The Supreme Court of South Carolina

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TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
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March 4, 2016

The Honorable Jane E. Shealy
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

REMITTITUR

Re: Duke Energy v. SCDOR
Lower Court Case No. 2010-ALJ-17-0270-CC
Appellate Case No. 2014-002736

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc: Burnet Rhett Maybank, III, Esquire
Eric S. Tresh, Esq, Esquire
Maria M. Todorova, Esq, Esquire

Jeffrey A. Friedman, Esq, Esquire
Milton Gary Kimpson, Esquire
John Marion S. Hoefer, Esquire
Tracey Colton Green, Esquire
John William Roberts, Esquire
Lewis Francis Gossett, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Duke Energy Corporation, Petitioner,

v.

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2014-002736

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Opinion No. 27606
Heard November 18, 2015 – Filed February 17, 2016

AFFIRMED AS MODIFIED

Burnet Rhett Maybank, III, of Nexsen Pruet, LLC, of Columbia; Jeffrey A. Friedman, of Washington, D.C., Eric S. Tresh and Maria M. Todorova, of Atlanta, Georgia, all of Sutherland, Asbill & Brennan, LLP, all for Petitioner Duke Energy Corporation.

John Marion S. Hoefer, Tracey Colton Green, and John William Roberts, all of Willoughby & Hoefer, PA, of Columbia; and Milton Gary Kimpson, of Columbia, all for Respondent South Carolina

Department of Revenue.

CHIEF JUSTICE PLEICONES: We granted certiorari to review the Court of Appeals' decision affirming the administrative law judge's finding that the principal recovered from the sale of short-term securities was not includible in the sales factor of the multi-factor apportionment formula, and, therefore, Duke Energy was not entitled to a tax refund. *See Duke Energy Corp. v. S.C. Dep't of Revenue*, 410 S.C. 415, 764 S.E.2d 712 (Ct. App. 2014). We affirm as modified.

FACTS

The controversy in this case arises from the South Carolina Department of Revenue's ("SCDOR") computation of Duke Energy's taxable income.

Duke Energy generates and sells electricity. Because Duke Energy does business in both North Carolina and South Carolina, it must apportion its income to determine its income tax liability in South Carolina. *See* S.C. Code Ann. § 12-6-2210(B) (2014)[1] ("If a taxpayer is transacting or conducting business partly within and partly without this State, the South Carolina income tax is imposed upon a base which reasonably represents the proportion of the trade or business carried on within this State.").

Duke Energy has a treasury department responsible for purchasing and selling securities, such as commercial paper, corporate bonds, United States Treasury bills and notes, United States money market preferred securities, loan repurchase agreements, and municipal bonds. In 2002, Duke Energy filed amended corporate tax returns with the SCDOR for the income tax years of 1978 to 2001, seeking a total refund of $126,240,645 plus interest.[2] In the amended returns, Duke Energy

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[1] Section 12-6-2210(B) was enacted in 1995 and effective for all taxable years after 1995. The language of the statute applicable to years prior to § 12-6-2210(B) varies slightly, but the effect is the same. *See* S.C. Code Ann. § 12-7-250 (1976).

[2] Duke Energy requested recalculation of its tax liability for tax years 1978 to 2001. The ALC found Duke Energy's claims for tax years 1978 to 1993 were untimely, and this issue has not been appropriately preserved for review by this Court. *See* Rule 208(b)(1)(D), SCACR (stating an issue which is not argued in the

sought to include the principal recovered from the sale of short-term securities from 1978 to 1999 in the sales factor of the multi-factor apportionment formula. In its original returns, Duke Energy included only the interest or gain from those transactions.

The SCDOR denied the refund request. Duke Energy appealed the decision to the SCDOR's Office of Appeals. The Office of Appeals denied Duke Energy's refund request, finding, *inter alia*, that including recovered principal in the apportionment formula: was contrary to the SCDOR's long-standing administrative policy, would lead to an absurd result, and would misrepresent the amount of business Duke Energy does in South Carolina.

