *3 (*citing State v Sweat*, 379 S C 367, 376, 665 S E 2d 645, 650 (Ct App 2008)) As discussed later, there is no absurd result with respect to the literal application of the statute’s plain language and use of the statutorily defined terms utilized within the

Infrastructure Credit Statute

Moreover, the rule of strict construction is not always applied as narrowly as noted above in the general rule when the interpretation of economic tax incentive statutes is involved (As the ALC correctly noted, the Infrastructure Credit is an economic development incentive) (ALC Order, p 8, R at p __) 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 *Arizona v Capitol Castings Inc* , 88 P 3d 159, 160 (Ariz 2004), *Sharp v Tyler Pipe Indus Inc* 919 S W 2d 157, 161 (Ct App Tex 1996) (terms “liberal” and “strict” as applied to statutory construction can be misleading where other principles are at work, construing tax exemption statutes too narrowly could defeat legislative purpose of economic development), *Idaho State Tax Comm n v Haener Bros* 828 P 2d 304, 307 (Idaho 1992), and *Amoena Corp v Strickland*, 283 S E 2d 894, 897 (Ga 1981) (construing the Georgia sales tax exemption for machinery and equipment in which the Georgia Supreme Court stated that “it is true that tax exemptions are to be strictly construed against the taxpayer and doubts resolved in favor of taxability 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 purpose ” 283 S E 2d at 897)

Indeed, 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

S C TAM 89-14 (emphasis added)

The South Carolina Supreme Court has previously recognized the importance of economic development incentives in a number of sales and property tax exemption cases. In one case dealing with a sales tax exemption, the Court noted that the purpose of exempting the purchase of machinery is “to promote new industry within the State and encourage expansion of present industry” *Southeastern-Kusan Inc v S C Tax Comm n*, 276 S C 487, 490, 280 S E 2d 57, 59 (1981), *see also Hercules Contractors & Engineers v S C Tax Comm n*, 280 S C 426, 435, 313 S E 2d 300, 306 (Ct App 1984), and *Anon Corp v S C Dep t of Rev* 99 ALJ-17-0153 (1999) (noting that “[c]ourts of other jurisdictions have recognized that construing tax exemption statutes too narrowly could defeat the legislative purpose of such statutes”)

Similarly, in *Duke Power Co v Bell*, 156 S C 299, 301, 152 S E 865, 868 (1930), a county treasurer argued that a statute providing property tax exemptions to manufacturers who located in certain South Carolina counties was unconstitutional. In rationalizing its decision, the Court stressed the importance of tax incentives for attracting manufacturing industry investment. *Id.* at 303, 152 S E at 871-72. Further, the Court noted that “[t]he theory of the transaction is that a public benefit will accrue to the town and its inhabitants by the introduction of the business enterprise. The property

of a town is benefitted, both in value and income, by the introduction of business, and the consequent increase of inhabitants ”” *Id* at 303, 152 S E at 871-72 (quoting *Crafts v Ray*, 22 R I 179, 46 A 1043 (1900))

The SCDOR took a similar position in S C Private Letter Ruling (PLR) 95-3 regarding a similar Title 25 economic development incentive, the Job Tax Credit Act At that time, as noted in the PLR, the Job Tax Credit was limited to a “[c]orporation” [which] means a business entity which is **subject to** South Carolina taxes as contained in Section 12-7-230 and Chapter 7, Title 38 (Emphasis in original)” S C PLR 95-3

As an S corporation, the taxpayer “paid no corporate level taxes ” *Id* The PLR nevertheless held the taxpayer was entitled to the credit, stating

In reviewing Code Section 12-7-1220 in its entirety, the legislature intended the job tax credit to be available as an economic incentive to encourage businesses subject to corporate level taxes to expand work forces in South Carolina Although it is rare that S corporations are subject to corporate level taxes and it is rare that S corporations convert to C corporations, S corporations may earn and carryover a job tax credit

Id

Similarly, at issue in S C Rev Rul 96-11 was whether an eligible project had to meet the requirements of four--or only one--tax credit provisions in order to be entitled to incentives found in the utility tax credit statute, Section 12-6-3490 (now codified as Section 12-20-105) The statute reads “(A) Any company subject to a license tax under Section 12-20-100 may apply for a credit against its tax liability for amounts paid in cash to provide infrastructure for a project qualifying for income tax credits under Chapter 6 of Title 12, withholding tax credits under Chapter 10 of Title 12, income tax credits under Chapter 14 of Title 12, *and* fees in lieu of property taxes under Chapter 12 of Title 4 ” (Emphasis added)

In holding that “and” in the statute meant “or” (so that an eligible project only had to satisfy any one of the tax credit provisions), the SCDOR stated

As a general rule, the use of the word “and” within a statute connotes that all the requirements listed must be met in order to qualify under the statute, while the use of “or” within a statute means that only one of the requirements needs be met in order to satisfy the particulars of the statute. However, when those meanings are inconsistent with the perceived intent of the legislature or the purpose of the legislation itself, “and” has been construed to mean “or”, and “or” has been construed to mean “and”

Section 12-6-3490 of the Code was enacted as part of the South Carolina Rural Development Act of 1996. The stated purposes of the Rural Redevelopment Act include promoting positive economic development momentum in rural areas of the State and encouraging significant incentives to induce capital investment and job creation within rural counties. *To read the provision of Code Section 12-6-3490(A) narrowly to require a project to meet all the requirements listed in the statute would severely limit the number of projects that could qualify and would exclude projects located in eleven of the least developed and underdeveloped counties from qualifying under the statute.*

Id. (emphasis added) (citations omitted)

The clear objective of the Infrastructure Credit Statute is to encourage and reward infrastructure investment in South Carolina. Centex, one of the largest homebuilders in South Carolina, made approximately \$68 million in such infrastructure investments, and the State has received a significant benefit from this infrastructure. Thus, the statute should be construed in a way that furthers its objectives, rewards Centex for making its investment and continues to encourage investments in the State.

2 The Infrastructure Credit Statute

1 In General

The statute at issue is not ambiguous and should be interpreted in accordance with the clear and plain meaning of the language and statutorily defined terms therein. The Infrastructure Credit Statute provides, in pertinent part

(A) *A corporation may claim a credit for the construction or improvement of an infrastructure project against taxes due under Section 12-6-530 or Section 12-11-20 for*

(1) *expenses paid or accrued by the taxpayer,*

(2) *contributions made to a governmental entity, or*

(3) *contributions made to a qualified private entity in the case of water or sewer lines and their related facilities in areas served by a private water and sewer company*

(B) *For expenses paid or accrued by the taxpayer in building or improving any one infrastructure project*

(1) *the credit is equal to fifty percent of the expenses or contributions,*

(2) *the credit is limited to ten thousand dollars annually, and*

(3) *any unused credit, up to a total amount of thirty thousand dollars, may be carried forward three years*

(C) *For purposes of this section*

(1) *An infrastructure project includes water lines or sewer lines, their related facilities, and roads that*

(a) *do not exclusively benefit the taxpayer,*

(b) *are built to applicable standards, and*

(c) *are dedicated to public use*

* * * *

(D) *If an infrastructure project benefits more than the taxpayer the expenses of the taxpayer must be allocated to the various beneficiaries and only those expenses not allocated to the taxpayer's benefit qualify for the credit*

(E) *The credit may be claimed before dedication or conveyance if the taxpayer submits with its tax return a letter of intent signed by the chief operating officer of the appropriate governmental entity or qualified private entity stating that upon completion the governmental entity or qualified private entity shall accept the infrastructure project for the appropriate use*

(F) *A qualifying private entity is not allowed the credit provided by this section for expenses it incurs in building or improving facilities it owns, manages, or operates*

* * * *

(H) *A corporation which files or is required to file a consolidated return is entitled to the income tax credit allowed by this section on a consolidated basis. The tax credit may be determined on a consolidated basis regardless of whether or not the corporation entitled to the credit contributed to the tax liability of the consolidated group*

S C Code Ann § 12-6-3420 (1976) (emphasis added)

Section 12-6-3420 accordingly requires (1) a corporation to claim the credit on its corporate income tax return, (2) for expenses paid by the taxpayer, or contributions

made to a governmental entity or a qualified private entity, (3) in building or improving an infrastructure project. There is no disagreement over the first and the third requirements.

The disagreement solely focuses on the second requirement. The Appellant maintains that the expenditures made by the general partnership, Centex Homes, satisfied the second requirement. (In other words, the partnership earned the credit by paying the qualifying expenditures and contributions of the resulting infrastructure projects were made allowing the corporate partners to claim the credit.) The SCDOR maintains that the expenditures must be directly made by the corporation filing the tax return which claims the credit. (In other words, the corporation must earn the credit by cutting the checks to the contractors who performed the road and sewer work in order to claim the credit.) This is the dispute.

While South Carolina has no true record of legislative intent, it is clear from the statute itself that its purpose is to encourage development and investment in the state by defraying a portion of the cost incurred by real estate developers for making public infrastructure improvements (road, water and sewer) that historically would have been borne by state (e.g., S.C. Department of Transportation) or local government (e.g., county, city, water and sewer authority). Of course, the government benefits from receiving the “free” public infrastructure and from the enhanced tax base. (And the credit is indeed partial, the appellant expended some \$68 million for public infrastructure in return for a \$5 million potential credit.) In what appears to be the only published decision on the Infrastructure Credit, *Anonymous Corporation v. South Carolina Department of Revenue*, 98-ALJ-17-0533 (1999), the ALC noted

13 The Taxpayer's development of these subdivisions substantially contributed to Lexington's growth, helping to increase disposable income, attract new businesses and employers and expand the property tax base

* * * *

18 The Taxpayer's infrastructure projects benefited the communities in which they were constructed by contributing to the growth of the community, thereby increasing disposable income, attracting new businesses and employers and expanding the property tax base

ii Appellant, as a Corporate Taxpayer, May Claim the Credit

The parties agree that the Infrastructure Credit Statute requires a corporation to claim the credits against corporate income taxes. It clearly so states "[a] corporation may claim" an infrastructure credit against corporate income taxes. In this case, Appellant, a corporation that owns Centex Homes, has claimed the credit in its consolidated income tax return against its South Carolina corporate income taxes thus satisfying the plain language and meaning of the statute.

iii Centex Homes, a Partnership, May Earn the Credit as a "Taxpayer" (a Statutorily Defined Term)

The Infrastructure Credit Statute provides that a corporation may claim a credit for "expenses paid or accrued by the taxpayer." S.C. Code Ann. § 12-6-3420(A)(1). The ALC's Order is premised almost entirely on its finding that "'the taxpayer' in subsection (A)(1) is limited to the 'corporation' attempting to claim the credit, as referred to in subsection (A)." The infrastructure tax credit statute, itself, however, clearly indicates this is not the case in at least one instance. Subsection (F) of Section 12-6-3420 states "A qualifying private entity is not allowed the credit provided by this section for expenses it incurs in building or improving facilities it owns, manages, or operates." The "qualifying private entity" referred to in subsection (F) includes an electric cooperative.

Section 12-20-105 provides a tax credit for entities which pay license taxes under Section 12-20-100. As the section title to Section 12-20-100 notes, this is a “[l]icense tax on utilities and electric cooperatives.” Section 12-20-105(D) provides virtually the identical “anti-double dip” language as Section 12-6-3420(F). In addition, Section 12-20-105(G) states that “[f]or South Carolina income tax and license purposes, a company that claims the credit allowed by this section is ineligible to claim the credit allowed by [the infrastructure credit].”

Section 12-6-3420(F) of the infrastructure credit presumably uses the words “qualifying private entity” instead of “corporation” given that cooperatives (unlike investor owned utilities) are not incorporated in the same manner as traditional corporations, *see* S C Code Ann. § 33-45-10 et seq., and are subject to different tax treatment than traditional corporations under both state and federal tax law.

Electric Cooperatives do not pay corporate income taxes based on Section 33-49-120. For this limitation to have any meaning it is clear that the statute is limiting a cooperative--which made expenditures on property which it manages or operates—from passing the credit onto a parent corporation with a corporate income tax liability.

The term “taxpayer” was also not limited by the Administrative Law Court in the only published decision dealing with the infrastructure credit, *Anonymous Corporation v South Carolina Department of Revenue*, 98-ALJ-17-0533 (S C Admin. Law Judge Div 1999). The ALC noted in its Finding of Facts:

The taxpayer is a conglomerate which files a consolidated corporate tax return annually with the State of South Carolina.

At all times relevant to this case, *one of the taxpayer's subsidiaries* was in the business of developing real estate for profit. This business was included in the taxpayer's consolidated return filings. *For purposes of this contested*

case this business shall also be referenced as Taxpayer

Id (emphasis added) Accordingly, it is clear that the entities making the infrastructure expenditures were not the parent corporation filing the return (but rather they were part of the consolidated group) The SCDOR did not challenge this issue before the ALC

Title 12, Chapter 6 contains some 37 business tax credits, including the Infrastructure Credit Chapters 10, 14 and 15 contain additional business tax credits The majority of the business tax credits including the Infrastructure Credit, are found in Title 12, Chapter 6, Article 25 Article 25 starts with South Carolina's pass through statute, section 12-6-3310, which provides that unless "specifically prohibited," S corporations, LLCs and partnerships may pass through tax credits to shareholders, members and partners The word "taxpayer" (singular and plural) is used 381 times in Article 25 (Indeed, the Job Tax Credit Act, section 12-6-3360, alone uses the word "taxpayer" some 27 times)

"Taxpayer" is a statutorily defined term that "unless otherwise required by the context" means " an individual, trust, estate, *partnership*, association, company, corporation or any other entity subject to the tax imposed by this chapter or required to file a return " S C Code Ann § 12-6-30(1) (emphasis added) This definition applies with respect to reading and interpreting the statutes under Title 12

The word "taxpayer" is a term of art and was used with precise intentions by the Legislature Had it wanted to limit the entities or taxpayers that "qualify" for the credit to be just corporations, the Legislature could have and would have simply used the term "corporation" consistently throughout Section 12-6-3420 such that, for example, the first paragraph would read as follows

A corporation may claim a credit for the construction or improvement of an infrastructure project against taxes due under § 12-6-530 or § 12-11-20

for expenses paid or accrued by the taxpayer corporation,

However, the Legislature chose not to use the word “corporation” in certain specific sections of the statute for specific reasons (and there are many reasons why it would make sense to do so)

As the Supreme Court very recently stated in *CFRE LLC v Greenville County Assessor*

However, “the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect ” *S C State Ports Auth v Jasper County* 368 S C 388, 398, 629 S E 2d 624, 629 (2006) We therefore should not concentrate on isolated phrases within the statute *Id* Instead, we read the statute as a whole and in a manner consonant and in harmony with its purpose *State v Sweat* 379 S C 367, 376, 665 S E 2d 645, 650 (Ct App 2008), *aff’d* 386 S C 339, 688 S E 2d 569 (2010) In that vein, we must read the statute so “that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,” *id* at 377, 665 S E 2d at 651, for “[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law” *id* at 382, 665 S E 2d at 654

2011 WL 3804517, at *3 (S C 2011)

Additionally, a careful analysis of when and why the Legislature used “taxpayer” versus when it used “corporation” in the Infrastructure Credit Statute reveals a clear and obvious theme which is indicative of the Legislatures intentions “Corporation” is used in subsection (A) providing for the type of entity that can “claim” the infrastructure credit, and it is used again later in subsection (H) to explain that “[a] corporation which files or is required to file a consolidated return is entitled to the income tax credit allowed by this section on a consolidated basis” and that the tax credit may be determined on a consolidated basis regardless of whether or not the corporation entitled to the credit contributed to the tax liability of the consolidated group And lastly, “corporation” is

used in subsection (I) to explain that unused credits can be transferred to a succeeding corporation in instances of merger, consolidation or reorganization of a corporation where tax attributes survive

“Taxpayer,” a term with broader meaning (which includes partnership), is used by the Legislature to explain which entities qualify for the infrastructure credit and what those entities must do in order to earn (or generate) the credit. Subsection (A)(1) states that the infrastructure costs must be “paid or accrued by the taxpayer” and further explains certain limitations, in subsection (B) where the term “taxpayer” is used again, regarding the “expenses paid or accrued by the taxpayer” in building or improving any one infrastructure project. In subsections (C) and (D), the Legislature explains (again using the term “taxpayer”) that the credit is only available for expenses paid or accrued that “do not exclusively benefit the taxpayer, are built to applicable standards, and are dedicated to public use” and “[i]f an infrastructure project benefits more than the taxpayer, the expenses of the taxpayer must be allocated to the various beneficiaries and only those expenses not allocated to the taxpayer's benefit qualify for the credit.” The last phrase in subsection (D)—“only those expenses not allocated to the taxpayer's benefit qualify for the credit”—emphasizes the point made here that the Legislature clearly intended (specifically provided via its articulate use of “corporation” and “taxpayer”) that a taxpayer may **earn** by way of qualifying for the credit as provided here in subsection (D) in contrast to subsection (A) where the Legislature limited which entities could **claim** the credit stating “[a] corporation may claim a credit.”

Thus, after analyzing the placement and use of the term “taxpayer” and “corporation” throughout Section 12-6-3420, the Legislature's reason for using

“taxpayer” in certain portions and “corporation” in others becomes quite obvious—it used the broader term “taxpayer” (as defined by Section 12-6-30(1)) when it needed to focus on the entity making an expenditure or taking an action related to the project itself whereas it used “corporation” only when it needed to focus on the entity actually claiming, repaying, or transferring the credit

The ALC states that “in order for this Court to apply the definition of Section 12-6-30(1) to the infrastructure credit’s inclusion of the word ‘taxpayer,’ each of the entities enumerated therein must be a ‘feasible substitution.’ This inevitably leads to absurd results, since portions of the Petitioner’s proposed interpretation of ‘taxpayer’ would be meaningless (i.e., an individual could make qualifying expenditures yet the credit could not be claimed).” However, applying the statutory definition of “taxpayer” as used in the infrastructure credit statute does not produce such an absurd result. While an individual or trust could make the qualifying expenditures, neither could claim the credit because neither pays tax “under Section 12-6-530 or Section 12-11-20” (as required under Section 12-6-3420). In other words, they could meet part but not all of the statutory requirements. On the other hand, a partnership can incur the qualifying expenditures and dedicate the infrastructure project to public use thereby earning or generating the credit, and then, by operation of the partnership pass-through provisions, those qualifying expenditures or the infrastructure credit itself is passed through to its corporate partners to be claimed against a corporate income tax liability under both the federal and South Carolina tax statutes.

Because the plain language of the statute expressly allows a partnership like Centex Homes (a “taxpayer”) to earn the credit and the corporate partners (or a parent

company with respect to a consolidated tax return) to claim the credit, “the Court has no right to impose another meaning” *Hodges v Rainey*, 341 S C 79, 85, 533 S E 2d 578, 581 (2000) The restrictive use or failure to use the statutory definition of the term “taxpayer” in this Statute, where there is no such restriction nor absurd results, would render it superfluous and allow for the opportunity to restrict or fail to use the statutory definition throughout the South Carolina Code

Also of relevance is S C Rev Rul 97-8 which dealt with the Economic Impact Investment Tax Credit At issue was whether a taxpayer must be an “economic impact zone business” (which was narrowly defined in former Section 12-14-70) in order to be eligible for the economic impact zone investment tax credit under Section 12-14-60 (Such a conclusion would have greatly limited the number of businesses which qualified for the investment tax credit) In holding it did not, the SCDOR stated

The general rule of statutory construction is that nothing can be read into a statute which is not within the intent of the legislature as gathered from the statute itself Where the language of a statute is clear and leaves no room for doubt as to the intention of the legislature, there is no authority to add or take away from the language in the statute See, Another rule of statutory construction is that a condition or restriction should not be implied if the right granted by the statute is unrestricted and *it will be presumed that the legislature did not intend to restrict the use of the statute to a particular class of persons or things when it has included in the general language of the statute a number of persons or entities without limitation*

Id (emphasis added and citations omitted)

In this vein, the infrastructure statute uses the word “taxpayer” eight times without limitation Incidentally, the South Carolina Supreme Court in *Media General v South Carolina Department of Revenue*, 388 S C 138, 694 S E 2d 525 (2010), very recently dealt with the definition of “taxpayer” contained in Section 12-6-30(1) The

Supreme Court rejected the SCDOR's interpretation that the statute's reference to "corporation" (in the singular) prevented two or more corporations from filing a combined unitary return under Section 12-6-2320(A)(4) *See id* at 148-49, 694 S E 2d at 530

3 The Doctrine of *In Pari Materia* Supports Allowing Centex Homes to Pass Through Credits

Although the Appellant believes its interpretation is clear when viewing the Infrastructure Credit Statute and the Pass-Through Statute separate and apart from one another, the Appellant's interpretation is buttressed when the statutes are read together as the doctrine of *in pari materia* requires. This doctrine provides that statutes that address the same subject matter must be construed together to achieve the intent of the Legislature. *See Grant v City of Folly Beach*, 346 S C 74, 79, 551 S E 2d 229, 231 (2001) ("It is well-settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single harmonious result. The SCDOR in PLR 95-3, quoted this rule in allowing an S corporation to qualify for the Job Tax Credit

Under the rule of statutory construction of statutes *in pari materia*, statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great, connected homogenous system. Such statutes are considered as if they constituted but one act, so that sections of one act may be considered as though they were parts of the other act, as far as this can reasonably be done. Indeed, as a general rule, where legislature dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, unless a different purpose is shown plainly, 73 Am Jur 2d *Statutes* Section 188

The Infrastructure Credit Statute and the Pass-Through Statute address the same subject matter, i.e. the earning and claiming of credits in the case of the Infrastructure

Credit Statute and the earning and passing through of credits in the case of the Pass-Through Statute. Thus, these statutes must be construed together to achieve the intention of the Legislature. (In addition, the incentives pass-through statute was codified as the first section of Article 25.)

As previously stated, the purpose of the Legislature in enacting the Infrastructure Credit Statute was to incentivize and reward infrastructure expenditures in South Carolina, the purpose of the Pass-Through Statute is to codify the ability of a pass-through entity to pass credits through to its partners unless a given credit statute specifically prohibits it from doing so. The Infrastructure Credit Statute states that a corporation may “claim the credit” and the Pass-Through Statute states that a partnership that “qualifies for the credit” by making qualifying infrastructure expenditures can pass through the “credit earned” to its corporate partner. The only interpretation of the wording in these statutes that is consistent both with the language therein and the purposes thereof is the phrase “expenses paid or accrued by the taxpayer” in the Infrastructure Credit Statute means expenses paid or accrued by the applicable pass-through entity, the language in the Pass-Through Statute referencing a partnership that “earned” the credit clearly indicates that a partnership can “earn” or “generate” a credit and pass it through to its partners unless the particular credit statute specifically prohibits it, and the language in the Pass-Through Statute “that qualifies for the credit” means the entity that makes the required expenditures and contributes (i.e., dedicates or conveys) the property to public use. There is no question in this case that the taxpayer, a partnership, made qualified expenditures and contributed the resulting infrastructure projects to local municipalities on behalf of its corporate partners and therefore earned

the credit and that a corporation eligible to claim the credits did in fact claim them “against its taxes due under § 12-6-530 ” See S C Code Ann § 12-6-3420(A)

The ALC erred in its finding that the word “claim” and “generate” have identical meanings and are used synonymously by the Legislature. It is undisputed that these words are defined differently in any dictionary. In addition, the Legislature demonstrates that these terms have different meanings by their articulate use of these terms including not only “claim” and “generate,” but also “qualifies,” “pass through” and “earned” all of which are artfully utilized in Sections 12-6-3310 and 12-6-3420.

In reaching its conclusion, the ALC mistakenly relies upon SCDOR’s assertion that it has a long-standing policy of interpreting credit statutes to require that the entity that generates the credits be the same one that claims the credits (ALC Order at p. 9, R. at p. __).

This appeal was instituted through the issuance of a Final Agency Determination (FAD) by the SCDOR. Although the SCDOR’s FAD stated that “absent a statutory provision stating otherwise, the general rule is that tax benefits *may only be claimed by the taxpayer that generated the credit* ” (Emphasis in original)(FAD at p. 9, R. at p. __) it provided no citation or authority for such “general rule,” nor did it claim (unlike the ALC) that this was the SCDOR’s long standing Agency interpretation. Certainly the SCDOR has not promulgated a Regulation or issued a policy document to this effect. Indeed, in what is apparently the only written SCDOR pronouncement on the subject, the *South Carolina Tax Incentives for Economic Development Winter Edition 2009*, the rule is just the opposite. The publication states

Except as otherwise provided, a credit must be used by the taxpayer who earns it. *Exception to these rules exist for the following:* (1) taxpayers

[like Centex] participating in a consolidated corporate income tax return [and] (2) pass through entities [like Centex Homes] eligible to earn and use a credit

Id. at 21

Again the SCDOR publication cites absolutely no authority for this “rule.” While a Court generally gives deference to an Agency’s interpretation of a statute or regulation, *Brown v. Bi-Lo Inc.* 354 S. Ct. 436, 581 S. E. 2d 836 (2003), the SCDOR cites no statute or regulation in support of the rule. Incidentally all three SCDOR witnesses admitted that the SCDOR had no policy, written or otherwise, regarding either the infrastructure credit or the pass through of credits by a partnership. (See Donovan depo. at p. 40 18-23, R. at p. ___, Sharpe depo. at p. 69 5, 13-70, R. at p. ___ and Swearingen depo. at pp. 43 18-44, R. at p. ___). “Secret” rules asserted by agency staff which have not been promulgated in regulations or binding policy documents are entitled to little, if any, deference. See S. C. Tax Comm’n Dec. 93-78 (rejecting taxpayer’s use of longstanding agency interpretation stating that, “we do not believe there are any generally accepted consolidation rules which exist *if they are not codified*,” (emphasis added) S. C. Tax Comm’n Dec. 94-90 (likewise rejecting the taxpayer’s “longstanding administrative policy,” argument, stating “it is important to note that there are no Commission decisions or Department approved policy documents which support that [Department] decision”), *Seigfried v. S. C. Dep’t of Rev.* 2003 WL 24004736 (S. C. Admin. Law Judge Div. 2003), *S. C. Dep’t of Motor Vehicles v. Laquenesse* 2008 WL 1740063 (S. C. Admin. Law Judge Div. 2008), *Coastal Conservation League v. S. C. Dep’t of Health & Envtl. Control*, 363 S. C. 67, 610 S. E. 2d 482 (2005), and *Clarendon Cnty. Mem. Hosp. v. S. C. Dep’t of Health & Envtl. Control* 2006 WL 1430090 (S. C. Admin. Law Judge Div. 2006).

Additionally, the ALC decision primarily relies on *Bell Atlantic Nynex Mobile Inc v Commissioner of Revenue Services*, 273 Conn 240, 869 A 2d 611 (2005), wherein corporate partners of a partnership attempted to claim a tax credit for payment of personal property taxes by the partnership on electronic data processing equipment. The ALC Order is premised on the fact that the Connecticut statute was a “similarly worded credit provision” to the South Carolina statute (ALC Order at 15, R at ____). The Connecticut Statute, however, contains two significant differences

(i) Comparison of CT vs SC statutes regarding Payment

Connecticut

“Thus the text of the statute indicates that the legislature intended to grant eligibility for the 212-217 tax credit to a ‘taxpayer’ *who has paid the personal property taxes* on the electronic data processing equipment ” 869 A 2d at 620 (Emphasis added)

South Carolina

“Expenses paid or accrued by the taxpayer”

(ii) Comparison of CT vs SC statutes regarding the definition of “Taxpayer”

Connecticut

“[A] corporation, foreign municipal electric utility [and other utility entities]”

South Carolina

“ ‘Taxpayer’ includes an individual, trust, estate, partnership, association, company, corporation, or any other entity subject to the tax imposed by this chapter or required to file a return ”

In *2004 and 2005 Connecticut Tax Law Developments*, the author, in discussing the *Bell Atlantic* case, states “To the extent it is so applied, the decision presents a trap

for the taxpayer unaware that, with respect to credits, Connecticut *does not follow the general rule that partnership expenditures are those of its partners*” John R. Shaughnessy, *2004 and 2005 Connecticut Tax Law Developments*, 79 Conn. B.J. 67, 76-77 (2005) (emphasis added). The ALC erred in its application and reliance upon *Bell Atlantic*, since the statutory definition of “taxpayer” in *Bell Atlantic* was limited to electrical utility corporations who paid personal property taxes on data processing equipment owned by it. The definition did not include partnerships, and thus, a partnership could not pass the credit through to its corporate partners as a matter of Connecticut law, which is not the case under South Carolina tax law.

The ALC Order also relied upon *L&W Construction Co. Inc. v. Wisconsin Department of Revenue*, 149 Wis. 2d 684, 439 N.W.2d 619 (1989), in which a corporation claimed an income tax credit for sales and use tax paid by a partnership in which the corporation was a partner. This case is also readily distinguishable as the Wisconsin credit statute at issue clearly stated

(2) The tax imposed upon or measured by corporate net income may be reduced by an amount equal to the sales and use tax under ch. 77 *paid by the corporation* in such taxable year on fuel and electricity consumed in manufacturing tangible personal property in this state. 439 N.W.2d at 620. *Id.* (Emphasis in original).

By contrast, the South Carolina statute does **not** read “expenses paid by the corporation,” as the SCDOR would like but rather it reads “expenses paid by the taxpayer.”

Lastly, the ALC’s reliance on *Rath v. Commissioner*, 101 T.C. 196 (1993), is misplaced. In *Rath*, an S-corporation sold securities for a loss which was not properly reported on its informational tax return as a pass through item to its shareholders. Similar

to the partnership tax rules, both the “Aggregate” and “Entity” theories of taxation are applied to S corporations. That is, I R C Sections 1366(a) and (b) provide that the amount and character of the S-corporation’s reportable items (e.g. income, loss, deduction or credit) is determined at the S-corporation level and, then passed through to the shareholders as if realized directly from the source from which realized by the S-corporation. However, the individual shareholders of the S-corporation, who were aware of the stock sale transaction, reported ordinary loss on their individual income tax returns.

The individual shareholders asserted that I R C Section 1244 applied allowing them to re-characterize the capital loss to an ordinary loss. Specifically, I R C Section 1244(b) states

In the case of an individual, a loss on §1244 stock issued to such individual or to a partnership which would (but for this section) be treated as a loss from the sale or exchange of a capital asset shall, to the extent provided in this section, be treated as an ordinary loss.

In making its decision that the individual shareholders were not entitled to report the loss as an ordinary loss, the Tax Court stated

“ the plain language of section 1244(a) directs that the relief provided therein is limited to individuals and partnerships. Simply stated, ordinary loss treatment is only available where section 1244 stock is issued to an individual or a partnership and then sold by that individual or partnership at a loss. Treas. Reg. 1.1244(a)-1(B).

* * * *

Moreover, where a statute is clear on its face, we require unequivocal evidence of legislative purpose before construing the statute so as to override the plain meaning of the words used therein. *Halpern v Commissioner*, 96 T.C. 895, 899 (1991), *Huntsberry v Commissioner* 83 T.C. 742-747-748 (1984).

Rath, 101 T.C. at 200-01

The basis for the ALC’s reliance on *Rath* is not readily apparent because the

special deduction statute at issue clearly and unambiguously prohibits corporations from claiming an ordinary loss deduction, whereas a specific prohibition like that found in I R C Section 1244 is not found in the South Carolina Infrastructure tax credit. Moreover, I R C Section 1244 explicitly allows a partnership like Centex to receive ordinary loss treatment, as characterized and determined at the partnership level, and pass through such deduction to its individual partners. Accordingly, this case supports Appellant's position that partners, who are specified as the type of taxpayer eligible to claim the credit or deduction (e.g., I R C Section 1244 – individuals, S C Code Ann. § 12-6-3420 – corporations) may do so via pass through from their partnership investment unless the deduction or credit statute specifically prohibits the partnership, or an S corporation as in *Rath*, from earning such credit or deduction.

The ALC Order (Order at pp. 10 and 13, R. at pp. ____ and ____) also asserts as support of its conclusions that (unlike the infrastructure tax credit) three South Carolina tax credit statutes explicitly provide for pass through provisions for partnerships. The ALC Order cites Sections 12-6-3340, 12-6-3370 and 12-6-3560. While these Sections indeed contain explicit pass through provisions, they provide no support to the SCDOR's arguments as all three were enacted *prior* to the incentives pass through statute, 12-6-3310. Section 12-6-3310 was amended in 2003, 2003 Act No. 69, § 3N, to include partnership pass through treatment. Section 12-6-3340 and Section 12-6-3370 were enacted in 1995 Act No. 76. (Both pass through provisions serve to *limit* the amount of the credit at the partnership level rather than at the partner level (which would result in much higher deductions).) Section 12-6-3560 was enacted in 2004 Act No. 299, but as the Code Commissioner's note to the predecessor statute, Section 12-6-3510, the Section

“was derived from 2000 Act No 399 ” (Current Section 12-6-3560 was re-codified from Section 12-6-3510, which was “derived” from 2000 Act No 399)

Decisions from other authorities are to the contrary At issue in New York Department of Taxation Advisory Opinion Petition No C850528A (attached as **Exhibit 1**) was whether Xco, a corporation which was a partner in a partnership, was entitled to the New York investment tax credit “permitted for production equipment not only in situations where Xco directly purchases the equipment but also in situations where the cost or other basis of such equipment passes through from a partnership Petitioner feels that this result is consistent with analogous situations, such as the treatment of shareholders of S corporations and individual partners of a partnership, and conforms with the general pattern for taxing a corporate partner on its allocable share of partnership items ” *Id*

The Department of Taxation allowed the credit, stating

[A] strict interpretation of Section 210 12(b) of the Tax Law, would deny the passthrough to the corporate partner of the principal use of the qualifying property because the partnership is using the property, not the partners

However, in *Symphony Space v Tishelman* 60 NY2d 33 (1983), the Court of Appeals invoked statutory purpose over the doctrine that tax exemptions are to be strictly construed It stated

While exemption statutes should be construed against the taxpayer seeking the benefit of the exemption, an interpretation so literal and narrow that defeats the exemption’s settled purpose is to be avoided *Id* at 36

Id

In *Bordon Chemicals and Plastics LP v Zehnder*, 726 N E 2d 73 (2000), an operating partnership purchased certain assets which gave rise to replacement tax investment credits for years 1988 and 1989 However, the operating partnership was not

entitled to an investment credit because it had no replacement tax liability, which the investment credit offset. Plaintiff, however, was subject to the Illinois personal property tax (replacement tax). Plaintiff claimed that, under these circumstances, it was entitled to use the Operating Partnership's replacement tax investment credit. The Department rejected this claim because the assets that generated the investment credit were owned by the Operating Partnership, not the plaintiff, which owned no assets in Illinois. As the Court noted, the tax credit section did not explicitly provide at the time whether pass through of the investment credit from partnerships to partners was allowed or disallowed, nor did the statute expressly prohibit pass through. *Id.* at 82. The Statute was silent. *Id.*

The Court held for the plaintiff, stating

Our decision comports with the rule of statutory construction that a court, in construing a statute, presumes that the legislature did not intend absurd, inconvenient or unjust results. Under the present situation in view of the subtraction modification required by section 203(D)(2)(1), the operating partnership will never incur a replacement tax liability, and can never utilize the investment credit generated by the investment in qualified property. If, in spite of the shift of the Operating Partnership's replacement taxation to the plaintiff, the plaintiff is not allowed to utilize the investment credit that leaves the credit unusable by any taxpayer. We believe such a result to be unreasonable and, not one intended by the legislature.

Id. at 83-4 (citations omitted)

4 "Qualifying Expenditures" were Paid and Infrastructure Projects were Contributed for Public Use

Centex Homes spent approximately \$68 million in South Carolina developments on roads and water and sewer lines, which CREC, the managing general partner of Centex Homes, then contributed to local municipalities. Accordingly, Centex Homes (which as just discussed is a "taxpayer" as defined within S.C. Code Ann. § 12-6-30(1) and I.R.C. § 7701(a)) and its corporate partners *qualify* for the tax credit pursuant to the

Infrastructure Credit Statute by satisfying each of its requirements as follows

- 1) Centex Homes made qualifying expenditures related to water lines, sewer lines or roads,
- 2) Said expenditures for infrastructure projects benefited the local community as a whole and were built to applicable standards, and
- 3) CREC, (as managing general partners acting on behalf of Centex Homes and the other general partners) dedicated the properties to public use by contributing the infrastructure projects to local municipalities in South Carolina

That the above requirements were met is undisputed

B The Corporate Partners of Centex are Entitled to the Infrastructure Tax Credit Based on the Application of South Carolina's Pass Through Statutes

South Carolina has two pass-through statutes or regimes which serve to pass through the expenditures made by the General Partnership, Centex Homes, to the corporate partners and then, (through South Carolina's consolidated return statute) onto the Appellant's tax return. The first of these regimes is the general taxation of partnerships in South Carolina. The second is the tax statute adopted by the General Assembly to explicitly pass through economic development tax credits. Both are discussed below, and the application of either (or both) allows the Appellant to use the Infrastructure Credits.

1 General Federal Partnership Tax Rules Adopted by State Law Allow Centex to Pass Through Earned Tax Credits to its Corporate Partners

As previously stated, it is undisputed that the Centex Homes partnership made expenditures for qualifying infrastructure projects contemplated by the Infrastructure Credit Statute. For both federal and state purposes, partnerships like Centex Homes are "pass-through" entities, meaning that they are not subject to income tax but rather their

income, deductions and credits pass through the partnership to its partners See I R C § 701 et seq South Carolina adopts the I R C 's provisions for determining the taxation of partnerships See S C Code Ann §§ 12-6-40 (2000 & Supp 2010), 12-6-50 (2000 & Supp 2010) and 12-6-600 (2000) More specifically, the SCDOR publication, *South Carolina Tax Incentives for Economic Development Winter Edition 2009* states

Partnerships are not subject to South Carolina income tax under South Carolina Code §12-6-600 The gross income, adjusted gross income, and taxable income of a partnership and its partners are determined in accordance with applicable provisions of the Internal Revenue Code Partners include in their South Carolina taxable incomes their proportionate share of the partnership's South Carolina taxable income

Id at 5

“South Carolina has adopted all of the partnership and corporate provisions (subchapters K, C and S) of the Internal Revenue Code and Internal Revenue Code Section 7701 which defines “partnership” and “corporation ”” S Barnes, J Burkhardt, R Handle, B Maybank, M McWilliams & D Merline, *South Carolina Limited Liability Companies and Limited Liability Partnerships* (S C Bar 3d ed)

Accordingly, for both federal and South Carolina income tax purposes, a partnership computes its income from an active trade or business in the same manner as other taxpayers See § 12-6-600, I R C § 702(a)¹ The net income or loss is then distributed among the partners See I R C section 704

As stated above, Appellant is a corporation which claimed the infrastructure credit on its South Carolina consolidated return The qualifying expenditures for the public

¹ I R C §§ 701 – 703 IRC § 703(a) provides that a partnership must separately compute its taxable income or loss where the computation is based upon the same principles used to calculate an individual s taxable income See I R C §61 and 162 for determination of gross income and trade or business expenses relative to computing a taxpayer s taxable business income See also Instructions to Form 1065 pp 1 15 19

infrastructure were made by a general partnership, Centex Homes, whose 3 partners were corporate subsidiaries of Centex International, Inc. I R C Section 702(b) provides that the “character of any item of income, gain, loss, deduction or credit included in a partner's distributive share **shall be determined as if such item were realized directly from the source from which realized by the partnership, or incurred in the same manner as incurred by the partnership**” I R C Section 702(b) (emphasis added) South Carolina, as previously discussed, has adopted the federal rules regarding the taxation of partnerships. Thus, I R C Section 702(b) dictates that the credits earned by Centex Homes (the partnership) be treated as if the corporate partners earned those credits themselves.

S C Rev Rul 97-7 states

Code Section 12-6-600 addresses the taxation of partnerships and reads

An entity treated as a partnership for federal income tax purposes is not subject to tax under this chapter. Each partner shall include its share of South Carolina partnership income on the partner's respective income tax return. All of the provisions of the Internal Revenue Code apply to determine the gross income, adjusted gross income, and taxable income of a partnership and its partners, subject to the modifications provided in Article 9 of this chapter and subject to allocation and apportionment as provided in Article 17 of this chapter.

The law provides that each partner is directly taxable on his distributive share of partnership income. Items of income, such as personal service income received from a partnership performing legal or accounting services, are separately stated and passed through to the partners. *Such items retain their character at the partner level and are treated as if realized by the partner directly from the source from which realized by the partnership.* See *Ellis v. South Carolina Tax Commission*, 280 S C 65, 309 S E 2d 761 (1983).

(Emphasis added)

Two South Carolina cases dealing with income tax deductions by partnerships are to the same effect (These cases also illustrate that our pass through statute is not exclusively “pro-taxpayer” The statute also operates to disallow deductions as well) *Dalton v S C Tax Commission*, 295 S C 174, 367 S E 2d 459 (1988), and *Ellis v S C Tax Commission* 280 S C 65, 309 S E 2d 761 (1983), both utilized the general partnership pass through statute now codified at Section 12-6-600 to disallow deductions In *Ellis*, the Supreme Court disallowed deductions on an individual income tax return which were incurred by the taxpayers from out-of-state limited partnerships The Court first noted that “[p]artnerships and limited partnerships are not taxed on their income or losses Although a partnership files an informational return, the income or losses must be passed through and distributed to the individual partners for separate inclusion or deduction in their individual tax returns ” *Id* at 68, 309 S E 2d at 762 The Court then stated

The “pass through” rule is equally applicable to limited partnerships Section 12-7-300 makes no distinction between a general or limited partnership By reason of the “pass through” rule, the character of any item of income, gain, loss deduction or credit included in a partner’s distributive share of gains and losses shall be the same as if such item was realized directly from the source from which realized or incurred by the incurred by the partnership In other words, *each item of income, gain, loss, deduction or credit is treated as if it were realized or incurred by the partner directly from the source without ever having passed through the partnership* If this were not the case, then partners in real estate or other business ventures could not take advantage of depreciation write-offs and other operating expenses or losses

Id at 68, 309 S E 2d at 762-63 (emphasis added)

The Court in *Dalton* referring to the nearly identical *Ellis* decision, similarly stated “The Court found that the loss deduction of the partnership *was treated as if it were incurred by the partners directly* from the source with the source being out-of-state

income not taxable in South Carolina ” 295 S C 174, 180, 367 S E 2d 459, 462 (1988) (emphasis added) It bears repeating that the three partners of Centex Homes were corporations, which reported tax deductions for qualifying infrastructure expenditures as well as income generated from such expenditures in a consolidated corporate income tax return

As noted on the SCDOR’s website, “South Carolina taxable income of a partnership is the same as for federal partnership income tax purposes with certain South Carolina modifications Taxable income (loss) of a partnership flows through and is taxable to the partners in the same manner as for federal partnership income purposes ”²

Additionally, commentators have addressed this issue, noting

Owners of pass-through entities must learn their particular states rules with respect to the use of income tax credits generated by the entity *In states that do not tax the entity itself [such as South Carolina] the entity’s credits presumably will flow through to the owners*

The state’s tax forms should be one of the first items reviewed For example, federal Schedules K-1 indicate that income, deductions, and credits are to be taken into account by partners and S corporation shareholders *Many states [like South Carolina] have their own Schedules K-1, or comparable forms, that indicate the items to be taken into account by the pass-through entity’s owners If the form has a line to report tax credits [as stated below South Carolina does] it is likely that the credits pass through* The forms generally reflect the state revenue department’s position as to the tax treatment of a particular item Tax forms do not carry the same authoritative weight as statutes but may have the same weight as a regulation

David A Hughes & C Eric Fader, *Pass-Through Entities and Tax Credits Don’t Lose the Opportunity*, J Multistate Tax’n & Incentives, June 1999, at 31 (emphasis added)

The partners of a partnership in South Carolina annually receive a SC 1065 K-1 (attached as **Exhibit 2**) As the instructions to this form state “**Lines 15 through 18** [of

² Corporate Income Tax <http://www.sctax.org/Tax+Information/Corporate+Income+Tax/corpingo.htm>

the form] list the partner's share of applicable South Carolina Credits" (emphasis in original)

South Carolina follows the general treatment of partnerships as stated in Hellerstein's State Taxation treatise

Most states follow the basic federal tax structure governing income taxation of partners and partnerships. Under the federal rules, partnerships are treated as conduits and are not themselves subject to tax, but partners are directly taxable with respect to their distributive shares of partnership items of income, gain, loss, deduction, and credit. *As under federal law partnership items normally retain their character when passed through to the person as though realized directly by the partners from their source*

Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* (3d Ed 2003) § 20.08, p. 20-134 (emphasis added)

2 The Pass-Through Statute was Enacted in Part to Accommodate the Use of Tax Credits and Eliminate Choice of Entity Issues

The Infrastructure Credit was originally passed in 1988. Many of South Carolina's modern tax incentives came into existence at this time. Most large business entities during this time period (and before) were traditional corporations who were taxed as C corporations for state and federal income tax purposes. As a result of passage of various federal tax laws, many entities were subsequently formed (or converted) to other kinds of legal entities (S corporations, partnerships and limited liability companies). The General Assembly reacted to this change by amending the various specific tax credit statutes to include other forms of entities, *see e.g.*, Job Tax Credit Act, Section 12-6-3360(k)(1). This proved to be a laborious chore because of the numerous tax credit provisions, (Title 12, Chapter 6 alone contains 37 business tax credits) and as a result, the General Assembly in 2003, 2003 Act No. 69, adopted a broad pass-through statute, Section 12-6-3310, which allows tax credits to be claimed by any entity except where

“specifically prohibited ”

In the *Journal of Multistate Taxation*, *supra*, the author states, at the time this article was written (1991), that

In a majority of the states that impose a tax on partners rather than on the partnerships, the statutes do not expressly provide for a pass through of credits

Nevertheless, despite state statutes’ silence as to pass-through of credits, the taxing authorities may interpret the law to allow for pass-through treatment. Such a favorable position may be reflected in regulations, tax forms or official publications

Some states have drafted credit statutes to expressly allow a pass through from partnerships to partners

David A. Hughes & C. Eric Fader, *Pass-Through Entities and Tax Credits Don’t Lose the Opportunity*, 19 *J. Multistate Tax’n & Incentives*, June 1999, at 34-5 (emphasis added). South Carolina is one such state.