Duke Energy filed a contested case in the Administrative Law Court ("ALC"). The ALC was asked to determine whether Duke Energy, in its amended returns, properly included the principal recovered from the sale of short-term securities in the sales factor of the multi-factor apportionment formula. The parties filed cross-motions for summary judgment. Duke Energy claimed it was required by S.C. Code Ann. § 12-6-2280 (1995) to include all monies recovered from any sales in the "total sales" computation of the apportionment calculation, including the principal recovered from the sale of short-term securities. The SCDOR disagreed, and the ALC granted summary judgment to the SCDOR on this issue. Specifically, the ALC found this issue is novel in South Carolina, and adopted the reasoning of states that have found including the principal recovered from the sale of short-term investments in an apportionment formula would lead to "absurd results" by greatly distorting the calculation, and by defeating the intent and purpose of the applicable statutes.

The Court of Appeals affirmed, albeit applying a different analysis.

We granted Duke Energy's petition for a writ of certiorari to review the Court of Appeals' decision.

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brief is deemed abandoned and precludes consideration on appeal). Therefore, the law cited herein relates to tax years 1994 to 2001, unless otherwise indicated.

ISSUE

Did the Court of Appeals err in affirming the ALC's ruling that the principal recovered from the sale of short-term securities is not includable in the sales factor of the multi-factor apportionment formula?

LAW/ANALYSIS

The Court of Appeals found the ALC correctly concluded the principal recovered from the sale of short-term securities is not includable in the sales factor of the multi-factor apportionment formula, and, therefore, summary judgment in favor of the SCDOR on this issue was proper. We agree; however, we disagree with the analysis applied by the Court of Appeals. Accordingly, we affirm as modified.

Questions of statutory interpretation are questions of law, which this Court is free to decide without any deference to the tribunal below. *Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013) (citing *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). The language of a tax statute must be given its plain and ordinary meaning in the absence of an ambiguity therein. *Beach v. Livingston*, 248 S.C. 135, 139, 149 S.E.2d 328, 330 (1966) (citation omitted). However, regardless of how plain the ordinary meaning of the words in a statute, courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the General Assembly. *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (citing *Stackhouse v. Cnty. Bd. of Comm'rs for Dillon Cnty.*, 86 S.C. 419, 422, 68 S.E. 561, 562 (1910));[3] *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 351, 549 S.E.2d 243, 249 (2001) (citation omitted)

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[3] We note there is a discrepancy between the South Carolina Reports and the South Eastern Reporter as to the proper party names in *Stackhouse*. The South Eastern Reporter reflects the case citation as "*Stackhouse v. Rowland*, 68 S.E. 561 (1910)." However, the South Carolina Reports reflects the case citation as "*Stackhouse v. Cnty. Bd. of Comm'rs for Dillon Cnty.*, 86 S.C. 419 (1910)." Because the official publication of the decisions of this Court is the South Carolina Reports, we defer to its citation as to the proper party names.

(finding statutes should not be construed so as to lead to an absurd result). If possible, the Court will construe a statute so as to escape the absurdity and carry the intention into effect. *Kiriakides*, 312 S.C. at 275, 440 S.E.2d at 366 (citing *Stackhouse*, 86 S.C. at 422, 68 S.E. at 562). In so doing, the Court should not concentrate on isolated phrases within the statute, but rather, read the statute as a whole and in a manner consonant and in harmony with its purpose. *CFRE*, 395 S.C. at 74, 716 S.E.2d at 881 (citing *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)); *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (citing *Laurens Cnty. Sch. Dists. 55 & 56 v. Cox*, 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992)).

In South Carolina, if a taxpayer is transacting business both within and without the State, an apportionment formula determines the fraction of business conducted in South Carolina—the tax "base"—upon which the taxpayer's state income tax is calculated. S.C. Code Ann. § 12-6-2210(B) (2014). Regarding the apportionment statutes, "the statutory policy is designed to apportion to South Carolina a fraction of the taxpayer's total income *reasonably attributable* to its business activity in this State." *Emerson Elec. Co. v. S.C. Dep't of Revenue*, 395 S.C. 481, 485–86, 719 S.E.2d 650, 652 (2011) (emphasis supplied) (quoting *U.S. Steel Corp. v. S.C. Tax Comm'n*, 259 S.C. 153, 156, 191 S.E.2d 9, 10 (1972)).

The applicable apportionment formula in this case is the multi-factor formula. The multi-factor formula is a fraction, the numerator of which is the property factor, plus the payroll factor, plus twice the sales factor, and the denominator of which is four. S.C. Code Ann. § 12-6-2252 (2014).[4]

The issue presented in this case regards the calculation of the sales factor within the multi-factor apportionment statute. For the majority of the years at issue, the statute defining the sales factor provided:

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[4] Section 12-6-2252 was enacted in 2007. Its language, however, is effectively identical to the predecessor statutes that apply to this case: (1) former section 12-7-1140 (1976), which applied to tax years 1978 to 1995; and (2) former section 12-6-2250 (2000), which applied to tax years 1996 to 2001. Section 12-7-1140 was repealed and section 12-6-2250 was enacted in 1995. Section 12-6-2250 was repealed in 2007 when section 12-6-2252 was enacted.

> (A) The sales factor is a fraction in which the numerator is the *total sales* of the taxpayer in this State during the taxable year and the denominator is the *total sales* of the taxpayer everywhere during the taxable year.
>
> . . .
>
> (C) The word "sales" includes, but is not limited to:
>
> . . .
>
> (2) sales of intangible personal property and receipts from services if the entire income-producing activity is within this State. If the income-producing activity is performed partly within and partly without this State, sales are attributable to this State to the extent the income-producing activity is performed within this State.

Section 12-6-2280[5] (emphasis supplied).

In addressing this issue, the Court of Appeals limited its analysis to the concept of "receipts," stating, "We find . . . the issue does not depend on the difference between 'gross' and 'net' receipts. Instead, the issue turns on whether the return of the principal of these investments is properly characterized as a 'receipt' in the first place." The Court of Appeals cited Webster's Dictionary to define "receipt," which is the only authority cited by the court in its analysis on this issue. The Court of Appeals concluded the profit received from the sale of short-term securities was properly considered a "receipt," but the principal of the investment was Duke

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[5] Section 12-6-2280 was enacted in 1995. The prior provision, S.C. Code Ann. § 12-7-1170 (1976), required the same calculation, and also utilized the term "total sales."

As discussed *infra*, the definition of the sales factor was changed in 2007. Prior to tax year 1996, former South Carolina Code § 12-7-1170 (1976), provided for the same calculation of the sales factor.

Energy's "own money," and, therefore, was not a "receipt," and may not be included in the apportionment formula. We find the Court of Appeals' analysis employs nomenclature that is subject to misinterpretation.

Specifically, we find the Court of Appeals' focus on the term "receipt" has the potential to generate confusion because the term is only relevant to the single-factor apportionment formula under S.C. Code Ann. § 12-6-2290 (2014), which is not at issue in this case. Rather, it is undisputed on certiorari to this Court that section 12-6-2252, the multi-factor apportionment formula, applies in this case, which uses the term "total sales." Accordingly, we find the appropriate determination is whether principal recovered from the sale of short-term securities could be included as "total sales" in the sales factor of the multi-factor formula, the relevant term under the apportionment statutes.

Whether principal recovered is includable in the total sales under the apportionment statutes is a novel issue in South Carolina. We agree with the ALC that extra-jurisdictional cases addressing this issue are instructive, and as explained *infra*, we agree with the states that have found the inclusion of principal recovered from the sale of short-term securities in an apportionment formula leads to absurd results by distorting the sales factor within the formula, and by defeating the legislative intent of the apportionment statutes.

In *American Telephone and Telegraph Co.*, AT&T claimed all receipts received upon the sale of investment paper should be included in the multi-factor allocation formula. *See Am. Tel. & Tel. Co. v. Dir., Div. of Taxation*, 194 N.J. Super. 168, 172, 476 A.2d 800, 802 (Super. Ct. App. Div. 1984). The court disagreed, reasoning:

> It is no true reflection of the scope of AT & T's business done within and without New Jersey to allocate to the numerator or the denominator of the receipts fraction the full amount of money returned to AT & T upon the sale or redemption of investment paper. To include such receipts in the fraction would be comparable to measuring business activity by the amount of money that a taxpayer repeatedly deposited and withdrew from its own bank account. The bulk of funds flowing back to

> AT & T from investment paper was simply its own money. Whatever other justification there is for excluding such revenues from the receipts fraction, it is sufficient to say that to do otherwise produces an absurd interpretation of [the apportionment statute]. "It is axiomatic that a statute will not be construed to lead to absurd results. All rules of construction are subordinate to that obvious proposition. [Even the rule of strict construction] does not mean that a ridiculous result shall be reached because some ingenious path may be found to that end."