3 Nothing in South Carolina Code Specifically Prohibits the Pass-Through of the Infrastructure Tax Credit by Partnerships under S.C. Code Ann. § 12-6-3310

The Pass Through Statute, S.C. Code Ann. § 12-6-3310, allows Centex Homes to pass through the credits earned to its corporate partners. Note that this Section is the first code section in Article 25, which contains the Infrastructure Credit. The statute reads in part as follows:

SECTION 12-6-3310 Tax credits, time-frame for use, pass through and calculation of shareholder credit, limited liability companies

(A) Credits allowed in this article are nonrefundable and may be used only in the year generated unless otherwise provided.

(B)(1) *Unless specifically prohibited*, an “S” corporation, limited liability company taxed as a partnership, or *partnership that qualifies for a credit pursuant to this article* may pass through the credit earned to each shareholder of the “S” corporation, member of the limited liability company, or *partner of the partnership*.

Id (emphasis added)

The statute states that unless “*specifically prohibited*” a partnership may pass through a credit for which it qualifies pursuant to this Article (“This Article” is Article 25, which includes the infrastructure credit) This is significant as the exact phrase “specifically prohibited” is found only twice in the state tax code and only ten times in the entire South Carolina Code Even using different versions of the phrase (e.g., “specifically prohibits”), it is found only 13 times in the entire South Carolina Code Black’s Law Dictionary defines “specific” as “relating to, or designating a particular or defined thing, explicit” Black’s Law Dictionary (9th ed 2009) A common dictionary definition similarly defines “specific” as “set forth explicitly definite” Webster’s II New College Dictionary 1060 (2d ed 2001)

This, of course, begs the question, where does the Infrastructure Credit, explicitly or definitively, prohibit the pass through of the tax credit from a partnership to the corporate taxpayer? Simply put, there is no such specific prohibition (Indeed, there is no prohibition at all)

The SCDOR’s publication, *South Carolina Tax Incentives for Economic Development Winter Edition 2009*, discusses the pass through statute with admirable clarity The publication first states

Except as otherwise provided, a credit must be used by the taxpayer who earns it *Exceptions to these rules exist* for the following (1) taxpayers participating in a consolidated corporate income tax return, (2) pass through entities eligible to earn and use a credit, (3) limited liability companies not expressly eligible to earn a credit, (Emphasis added)

Id at 21 (emphasis added) The publication then states the rule with regards to partnerships

South Carolina Code § 12-6-3310(B) contains several provisions concerning the use of income tax credits by pass through entities. These rules include

Unless specifically prohibited an S corporation, limited liability company taxed as a partnership, or *partnership that qualifies for a credit pursuant to Article 25 of Chapter 6 Title 12 may pass through the credit earned to each* shareholder of the S corporation, member of the limited liability company, or *partner of the partnership*. Note. The statutory language of a particular tax credit controls whether a credit generated by an entity may be used by a partner, shareholder, or member. For example, the infrastructure credit in South Carolina Code § 12-6-3420 specifically states that the credit is claimed against corporate income taxes imposed under South Carolina Code § 12-6-530 or bank taxes imposed under South Carolina Code § 12-11-20, therefore, it cannot be used by an individual against individual income taxes imposed under South Carolina Code § 12-6-510.

Id. (emphasis added). Again, note that the Infrastructure Credit is found in Article 25.

The Pass Through Statute further provides that a corporate partner of a partnership (such as the corporate taxpayers here) may claim a credit against its corporate tax liability in proportion to its ownership interest (here 100% total for the corporate partners). More specifically, the statute states that the percentage of the corporate partner's interest in the partnership is to be “multiplied by the amount of the credit *earned* by the entity.” See S.C. Code Ann. § 12-6-3310(B)(3) (2003) (emphasis added).

The South Carolina Pass Through Statute clearly states that a partnership qualifies for a credit and may pass through the credit earned to its partners unless specifically prohibited by another statute. There is no specific prohibition regarding a partnership earning and passing the infrastructure credit through to its partners. Accordingly, the Pass-Through Statute, consistent with the IRC, allows a corporate partner of a partnership to claim a credit against its corporate tax liability in proportion to its ownership interest, which in this case would mean Centex should claim 100% of the credit flowing through

from its wholly owned partnership, Centex Homes, which qualified for the credits as a result of making infrastructure expenses and contributing the infrastructure project to public use

4 A Review of the Treatment of Limited Liability Companies with Respect to the Infrastructure Tax Credit Demonstrates the Credit's Applicability to Partnerships

The SCDOR publication cited above specifically discusses limited liability companies as follows

South Carolina Code § 12-6-3310(C) contains special provisions concerning the qualification and use of credits by limited liability companies that are not organized as a legal entity that expressly qualifies for a credit in Article 25 of Chapter 6, Title 12. Note. These special provisions do not apply to credits in other Articles or Titles of the South Carolina Code, such as Chapter 14 of Title 12 containing the economic impact zone credit, or Chapter 65 of Title 12 containing the textile revitalization credit. The rules include

Limited Liability Company Taxed as a Partnership

Individual Member The limited liability company may earn and pass through any credits allowed by Article 25. The individual member will use any credits against individual income taxes imposed under South Carolina Code §12-6-510.

Corporate Member The limited liability company may earn and pass through any credits allowed by Article 25. *The corporate member will use any credits against corporate income taxes imposed under South Carolina Code §12-6-530.*

Note. South Carolina Code § 12-6-3310(c) controls over the statutory language of a particular tax credit. For example, the infrastructure credit in South Carolina Code § 12-6-3420 specifically states that the credit is claimed against corporate income taxes imposed under South Carolina Code § 12-6-530 or bank taxes imposed under South Carolina Code § 12-11-20, however, an individual member of a limited liability company taxed as a partnership can use the credit against individual income taxes imposed under South Carolina Code § 12-6-510.

Id. at 22 (emphasis added). Section 12-6-3310(C) states

“ Limited liability companies taxed for South Carolina income tax purposes as partnerships shall apply the credits as provided in subsection (B)” As previously indicated, Section 12-6-3110(B)(1) provides, “Unless specifically prohibited, an “S” corporation, limited liability company taxed as a partnership, or partnership qualifies for a credit pursuant to this article may pass through the credit earned to each shareholder of the “S” corporation, member of the limited liability company, or partner of the partnership”

Thus, an LLC (taxed as a partnership) may qualify to earn and pass through tax credits unless specifically prohibited by the applicable credit statute The Pass Through Statute, consistent with the guidance and statutory provisions discussed below, provides that except for LLCs which elect to be taxed as corporations, the taxation of LLCs and partnerships is identical for both state and federal income tax purposes ³

As noted in S C Rev Rul 98-11

A limited liability company (LLC) is an unincorporated business association that provides its owners (members) limited liability, flexible management, and financial alternatives It is a popular form of business entity since a properly formed LLC can provide the favorable pass-through tax treatment of partnerships, and the limited liability of corporations

S C Rev Rul 98-11 Section 12-2-25 states for purposes of state taxation

(A) as used in this title and in other titles which provide for taxes administered by the department and unless otherwise required by the context

(1) “partnership” includes a limited liability company taxed for South Carolina income tax purposes as a partnership

(2) “partner” includes a member of a limited liability company taxed for

³ The Court would also note as consistent with its position in this case (but contrary to SCDOR's) statements made by a policy member of SCDOR in connection with a 2008 amendment to the Infrastructure Credit Statute which specifically addressed the right of a limited liability company ("LLC") to pass through a credit earned by it to a member SCDOR's policy section advised the taxpayer who was lobbying for this amendment that the amendment was not necessary because the statute's existing language already allowed an LLC to qualify for and pass the credits through to its members See p 29 of Appellant's Proposed Order for ALC at R __, SCDOR's Responses to Centex's Requests for Admission at ¶¶ 6 7 R at pp __ and __

South Carolina income tax purposes as a partnership

South Carolina Tax Incentives for Economic Development states

South Carolina follows the federal tax treatment of limited liability companies. If a limited liability company is treated as a corporation for federal income tax purposes it is treated as a corporation for South Carolina income tax purposes and is subject to a corporate license fee. South Carolina Code §12-2-25 provides that a partnership includes a limited liability company taxed for all South Carolina income tax purposes as a partnership. Accordingly, a limited liability company that is treated as a partnership for federal income tax purposes is not subject to South Carolina income tax or the corporate license fee.

Id. at 6

LLCs and partnerships file the same tax form with the SCDOR. See, e.g., SCDOR

Partnership FAQ

Which tax form does a limited liability company (LLC) taxed as a partnership file? An LLC taxed as a partnership must file SC1065.

See also, the instructions of the South Carolina Partnership Income Tax Return, SCDOR SC1065.

Every partnership (including any multiple member LLC not taxed as a corporation), domestic or foreign, doing business or owning property in South Carolina must file SC 1065.

Given that (1) partnerships and LLCs are taxed exactly the same for South Carolina tax purposes, and (2) the SCDOR publication quoted above explicitly states that LLCs taxed as partnerships may pass through the Infrastructure Credit to its members, the ALC and SCDOR's application of the statutes undoubtedly produce an absurd result. Essentially, their application of the statutes results in all entities other than actual partnerships being permitted to pass through infrastructure credits (e.g., S-Corporations are permitted to pass through the credits to its shareholders, LLCs taxed as partnerships would pass through the credits to their member-partners), however, a true partnership

would not be permitted to do so, such as in the case Centex Homes

II THE ALC ERRED IN ITS APPLICATION AND INTERPRETATION OF THE AGGREGATE AND ENTITY THEORIES OF PARTNERSHIP TAXATION BY CONCLUDING THAT THE INFRASTRUCTURE EXPENDITURES AND CONTRIBUTIONS MADE BY CENTEX REAL ESTATE CORPORATION (CREC), AS MANAGING GENERAL PARTNER OF CENTEX HOMES, REMAIN ATTRIBUTABLE TO THE PARTNERSHIP

As mentioned previously, Section 12-6-3420 requires (1) a corporation to claim the credit on its corporate income tax return, (2) for expenses paid by the taxpayer, (3) or for contributions made to a governmental entity or a qualified private entity, (4) in building or improving an infrastructure project. Again, there is no disagreement over the first and the fourth requirements.

Based upon application of the “aggregate” and “entity” theories of partnership law as well as the fact that CREC signed the conveyance agreements, Appellant believes the corporate partners directly earned the credit with respect to requirements 2 (making the expenditures) and 3 (making contributions) above. Accordingly, the SCDOR’s position is incorrect, where they maintain that the corporate partners did not directly earn and, thus, may not claim the credit because the corporate partners did not cut the checks to the contractors who performed the road and sewer work.

A The Partners’ Expenditures at Issue Meet the Definition of “Qualifying Infrastructure Expenditures” According to the Infrastructure Tax Credit

The ALC erred in its finding that expenditures remain attributable to the partnership and, thus, the corporate partners of Centex Homes did not incur the expenditures made on infrastructure. The statutory framework for the federal income taxation and, thus, South Carolina income taxation of partners and partnerships is set for

in I R C Sections 701-777 (Subchapter K) One of the recurrent themes of Subchapter K is the blending of aggregate and entity concepts According to the IRS Partnership Audit Technique Guide

[t]here is a basic tension between the “Entity” and “Aggregate” Theories of partnership accounting for tax purposes Under the Entity Theory, the amount and character of partnership income is determined at the partnership level as though it was an entity separate from its partners According to the Aggregate Theory, each partner is treated as the owner of a direct and undivided interest in partnership assets, liabilities and operations Tax is actually paid at the partner level

Internal Revenue Service, Partnership - Audit Technique Guide – Overview (December 2002), *available at* www.irs.gov/businesses/partnerships/article/0,,id=134689,00.html In other words, a partnership is treated as a conduit which passes its tax attributes including income, deductions and credits through to the partners to be reported on their individual, or in this case corporate, tax returns

In *Ellis v South Carolina Tax Commission*, 280 S C 65, 309 S E 2d 761 (1983), as previously mentioned, the South Carolina Supreme Court recognized the blending of both concepts or theories in reaching its decision to disallow deductions on an individual income tax return since the deductions or expenditures were incurred by (passed through to) the individual taxpayer from out-of-state limited partnerships (stating that “each item of income, gain loss, deduction or credit is treated as if it were realized or incurred by the partner directly from the source without ever having passed through the partnership”) “Without ever passing through the partnership” precisely articulates or describes the “aggregate theory” concept or method

Under the entity theory as the ALC recognized, but misapplied, the character of a deduction or expenditure is retained at the partner level, thus, the deduction or

expenditure is determined by its nature or origin as defined by the applicable tax statute. The SCDOR acknowledges that the infrastructure expenditures incurred by Centex Homes meet the definition and are of the type considered to be qualifying infrastructure expenditures as defined in Section 12-6-3420, but deny the credit solely because the checks to pay the expenditures were made by a partnership, not a corporation. However, the SCDOR fails to recognize or apply the tax law, which is clear under I R C Section 702(b) and the Supreme Court's conclusion in *Ellis*. Under the entity theory, the amount and character of partnership income and deductions including expenditures for qualifying infrastructure projects is determined at the partnership level as though it was an entity separate from its partners. Here, Centex Homes, a general partnership, incurred qualifying infrastructure expenditures and allocated the income and deductions associated with such expenditures and business activities to its corporate partners. Under the aggregate theory, the income and tax deductions, such as expenditures for qualifying infrastructure projects, retain their character (as if the partners directly realized and incurred the partnership items) passing through to the partners to be claimed on their individual, in this case corporate, income tax returns.

In Decision No. 93-78, the South Carolina Tax Commission states, "the Department's treatment of credits is consistent with the treatment of income tax deduction limitations on South Carolina consolidated returns. A credit is very similar to a deduction. Because of the similarity between deductions and credits, we find that these items should be treated in a similar manner for South Carolina consolidation purposes." S C Tax Comm'n Decision No. 93-78 (1993). Accordingly, the tax credit generated by the revenue and expenditures and reflected in the corporate partner's

South Carolina taxable income should also be determined at the corporate level and, thus, pass through to the partnership's owners (i.e., (1) the tax credit created at the partnership level receives similar pass through treatment and/or (2) the qualifying expenditures are treated as passing through and, thus, incurred directly by the corporate partner which then qualifies as earning and claiming the credit at the corporate partner level)

Since the infrastructure expenditures meet the definition of qualifying infrastructure credit expenditures as defined within Section 12-6-3420, the corporate partners are considered to have directly incurred the qualifying expenditures under the tax law

B The Corporate Partners were Directly Involved in the Contribution of Qualifying Infrastructure Projects and Thus Qualify for the Infrastructure Tax Credit

As discussed above, each partner is treated as the owner of a direct and undivided interest in partnership assets, liabilities and operations. This aggregate theory is clearly applied with respect to property ownership upon reviewing the South Carolina Partnership Return (See Line 19 of Form SC1065 and Schedule SC1065 K-1), as partners must take into account their interest of partnership property in applying the state apportionment rules (property factor) to determine their South Carolina taxable income and liability. Use of the aggregate theory for property ownership is consistent with the South Carolina Partnership Act, where an officer of CREC, the managing general partner of Centex Homes, signed the property conveyance agreements with the local municipalities in order to contribute or transfer the qualifying infrastructure projects. Since the partners are considered to own the land and qualifying infrastructure projects within Centex Homes, the execution of the conveyance agreements and contribution of

the infrastructure projects are considered to have been made directly by CREC and the other general partners

The ALC states, “ the expenditures made by a managing partner remain attributable to the partnership, and do not circumvent the determination that the individual partners of Centex Homes indirectly incurred the expenditures made on infrastructure” (Final Order Denying Petitioner’s Motion for Reconsideration, p 9) Upon review of South Carolina partnership law and the facts of this case, the corporate partners were not investment partners of Centex Homes with an indirect or passive role with respect to business activities South Carolina partnership law views a general partnership and all of its partners as being agents of one another and liable for the acts or omissions of any partner acting in the ordinary course of the business of the partnership *See S C Code Ann §§ 33-41-10 et seq* (the “South Carolina Partnership Act”) That is, every partner is considered an agent of a general partnership and generally any partner can bind the partnership § 33-41-310 Each general partner is considered to have an equal amount of influence over the day-to-day operations of Centex Homes, and each partner shares equally in the profits and liabilities of the partnership §§ 33-41-370, 33-41-510 and 33-41-730 The corporate partners of Centex Homes exercise command, direction and control over the activities of Centex Homes as well as furnish the capital and bear the risk for the operations of Centex Homes Accordingly, the ALC erred in its conclusion that the corporate partners cannot claim the credit based upon their indirect involvement in the partnership’s business activity

III THE ALC ERRED IN ITS CONCLUSION THAT CENTEX INTERNATIONAL, INC AND AFFILIATES ARE NOT A SINGLE TAXPAYER AND MAY NOT CLAIM THE INFRASTRUCTURE CREDIT ON ITS CONSOLIDATED RETURN

Under South Carolina law, a consolidated corporate income tax return may be filed with respect to a parent and its substantially controlled subsidiaries S C Code Ann § 12-6-5020(A)(1) When such a consolidated return is filed, the entities included on that return are combined and reported on a single return for the controlled group § 12-6-5020(D) Specifically, the controlled group is **treated as a single taxpayer** for purposes of administering and claiming tax credits If a corporation that files or is required to file a consolidated return is entitled to one or more income tax credits, the income tax credits must be determined on a consolidated basis § 12-6-5020(F) Moreover, limitations on credits that refer to the income or the income tax liability of a corporation are deemed to refer to the income or income tax liability of the consolidated group, and credits shall reduce the consolidated group's tax liability regardless of whether or not the corporation entitled to the credit contributed to the tax liability of the consolidated group *Id* Additionally, the Infrastructure Credit Statute states that “a corporation which files or is required to file a consolidated return is entitled to the income tax credit allowed by this section on a consolidated basis regardless of whether or not the corporation entitled to the credit contributed to the tax liability of the consolidated group ” § 12-6-3420(H)

Also, the corporate partners of Centex Homes are considered to be the “taxpayer” with respect to filing and signing a partnership tax return See Instructions, Form 1065 (2010) (“U S Return of Partnership Income” (“Form 1065”)), which states, “Form 1065 is not considered to be a return unless it is signed One general partner or LLC member manager must sign the return ” Similarly, page 1 of Form SC1065 requires a signature of

a general partner or LLC/LLP member. Given that CREC is considered the taxpayer with respect to filing and signing the Centex Homes partnership return and it along with all of the other partners are corporations included in the Centex consolidated corporate tax return, there is, in substance, a single taxpayer reporting and paying of tax on a consolidated basis including Centex Homes.

In this case, Centex International, Inc. is the parent company owning 100% of the corporate subsidiary partners of Centex Homes, which in turn own 100% of the Centex Homes partnership. Because a single tax liability was incurred and a single corporate tax return was filed by Centex International, Inc. as the parent holding company, it is treated and viewed as the “taxpayer” and its consolidated return must include the income and deductions related to qualifying infrastructure expenditures. Since these qualifying expenditures are considered to have been accrued by the Centex consolidated group with respect to determining and reporting taxable income, such expenditures must also be considered as being incurred for purposes of administering and claiming the infrastructure tax credit.

Accordingly, the Centex Consolidated Group met the requirements of the Infrastructure Credit Statute (i.e., expenses paid or contributions made and should be allowed to claim the credit against its consolidated tax liability subject to the limitation of the credit (i.e., 50% of the expenses or contributions or \$10,000 annually per project) as applied to the Centex Consolidated Group.

CONCLUSION

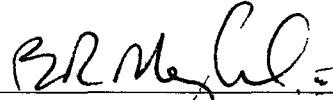
Based upon a literal reading with no absurd results of the infrastructure tax credit statute, the Appellant Centex International, Inc. & Affiliates correctly claimed a credit

against taxes due under S C Code Ann § 12-6-530 for expenses paid by Centex Homes, a taxpayer and contributions directly made by CREC, the managing general partner

In addition, pursuant to case law (*Ellis* and *Dalton*) and the general pass-through statute, Section 12-6-600, treatment of partnerships in South Carolina requires that expenditures made by the partnership are treated as if made directly by the partners. All three partners are corporations and included in Appellant's consolidated corporate tax return.

Lastly, the incentives pass-through statute, Section 12-6-3310, was codified as the first section of Article 25, which includes the infrastructure tax credit statute. It allows the pass through of any tax credit incentive except where "specifically prohibited." The infrastructure tax credit statute contains no such explicit or definite prohibition.

November 4, 2011



Burnet R. Maybank, III
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202-2426
PHONE 803 771 8900
FACSIMILE 803 253 8277
bmaybank@nexsenpruet.com

Attorney for Appellant Centex
International, Inc & Affiliates

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-87 (9) C
Corporation Tax
April 29, 1987

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO C850528A

On May 28, 1985, a Petition for Advisory Opinion was received from John J Eagan, Norris, McLaughlin & Marcus, 1081 Rt 22, P O Box 310, Somerville, New Jersey 08876

The issues raised for purposes of Article 9-A of the Tax Law, are (1) whether a corporate partner of a partnership will be able to claim its allocable share of the cost or other basis of tangible personal property for purposes of the investment tax credit pursuant to section 210 12(a) of the Tax Law where the partnership purchases tangible personal property that qualifies for the credit and (2) whether the corporation qualifies as a new business pursuant to Section 210 12(j) of the Tax Law and is therefore eligible to claim a refund of the credit pursuant to section 210 12(e) of the Tax Law

Issue (1)

"Xco ", a New York corporation, is a partner of a partnership engaged in business in New York State The partnership intends to purchase tangible personal property for use in its production process, in fact, the partnership was formed in 1985 for the purpose of acquiring the production equipment

Petitioner contends that based on section 210 12(a) of the Tax Law, a credit should be permitted for production equipment not only in situations where Xco directly purchases the equipment but also in situations where the cost or other basis of such equipment passes through from a partnership Petitioner feels that this result is consistent with analogous situations, such as the treatment of shareholders of S corporations and individual partners of a partnership, and conforms with the general pattern for taxing a corporate partner on its allocable share of partnership items

A partnership itself is not taxable under Article 9-A of the Tax Law As such, a partnership would not be allowed an investment tax credit pursuant to section 210 12(a) of Article 9-A since there is no liability under Article 9-A to which the credit could be applied

Each corporation subject to tax under Article 9-A of the Tax Law is required to compute its entire net income pursuant to section 208 9 of the Tax Law The starting point for such computation is the corporation's entire taxable income as required to be reported for federal income tax purposes Pursuant to the Internal Revenue Code, each corporation must include in federal entire taxable income its allocable or pro rata share of the partnership income, gains, losses and deductions (Internal Revenue Code §702)

RODERICK G W CHU COMMISSIONER

GABRIEL B DICERBO DEPUTY COMMISSIONER

FRANK J PUCCIA DIRECTOR

TP 8 (3/83)

EXHIBIT

1

TSB-A-87 (9) C
Corporation Tax
April 29, 1987

It should be noted that for federal income tax purposes each partner would be allowed an investment tax credit for the partner's allocable or pro rata share of the partnership's qualifying property

Tax Law section 210 12(a) provides that a taxpayer is allowed a credit against the tax imposed by Article 9-A, with respect to tangible personal property and other tangible property, including buildings and structural components of buildings which

- (1) are acquired, constructed, reconstructed or erected by the taxpayer after December 31, 1968,
- (2) are depreciable pursuant to section 167 of the Internal Revenue Code or recovery property with respect to which an accelerated cost recovery system deduction is allowable under section 168 of the Internal Revenue Code,
- (3) have a useful life of four years or more,
- (4) are acquired by the taxpayer by purchase as defined in section 179(d) of the Internal Revenue Code,
- (5) have a situs in New York State, and
- (6) are principally used by the taxpayer in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing

Section 210 12(b) of the Tax Law clearly requires that all of the above criteria be met before an investment tax credit is allowed. The criteria at issue herein are whether the property qualifying for the investment tax credit is acquired by the taxpayer by purchase as defined in section 179(d) of the Internal Revenue Code and whether such property is principally used by the taxpayer in the production of goods by manufacturing, processing, assembling, etc. It is assumed for purposes of this advisory opinion that the property purchased by the partnership will satisfy the requirements of criteria (1), (2), (3) and (5) above.

Tangible property that a partnership purchases, as defined in section 179(d) of the Internal Revenue Code, is deemed to be purchased by each partner to the extent of the partner's allocable or pro rata share of the partnership's property. Accordingly, tangible property that is deemed to be purchased by a corporate partner pursuant to section 179(d) of the Internal Revenue Code will be deemed to be acquired by purchase for purposes of section 210 12(b) of the Tax Law.

The requirement in section 210 12(b) of the Tax Law that the property must be principally used by the taxpayer in the production of goods by manufacturing, processing, assembling, etc. is not as easily determined. In Matter of Havemeyer, 17 NY2d 216 (1966), it was held that, by reason of New York State's adoption of section 26 of the Uniform Partnership Act in section 52 of the New York Partnership Law, a partner's interest is intangible personalty.

TSB-A-87 (9) C
Corporation Tax
April 29, 1987

rather than a direct tangible share of the underlying partnership assets. Therefore, a strict interpretation of section 210 12(b) of the Tax Law, based upon Havemeyer, would deny the pass-through to the corporate partner of the principal use of the qualifying property because the partnership is using the property, not the partners.

However, in Symphony Space v. Tishelman, 60 NY2d 33 (1983), the Court of Appeals invoked statutory purpose over the doctrine that tax exemptions are to be strictly construed. It stated:

While exemption statutes should be construed against the taxpayer seeking the benefit of the exemption, an interpretation so literal and narrow that it defeats the exemption's settled purpose is to be avoided. Id. at 36.

The legislative history of Chapter 1072, of the Laws of 1969, which enacted the investment tax credit, states the following:

This bill would replace all double depreciation provisions with a tax credit equal to one percent of qualified capital investment. The credit would be available to all taxpayers now eligible for double depreciation benefits. (1969 N Y S Legislative Annual p. 448)

Inasmuch as each corporate partner was entitled to its share of the double depreciation benefit prior to enactment of the credit, it is concluded that the Legislature intended that such corporate partner also be allowed its share of the investment tax credit.

Accordingly, Xco will be allowed an investment tax credit pursuant to section 210 12(a) of the Tax Law for its allocable share of the cost or other basis of qualifying tangible personal property where the property qualifying for the credit is purchased by the partnership.

Issue (2)

Section 210 12(e) of the Tax Law provides, in part, that

[I]f the amount of credit allowable under this subdivision for any taxable year reduces the tax to the minimum fixed by clause four of paragraph (a) of subdivision one of this section, any amount of credit not deductible in such taxable year may be carried over to the following year or years and may be deducted from the taxpayer's tax for such year or years. In lieu of such carryover, any such taxpayer which qualifies as a new business under paragraph (j) of this subdivision may elect to treat the amount of such carryover as an overpayment of tax to be credited or refunded.

Section 210 12(j) of the Tax Law provides that

For purposes of paragraph (e) of this subdivision, a new business shall include any corporation, except a corporation which

(1) over fifty percent of the number of shares of stock entitling the holders thereof to vote for the election of directors or trustees is owned by a taxpayer subject to tax under this article, section one hundred eighty-three, one hundred eighty-four, one hundred eighty-five or one hundred eighty-six of article nine, article thirty-two or thirty-three of this chapter, or

(2) is substantially similar in operation and in ownership to a business entity (or entities) taxable, or previously taxable, under this article, section one hundred eighty-three, one hundred eighty-four, one hundred eighty-five or one hundred eighty-six of article nine, article thirty-two or thirty-three of this chapter, article twenty-three of this chapter or which would have been subject to tax under such article twenty-three (as such article was in effect on January first, nineteen hundred eighty) or the income (or losses) of which is (or was) includable under article twenty-two of this chapter whereby the intent and purpose of this paragraph and paragraph (e) of this subdivision with respect to refunding of credit to new business would be evaded, or

(3) has been subject to tax under this article for more than four taxable years (excluding short taxable years) prior to the taxable year during which the taxpayer first becomes eligible for the investment tax credit

Where a taxpayer is allowed an investment tax credit, such taxpayer may elect to have the amount of any carryover treated as an overpayment of tax if such taxpayer is a new business pursuant to section 210 12(j) of the Tax Law. If the taxpayer is a corporate partner in a partnership, the corporation must qualify as a new business regardless of the status of the partnership, because it is the corporation, not the partnership, that is claiming the investment tax credit.

TSB-A-87 (9) C
Corporation Tax
April 29, 1987

Accordingly, if Xco , itself, is a new business pursuant to section 210 12(j) of the Tax Law, it may elect, pursuant to section 210 12(e) of the Tax Law, to treat as an overpayment of tax to be credited or refunded the amount of the carryover of its allowable investment tax credit determined pursuant to section 210 12(a) of the Tax Law

DATED April 29, 1987

s/FRANK J PUCCIA
Director
Technical Services Bureau

NOTE The opinions expressed in Advisory Opinions
are limited to the facts set forth therein

1350



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
**PARTNER'S SHARE OF SOUTH CAROLINA
INCOME, DEDUCTIONS, CREDITS, ETC**

SC1065 K-1(Rev 8/26/10)
3515

For calendar year _____ or tax year beginning _____ and ending _____

Partner's identifying number ▶**Partnership's FEIN** ▶

Partner's name address and ZIP code

Partnership's name address and ZIP code

Check if applicable (1) ☐ Final K 1 (2) ☐ Amended K 1 (3) ☐ Nonresident

Partner's Share of Current Year Income Deductions Credits etc		(A) Federal K 1 Amounts	(B) Plus or Minus SC Adjustments	(C) Amounts Not Allocated or Apportioned to SC	(D) Amounts Allocated or Apportioned to SC
Income (Loss)	1 Ordinary business income (loss)	1	1	1	1
	2 Net rental real estate income (loss)	2	2	2	2
	3 Other net rental income (loss)	3	3	3	3
	4 Guaranteed payments	4	4	4	4
	5 Interest income	5	5	5	5
	6 Dividends	6	6	6	6
	7 Royalties	7	7	7	7
	8 Net short term capital gain (loss)	8	8	8	8
	9 Net long term capital gain (loss)	9	9	9	9
	10 Net Section 1231 gain (loss)	10	10	10	10
	11 Other income (loss)	11	11	11	11
Deductions	12 Section 179 deduction	12	12	12	12
	13 Other deductions _____	13	13	13	13

Credits	14 Withholding tax for nonresident partner				14
	List applicable South Carolina tax credits (Attach an additional sheet if needed)				
	15 _____				15
	16 _____				16
	17 _____				17
	18 _____				18
	19 Total South Carolina tax credits				19

35151018

EXHIBIT

2

SC1065 K-1

General purpose SC1065 K 1 is prepared by the partnership to show each partner's share of the entity's income. Each item of income is adjusted as required by South Carolina law and allocated or apportioned to South Carolina or to states other than South Carolina.

INSTRUCTIONS

Column A, lines 1 through 13 Enter amounts from the federal Schedule K 1.

Column B, lines 1 through 13 - Enter the partner's share of plus or minus South Carolina adjustments to federal taxable income (loss) from SC-K Worksheet column B.

Column C, lines 1 through 13 - Enter the partner's share of income (loss) or deductions allocated or apportioned to states other than South Carolina.

Column D, lines 1 through 13 - Enter the partner's share of income (loss) or deductions allocated or apportioned to South Carolina.

Line 14 Partnerships are required to withhold 5% of the South Carolina taxable income of nonresident partners. Partnerships must provide nonresident partners a federal Form 1099-MISC with "South Carolina Only" written at the top showing respective amounts of income and tax withheld. Enter the tax withholding amount on line 14.

Line 15 through 18 List the partner's share of applicable South Carolina credits.

Instructions for Partnership - Include SC1065 K-1 with your SC1065 Partnership Return. Provide a copy to the partner.

Instructions for Partner - If filing a paper return, attach to your Income Tax Return. If filing electronically, keep with your records.

Social Security Privacy Act Disclosure

It is mandatory that you provide your social security number on this tax form. 42 U.S.C. 405(c)(2)(C)(i) permits a state to use an individual's social security number as means of identification in administration of any tax. SC Regulation 117-201 mandates that any person required to make a return to the SC Department of Revenue shall provide identifying numbers as prescribed for securing proper identification. Your social security number is used for identification purposes.

The Family Privacy Protection Act

Under the Family Privacy Protection Act, the collection of personal information from citizens by the Department of Revenue is limited to the information necessary for the Department to fulfill its statutory duties. In most instances, once this information is collected by the Department, it is protected by law from public disclosure. In those situations where public disclosure is not prohibited, the Family Privacy Protection Act prevents such information from being used by third parties for commercial solicitation purposes.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

APPEAL FROM ADMINISTRATIVE LAW COURT

John D McLeod, Administrative Law Judge

Docket No 2009-ALJ-17-0532-CC

**Centex International, Inc
and Affiliates**

Appellant,

v

South Carolina Department of Revenue

Respondent

**APPELLANT'S DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

Burnet R. Maybank, III
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803 771 8900

Attorney for Appellant

RECEIVED
NOV 04 2011
SC Court of Appeals

Appellant Centex International, Inc & Affiliates (“Appellant”) proposes the following be included in the Record on Appeal

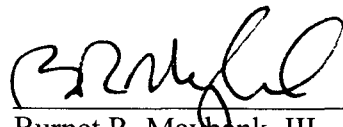
- 1 Department of Revenue’s Proposed Assessment Letter July 25, 2007
- 2 Appellant’s Appeal of Assessment Letter dated October 23, 2007
- 3 Department of Revenue’s Final Agency Determination dated December 7, 2009
- 4 Appellant’s (Petitioner’s) Notice of Request for Contested Case Hearing dated December 10, 2009
- 5 Respondent’s Prehearing Statement dated January 20, 2010
- 6 Appellant’s (Petitioner’s) Prehearing Statement dated January 27, 2010
- 7 Department of Revenue’s Motion For Partial Summary Judgment dated January 25, 2011
- 8 Centex International, Inc & Affiliates’ Cross Motion for Partial Summary Judgment and Memorandum in Response to South Carolina Department of Revenue’s Motion for Partial Summary Judgment dated March 4, 2011
- 9 Affidavit of Matthew Raines dated March 3, 2011
- 10 Email from O Sharpe to J Swearingen
- 11 Excerpts from Timothy Donovan Deposition, pp 10-13, 38-41
- 12 Excerpts from Orville Sharpe Deposition, pp 66-73
- 13 Excerpts from John Swearingen Deposition, pp 42-44
- 14 South Carolina Department of Revenue, *South Carolina Tax Incentives for Economic Development 2010 Edition*, pp 19-24
- 15 Department of Revenue’s Responses to Petitioner’s First Requests for

Admission

- 16 Transcript of Administrative Law Court Motions Hearing held on March 31, 2011
- 17 Department of Revenue's Proposed Order for Summary Judgment dated March 13, 2011
- 18 Centex International & Affiliates' Proposed Order for Summary Judgment
- 19 Order of the Administrative Law Court Granting Respondent's Motion for Partial Summary Judgment dated June 2, 2011
- 20 Appellant's (Petitioner's) Motion for Reconsideration Under ALC Rule 29(D) and/or To Alter or Amend Under SCRCR Rule 59(E) dated June 13, 2011
- 21 Respondent's Reply to Petitioners' Motion for Reconsideration and/or Motion to Alter or Amend dated June 17, 2011
- 22 Final Order of the Administrative Law Court Denying Petitioner's Motion for Reconsideration dated July 11, 2011
- 23 Notice of Appeal to Court of Appeals dated August 3, 2011

I certify that this designation contains no matter that is irrelevant to this appeal

November 4, 2011



Burnet R. Maybank, III
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803 771 8900

Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D McLeod, Administrative Law Judge

Case No 09-ALJ-17-0532-CC

Centex International Inc & Affiliates,

Appellant,

v

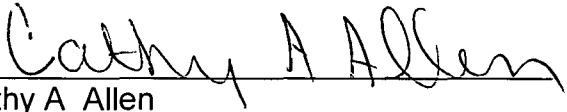
South Carolina Department of Revenue

Respondent

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellants and Designation of Matter to be Included in the Record of Appeal on the South Carolina Department of Revenue by mailing a copy of it on November 4, 2011, to their attorney of record, Adam Marinelli, SC Department of Revenue 301 Gervais Street Columbia, SC 29201

November 4 2011


Cathy A Allen
Nexsen Pruet, LLC
1230 Main Street, Suite 700
P O Drawer 2426
Columbia, South Carolina 29201
(803) 771-8900

RECEIVED

NOV 04 2011

SC Court of Appeals

Burnet R. Maybank, III
Member
Admitted in SC

November 4, 2011

VIA HAND DELIVERY

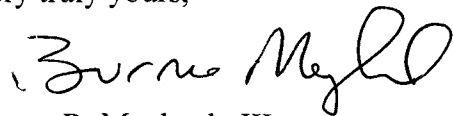
The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re Centex International, Inc. & Affiliates v. South Carolina Department
of Revenue, Case No. 09-ALJ-17-0532-CC
Case Tracking No. 2011196887

Dear Ms. Gee:

Enclosed for filing with the Court, is an original of the Initial Brief of
Appellant and Designation of Matter in the above-referenced matter. Please return a
clocked-in copy to me via our courier.

Very truly yours,



Burnet R. Maybank, III

BRM/JPR

Enclosures

cc Adam N. Marinelli, Esquire

RECEIVED
NOV 04 2011
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D McLeod, Administrative Law Judge

Case No 09-ALJ-17-0532-CC

Centex International, Inc & Affiliates

Appellant,

v

South Carolina Department of Revenue

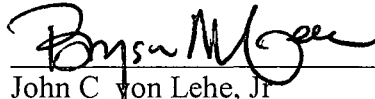
Respondent

**NOTICE OF MOTION AND MOTION TO
WITHDRAW AS COUNSEL FOR APPELLANT**

Pursuant to Rule 264(b) of the South Carolina Appellate Court Rules, and by and with the consent of Appellant Centex International, Inc & Affiliates (hereinafter "Appellant"), John C von Lehe, Jr, Esquire, and Bryson M Geer, Esquire, hereby move before this Honorable Court to withdraw and be relieved as counsel for the Appellant in the above-referenced matter. Going forward, Burnet R Maybank, III, and Nexsen Pruet, LLC, will continue representation of Appellant. By his consent set forth herein, the Appellant consents to counsels' withdrawal and desires that their attorney-client relationship be terminated.

RECEIVED
OCT 27 2011
SC Court of Appeals

Respectfully submitted,



John C. von Lehe, Jr.

Bryson M. Geer

NELSON MULLINS RILEY & SCARBOROUGH
LLP

151 Meeting Street / Sixth Floor

P O Box 1806 (29402-1806)

Charleston, SC 29401-2239

October 26, 2011
Columbia, South Carolina

Other Counsel of Record

Burnet R. Maybank, III
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
Attorney for Appellant

Adam N. Marinelli
Counsel for Revenue Litigation
P O Box 12265
Columbia, SC 29211
Attorney for Respondent

GRANTED

JOHN CANNON FEW, C.J.
FOR THE COURT

By V. Claire Allen
(Clerk) (Deputy Clerk)

FILED

Walter 11/17/11

I HAVE READ AND HEREBY CONSENT TO THIS MOTION



Lyle Stevens
Tax Managing Director
Centex International, Inc. & Affiliates
2728 North Harwood
Dallas, TX 75201-1516

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D McLeod, Administrative Law Judge

Case No 09-ALJ-17-0532-CC

Centex International, Inc & Affiliates,

Appellant,

v

South Carolina Department of Revenue,

Respondent

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Centex International, Inc , hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified via United States Mail, postage prepaid, to the following address(es)

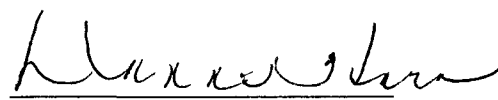
Pleadings NOTICE OF MOTION AND MOTION TO WITHDRAW AS
COUNSEL FOR APPELLANT

Counsel Served

Adam N Marinelli
Counsel for Litigation
South Carolina Department of Revenue
PO Box 12265
Columbia, SC 29211

Burnet R Maybank, III
Nexsen Pruet, LLC
PO Drawer 2426
Columbia, SC 29202

Lyle Stevens
Centex International, Inc & Affiliates
2728 North Harwood
Dallas, TX 75201-1516


Administrative Assistant

October 26, 2011

RECEIVED
OCT 27 2011
SC Court of Appeals

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP

Attorneys and Counselors at Law
151 Meeting Street / Sixth Floor / Charleston SC 29401 2239
Tel 843 853 5200 Fax 843 722 8700
www.nelsonmullins.com

Bryson M Geer
(Admitted in NC & SC)
Tel 843 720 4306
bryson.geer@nelsonmullins.com

October 26, 2011

The Honorable Tanya A Gee
Clerk of Court
SC Court of Appeals
PO Box 11629
Columbia, SC 29211

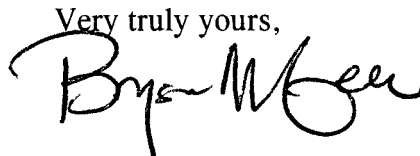
RE Centex International & Affiliates v South Carolina Department of Revenue
Docket No 09-ALJ-17-0532-CC
Our File No 31933/09000

Dear Ms Gee

Enclosed please find the original and one copy of a Notice of Motion and Motion to Withdraw as Counsel for Appellant in the above matter, along with our check in the amount of \$25 00. Please return a clocked-in copy of this Motion to me in the envelope provided.

By copy of this letter, we are serving this Motion on all counsel of record.

Thank you for your assistance.

Very truly yours,

Bryson M Geer

BMG dh
Enclosures

cc Adam N Marinelli, Esq (w/enclosure)
Burnet R Maybank, III, Esq (w/enclosure)
Lyle Stevens (w/enclosure)

RECEIVED
OCT 27 2011
SC Court of Appeals

Burnet R. Maybank, III
Member
Admitted in SC

October 7, 2011

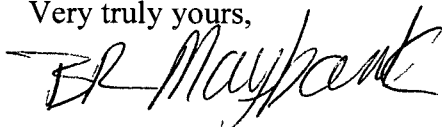
The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

Re *Centex International Inc & Affiliates v South Carolina Department
of Revenue*, Case No 09-ALJ-17-0532-CC
Case Tracking # 2011196887

Dear Ms. Gee

Pursuant to the Court's letter of October 3, 2011, and South Carolina Appellate Court Rule 207, this letter is to advise that Appellant Centex International, Inc. & Affiliates received the revised transcript of the hearing before the Administrative Law Court regarding the above-referenced matter on October 6, 2011.