Id. at 172–73, 476 A.2d at 802 (quoting *State v. Provenzano*, 34 N.J. 318, 322, 169 A.2d 135, 137 (1961)); *see also, Sherwin-Williams Co. v. Ind. Dep't of State Revenue*, 673 N.E.2d 849 (Ind. T.C. 1996) (finding persuasive the Superior Court of New Jersey, Appellate Division's rationale concluding any interpretation of the apportionment statutes allowing for the inclusion of principal produced absurd results).

Similarly, in *Walgreen Arizona Drug Co.*, the appellate court was tasked with determining whether "total sales" in the sales factor of the apportionment formula included principal recovered from short-term investments. *See Walgreen Ariz. Drug Co. v. Ariz. Dep't of Revenue*, 209 Ariz. 71, 97 P.3d 896 (Ct. App. 2004). The Arizona Court of Appeals found the reinvestment of funds, for example, in inventory, reflected ongoing business activity and did not "artificially distort the sales factor as does inclusion of unadjusted gross receipts from investment and reinvestment of intangibles."[6] *Id.* at 74, 97 P.3d at 899. The Arizona court further found including the principal from the sale of investment intangibles in the apportionment statute would create a tax loophole for businesses engaged in sales within and without the state, which was neither intended by the Arizona legislature, nor required by the plain meaning. *Id.* at 77, 97 P.3d at 902. Accordingly, the court held the return of principal from the types of short term

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[6] The statute in Arizona applicable at the time defined "sales" as "all gross receipts." *See* Ariz. Rev. Stat. Ann. §§ 43-1131(5), 43-1145 (1983).

investments at issue were not includable in the sales factor denominator.[7] *Id.*

We find the inclusion of principal recovered from the sale of short-term securities distorts the sales factor and does not reasonably reflect a taxpayer's business activity in this state. *See Emerson Elec. Co.*, 395 S.C. at 485–86, 719 S.E.2d at 652 (citation omitted) ("the statutory policy [as to the apportionment formulas] is designed to apportion to South Carolina a fraction of the taxpayer's total income *reasonably attributable* to its business activity in this State."). We further find the resulting distortion leads to absurd results that could not have been intended by the General Assembly. *See Kiriakides*, 312 S.C. at 275, 440 S.E.2d at 366 (citation omitted) (stating courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the General Assembly).

The record in this case demonstrates conclusively that a taxpayer could manipulate the sales factor by the simple expediency of a series of purchases using the same funds. As was indicated by the Court of Appeals, the following illustration elucidates why, from a common-sense standpoint, Duke Energy's position leads to absurd results. *See Kiriakides*, 312 S.C. at 275, 440 S.E.2d at 366.

Duke Energy's Assistant Treasurer and General Manager of Long Term Investments, Sherwood Love, testified by way of deposition that the short-term securities transactions at issue consisted of Duke Energy's Cash Management Group investing large sums of money "pretty much every day," which were typically left outstanding for less than thirty days. Mr. Love's deposition provided an example of a typical transaction controlled by the Cash Management Group. Specifically, the example provided: $14,982,900 was invested in a short-term instrument on August 7, 1996; the instrument was then sold eight days later on August 15, collecting $17,000 in interest; Duke Energy then immediately reinvested the approximately $15,000,000 in another short-term instrument. Under Duke Energy's theory, the transaction described yields a $15 million "sale" to be included as "total sales" in the denominator of the sales factor, as it was a "sale" outside of South Carolina. Further extrapolating under Duke Energy's theory, if the Cash Management Group had decided instead to sell the instrument on August

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[7] The types of short-term investments at issue were similar to those at issue in the instant case: U.S. Treasury bonds, notes, and bills; and bank certificates of deposit.

10, immediately reinvest the money, and sell the second instrument on August 15, its "total sales" in the denominator of the sales factor during the same time period as above would be approximately $30 million in principal alone. As a more extreme example, we could assume Duke Energy sold and reinvested the $15 million on August 9, August 11, August 13, and August 15. Duke Energy's theory applied to this example would result in its "total sales" outside South Carolina for purposes of the apportionment formula being reported as approximately $60 million dollars in principal alone. Accordingly, under Duke Energy's theory, the frequency of investments made within that eight day window would dictate how large or small Duke Energy's "total sales" would be reflected in the denominator of the sales factor of the multi-factor apportionment formula. The artificial inflation of the denominator of the sales factor allows a taxpayer to significantly reduce its tax liability in South Carolina in a manner clearly inconsistent with the legislative intent and logical interpretation of the term "reasonably attributable." *See Emerson Elec. Co.*, 395 S.C. at 485–86, 719 S.E.2d at 652 (citation omitted) ("the statutory policy [as to the apportionment formulas] is designed to apportion to South Carolina a fraction of the taxpayer's total income reasonably attributable to its business activity in this State.").