Very truly yours,

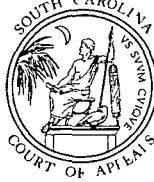


Burnet R. Maybank, III

BRM/JPR

cc Adam N. Marinelli, South Carolina Department of Revenue
Jana Shealy, Clerk, South Carolina Administrative Law Court
South Carolina Court Administration

RECEIVED
OCT 13 2011
SC Court of Appeals



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRF ALLEN
DEPUTY CLERK

POST OFFICE BOX 11679
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29 01
TELEPHONE (803) 734 1890
FAX (803) 7 4 18 9
www.sccourts.org

October 3, 2011

Burnet R. Maybank, III, Esquire
Nexsen Pruet, LLC
P O Drawer 2426
Columbia, SC 29202

Re Centex International v SCDOR
Case Tracking # 2011196887

Dear Counsel

You are reminded that the Appellant's Initial Brief and Designation of Matter must be served and filed no more than thirty days from the date the corrected transcript is received, pursuant to the Court's letter of September 1, 2011

Please provide an update regarding the status of the corrected transcript within ten days

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec

cc John von Lehe, Jr, Esquire
Bryson M Geer, Esquire
Adam Marinelli, Esquire



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11679
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

September 1, 2011

Burnet R. Maybank, III, Esquire
Nexsen Pruet, LLC
P O Drawer 2426
Columbia, SC 29202

Re Centex International v SCDOR
/ Case Tracking # 2011196887

Dear Counsel

The following Order has been endorsed on your "Motion to Extend the Time to File Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal" in the above entitled case on appeal

"Granted

John Cannon Few C J
For the Court

By s/ V. Claire Allen
Deputy Clerk

September 01, 2011 "

The Appellant's Initial Brief and Designation of Matter must be served and filed no more than thirty days from the date the corrected transcript is received

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec

cc John von Lehe, Jr , Esquire
Bryson M Geer, Esquire
Adam Marinelli, Esquire
The Honorable Jana E Shealy

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

AUG 23 2011

APPEAL FROM THE ADMINISTRATIVE LAW COURT

SC Court of Appeals

John D McLeod, Administrative Law Judge

Case No 09-ALJ-17-0532-CC

Centex International, Inc & Affiliates

Appellant,

v

South Carolina Department of Revenue

Respondent

**MOTION TO EXTEND THE TIME TO FILE APPELLANT'S INITIAL BRIEF AND
DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL**

Appellant Centex International, Inc & Affiliates ("Appellant"), with the consent of Respondent South Carolina Department of Revenue ("Respondent"), hereby submits this motion on the following grounds

1 After filing a timely Notice of Appeal on August 3, 2011, Appellant requested via e-mail a Hearing Transcript from the court reporter on August 10, 2011, consistent with SCACR Rule 207(b)(1)

2 Appellant received the Hearing Transcript on August 11, 2011, and provided notice of receipt to the Court, a copy of which is attached hereto as **Exhibit A**, such that the Initial Brief and Designation of Matter to be Included in the Record on Appeal of the Appellant is currently due on or before September 12, 2011

3 The Hearing Transcript is a vital part of the Designation of Matter to be Included in the Record on Appeal and is required to prepare the Initial Brief of the Appellant

4 Appellant's and Respondent's review of the Hearing Transcript prepared by the court reporter uncovered discrepancies and inaccuracies in the Hearing Transcript that must be corrected in order to properly review the Hearing Transcript and prepare the Initial Brief and Designation of Matter to be Included in the Record on Appeal

5 The court reporter currently is reviewing its recording of the Hearing and is preparing a revised Hearing Transcript

6 Therefore, Appellant requests that the Court disregard the Appellant's receipt of the faulty and incomplete Hearing Transcript, and provide the court reporter 60 days from the date of Appellant's original request to deliver a revised Hearing Transcript, consistent with SCACR Rule 207(b)(2)

7 Furthermore, Appellant requests that the Court disregard the current deadline of September 12, 2011, and extend the due date of the Initial Brief and Designation of Matter to be Included in the Record on Appeal of Appellant to **30 days from receipt of the revised Hearing Transcript**, consistent with SCACR Rule 208

GRANTED

JOHN CANNON FEW, C J
FOR THE COURT

By V. Claire Allen
~~(Clerk)~~ (Deputy Clerk)

SIGNATURE BLOCK ON NEXT PAGE

FILED

Harter 9/1/11

WE SO MOVE AND CONSENT

Adam Marinelli

Adam N. Marinelli
Counsel for Revenue Litigation
Milton G. Kimpson
General Counsel for Litigation
Harry T. Cooper, Jr.
Interim Director
P O Box 12265
Columbia, SC 29211
PHONE 803 898 5153
FACSIMILE 803 898 5147

Burnet R. Maybank, III

Burnet R. Maybank, III
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
PHONE 803 771 8900
FACSIMILE 803 727 1460
BMaybank@nexsenpruet.com

Attorneys for the Department of Revenue

*Attorney for Appellant Centex International
Inc. and Affiliates*

Columbia, South Carolina

Date 8/23/11

Columbia, South Carolina

Date 8/23/11

RECEIVED

AUG 23 2011

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D McLeod, Administrative Law Judge

Case No 09-ALJ-17-0532-CC

Centex International, Inc & Affiliates

Appellant,

v

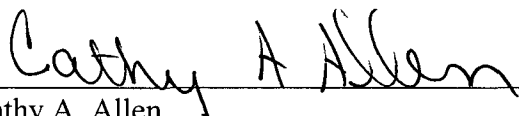
South Carolina Department of Revenue

Respondent

PROOF OF SERVICE

This is to certify that the foregoing Appellant's Motion to Extend the Time to File Appellant's Initial Brief and Designation of Matter to be Included on Appeal was sent via US Mail addressed as follows this 23rd day of August, 2011

Adam N Marinelli
SC Department of Revenue
301 Gervais Street
Columbia, SC 29211


Cathy A Allen

RECEIVED
AUG 23 2011
SC Court of Appeals

EXHIBIT A

NEXSEN | PRUET

Burnet R. Maybank, III
Member
Admitted in SC

August 12, 2011

The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

Re *Centex International Inc & Affiliates v South Carolina Department
of Revenue*, Case No 09-ALJ-17-0532-CC

Dear Ms. Gee

This letter is to advise that Appellant Centex International, Inc. & Affiliates received the transcript of the hearing before the Administrative Law Court regarding the above-referenced matter on August 11, 2011.

Charleston

Charlotte

Columbia

Greensboro

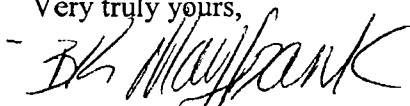
Greenville

Hilton Head

Myrtle Beach

Raleigh

Very truly yours,



Burnet R. Maybank, III

BRM/JPR

cc Adam N. Marinelli
Jana Shealy, Clerk, Administrative Law Court
South Carolina Court Administration

RECEIVED

AUG 23 2011

SC Court of Appeals

1230 Main Street
Suite 700 (29201)
PO Drawer 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803 540 2048
F 803 727 1472
E BMaybank@nexsenpruet.com
Nexsen Pruet LLC
Attorneys and Counselors at Law

August 23, 2011

VIA HAND DELIVERY

The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re Centex International, Inc. & Affiliates v. South Carolina Department
of Revenue, Case No. 09-ALJ-17-0532-CC
Case Tracking No. 2011196887

Dear Ms. Gee:

Enclosed for filing with the Court, is an original and six copies of the Appellant's Motion to Extend the Time to File Appellant's Initial Brief and Designation of Matter to be Included on Appeal in the above-referenced matter along with my firm's check in the amount of \$25.00 for the Motion filing fee. Please return a clocked-in copy to me via our courier.

Very truly yours,



Burnet R. Maybank, III

BRM/JPR

Enclosures

cc Adam N. Marinelli, Esquire

RECEIVED
AUG 23 2011
SC Court of Appeals

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Centex International, Inc & Affiliates,	)	Civil Action No 09-ALJ-17-0532-CC
	)	
Petitioner,	)	
	)	
vs	)	<u>CONSENT MOTION FOR</u>
	)	<u>SUBSTITUTION OF COUNSEL</u>
	)	
South Carolina Department of Revenue,	)	
	)	
Respondent	)	
	)	
	)	

Petitioner Centex International, Inc (n/k/a Centex International II, LLC) & Affiliates, by and with the consent of John C von Lehe, Jr , Esquire and Bryson M Geer Esquire, moves the Court for an Order authorizing the withdrawal of John C von Lehe, Jr , Esquire and Bryson M Geer, Esquire as counsel for the Petitioner and authorizing the substitution of Burnet R Maybank, III, and the law firm of Nexsen Pruet, LLC, as counsel for the Petitioner in this matter

RECEIVED
AUG 18 2011
SC Court of Appeals



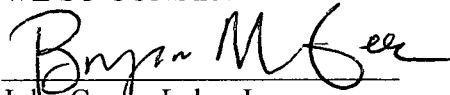
Burnet R Maybank, III
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Post Office Drawer 2426
Columbia, South Carolina 29201
(803) 771-8900

August 18, 2011

Columbia, South Carolina

Attorney for Petitioner

WE SO CONSENT



John C. von Lehe, Jr

Bryson M. Geer

Nelson Mullins Riley & Scarborough, LLP

151 Meeting Street, Sixth Floor

P O Box 1806 (29402-1806)

Charleston, SC 29401-2239

RECEIVED

AUG 18 2011

SC Court of Appeals

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Centex International, Inc & Affiliates,	)	Civil Action No 09-ALJ-17-0532-CC
	)	
Petitioner,	)	
	)	
vs	)	<u>ORDER GRANTING SUBSTITUTION</u>
	)	<u>OF COUNSEL</u>
	)	
South Carolina Department of Revenue,	)	
	)	
Respondent	)	
	)	
	)	

IT APPEARING to the Court that Centex International, Inc (n/k/a Centex International II, LLC) & Affiliates ("Centex"), Petitioner in the above-entitled action, desires to relieve its present counsel in this matter John C von Lehe, Jr, Esquire, and Bryson M Geer, Esquire, of the firm Nelson Mullins Riley & Scarborough, LLP, and further desires to have Burnet R Maybank, III, of the firm Nexsen Pruet, LLC, substituted as its counsel,

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Burnet R Maybank, III, be substituted as counsel for Petitioner Centex, and John C von Lehe Jr and Bryson M Geer be relieved as counsel

August __, 2011

The Honorable John D McLeod

RECEIVED
AUG 18 2011
SC Court of Appeals

The Honorable Tanya Gee
August 18, 2011
Page 2

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D McLeod, Administrative Law Judge

Case No 09-ALJ-17-0532-CC

Centex International, Inc & Affiliates

Appellant

v

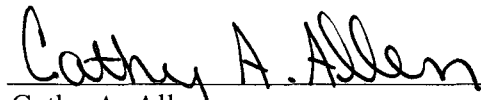
South Carolina Department of Revenue

Respondent

PROOF OF SERVICE

This is to certify that the foregoing Appellant's Notice of Appeal was sent via US Mail addressed as follows this 18th day of August 2011

Adam N Marinelli
SC Department of Revenue
301 Gervais Street
Columbia, SC 29211


Cathy A Allen

RECEIVED
AUG 18 2011
SC Court of Appeals

Burnet R. Maybank, III
Member
Admitted in SC

August 18, 2011

BY HAND DELIVERY

The Honorable Tanya A. Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re *Centex International Inc. & Affiliates vs. South Carolina Department
of Revenue*, Case No. 09-ALJ-17-0532-CC

Dear Ms. Gee:

Enclosed for filing is an original, along with one copy, of the Consent Motion for
Substitution of Counsel and Order Granting Substitution of Counsel in the above
referenced case.

Please return one clocked copy to me via our courier.

Very truly yours,



Burnet R. Maybank, III

BRM/JPR
Enclosures

cc Adam Marinelli, SCDOR

RECEIVED
AUG 18 2011
SC Court of Appeals

Burnet R. Maybank, III
Member
Admitted in SC

August 12, 2011

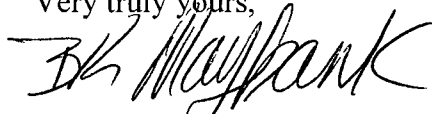
The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

Re *Centex International, Inc. & Affiliates v. South Carolina Department
of Revenue*, Case No. 09-ALJ-17-0532-CC

Dear Ms. Gee:

This letter is to advise that Appellant Centex International, Inc. & Affiliates received the transcript of the hearing before the Administrative Law Court regarding the above-referenced matter on August 11, 2011.

Very truly yours,



Burnet R. Maybank, III

BRM/JPR

cc Adam N. Marinelli
Jana Shealy, Clerk, Administrative Law Court
South Carolina Court Administration

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

RECEIVED
AUG 15 2011
SC Court of Appeals



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CL AIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11679
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29 01
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

August 12, 2011

Burnet R Maybank, III, Esquire
Nexsen Pruet, LLC
P O Drawer 2426
Columbia, SC 29202

Re Centex International v SCDOR
Case Tracking # 2011196887

Dear Counsel

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec

cc Adam Marinelli, Esquire
The Honorable Jana E Shealy



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

August 12, 2011

Burnet R. Maybank, III, Esquire
Nexsen Pruet, LLC
P.O. Drawer 2426
Columbia, SC 29202

Re Centex International v. SCDOR
Case Tracking # 2011196887

Dear Counsel,

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address 1015 Sumter Street, Columbia, S.C. 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the

notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript

NOTE If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S C Code Ann Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases

- 1) any final judgment from the circuit court which includes a sentence of death,
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58,
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance,
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state,
- 5) any final judgment from the circuit court pertaining to elections and election procedure,
- 6) any order limiting an investigation by a State Grand Jury under S C Code Ann Section 14-7-1630,
- 7) any order of the family court relating to an abortion by a minor under S C Code Ann Section 44-41-33

Very truly yours,
Tanya A. Gee
CLERK


TAG/ec

cc Adam Marinelli, Esquire
The Honorable Jana E. Shealy

Burnet R. Maybank III
Member
Admitted in SC

August 10, 2011

EMAIL (crystal@creelreporting.com)

Ms. Alexandra Hood
Creel Court Reporting
1230 Richland Street
Columbia, South Carolina 29201

RECEIVED

AUG 11 2011

SC Court of Appeals

Re *Centex International Inc & Affiliates vs South Carolina Department
of Revenue*, Case No 09-ALJ-17-0532-CC

Dear Madam

Please forward a copy of the transcript for the hearing on motions for summary judgment before the Honorable John McLeod in the above-referenced matter, which was conducted on March 31, 2011. We agree to pay the per page charge for this transcript as provided by Rule 607, SCACR.

If you have any questions regarding this request, please do not hesitate to contact us. Thank you for your assistance in this matter.

Sincerely,



Burnet R. Maybank, III

cc Mr. Adam N. Marinelli, Esquire
Office of Court Administration
The Honorable Tanya A. Gee, Clerk, South Carolina Court of Appeals
Ms. Jana Shealy, Clerk, South Carolina Administrative Law Court
Centex International, Inc. & Affiliates

1230 Main Street
Suite 700 (29201)
PO Drawer 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803 540 2048
F 803 727 1472
E BMaybank@nexsenpruet.com
Nexsen Pruet LLC
Attorneys and Counselors at Law

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D McLeod, Administrative Law Judge

Case No 09-ALJ-17-0532-CC

RECEIVED

AUG 03 2011

SC Court of Appeals

Centex International, Inc & Affiliates

Appellant,

v

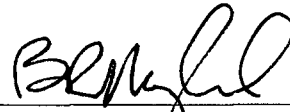
South Carolina Department of Revenue

Respondent

NOTICE OF APPEAL

Centex International, Inc (n/k/a Centex International II, LLC) & Affiliates ("Centex") hereby appeals the following two orders of the Honorable John D McLeod of the Administrative Law Court ("ALC") (1) the Order granting SCDOR's Motion for Partial Summary Judgment and denying Centex's Cross-Motion for Summary Judgment filed June 2, 2011 (the "Order Granting Partial Summary Judgment to SCDOR"), a copy of which is attached hereto as Exhibit A, and (2) the Order denying Centex's Motion to Reconsider and/or to Alter or Amend filed July 11, 2011 ("Order Denying Centex's Motion to Reconsider"), a copy of which is attached hereto as Exhibit B. Centex received written notice of the entry of the Order Granting Partial Summary Judgment to SCDOR on June 2, 2011. Thereafter, on June 13, 2011, Centex timely filed with the ALC its Motion to Reconsider, which Judge McLeod heard on July 7, 2011. Judge McLeod denied that motion on July 11, 2011, and Centex received that order that same

day Thus, pursuant to ALC Rule 29(D)(4), this Notice of Appeal is timely filed within
30 days of receipt of the Order Denying Centex's Motion to Reconsider



Burnet R. Maybank, III
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, South Carolina 29201
(803) 771-8900

Attorneys for Appellant
Centex International, Inc & Affiliates

August 3, 2011

Other Counsel of Record

Adam Marinelli
Counsel for Litigation
South Carolina Department of Revenue
P O Box 12265
Columbia, SC 29211
(803) 898-5153

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D McLeod, Administrative Law Judge

Case No 09-ALJ-17-0532-CC

Centex International, Inc & Affiliates

Appellant,

v

South Carolina Department of Revenue

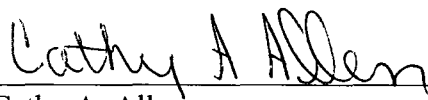
Respondent

PROOF OF SERVICE

This is to certify that the foregoing Appellant's Notice of Appeal was sent via US
Mail addressed as follows this 3rd day of August 2011

Adam N Marinelli
SC Department of Revenue
301 Gervais Street
Columbia, SC 29211

The Honorable John D McLeod
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Edgar A Brown Building
Columbia, SC 29201


Cathy A Allen

RECEIVED

AUG 03 2011

SC Court of Appeals

Burnet R. Maybank, III
Member
Admitted in SC

August 3, 2011

BY HAND DELIVERY

The Honorable Tanya A. Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re *Centex International Inc. & Affiliates vs. South Carolina Department
of Revenue*, Case No. 09-ALJ-17-0532-CC

Dear Ms. Gee

Enclosed for filing is an original, along with one copy, of the Notice of Appeal in the
above case. Also enclosed are the following:

- (1) Proof of service of the Notice of Appeal on the Respondent,
- (2) A copy of the Orders which are to be challenged on appeal,
- (3) A filing fee of \$100

Please return one clocked copy of the Notice of Appeal to me via our courier.

Very truly yours,



Burnet R. Maybank, III

BRM/JPR
Enclosures

cc The Honorable John D. McLeod
Adam N. Marinelli

1230 Main Street
Suite 700 (29201)
PO Drawer 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803 540 2048
F 803 727 1472
E BMaybank@nexsenpruet.com
Nexsen Pruet LLC
Attorneys and Counselors at Law

RECEIVED
AUG 03 2011
SC Court of Appeals

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Centex International, Inc	)	DOCKET NO 09-ALJ-17-0532-CC
and Affiliates,	)	
	)	
Petitioner,	)	
	)	FINAL ORDER DENYING
	)	PETITIONER'S MOTION
	)	FOR RECONSIDERATION
v	)	
	)	
South Carolina Department of	)	
Revenue,	)	
	)	
Respondent	)	
_____	)	

APPEARANCES Petitioner John von Lehe Jr , Esquire, Bryson M Geer, Esquire
 Respondent Adam N Marinelli, Esquire

STATEMENT OF THE CASE

This matter comes before the Administrative Law Court (ALC or Court) pursuant to S C Code Ann §§ 12-60-460 and 12-60-470 (Supp 2010) This action began when the Petitioner (Petitioner or taxpayer) filed amended returns in 2007 adjusting the apportionment ratio for its income from the sale of bundled mortgages for the 2002-2005 tax years The amended returns also claimed infrastructure tax credits based upon the expenditures made by disregarded subsidiaries of the Petitioner, operating in South Carolina as a general partnership The Department of Revenue (Department) determined the taxpayer was not entitled to the apportionment adjustments, or the claim for infrastructure tax credits made therein, on the basis that the infrastructure expenses were incurred by an unqualified affiliate of the taxpayer, a general partnership, rather than the taxpayer directly On July 25, 2007 the Department disallowed the adjustments made on the Petitioner s amended returns for the 2002-2005 tax years, issued a notice of proposed

FILED

JUL 11 2011

SC ADMIN LAW COURT

assessment, and denied the claim for credits. On October 23, 2007, the Petitioner wrote the Department appealing the denial of the credits and the notice of proposed assessment. The Department issued its Determination on December 4, 2009, setting forth the legal basis for its adjustments and denial of the claim for credits. On December 7, 2009, the Petitioner requested a contested case hearing before this Court to dispute the Department's Determination. Prior to a hearing on the merits, the Department filed a Motion for Partial Summary Judgment on the infrastructure credit question, to which the Petitioner responded with a Cross-Motion for Summary Judgment on the same issue. A hearing was held before this Court on March 31, 2011, and the Department's Motion was subsequently granted. Petitioner timely filed a Motion for Reconsideration pursuant to Rule 59(e), SCRCPP, on June 13, 2011. The Department filed a Reply in Opposition on June 16, 2011. A hearing on this motion was held before this Court, at the offices of the ALC on July 7, 2011.

STATEMENT OF FACTS

The following facts were undisputed between the parties:

Centex Homes is a general partnership that is wholly owned by three corporate affiliates of Centex International. It purchases, develops, sells land or lots, and constructs and sells single family homes in South Carolina and many other states. As part of its business in this State, the partnership incurred expenses from constructing or improving the infrastructure within certain developments.

For tax years 2002-2005, the parent company - Centex International & Affiliates filed amended corporate income tax returns, which included amended partnership returns for Centex Homes, claiming tax credits pursuant to S.C. Code Ann. § 12-6-3420 (Supp.

2010) for expenses Centex Homes incurred in constructing or improving infrastructure in those areas that the partnership developed. Upon audit, these credits were denied by the Department.