We find the potentially drastic impacts such cash management decisions have on determining a company's business activity demonstrates the absurdity that results from Duke Energy's position. Duke Energy's view would require two taxpayers, equal in all respects except for their level of investment activity, to report drastically different results in the taxable income reported through application of the multi-factor apportionment formula due solely to the difference in frequency at which the taxpayers roll over their investments. Plainly, counting the same principal that is invested and sold repeatedly as "total sales" can radically misrepresent any taxpayer's business activity.

We find this illustration further demonstrates Duke Energy's position could not have been intended by the General Assembly, and defeats the legislative intent of the apportionment statutes—to reasonably represent the proportion of business conducted within South Carolina. *See* S.C. Code Ann. § 12-6-2210(B) (2014) ("If a taxpayer is transacting or conducting business partly within and partly without this State, the South Carolina income tax is imposed upon a base which reasonably represents the proportion of the trade or business carried on within this State."); *Kiriakides*, 312 S.C. at 275, 440 S.E.2d at 366 (citation omitted) (finding

regardless of how plain the ordinary meaning of the words in a statute, courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the General Assembly).

Further, the General Assembly enacted S.C. Code Ann. § 12-6-2295 (2007), defining the term "sales" in the apportionment formulas, effective for taxable years after 2007. Section 12-6-2295(B) explicitly excludes from the sales factor: (1) "repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument;" and (2) "the principal amount received under a repurchase agreement or other transaction properly characterized as a loan." We find the General Assembly's decision to define "sales" in § 12-6-2295, supports our finding that the legislative intent has always been to exclude such distortive calculations from the apportionment formulas. *See Stuckey v. State Budget & Control Bd.*, 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000) ("A subsequent statutory amendment may be interpreted as clarifying original legislative intent."); *Cotty v. Yartzeff*, 309 S.C. 259, 262 n.1, 422 S.E.2d 100, 102 n.1 (1992) (citation omitted) (noting light may be shed upon the intent of the General Assembly by reference to subsequent amendments which may be interpreted as clarifying it); *see also See Emerson Elec. Co.*, 395 S.C. at 485–86, 719 S.E.2d at 652 (citation omitted) ("the statutory policy [as to the apportionment formulas] is designed to apportion to South Carolina a fraction of the taxpayer's total income reasonably attributable to its business activity in this State.").

Accordingly, we find the inclusion of principal recovered from the sale of short-term securities produces absurd results, which could not have been intended by the General Assembly. Therefore, we affirm as modified the decision by the Court of Appeals. *See Duke Energy Corp. v. S.C. Dep't of Revenue*, 410 S.C. 415, 764 S.E.2d 712 (Ct. App. 2014).

The Court of Appeals' decision is therefore

AFFIRMED AS MODIFIED

HEARN, J., and Acting Justices James E. Moore, Robert E. Hood and G. Thomas Cooper, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Duke Energy Corporation, Appellant,

v.

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2012-213180

Appeal from the Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Opinion No. 5274
Heard February 18, 2014 – Filed October 8, 2014

AFFIRMED

Eric S. Tresh and Maria M. Todorova, both of Atlanta, GA, and Jeffrey A. Friedman, of Washington, DC, all of Sutherland Asbill & Brennan, LLP, and Burnet Rhett Maybank, III and Tanya Amber Gee, Nexsen Pruet, LLC, both of Columbia, for Appellant.

Tracey Colton Green, John Marion S. Hoefer, and John William Roberts, Willoughby & Hoefer, PA, all of Columbia, Jonathon Abraham Gutting, Young Clement Rivers, LLP, of Charleston, Milton Gary Kimpson, of Columbia, and Harry A. Hancock, of Bordentown, NJ, for Respondent.

FEW, C.J.: This appeal arises from Duke Energy Corporation's claims to the South Carolina Department of Revenue for corporate income tax refunds totaling

$126,240,645, plus interest, for tax years 1978 to 2001. We affirm the denial of Duke Energy's refund claims.

I. Facts and Procedural History

Duke Energy generates electricity and sells it to customers. Because it does business in North Carolina and South Carolina, Duke Energy must apportion its income between these states to determine the income tax due to each state. *See* S.C. Code Ann. § 12-6-2210(B) (2014) ("If a taxpayer is transacting or conducting business partly within and partly without this State, the South Carolina income tax is imposed upon a base which reasonably represents the proportion of the trade or business carried on within this State.").[1] A taxpayer's income is apportioned using a formula—a fraction—in which the numerator represents the business the taxpayer did in the applicable tax year in this state, and the denominator indicates the total business the taxpayer did in all states. The South Carolina Income Tax Act provides two formulas: (1) the formula applicable to "manufacturers," which contains three factors in both the numerator and the denominator—property, sales, and payroll, S.C. Code Ann. § 12-6-2252 (2014);[2] and (2) the formula applicable to all other taxpayers, which contains only one factor—sales, S.C. Code Ann. § 12-6-

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[1] This section was enacted in 1995. Act No. 76, 1995 S.C. Acts 460. Prior to tax year 1996, the apportionment of a taxpayer's income between states was governed by the predecessor to section 12-6-2210—South Carolina Code section 12-7-250 (1976), which was located in Article 9 of the now-repealed Chapter 7 of Title 12 in the Income Tax Act of 1926. *See* Act No. 76, 1995 S.C. Acts 536 (stating "this act is effective for taxable years beginning after 1995"); Act No. 76, 1995 S.C. Acts 535 (repealing "Chapter[] 7 . . . of Title 12 of the 1976 Code"). The wording of the former and current versions of the section differs slightly, but the effect of the sections is the same.

[2] Section 12-6-2252 applies to more than just manufacturers, as we discuss in section III of this opinion. Section 12-6-2252 was enacted in 2007. Its language, however, is identical to the predecessors that apply to this case: (1) former section 12-7-1140 (1976), which applied to tax years 1978 to 1995; and (2) former section 12-6-2250 (2000), which applied to tax years 1996 to 2001. Section 12-7-1140 was repealed and section 12-6-2250 was enacted in 1995. Act No. 76, 1995 S.C. Acts 461, 535. Section 12-6-2250 was repealed in 2007 when section 12-6-2252 was enacted. Act No. 110, 2007 S.C. Acts 590, 595.

2290 (2014).[3] In either formula, the business of the taxpayer in this state is converted to a fraction of its total business, which becomes the "base" upon which the taxpayer's state income tax is calculated.

Duke Energy filed timely income tax returns for each of the tax years at issue—1978 to 2001. In December 2002, Duke Energy filed amended tax returns for each of these years. Duke Energy sought to have its South Carolina income tax recalculated and requested refunds in the amount of $126,240,645, plus interest. In February 2003, the department denied the requests. In March 2003, Duke Energy appealed this decision to the department's Office of Appeals. The department did not act on the appeal until February 2010—almost seven years—when it issued a "determination" denying the appeal.

Duke Energy filed a contested case in the administrative law court ("ALC"). The ALC faced three primary issues: (1) whether Duke Energy's refund claims were timely, (2) which apportionment formula Duke Energy was required to use, which we refer to as the "manufacturing" issue, and (3) whether Duke Energy could include in the denominator of the applicable formula its gross receipts from sales of certain short-term investments, which we refer to as the "gross receipts" issue. The department moved for summary judgment on all three issues, and Duke Energy moved for summary judgment on the gross receipts issue. The ALC granted partial summary judgment to the department, ruling Duke Energy's refund claims were untimely for tax years 1978 to 1993,[4] and Duke Energy may not include gross receipts in the denominator of the applicable apportionment formula. The ALC then conducted a trial on the question of which formula Duke Energy must use and ruled for the department, finding Duke Energy must use the formula set forth in section 12-6-2252.

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[3] Section 12-6-2290 was enacted in 1995, *see* Act No. 76, 1995 S.C. Acts 464, and amended in 2007, *see* Act No. 110, 2007 S.C. Acts 594, 595. The predecessor to section 12-6-2290 was South Carolina Code section 12-7-1190 (1976), which was effective in all tax years before 1996. Section 12-7-1190 was repealed when section 12-6-2290 was enacted in 1995. Act No. 76, 1995 S.C. Acts 535.