The Department also audited the taxpayer for South Carolina corporate income tax periods ending March 2002 through March 2005. The Department's audit determined that the taxpayer had incorrectly calculated its South Carolina corporate income in failing to apportion the amounts of revenue from the out-of-state sale of intangibles generated from activity in South Carolina. Subsequently, the Department issued a proposed assessment against the taxpayer, and the taxpayer timely protested the proposed assessment and denial of the credits. The taxpayer filed for a contested case hearing before the ALC, and the instant action arises from these operative facts.

CONCLUSIONS OF LAW

Based upon the submitted briefs, oral arguments presented, and a thorough examination of the applicable statutes and jurisprudence, I conclude the following as a matter of law:

S.C. Code Ann. § 12-60-30 (Supp. 2010) grants jurisdiction to this Court to hear contested cases under the Administrative Procedures Act. Specifically, § 12-60-460 grants this Court the authority to conduct contested case hearings in matters concerning taxes. The burden of proof is with the party asserting the affirmative in an adjudicatory administrative proceeding. 2 Am. Jur. 2d Administrative Law § 354 (2004). In the instant matter, it is the taxpayer who requested a contested case hearing to challenge the Department's Determination. Thus, the taxpayer asserts the affirmative and must carry

the burden of proving the Department's Determination is incorrect Id cf Cloyd v Mabry, 295 S C 86, 367 S E 2d 171 (Ct App 1988)

Rule 56(c), SCRCF, provides that a trial court may grant a motion for summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law ” See Bovain v Canal Ins , 383 S C 100, 105, 678 S E 2d 422, 424 (2009)

Rule 59(e), SCRCF, provides that when an issue or argument has been raised to but not ruled upon by the trial court, a party must file a motion to alter or amend judgment to preserve the issue for appeal Shirley’s Iron Works, Inc v City of Union, 387 S C 389, 693 S E 2d 1 (Ct App 2010)

But for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the court Lucas v Rawl Family Ltd P’ship, 359 S C 505, 510-11, 598 S E 2d 712, 715 (2004) “Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments ” I’On, LLC v Town of Mount Pleasant, 338 S C 406, 422, 526 S E 2d 716, 724 (2000) As such, a party cannot use a Rule 59(e), SCRCF, motion to present to the court an issue the party could have raised prior to judgment but did not Crary v Djebelli, 321 S C 38, 43, 467 S E 2d 128, 131-32 (Ct App 1995), rev'd on other grounds, 329 S C 385, 496 S E 2d 21 (1998), Gartside v Gartside, 383 S C 35, 43, 677 S E 2d 621, 625 (Ct App 2009)

ISSUES

I DID THE PETITIONER RAISE NEW LEGAL ARGUMENTS IN ITS POST-HEARING FILINGS THAT ARE OUTSIDE OF THE RECORD AND THEREFORE INAPPROPRIATE FOR THIS COURT TO CONSIDER?

Upon completion of oral arguments for the cross-motions for partial summary judgment, the parties were instructed to prepare proposed orders on the issues at bar. The parties were further instructed to expand discussions surrounding the terms “taxpayer” and “qualify,” which this Court determined to be integral to the central issue of the case. Once the proposed orders were submitted, Counsel for Respondent wrote a letter dated May 18, 2011, to this Court objecting to the inclusion of several new legal arguments in Petitioner’s proposed order. Petitioner responded in kind, arguing that the request for proposed orders had been in lieu of final briefs and the expanded arguments were linked to arguments already made a part of the record. As part of the Petitioner’s Rule 59(e), SCRCF, Motion for Reconsideration, many of the items sought to be reconsidered were similar to arguments found in the proposed order, and citations to specific sections of the document were included by the Petitioner. The Respondent’s Reply to this Motion reiterated the same objections as the May 18th letter, to which Petitioner responded in the same manner as before. I am inclined to agree with the Respondent, that regardless of whether or not these arguments were appropriately raised, they have little effect upon the plain language analysis of the credit statute at issue, and thus consideration of these arguments has little bearing on this Court’s decision. Despite this fact, I feel it necessary to address each below.

A Is the “Aggregate Theory” and “Unitary Business Doctrine” a properly raised argument by the Petitioner?

The first legal theory raised by the Petitioner which was objected to by the Respondent is found on pages 22-25 of the Petitioner's proposed order, and paragraph 18 of its Motion for Reconsideration. In defense of these arguments, Petitioner cites to pages 23 and 42 of the Hearing Transcript, pages 4 and 13 of its original Cross-Motion for Partial Summary Judgment, pages 16, 18, and 19 of its Pre-hearing Statement, and its Protest Letter at page 11. I have reviewed each of these pages in detail, (with the exception of the Protest Letter, as it was not made part of the record by either party), and find no mention of the unitary business doctrine. In fact, the only tangentially related material I have found in any of these citations would be the Petitioner's discussion of pass-through entities in general, which can be related to aggregate theory. To that extent, I am willing to entertain the Petitioner's use of aggregate theory as both parties allude to its principles in various forms, but I decline to consider the use of the unitary business doctrine here.

The Petitioner argues vigorously that Ellis v. S.C. Tax Comm'n, 280 S.C. 65, 309 S.E.2d 761 (1983), supports its position for a complete disregard of the partnership entity and for each individual partner to realize every item of income, loss, deduction, and credit as if acting independently. The Petitioner's interpretation of this case is incorrect, and it does not support the proposition that “we are an aggregate theory State” and do not use the “conduit theory” as was proffered during oral arguments. While the aggregate theory is applied in Ellis, the deductions for out-of-state losses against in-state income were properly denied in Ellis by the court's recognition of the “conduit theory” approach,

which simply means that every item of income, loss credit, or deduction *retains its character* before being passed through to the partners. The holding in Ellis affirms the Respondent's position that the character of the infrastructure credit should be retained before it can be passed-through to Centex's partners. To that extent, the Petitioner is mistaken in its application of aggregate theory, as it begs the question on whether or not the partnership earned the credit in the first place. Before an individual partner can realize a credit, take a deduction, or pay tax on income that is part of its distributive share, the *partnership must have earned that credit, taken deductible losses, or made taxable gains in the first place*. As the Respondent argued in its initial Motion for Partial Summary Judgment at pages 6-7

'The Petitioner further argues that South Carolina's adoption of the Internal Revenue Code provisions for partnerships, specifically S C Code Ann §§ 12-6-40, 12-6-50, and 12-6-600 (Supp. 2009), dictates that the tax credit be treated as if the individual corporate partners generated credits directly under a modified "aggregate theory." This contention is tenuous at best. The Internal Revenue Code § 702(b), states in relevant part

The character of any item of income, gain, loss, deduction, or **credit** included in a partner's distributive share under paragraphs (1) through (7) of subsection (a) shall be determined as if such item were realized directly **from the source from which realized by the partnership or incurred in the same manner as incurred by the partnership**

(Emphasis added) The Petitioner's assertion that I R C § 702(b) allows the individual partners to realize all the gains, losses, deductions, and credits that the partnership realized is absolutely correct. This does not, however, give the individual partners the ability to extend the reach that the partnership has in regards to its eligibility for tax credits. "It is well settled that [Internal Revenue Code §

702(b) reflects a ‘conduit’ approach whereby the character of an item of income gain, loss, deduction, or credit is **determined at the entity or partnership level before the item is passed through** to the partners” Rath v. Comm’r, 101 T.C. 196, 203 (1993) (Emphasis added)

The Petitioner argues that this Court should not consider Rath, however, since I.R.C. § 702 has been incorporated as part of our Code, I find this decision highly instructive in this matter. Regardless, I find Ellis is consistent with the rationale found in Rath, as the out-of-state losses for a partnership in that case retained their character and were not deductible for in-state partners.

B Is the argument that the Department’s position on asserting nexus over partners inconsistent with its current position properly raised by the Petitioner?

Once again, I have reviewed the citations listed by the Petitioner as a basis for this argument being part of the record. I find that the Petitioner’s attempt to bootstrap a nexus-related argument into its use of aggregate theory inappropriately raised in its proposed order on page 23. This argument was not raised prior to the summary judgment hearing, nor made during oral arguments, and is therefore inappropriate to consider here. This argument was abandoned in the Petitioner’s Motion for Reconsideration, but in an attempt to specifically address Respondent’s objections, I note this argument’s untimeliness here.

C Is the filing of consolidated returns as a basis for disregarding partnership law and use of single taxpayer treatment a properly raised argument by the Petitioner?

I find that there is a sufficient foundation in the record for the use of consolidated returns and the surrounding tax treatment of such, and therefore find this to be a properly raised argument. The merits of such will be discussed in Issue II below.

D Is the argument that Centex Real Estate Corporation (CREC) as managing partner that made infrastructure expenditures that should give rise to eligibility for the credit a properly raised argument by the Petitioner?

After reviewing the expanse of this case's record I find that this argument, regardless of its merit, is not an improperly raised new argument. Nevertheless, the expenditures made by a managing partner remain attributable to the partnership, and do not circumvent the determination that the individual partners of Centex Homes indirectly incurred the expenditures made on infrastructure.

For the reasons outlined above, I decline to address the Petitioner's arguments based upon the unitary business doctrine and nexus. The remainder of those above are included as part of the record.

II IS THE PETITIONER ENTITLED TO RECONSIDERATION OF THIS COURT'S ORIGINAL ORDER GRANTING PARTIAL SUMMARY JUDGMENT FOR THE RESPONDENT?

The present matter involves the denial of a claim for the infrastructure tax credits pursuant to § 12-6-3420. It is well established in South Carolina that tax deductions are not a matter of right, rather, they are a matter of legislative grace, and a taxpayer claiming one must bring himself squarely within the terms of the statute expressly authorizing it. Allied Corp. v. S.C. Tax Comm'n, 288 S.C. 197, 199, 341 S.E.2d 139, 141 (1986). Moreover, I would note that the allowance of a tax credit is analogous to a tax deduction since both are a matter of legislative grace. SCANA Corp. v. S.C. Dept. of Revenue, 384 S.C. 388, 394, 683 S.E.2d 468, 471 (2009) (Beatty, J., dissenting).¹

¹I note the rule of construction in other jurisdictions is also that because a tax credit is a matter of grace, it is strictly construed against the taxpayer. See, e.g., Texasgulf, Inc. v. Comm'r of Internal Revenue, 172 F.3d 209 (2d Cir. 1999), Team

When construing a statute the cardinal rule is to ascertain the intent of the Legislature Georgia-Carolina Bail Bonds, Inc v County of Aiken, 354 S C 18, 22, 579 S E 2d 334, 336 (Ct App 2003) “All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute ” Id at 23, 579 S E 2d at 336 The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation Hitachi Data Sys Corp v Leatherman, 309 S C 174, 178, 420 S E 2d 843, 846 (1992) Furthermore, “[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons ” Brown v S C Dep't of Health & Envtl Control, 348 S C 507, 515, 560 S E 2d 410, 414 (2002) (quoting Dunton v S C Bd of Examin'rs in Optometry, 291 S C 221, 223 353 S E 2d 132, 133 (1987)), see also Nucor Steel v S C Pub Serv Comm'n, 310 S C 539, 543, 426 S E 2d 319, 321 (1992) (recognizing that where an agency is charged with the execution of a statute, the agency's interpretation should not be overruled without cogent reason)

Most important to this case is the proposition that a court should not consider a particular clause being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law South Carolina Coastal Council v South Carolina State Ethics Comm'n, 306 S C 41, 44, 410 S E 2d 245, 247 (1991) The

Specialty Prods, Inc v N M Taxation & Revenue Dep't, 137 N M 50, 107 P 3d 4 (2004), MacFarlane v Utah State Tax Comm'n, 134 P 3d 1116 (Utah 2006), Midland Fin Corp v Wis Dep't of Revenue, 116 Wis 2d 40, 341 N W 2d 397 (1983)

terms [of a statute] must be construed **in context** (emphasis supplied) and their meaning determined by looking at the other terms used in the statute S Mut Church Ins Co v South Carolina Windstorm & Hail Underwriting Ass'n, 306 S C 339, 342, 412 S E 2d 377, 379 (1991), State v Dupree, 354 S C 676, 693, 583 S E 2d 437, 446 (2003)

Petitioner's Motion for Reconsideration is premised on the belief that this Court "overlooked, misinterpreted or failed to apply South Carolina law and/or failed to consider certain evidence or arguments presented " More specifically, the Petitioner suggests that this Court misinterpreted and misapplied the plain language of § 12-6-3420 that provides an infrastructure credit to corporations, the plain language of S C Code Ann § 12-6-3310 (Supp 2010) that provides for flow-through tax treatment for specific entities, and I R C §§ 701-704 and 7701 Petitioner also seeks consideration of various arguments it claims were made yet not ruled upon, all of which will be addressed individually below

A Petitioner claims this Court erroneously concluded that the word "taxpayer" in subsection (A)(1) of § 12-6-3420 means "corporation "

Petitioner's arguments 1, 2, 3, 9, 10, and 12, for which it seeks reconsideration are based upon this Court's interpretation of the plain language of § 12-6-3420, specifically regarding the word "taxpayer " (Petr's Mot For Reconsideration at pp 2-6) While I find that these arguments were raised and ruled upon, I am not persuaded that this Court's findings were incorrect and deny the Petitioner's requests for reconsideration on these issues

As I detailed in the original Order, § 12-6-3420 unambiguously states

(A) A **corporation** may claim a credit for the construction or improvement of an infrastructure project

against taxes due under Section 12-6-530 or Section 12-11-20 for

- (1) expenses paid or accrued by the taxpayer,
- (2) contributions made to a governmental entity, or
- (3) contributions made to a qualified private entity in the case of water or sewer lines and their related facilities in areas served by a private water and sewer company

(Emphasis added) The Petitioner sought to interpret the term “taxpayer” in subsection (A)(1) broadly to extend beyond the entity that directly incurred the expenses, while the Department argued that the term is constrained by the corporate limitation imposed within the first line of the statute. I remain inclined to agree with the latter interpretation.

Petitioner argued the definition of “taxpayer” found in S.C. Code Ann. § 12-6-30(1) (2000) includes the Petitioner as a partnership. Section 12-6-30(1) provides “**unless otherwise required by the context**” (emphasis supplied) means “an individual, trust, estate, partnership, association, company, corporation, or any other entity subject to the tax imposed by this chapter or required to file a return.”

Considering, as I must, the statute as a whole, I remain convinced that its context requires that the credit must be limited to corporations. Section 12-6-3420(G), (H), and (I), all make references that leave no doubt that § 12-6-3420, read as a whole refers only to corporations, viz

(G) If a road qualifying for the credit is subsequently removed from the state highway or public road system, the amount of the credit allowed for the construction of the road must be added to any **corporate income tax due from the taxpayer** in the first taxable year following the removal of the road from public use. The department may implement the provisions of this subsection by rules or regulation.

(H) A **corporation** which files or is required to file a consolidated return is entitled to the income tax credit

allowed by this section on a consolidated basis. The tax credit may be determined on a consolidated basis regardless of whether or **not the corporation entitled to the credit** contributed to the tax liability of the consolidated group.

(I) The merger, consolidation, or reorganization of a **corporation** where tax attributes survive does not create new eligibility in a succeeding **corporation** but unused credits may be transferred and continued by the succeeding **corporation**. In addition, a **corporation** may assign its rights to its unused credit to another **corporation** if it transfers all, or substantially all, of the assets of the **corporation** or all, or substantially all, of the assets of a trade or business or operating division of a **corporation** to another **corporation**.

(Emphasis added)

The Petitioner's 9th argument for which it seeks reconsideration involves the doctrine of *ejusdem generis* (Petr's Mot For Reconsideration at p. 4). The Department contends that under that doctrine, the meaning of general words (in this case, "taxpayer") may be restricted by words of specification which precede them ("corporation") on the theory that, had the Legislature intended the general words be used in their unrestricted sense, there would have been no mention of the particular class. State v. Four Video Slot Machines, 317 S.C. 397, 400, 453 S.E.2d 896, 898 (1995) (citing State v. Patterson, 261 S.C. 362, 200 S.E.2d 68 (1973)).

In response to this, the Petitioner restates its argument that *ejusdem generis* should not be applied since the terms "taxpayer" and "corporation" are not "referred to in a listing or class of items as the doctrine was intended to be used" (Petr's Mot For Reconsideration at p. 4). Once again, I disagree with the Petitioner's application of this doctrine. *Ejusdem generis* simply reinforces the basic rules of statutory construction with contextual consistency. This Court is bound to read statutes as a whole, and had the

Legislature intended for “taxpayer” to be read broadly, it would not have included a corporate restriction to start, coupled with obvious and continuous references to corporate activity throughout. Read as a whole, I remain convinced that the context of this credit statute is one limited solely to corporations, and leaves no room for partnerships.

To even consider the Petitioner’s interpretation, one must read the statute disjunctively, separating the type of entities allowed to claim this credit from the entities allowed to make qualifying expenditures. I find this interpretation to be unfounded and it fails to place the taxpayer squarely within the terms of the statute. See Allied Corp., 288 S.C. at 199, 341 S.E.2d at 141. The Petitioner supports its reading of the credit statute by arguing that the general partnership is, in fact, a “taxpayer” as defined by language in § 12-6-30(1) that enumerates the types of entities subject to taxation under Title 12. These entities include individuals, trusts, estates, partnerships, associations, companies, corporations, “or any other entity subject to the tax imposed by this chapter or required to file a return.” Section 12-6-30(1). However, in order for this Court to apply the definition of § 12-6-30(1) to the infrastructure credit’s inclusion of the word “taxpayer,” each of the entities enumerated therein must be a feasible substitution.² This inevitably leads to absurd results, since portions of the Petitioner’s proposed interpretation of “taxpayer” would be meaningless (i.e., an individual could make qualifying expenditures yet the credit could not be claimed).

Entertaining the Petitioner’s claim, *in arguendo*, that the Legislature could have easily used the word “corporation” throughout instead of “taxpayer,” this Court could

²Counsel for Respondent suggested during the hearing that inserting “individual” or “trust” for the word taxpayer, for example, presents an unworkable disjunction between subsection (A) and (A)(1).

also speculate as to why the General Assembly did not include language pertaining to pass-through entities. Such speculation does not provide this Court with any direction and is therefore unnecessary to consider. Regardless, reading the term “taxpayer” in isolation does not agree with the full context of the credit statute, and also results in the possibility for absurd results. Therefore I am not inclined to agree with this application.

To the extent that the Petitioner contends that any other arguments pertaining to the plain language interpretation of the term “taxpayer” are not directly addressed in my determinations, the Court denies the request for reconsideration on the implied or express grounds explained above.

B The Petitioner contends that this Court erroneously interpreted the words “claim” and “generate” as synonymous, giving deference to the Department’s policy of interpreting credits in this manner

This Court’s finding that an entity that generates a credit practically results in the presumption that the entity has the ability to claim it is well founded. The Petitioner’s arguments in paragraphs 4, 5, and 6 of its Motion, that this Court created a new definition for these words and gave improper deference, are without merit. Furthermore, the context by which this Court determined that “claim” and “generate” are synonymous should be tempered by carefully reading both the infrastructure credit statute’s limitations, and the pass-through provisions of § 12-6-3310, and is limited to the factual context of this case.

As noted above, when § 12-6-3420 is read together in its entirety, it is clear that “the taxpayer” in subsection (A)(1) is limited to the “corporation” attempting to claim the credit, as referred to in subsection (A). Thus, a corporation must directly incur the expenses that generate the tax credit. Because the expenses in this case were directly

incurred by a general partnership, the corporate partner cannot claim the credit based upon its indirect involvement in the partnership's business activity

Furthermore, during oral arguments it was made apparent that the long standing policy of the Department in interpreting tax credit statutes has been that “[e]xcept as otherwise provided, a credit must be used by the taxpayer that earns it ” See Pet’r Ex G at 21, (Summ J Hr’g Tr 60 5-7) Absent cogent reason, this Court declines the Petitioner’s invitation to negate this long standing policy See Nucor Steel, 310 S C at 543

One exception to that rule, which would allow an avenue for indirect expenditures to create access to tax credits, is contained within § 12-6-3310(B)(1) Unfortunately for the Petitioner, the pass-through statute is simply not triggered here The provisions of that statute state that “[u]nless specifically prohibited, an 'S' corporation, limited liability company taxed as a partnership, or **partnership that qualifies for a credit** pursuant to this article may pass through the credit earned to each shareholder of the 'S' corporation, member of the limited liability company, or partner of the partnership ” (Emphasis added) To that extent, a tax credit may only be passed through to individual partners after the partnership itself *qualifies* for the tax credit As noted above, the tax credits the Petitioner is seeking to pass through its partnership is exclusively limited to corporations by the General Assembly, as § 12-6-3420 plainly states that only a “corporation may claim [the credit] against taxes due under Section 12-6-530 ” The intent of the Legislature to limit the eligibility for this credit solely to corporations is unambiguous and clear from the plain language During oral argument at the summary judgment

hearing, Counsel for Respondent presented several examples of tax credits³ that incorporated express language for the applicability of the pass through provisions of § 12-6-3310 (Summ J Hr'g Tr 12) That type of language, curiously enough, is not found in the infrastructure credit statute

The Petitioner contends that the use of the word "claim" in § 12-6-3420(A) should be read as separate from the act of generating the credit, and therefore, any corporate member of the Centex Homes partnership that indirectly incurred some of the infrastructure expenses should be able to claim the credit This argument is also without merit Tax credits are conferred by legislative grace and are not assignable in the absence of either explicit contractual or statutory language DaimlerChrysler Services N Am, LLC v Ariz Dep't of Revenue, 210 Ariz 297, 304, 110 P 3d 1031, 1038 (Ct App 2005) (quoting DaimlerChrysler Services N Am, LLC v State Tax Assessor, 817 A 2d 862, 866 (Me 2003)) Income tax is generally assessed on an individual taxpayer, and concurrently, tax credits and refunds are generally conferred upon the taxpayer that originally generated the credit Absent a statutory provision stating otherwise, the general rule is that tax benefits may only be claimed by the taxpayer that generated that benefit Our Legislature included the "qualified claimant prerequisite" in the flow through provisions of § 12-6-3310(B)(1), on the basis of this premise and the Petitioner's attempt to disregard it would allow partnerships to flow through any credit, regardless of entity specific limitations There is no legal basis for such a result In order for the flow

³See, S C Code Ann §§ 12-6-3340- Renewable Energy Credit, 12-6-3370- Water Control Structure Credit, 12-6-3560 Motion Picture and Advertisement Company Credit (2000) (The Motion Picture credit expressly provides for corporate partners generating the credit through indirect expenditures in a general partnership)

through provisions to remain consistent with the corporate limitations of § 12-6-3420, the word “claim” must be interpreted as synonymous with “generate.” Consequentially, because the partnership was not qualified to claim the tax credit in the first place, no credit was ever generated, and none of its corporate partners may claim it under § 12-6-3310(B)(1). It is upon this logical basis that this Court determined “claim” and “generate” must be read as equivalents, and reconsideration of this issue is denied.

C The Petitioner claims the Court failed to make a factual finding that the Department had no long standing administrative policy regarding the application of the infrastructure credit to partnerships

Argument 7 of the Petitioner’s Motion can be swiftly disposed of, in light of the fact that this Court accepted the Department’s plain language argument, limiting the credit solely to corporations. There is little need to inquire into the existence of an administrative policy applying a corporate credit to any other choice of business entity. It begs a question that this Court has clearly already ruled on in favor of the Department.

D The Petitioner claims that the Court failed to consider the argument of frustrating the purpose of economic incentive statutes

The Petitioner is mistaken in this claim. This issue was directly ruled upon on page 8 of the Order.

While I agree that this is indeed an economic incentive statute, I am not persuaded that applying the unambiguous corporate limitation included in subsection (A) defeats the encouragement of such investments. Evaluating the efficacy or validity of the Legislature’s prerogative to limit such incentives to a particular type of business entity rests not with this Court, and the policy decisions to encourage corporate activity need not be examined here.

I remain unwavering in the conclusions made therein, and deny the Petitioner’s request to reconsider, alter or amend this portion of the Order.

E The Petitioner claims that this Court erred in ruling based upon a corporate limitation, as such limitation conflicts with S C Code Ann § 12-20-105(G) (Supp 2010)

The license tax credit which the Petitioner refers to remains harmonious with this Court's interpretation of the infrastructure credit statute. Section 12-20-105 is simply another infrastructure credit to be taken against license tax liability by utilities and electric cooperatives. The cross-reference of subsection (G) with § 12-6-3420 is intended to prevent "double dipping" for infrastructure credits. Section 12-20-105 is limited solely to utilities and electric cooperatives. The Petitioner's contention that all cooperatives are not organized or taxed as corporations is quite incorrect. The definitional section for the Code chapter for cooperative associations, S C Code Ann § 33-45-10 (2006) reads "[f]or the purposes of this chapter the words 'association,' 'society,' 'company,' 'union,' and 'exchange' shall have the same signification and shall import a corporation " (Emphasis added). Cooperatives are incorporated entities, with bylaws, directors, and some do in fact owe tax pursuant to S C Code Ann § 12-6-530 (2000), such as Marketing Cooperative Associations. See S C Code Ann § 33-47-40 (2006). Interestingly enough, electrical cooperatives are exempt from income tax pursuant to S C Code Ann § 33-49-120 (2006), essentially making part of the cross-reference from the Code Commissioner meaningless, regardless of which interpretation of the infrastructure credit I accept. A likely oversight, by the Code Commissioner, as an electrical cooperative would never claim the credit found in § 12-6-3420 since it owes no income tax. Utility companies often do owe corporate income tax, however, and subsection (G) therefore remains harmonious with the corporate limitation argued by the Department, insofar as a

corporate utility would have to choose one credit over the other. Regardless, I fail to see how this argument supports the Petitioner's position, and decline to reconsider it.

F The Petitioner claims that this Court failed to make a factual finding that the Department's position that tax credit statutes must specifically provide for partnerships is inconsistent from its published position.

The Petitioner's argument in paragraph 13 of its Motion simply holds no merit, and was impliedly ruled upon by my analysis regarding the plain language of §§ 12-6-3420 and 12-6-3310. The flow-through provisions of § 12-6-3310 begin with "unless specifically prohibited." I remain unwavering in my interpretation of the corporate limitation of the infrastructure credit as being a quite specific limitation and therefore deny Petitioner's request for reconsideration on this issue.

G Petitioner contends that this Court failed to consider that Petitioner, as a corporation, may claim the credit per the express wording of the statute.

The Petitioner is also mistaken in this claim. I ruled directly on this matter on page 9 of the Order.

Thus, a corporation must directly incur the expenses that generate the tax credit. Because the expenses in question were directly incurred by a general partnership, the corporate partner cannot claim the credit based upon its indirect involvement in the partnership's business activity.

I am also persuaded by the rationale contained in Bell Atlantic Nynex Mobile, Inc. v. Comm'r of Revenue Services, 273 Conn. 240, 869 A.2d 611 (2005), which held that

All parties agree that, had the plaintiffs operated as thirteen separate corporations, instead of through a partnership, and had those corporations collectively paid the same taxes on the same equipment, each corporation would fall within the definition of "taxpayer" and would be able to use the associated tax credit to offset its tax liability under the

corporation business tax as the plaintiffs seek to do in the present case. **The plaintiffs, however, chose to operate through a partnership, not as separate corporations. Sophisticated business entities recognize selection of a business form as a critical decision that carries with it certain legal consequences, including tax implications.** The legislature's decision to grant a tax credit to certain business forms while denying it to others does not constitute an absurd result. The fairness of such decisions remains within the prerogative of the legislature, not of this court.

(Emphasis added) As such, I deny the Petitioner's request to reconsider, alter, or amend this issue.

H The Petitioner contends that examples of other tax credit statutes it provided were not considered by this Court in interpreting "taxpayer."

While not individually discussed in the Order, the Court certainly examined the applicable law in arriving at its decision. In an attempt to provide further clarification, the examples provided by the Petitioner, which include S.C. Code Ann. §§ 12-6-3410 (Supp. 2010), 12-6-3340, 12-6-3370, 12-6-3415 (2000), and 12-6-3570 (Supp. 2010) will be addressed here.

Petitioner's invocation of the corporate headquarters credit found at § 12-6-3410 is puzzling at best. No definition of "taxpayer" is found in this code section, nor are there any applications in regards to pass-through attributes of the credit. In fact, there are specific limitations that the credit is due only for direct expenditures, an element not incurred by the Petitioner in this case. This example provides little assistance to the Petitioner's case, and is simply not grounds to alter or amend the original Order.

Next the Petitioner provides the investment tax credit for purchase and installation of certain energy conservation and renewable energy production measures, pursuant to §

12-6-3340, as an example. It should be noted that the Department provided this example at trial. This credit begins broadly, stating that “[a] taxpayer may claim” the credit. The Petitioner’s use of this statute also does little to sway the Court’s opinion, as not only does it allow for all taxpayers to claim it, but also specifically provides a subsection (B) that details the method for pass-through entities to claim it, something the Legislature could have easily done if the Petitioner’s interpretation of intent was correct.

The Petitioner also provides § 12-6-3370, which is a credit for water impoundments and water control structures. This section was also noted by the Department at trial. This credit allows all taxpayers to claim it and provides specific instructions for pass-through entities. This example also does little to change my determination that the infrastructure credit’s corporate limitation bars the Petitioner from claiming it.

Next, the Petitioner provides § 12-6-3415, a tax credit for research and development expenditures. The only noteworthy portion of this credit is that the Legislature granted it to all taxpayers for “any tax due pursuant this chapter or Section 12-20-50.” This broad application for all income taxes or corporate license fees gives wide berth for a taxpayer like the Petitioner to claim it. There are no specific limitations by entity, and is easily juxtaposed with the infrastructure credit’s language limiting the credit’s application to corporate income tax due under § 12-6-530. I remain unwavering in my original analysis after considering this example.

Finally, the Petitioner provides § 12-6-3570, the motion picture tax credit. This credit specifically defines its use of the term taxpayer, in regards to the expenditures made, which could be construed to support the Petitioner’s argument that the General

Assembly could have defined taxpayer in § 12-6-3420 as well, had it meant to limit it. However, I am not persuaded that such a step is necessary, as the opening line of the infrastructure credit, coupled with pervasive context of the statute referring to corporations and dearth of any mention of pass-through entities supports my original interpretation. The request for reconsideration based upon these examples is therefore denied.

I The Petitioner claims that this Court failed to consider partnership tax rules, pass-through rules, the doctrine of *in pari materia*, aggregate theory, and the unitary business theory

To reiterate the discussion listed above, the Petitioner argues in paragraphs 17, 18, and 20 of its motion, that South Carolina's adoption of the Internal Revenue Code provisions for partnerships, specifically S C Code Ann §§ 12-6-40, 12-6-50, and 12-6-600 (Supp 2010), dictates that the tax credit be treated as if the individual corporate partners generated credits directly under a modified "aggregate theory."⁴ This contention is tenuous at best. I R C § 702(b), states in relevant part

The character of any item of income, gain, loss, deduction, or **credit** included in a partner's distributive share under paragraphs (1) through (7) of subsection (a) shall be determined as if such item were realized directly **from the source from which realized by the partnership or incurred in the same manner as incurred by the partnership**

⁴The Petitioner essentially argues from an equity standpoint that it is unfair to deny the corporate partners the tax credits when they spent over 68 million dollars on infrastructure and have to pay corporate income taxes on their distributive share from the partnership. However, equitable considerations would not serve the Petitioner well. As a sophisticated business entity, the ramifications of choosing to operate as a partnership, including tax implications, should have been part of that decision making process. See also United States v Brockamp, 519 U S 347, 352 (1997) (holding that tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities).

(Emphasis added)

The Petitioner's assertion that I R C § 702(b) allows the individual partners to realize all the general gains losses deductions, and credits that the partnership realized is absolutely correct. This does not, however, give the individual partners the ability to extend the reach that the partnership has in regards to its *eligibility* for tax credits with specific limitations. "It is well settled that [Internal Revenue Code] § 702(b) reflects a 'conduit' approach whereby the character of an item of income, gain, loss, deduction, or credit **is determined at the entity or partnership level before the item is passed through** to the partners." Rath v Comm'r, 101 T C 196, 203 (1993) (emphasis added). Therefore, in order for any sort of pass through to take place, the initial entity through which the credit is being transferred must have been eligible in the first place. Here, the partnership is simply not entitled to the infrastructure credit, and in that regard, it has nothing to pass through to its partners.

The Petitioner asserts that the word "qualify" within the pass-through provisions pertaining to partnerships in § 12-6-3310, should be interpreted to merely mean "make the qualifying expenditures" (Summ. J. Hr'g Tr. 30 9-13). This argument is predicated upon the simple fact that partnerships have no income tax liability, and ostensibly would never use a credit, in the most basic sense of the word. However, partnerships are required to file informational returns that include the distributive shares of income, losses deductions and credits to each partner, and I am not inclined to accept the Petitioner's depiction of partnerships as ethereal entities that have no legal purpose or ramifications in the realm of taxation. Partnerships do, in fact, claim credits. It is only the method of claiming that differs from other taxpayers. To illustrate, the examples of

credits listed above in footnote 3 provide express instructions for pass-through entities seeking to claim those credits, including how to allocate the credit among partners. While a partnership claiming an allocable credit does not offset an aggregate tax liability for the group it can qualify for and pass through credits – this act is the method by which partnerships “use” credits. The fundamental fallacy in the Petitioner’s logic, however, appears within the first three words of the pass-through statute which states “[u]nless specifically prohibited.” The express corporate limitation of § 12-6-3420 is, in fact, a quite specific prohibition. This direct statutory mandate firmly undercuts the partnerships ability to ever *qualify* for the credit, and therefore, the credit cannot be claimed and passed through to the partners. The infrastructure credit includes no language indicating pass through entities could qualify, nor does it begin with the more common phrase “[a] taxpayer may claim.” That broad range of possible claimants is used in every other credit statute that does provide for pass through entities. Such is not the case for § 12-6-3420. I am not persuaded that my application of partnership laws and pass-through rules was incorrect and deny the requested relief for these issues.

The doctrine of *in pari materia* is also not disturbed by this Court’s Order. I find that this Court has effectively reached a harmonious result between the pass-through provisions of § 12-6-3310 and the infrastructure statute. Because the corporate limitation of the credit is clear and unambiguous, I find that the partnership in this case is not considered a “qualifying” entity and therefore the pass-through statute is simply not triggered. Reconsideration is denied on these grounds.

J The Petitioner claims this Court failed to rule upon single taxpayer treatment when a consolidated return is filed

In order for a consolidated group to claim the credit on a consolidated basis, § 12-6-3420 requires that at least one corporation of the group must first be entitled to the credit. Subsection (H) states that “[t]he tax credit may be determined on a consolidated basis regardless of whether or not the corporation entitled to the credit contributed to the tax liability of the group.” The fallacy of the Petitioner’s contention is that although correct in that the credit can be applied on a consolidated basis, it is mistaken in presuming that the corporate partners were ever entitled to the credit in the first place. For the reasons clearly outlined above, the consolidated group is not entitled to the credit on the same basis as the denial for the corporate partners.

K. The Petitioner claims that this Court failed to consider its argument that denying this credit would set an unfavorable precedent

The argument found in paragraph 21 of its motion, is simply not within the scope of this Court’s consideration in determining the eligibility for tax credits. The prerogative of the Legislature to limit such eligibility to specific business entities rests not with this Court, and I do not accept the Petitioner’s invitation to wade into the murky political waters by weighing the possibility of disappointing partnerships poised to invest in this State’s infrastructure.

L. The Petitioner contends that this Court did not consider its arguments against the persuasive jurisprudence proffered by the Department

Paragraph 22 of the Petitioner’s Motion states that the Rath and Bell Atlantic decisions are “completely distinguishable from the facts in this case as the statutes in both clearly and unambiguously excluded the petitioners in those cases from claiming the deductions (Rath) and credits (Bell Atlantic) at issue.” The Petitioner could not have

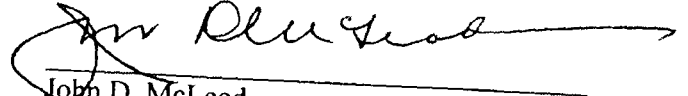
stated the reason why these cases apply more perfectly, as this Court remains convinced that the infrastructure credit at issue here clearly and unambiguously excludes partnerships from eligibility. I continue to find these holdings to be persuasive and highly instructive holdings that provide a sound basis of rationale that supports the Order granting the Department partial summary judgment. Reconsideration of these decisions as they apply to the case at bar is therefore denied.

M The Petitioner claims this Court failed to consider its argument that deductions and credits should be treated the same

The final argument presented for reconsideration is based, rather loosely, on the partnership conduit approach mentioned above. While the Petitioner is again correct that deductions and credits are realized directly from the source from which realized by the partnership or incurred in the same manner as incurred by the partnership, the Petitioner presupposes that the credit at issue here was ever actually “incurred.” To repeat the language above, “[i]t is well settled that [Internal Revenue Code] § 702(b) reflects a ‘conduit’ approach whereby the character of an item of income, gain, loss, deduction, or credit is determined at the entity or partnership level before the item is passed through to the partners.” Rath v. Comm’r, 101 T.C. 196, 203 (1993) (emphasis added). The character of the infrastructure credit includes the corporate limitation, and therefore the partnership’s lack of eligibility cannot be circumnavigated by the existence of corporate partners. Reconsideration on these grounds is also denied.

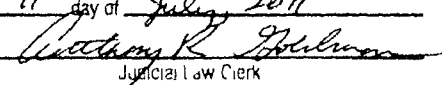
WHEREFORE, for the reasons set forth more fully herein, the taxpayer has not established entitlement to the tax credits contained in § 12-6-3420, and the Petitioner’s Motion for Reconsideration and Motion to Alter or Amend **IS DENIED**.

AND IT IS SO ORDERED


John D. McLeod
Administrative Law Judge

Columbia, South Carolina
July 11, 2011

This is to certify that the undersigned has this date
served this order on the above entitled action upon all
parties to this cause by depositing a copy hereof
in the United States mail postage paid or in the Interagency
Mail Service addressed to the party(ies) or their attorney(s)

This 11 day of July, 2011
By: 
Judicial Law Clerk

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Centex International, Inc
and Affiliates

Petitioner,

v

South Carolina Department of
Revenue,

Respondent

) **DOCKET NO 09-ALJ-17-0532-CC**
)
)

) **ORDER GRANTING RESPONDENT'S**
) **MOTION FOR PARTIAL**
) **SUMMARY JUDGMENT**
)

RECEIVED

AUG 03 2011

SC Court of Appeals

APPEARANCES Petitioner John von Lehe, Jr , Esquire, Bryson M Geer, Esquire
 Respondent Adam N Marinelli, Esquire

STATEMENT OF THE CASE

This matter comes before the Administrative Law Court (ALC or Court) pursuant to S C Code Ann §§ 12-60-460 470 (Supp 2010) This action began when the Petitioner (Petitioner or taxpayer) filed amended returns in 2007 adjusting the apportionment ratio for its income from the sale of bundled mortgages for the 2002-2005 tax years The amended returns also claimed infrastructure tax credits based upon the expenditures made by disregarded subsidiaries of the Petitioner, operating in South Carolina as a general partnership The Department of Revenue (Department) determined the taxpayer was not entitled to the apportionment adjustments, or the claim for infrastructure tax credits made therein, on the basis that the infrastructure expenses were incurred by an unqualified affiliate of the taxpayer a general partnership rather than the taxpayer directly On July 25 2007, the Department disallowed the adjustments made on the Petitioner's amended returns for the 2002 2005 tax years, issued a notice of proposed assessment, and denied the claim for credits On October 23 2007 the Petitioner wrote

FILED

JUN 02 2011

SC ADMIN LAW COURT

the Department appealing the denial of the credit and the notice of proposed assessment. The Department issued its Determination on December 4, 2009 setting forth the legal basis for its adjustments and denial of the claim for credits. On December 7, 2009, the Petitioner requested a contested case hearing before this Court to dispute the Department's Determination. Prior to a hearing on the merits, the Department filed a Motion for Partial Summary Judgment on the infrastructure credit question to which the Petitioner responded with a Cross-Motion for Summary Judgment on the same issue. With both parties stipulating that no issue of fact remained on the infrastructure credit issue, a hearing was held before this Court on March 31, 2011, at the offices of the ALC.

STATEMENT OF FACTS

The following facts were undisputed between the parties:

Centex Homes is a general partnership that is wholly owned by three corporate affiliates of Centex International. It purchases, develops, sells land or lots, and constructs and sells single family homes in South Carolina and many other states. As part of its business in this State, the partnership incurred expenses from constructing or improving the infrastructure within certain developments.

For tax years 2002-2005, the parent company - Centex International & Affiliates filed amended corporate income tax returns, which included amended partnership returns for Centex Homes, claiming tax credits pursuant to S.C. Code Ann. § 12-6-3420 (Supp. 2010) for expenses Centex Homes incurred in constructing or improving infrastructure in those areas that the partnership developed. Upon audit, these credits were denied by the Department.

The Department also audited the taxpayer for South Carolina corporate income

tax periods ending March 2002 through March 2005. The Department's audit determined that the taxpayer had incorrectly calculated its South Carolina corporate income in failing to apportion the amounts of revenue from the out-of-state sale of intangibles generated from activity in South Carolina. Subsequently, the Department issued a proposed assessment against the taxpayer, and the taxpayer timely protested the proposed assessment and denial of the credits. The taxpayer filed for a contested case hearing before the ALC, and the instant action arises from these operative facts.

CONCLUSIONS OF LAW

Based upon the submitted briefs, oral arguments presented, and a thorough examination of the applicable statutes and jurisprudence, I conclude the following as a matter of law:

S.C. Code Ann. § 12-60-30 (Supp. 2010) grants jurisdiction to this Court to hear contested cases under the Administrative Procedures Act. Specifically, § 12-60-460 grants this Court the authority to conduct contested case hearings in matters concerning taxes. The burden of proof is with the party asserting the affirmative in an adjudicatory administrative proceeding. 2 Am. Jur. 2d Administrative Law § 354 (2004). In the instant matter, it is the taxpayer who requested a contested case hearing to challenge the Department's Determination. Thus, the taxpayer asserts the affirmative and must carry the burden of proving the Department's Determination is incorrect. Id., cf. Cloyd v. Mabry, 295 S.C. 86, 367 S.E.2d 171 (Ct. App. 1988).

Rule 56(c) SCRCP provides that a trial court may grant a motion for summary judgment 'if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law ” See Bovain v Canal Ins., 383 S C 100, 105 678 S E 2d 422 424 (2009)

ISSUE

IS THE PETITIONER ENTITLED TO A REFUND FOR THE INFRASTRUCTURE TAX CREDITS PURSUANT TO § 12-6-3420 FOR EXPENDITURES MADE BY AN AFFILIATE OPERATING AS A GENERAL PARTNERSHIP?

The present matter involves the denial of a claim for the infrastructure tax credits pursuant to § 12-6-3420. It is well established in South Carolina that tax deductions are not a matter of right, rather, they are a matter of legislative grace and a taxpayer claiming one must bring himself squarely within the terms of the statute expressly authorizing it Allied Corp v S C Tax Comm'n, 288 S C 197 199 341 S E 2d 139, 141 (1986). Moreover, I would note that the allowance of a tax credit is analogous to a tax deduction since both are a matter of legislative grace SCANA Corp v S C Dept of Revenue, 384 S C 388, 394, 683 S E 2d 468, 471 (2009) (Beatty, J dissenting) ¹

When construing a statute, the cardinal rule is to ascertain the intent of the Legislature Georgia-Carolina Bail Bonds, Inc v County of Aiken, 354 S C 18, 22, 579 S E 2d 334, 336 (Ct App 2003). “All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose

¹I note the rule of construction in other jurisdictions is also that because a tax credit is a matter of grace, it is strictly construed against the taxpayer. See, e.g., Texasgulf, Inc v Comm'r of Internal Revenue, 172 F 3d 209 (2d Cir 1999), Team Specialty Prods, Inc v N M Taxation & Revenue Dep't, 137 N M 50, 107 P 3d 4 (2004), MacFarlane v Utah State Tax Comm'n, 134 P 3d 1116 (Utah 2006) Midland Fin Corp v Wis Dep't of Revenue, 116 Wis 2d 40, 341 N W 2d 397 (1983).

of the statute ” Id. at 23, 579 S E 2d at 336 The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation Hitachi Data Sys Corp v Leatherman, 309 S C 174 178 420 S E 2d 843 846 (1992) Furthermore, “[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons ” Brown v S C Dep't of Health & Env'tl Control 348 S C 507, 515, 560 S E 2d 410, 414 (2002) (quoting Dunton v S C Bd of Examin rs in Optometry 291 S C 221, 223, 353 S E 2d 132 133 (1987)), see also Nucor Steel v S C Pub Serv Comm'n, 310 S C 539, 543, 426 S E 2d 319, 321 (1992) (recognizing that where an agency is charged with the execution of a statute, the agency's interpretation should not be overruled without cogent reason)

Most important to this case is the proposition that a court should not consider a particular clause being construed in isolation but should read it in conjunction with the purpose of the whole statute and the policy of the law South Carolina Coastal Council v South Carolina State Ethics Comm'n, 306 S C 41, 44, 410 S E 2d 245, 247 (1991) The terms [of a statute] must be construed **in context** (emphasis supplied) and their meaning determined by looking at the other terms used in the statute *333 S Mut Church Ins Co v South Carolina Windstorm & Hail Underwriting Ass'n, 306 S C 339, 342, 412 S E 2d 377, 379 (1991), Dupree, 354 S C at 693 583 S E 2d at 446

A The Plain Language Argument

Both parties contend that the plain language of § 12-6-3420 supports their position Section 12-6-3420 unambiguously states

(A) A **corporation** may claim a credit for the construction or improvement of an infrastructure project against taxes due under Section 12-6-530 or Section 12-11-20 for

- (1) expenses paid or accrued by the taxpayer,
- (2) contributions made to a governmental entity, or
- (3) contributions made to a qualified private entity in the case of water or sewer lines and their related facilities in areas served by a private water and sewer company

(Emphasis added) The taxpayer has sought to interpret the term “taxpayer” in subsection (A)(1) broadly to extend beyond the entity that directly incurred the expenses, while the Department has argued that the term is constrained by the corporate limitation imposed within the first line of the statute. I am inclined to agree with the latter interpretation.

Petitioner argues the definition of “taxpayer” found in §12-6-30(1) includes Petitioner as a partnership. §12-6-30(1) provides “**unless otherwise required by the context**”(emphasis supplied) means “an individual, trust, estate, partnership, association, company, corporation or any other entity subject to the tax imposed by this chapter or required to file a return.”

Considering, as I must, the statute as a whole, I find that its context requires that the credit must be limited to corporations. §12-6-3420 (G), (H) and (I), all make references that leave no doubt that §12-6-3420, read as a whole, refers only to corporations, viz:

(G) If a road qualifying for the credit is subsequently removed from the state highway or public road system, the amount of the credit allowed for the construction of the road must be added to any **corporate income tax due from the taxpayer** in the first taxable year following the removal of the road from public use. The department may implement the provisions of this subsection by rules or regulation.

(H) A **corporation** which files or is required to file a consolidated return is entitled to the income tax credit allowed by this section on a consolidated basis. The tax credit may be determined on a consolidated basis regardless of whether or **not the corporation entitled to the credit** contributed to the tax liability of the consolidated group.

(I) The merger, consolidation or reorganization of a **corporation** where tax attributes survive does not create new eligibility in a succeeding **corporation** but unused credits may be transferred and continued by the succeeding **corporation**. In addition, a **corporation** may assign its rights to its unused credit to another **corporation** if it transfers all, or substantially all, of the assets of the corporation or all, or substantially all, of the assets of a trade or business or operating division of a **corporation** to another **corporation**.

The Department argues that this credit extends only to expenses incurred by corporations, not general partnerships, grounding its application in the plain wording of the statutory language and the doctrine of *ejusdem generis*. Under that doctrine, the meaning of general words (in this case, “taxpayer”) may be restricted by words of specification which precede them (“corporation”) on the theory that, had the Legislature intended the general words be used in their unrestricted sense, there would have been no mention of the particular class. State v. Four Video Slot Machines, 317 S.C. 397, 400, 453 S.E.2d 896, 898 (1995) (citing State v. Patterson, 261 S.C. 362, 200 S.E.2d 68 (1973)).

In response to this, the Petitioner contends that *ejusdem generis* should not be applied if doing so would defeat the clear purpose of the statute. (Petr.’s Cross Mot. For Partial Summ. J. 12) (citing U.S. v. Alpers, 338 U.S. 680 (1950) and State v. Southern Farm Bureau Life Ins. Co., 265 S.C. 402 (1975)). This argument rests upon the

Petitioner s claim that § 12-6-3420's purpose is "to encourage capital investments in infrastructure in South Carolina " (Petr s Cross Mot For Summ J 12) While I agree that this is indeed an economic incentive statute I am not persuaded that applying the unambiguous corporate limitation included in subsection (A) defeats the encouragement of such investments Evaluating the efficacy or validity of the Legislature s prerogative to limit such incentives to a particular type of business entity rests not with this Court, and the policy decisions to encourage corporate activity need not be examined here

During oral arguments, Counsel for Respondent further noted that if the corporate limitation in Section (A) was not intended to apply to the remainder of the statute, subsections (A)(2) and (A)(3) would become inherently ambiguous in that no reference is given to evince from whom the ' contributions' are made (Summ J Hr'g Tr 10, March 31, 2011) I find that the clear and logical reading of those two subsections is to relate each back to ' corporation' contained in the primary section (A) To abandon this logic in interpreting subsection (A)(1) would be erroneous, and will be further examined below

The Petitioner asserts that since the corporate partners of Centex Homes indirectly paid or accrued expenses to create or improve infrastructure, it may claim the infrastructure tax credits in § 12-6-3420(A)(1) To reach this interpretation, one must read the statute disjunctively, separating the type of entities allowed to claim this credit from the entities allowed to make qualifying expenditures I find this interpretation to be unfounded and fails to place the taxpayer squarely within the terms of the statute See Allied Corp, 288 S C at 199, 341 S E 2d at 141 The Petitioner supports its reading of the credit statute by arguing that the general partnership is in fact, a 'taxpayer' as defined by language in S C Code Ann § 12-6-30(1) (2000) that enumerates the types of

entities subject to taxation under Title 12. These entities include individuals, trusts, estates, partnerships, associations, companies, corporations, 'or any other entity subject to the tax imposed by this chapter or required to file a return.' Section 12-6-30(1). However, in order for this Court to apply the definition of § 12-6-30(1) to the infrastructure credit's inclusion of the word "taxpayer," each of the entities enumerated therein must be a feasible substitution.² This inevitably leads to absurd results and therefore I am not inclined to agree with this application.

As noted above, when § 12-6-3420 is read together in its entirety, it is clear that "the taxpayer" in subsection (A)(1) is limited to the "corporation" attempting to claim the credit, as referred to in subsection (A). Thus, a corporation must directly incur the expenses that generate the tax credit. Because the expenses in question were directly incurred by a general partnership, the corporate partner cannot claim the credit based upon its indirect involvement in the partnership's business activity. Furthermore, during oral arguments it was made apparent that the long-standing policy of the Department in interpreting tax credit statutes, has been that "[e]xcept as otherwise provided, a credit must be used by the taxpayer that earns it." See Pet. r. Ex. G at 21, (Summ. J. Hr'g Tr. 60:5-7). Absent cogent reason, this Court declines the Petitioner's invitation to negate this long-standing policy. See Nucor Steel, 310 S.C. at 543.

B The Pass Through Entity Argument

One exception to that rule, which would allow an avenue for indirect expenditures to create access to tax credits, is contained within S.C. Code Ann. § 12-6-3310(B)(1).

²Counsel for Respondent suggested during the hearing that inserting "individual" or "trust" for the word taxpayer, for example, presents an unworkable disjunction between subsection (A) and (A)(1).

(Supp 2010) The pass through provisions of that section state that “[u]nless specifically prohibited an 'S' corporation, limited liability company taxed as a partnership, or **partnership that qualifies for a credit** pursuant to this article may pass through the credit earned to each shareholder of the 'S' corporation member of the limited liability company or partner of the partnership ’ (Emphasis added) To that extent, a tax credit may only be passed through to individual partners after the partnership itself *qualifies* for the tax credit As noted above, the tax credits the Petitioner is seeking to pass through its partnership is exclusively limited to corporations by the General Assembly, as § 12-6-3420 plainly states that only a “corporation may claim [the credit] against taxes due under Section 12-6-530 ” The intent of the Legislature to limit the eligibility for this credit solely to corporations is unambiguous and clear from the plain language This application of § 12-6-3420 is further supported by the Legislature’s reference to S C Code Ann § 12-6-530 (2000), which is South Carolina’s corporate income tax statute During oral argument, Counsel for Respondent presented several examples³ of tax credits that incorporated express language for the applicability of the pass through provisions of § 12-6-3310 (Summ J Hr’g Tr 12)

The Petitioner contends that the use of the word “claim” in § 12-6-3420(A) should be read as separate from the act of generating the credit, and therefore, any corporate member of the Centex Homes partnership that indirectly incurred some of the infrastructure expenses should be able to claim the credit This argument is also without

³See, S C Code Ann §§ 12-6-3340- Renewable Energy Credit, 12-6-3370- Water Control Structure Credit, 12 6-3560- Motion Picture and Advertisement Company Credit (2000) (The Motion Picture credit expressly provides for corporate partners generating the credit through indirect expenditures in a general partnership)

merit Tax credits are conferred by legislative grace and are not assignable in the absence of either explicit contractual or statutory language DaimlerChrysler Services N. Am., LLC v. Ariz. Dep't of Revenue, 210 Ariz. 297, 304, 110 P.3d 1031, 1038 (Ct. App. 2005) (quoting DaimlerChrysler Services N. Am., LLC v. State Tax Assessor, 817 A.2d 862, 866 (Me. 2003)). Income tax is generally assessed on an individual taxpayer, and concurrently, tax credits and refunds are generally conferred upon the taxpayer that originally generated the credit. Absent a statutory provision stating otherwise, the general rule is that tax benefits may only be claimed by the taxpayer that generated that benefit. Our Legislature included the "qualified claimant prerequisite" in the flow through provisions of § 12-6-3310(B)(1), on the basis of this premise. In order for the flow through provisions to remain consistent with the corporate limitations of § 12-6-3420, the word "claim" must be interpreted as synonymous with "generate." Consequentially, because the partnership was not qualified to claim the tax credit in the first place, none of its corporate partners may do so under § 12-6-3310(B)(1).

The Petitioner further argues that South Carolina's adoption of the Internal Revenue Code provisions for partnerships, specifically S.C. Code Ann. §§ 12-6-40, 12-6-50, and 12-6-600 (Supp. 2010), dictates that the tax credit be treated as if the individual corporate partners generated credits directly under a modified "aggregate theory."⁴ This contention is tenuous at best. The I.R.C. § 702(b) states in relevant part

⁴The Petitioner essentially argues from an equity standpoint that it is unfair to deny the corporate partners the tax credits when they spent over 68 million dollars on infrastructure and have to pay corporate income taxes on their distributive share from the partnership. However, equitable considerations would not serve the Petitioner well. As a sophisticated business entity, the ramifications of choosing to operate as a partnership, including tax implications, should have been part of that decision making process. See

The character of any item of income, gain, loss, deduction, or **credit** included in a partner's distributive share under paragraphs (1) through (7) of subsection (a) shall be determined as if such item were realized directly **from the source from which realized by the partnership or incurred in the same manner as incurred by the partnership**

(Emphasis added)

The Petitioner's assertion that I R C § 702(b) allows the individual partners to realize all the general gains, losses, deductions, and credits that the partnership realized is absolutely correct. This does not, however, give the individual partners the ability to extend the reach that the partnership has in regards to its *eligibility* for tax credits with specific limitations. "It is well settled that [Internal Revenue Code] § 702(b) reflects a 'conduit' approach whereby the character of an item of income, gain, loss, deduction, or credit **is determined at the entity or partnership level before the item is passed through** to the partners." Rath v. Commissioner, 101 T.C. 196, 203 (1993) (emphasis added). Therefore, in order for any sort of pass through to take place, the initial entity through which the credit is being transferred must have been eligible in the first place. Here, the partnership is simply not entitled to the infrastructure credit, and in that regard, it has nothing to pass through to its partners.

The Petitioner asserts that the word "qualify" within the pass through provisions pertaining to partnerships of § 12-6-3310, should be interpreted to merely mean "make the qualifying expenditures" (Summ. J. Hr'g Tr. 30-9-13). This argument is predicated upon the simple fact that partnerships have no income tax liability, and ostensibly would

also United States v. Brockamp, 519 U.S. 347, 352 (1997) (holding that tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities)

never use a credit, in the most basic sense of the word. However, partnerships are required to file informational returns that include the distributive shares of income losses, deductions and credits to each partner and I am not inclined to accept the Petitioner's depiction of partnerships as ethereal entities that have no legal purpose or ramifications in the realm of taxation. Partnerships do, in fact, claim credits. It is only the method of claiming that differs from other taxpayers. To illustrate, the examples of credits listed above in footnote 4 provide express instructions for pass through entities seeking to claim those credits, including how to allocate the credit among partners. While a partnership claiming an allocable credit does not offset an aggregate tax liability for the group, it can qualify for and pass through credits – this act is the method by which partnerships “use” credits. The fundamental fallacy in the Petitioner's logic, however, appears within the first three words of the pass through statute which states “[u]nless specifically prohibited.” The express corporate limitation of § 12-6-3420 is, in fact, a quite specific prohibition. This direct statutory mandate firmly undercuts the partnerships ability to ever *qualify* for the credit, and therefore, the credit cannot be claimed and passed through to the partners. The infrastructure credit includes no language indicating pass through entities could qualify nor does it begin with the more common phrase “[a] taxpayer may claim.” That broad range of possible claimants is used in every other credit that does provide for pass through entities. Such is not the case for § 12-6-3420.

The Petitioner finally argues that to disallow the infrastructure tax credits to the corporate partners when they would have been qualified if acting independently would lead to an unjust result. Although South Carolina courts have not specifically addressed

the issue of corporate tax credits passing through a partnership for corporate partners other jurisdictions have done so. In Rath, shareholders of a subchapter S corporation attempted to claim an ordinary loss deduction arising from a sale of I R C § 1244 stock by the S corporation. Applying the plain language of the statute, the court found that the S corporation was not entitled to the ordinary loss deduction because “[s]imply stated, ordinary loss treatment is only available where section 1244 stock is issued to an individual or a partnership and then sold by that individual or partnership at a loss.” Id. at 200.

Despite the fact that the initial entity was precluded from claiming the ordinary loss deduction, the shareholders of the S corporation in Rath argued that they were entitled to report the loss on the sale of the stock on their federal income tax returns pursuant to a flow through provision in I R C § 1366(b), which states in pertinent part

(b) Character Passed Thru. The character of any item included in a shareholder’s pro rata share under paragraph (1) of subsection (a) shall be determined as if such item were realized directly from the source from which realized by the corporation, or incurred in the same manner as incurred by the corporation.

The Rath court found that the shareholders’ reliance on the flow through provision was misplaced, and applied the conduit approach used in I R C § 702(b) to find that although the “Petitioners read section 1366(b) as requiring an S corporation shareholder to step into the shoes of the corporation for purposes of determining the character of a loss incurred on a sale of section 1244 stock,” section 1366(a) and (b) requires the character of the loss to be determined from the viewpoint of the S corporation rather than from the

viewpoint of its individual shareholders” Id. at 204. The claimed loss was therefore denied.

The Supreme Court of Connecticut also addressed the applicability of a similarly worded credit provision in Bell Atlantic Nynex Mobile, Inc. v. Commissioner of Revenue Services, 273 Conn. 240, 869 A.2d 611 (2005), when corporate partners of a partnership attempted to claim a tax credit under C.G.S.A. § 12-217t for payment of personal property taxes on electronic data processing equipment. The language in § 12-217t, similar to the infrastructure credit at issue here, provided a property tax credit for “taxpayers.” In its analysis of the controlling statute, the court observed “[a]s the payer of the property tax on the electronic data equipment, [the partnership] qualifies as a ‘taxpayer’ as that term is generally understood. This general understanding of the meaning of ‘taxpayer’ does not control the term’s usage in § 12-217t, however, because § 12-213 contains the statutory definition of the term.” Id. at 256, 869 A.2d at 621. C.G.S.A. § 12-213(a)(1) defines “taxpayer” to mean

[A]ny corporation, foreign municipal electric utility as defined in section 12-59, electric distribution company, as defined in section 16-1, electric supplier, as defined in section 16-1, generation entity or affiliate, as defined in section 16-1, joint stock company or association or any fiduciary thereof and any dissolved corporation which continues to conduct business but does not include a passive investment company or municipal utility, as defined in section 12-265[]

Because “partnership” was absent from the entities qualifying as taxpayers, the partnership was precluded from claiming a credit under § 12-217t. Id. Therefore, the court concluded that “[the partnership] has not used and, indeed cannot use the tax credit against taxes paid under either the corporation business tax or other chapters specified in

§ 12-217t as required by the statute because as a partnership it has no income tax liability under those chapters Id. at 257, 869 A 2d at 621

Undaunted the partnership in Bell Atlantic then asserted that the corporate partners were entitled to claim the credit under a conduit approach exactly as the Petitioner here argues Id. at 261 869 A 2d at 624 The court again disallowed the credit, stating

Establishing that corporation business tax attributes pass through the partnership to the partners with the same character that they had at the partnership level does not suffice to establish that [the partnership's] payment of the municipal property tax resulted in a credit that can be attributed to the partners Under the conduit approach 'the character of [the tax attribute] is determined *at the entity or partnership level* before the item is passed through to the partners ' In the present case, [the partnership's] payment of the municipal property tax was just that, a payment, not a tax credit Not every action taken by the partnership passes through to the partners as if they performed the act Section 702(b) of the Internal Revenue Code provides that '[t]he character of any item of income, gain, loss, deduction, or credit included in a partner's distributive share shall be determined as if such item were realized directly from the source from which realized by the partnership or incurred in the same manner as incurred by the partnership ' This provision does pass credits through a partnership to its partners It does not, however, create credits [The partnership s] payment of the municipal property tax did not result in a tax credit because, under the Connecticut tax statute, it cannot be said that [the partnership] was plainly and unambiguously eligible to receive such a credit

Id. at 264-65, 869 A 2d at 625-26 (Internal citations omitted) (Emphasis added)

Finally, the corporate partners of the partnership asserted that an unjust result would occur if the court disallowed the tax credit, nearly identical to claims of the Petitioner here The Court addressed this argument and declared

Finally, the plaintiffs argue that an interpretation of § 12-217(t) that does not permit the partners to use the tax credit leads to an absurd result because it denies two corporations acting through a partnership a benefit that each party could obtain if it acted on its own. All parties agree that, had the plaintiffs operated as thirteen separate corporations, instead of through a partnership, and had those corporations collectively paid the same taxes on the same equipment, each corporation would fall within the definition of “taxpayer” and would be able to use the associated tax credit to offset its tax liability under the corporation business tax, as the plaintiffs seek to do in the present case. **The plaintiffs, however, chose to operate through a partnership, not as separate corporations. Sophisticated business entities recognize selection of a business form as a critical decision that carries with it certain legal consequences, including tax implications.** The legislature’s decision to grant a tax credit to certain business forms while denying it to others does not constitute an absurd result. The fairness of such decisions remains within the prerogative of the legislature, not of this court.

Id. at 265, 869 A.2d at 626 (emphasis added)

The Petitioner in this case chose the form of its organization as a sophisticated entity. Such a choice carries similar implications as described by the Supreme Court of Connecticut, and the Petitioner must accept the benefits and costs of its decision to organize in such a fashion.

The Court of Appeals of Wisconsin came to an identical conclusion regarding corporate tax credit eligibility for partnerships who sought to claim “a tax reduction credit pursuant to sec. 71.043(2), Stats., based on its distributive share of the sales and use taxes paid by [the general partnerships].” L & W Construction Co. v. Wisc. Dep’t of Revenue, 149 Wis. 2d 684, 687, 439 N.W.2d 619, 620 (Ct. App. 1989). The relevant portion of that statute stated

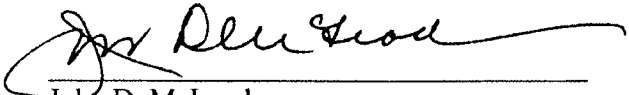
(2) The tax imposed upon or measured by corporation net income may be reduced by an amount equal to the sales and use tax under ch 77 paid by the corporation in such taxable year on fuel and electricity consumed in manufacturing tangible personal property in this state

Id (Emphasis added) Upon consideration of the statute, the court stated that if ‘ a different entity owned by the corporation actually pays the sales and use taxes there is no statutory provision for a tax credit to the corporation Id at 689, 439 N W 2d at 621 The court construed the tax credit strictly against the taxpayer and found that “[b]ecause L & W did not directly pay the partnerships’ costs of fuel and electricity, nor the resultant sales and use tax, it ha[d] not met the burden of showing that it [was] clearly within the terms of the credit statute” and therefore was “not entitled to the sec 71 043(2) Stats , income tax reduction for the sales and use tax paid by the partnerships ” Id at 691, 439 N W 2d at 621

Although these decisions are not binding on South Carolina jurisprudence, they are highly instructive and support the Respondent s position that a flow through of the infrastructure tax credits may take place only when the initial entity is qualified to claim it in the first place Simply put, Centex Homes does not qualify for the corporate tax credits because it is a general partnership Because Centex Homes is not eligible for the infrastructure tax credits, it cannot pass through these credits to its individual corporate partners

WHEREFORE for the reasons set forth more fully herein, the taxpayer has not established entitlement to the tax credits contained in § 12-6-3420 Department’s Motion for Partial Summary Judgment **IS GRANTED**, and the Petitioner’s Cross Motion **IS DENIED**

AND IT IS SO ORDERED


John D. McLeod
Administrative Law Judge

Columbia, South Carolina
June 2, 2011

CERTIFICATE OF SERVICE
This is to certify that I have signed and on this date
served this order in the above entitled action upon all
parties to this cause by depositing a copy hereof
in the United States mail postage paid or in the Interagency
Mail Service addressed to the party(ies) or their attorney(s)

This 2 day of June, 2011
By Anthony R. Hollman
Judicial Law Clerk