[4] The department concedes Duke Energy's refund requests for tax years 1994 to 2001 were timely due to the enactment of South Carolina Code subsection 12-60-470(A) (2014). Act No. 60, 1995 S.C. Acts 375-76.

We find the ALC properly granted summary judgment to the department because it correctly determined Duke Energy may not include its gross receipts from sales of short-term investments. We also affirm the ALC's ruling that Duke Energy must use the apportionment formula in section 12-6-2252. Because our resolution of these issues is dispositive of this appeal, we do not reach the timeliness of Duke Energy's refund claims. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (explaining an appellate court need not address remaining issues when the court's resolution of the issues it does address are dispositive of the appeal).

II. Standard of Review

We review the ALC's decision under subsection 1-23-610(B) of the South Carolina Code (Supp. 2013). The gross receipts issue is a pure question of law that the parties presented to the ALC on cross motions for summary judgment. Thus, we review the ALC's decision as to that issue under subsections 1-23-610(B)(a), (c), and (d). *See Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 244, 711 S.E.2d 908, 910 (2011) ("Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law."); *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 319 n.2, 731 S.E.2d 869, 872 n.2 (2012) ("[T]he parties filed cross motions for summary judgment, thereby indicating the parties' belief that further development of the facts was unnecessary."); *id.* ("[C]ross motions for summary judgments . . . authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties." (alteration in original) (citation omitted)); *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011) ("Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law.").

As to the manufacturing issue, the ALC decided the question after a trial. Both parties, as well as the ALC, address the question as one of fact. However, we find the manufacturing issue to be primarily one of statutory interpretation in which the facts are undisputed. To this extent, we review the ALC's ruling as a question of law under subsections 1-23-610(B)(a), (c), and (d). *Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013) (stating "questions of statutory interpretation are questions of law"); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) (stating "the proper interpretation of a statute is a question of law"). However, we review under a different standard the ALC's ruling that Duke Energy's "manufacturing" business is its "principal" business in South Carolina. In making this ruling, the ALC resolved

a factual dispute as to the appropriate inferences that should be drawn from undisputed facts. Therefore, we review this ruling as a factual determination under subsection 1-23-610(B)(e) and must determine if it is "clearly erroneous in view of the reliable, probative, and substantial evidence." *See ESA Servs., LLC v. S.C. Dep't of Revenue*, 392 S.C. 11, 24, 707 S.E.2d 431, 438 (Ct. App. 2011) (stating "as to [the ALC's] findings of fact, we may reverse or modify decisions that . . . are clearly erroneous in view of the substantial evidence"); *Comm'rs of Pub. Works v. S.C. Dep't of Health & Envtl. Control*, 372 S.C. 351, 358, 641 S.E.2d 763, 766-67 (Ct. App. 2007) (stating "we may not substitute our judgment for that of the AL[C] as to the weight of the evidence on questions of fact unless the AL[C]'s findings are clearly erroneous in view of the reliable, probative and substantial evidence").

III. The Manufacturing Issue

The central question regarding the manufacturing issue is whether the predecessors to section 12-6-2252 apply to Duke Energy. Section 12-6-2252 reads:

> A taxpayer whose principal business in this State is (i) manufacturing or a form of collecting, buying, assembling, or processing goods and materials within this State, or (ii) selling, distributing, or dealing in tangible personal property within this State, ...

If Duke Energy's principal business is considered "manufacturing," section 12-6-2252 applies and Duke Energy must use an apportionment formula based on three factors—property, sales, and payroll. If, however, its principal business is not manufacturing, or does not otherwise fall under section 12-6-2252, then section 12-6-2290 and its predecessors apply, which permits Duke Energy to use a formula based only on sales.

Both parties agree Duke Energy's business in South Carolina is the production and delivery of electrical power to homes and businesses. The ALC stated the parties stipulated "[Duke Energy] is, and was during the 1978-2001 tax periods, engaged in the generation, transmission, distribution, and sale of electricity." Duke Energy characterizes its business as "the provision of electric service to its customers," while the department characterizes it as "the generation, transmission, distribution, and sale of electricity," and simply "providing electricity." Each of these variations accurately describes Duke Energy's business, and there is no dispute as to what Duke Energy does. The only dispute is how Duke Energy's business

should be classified under the state tax laws—particularly under sections 12-6-2252 and 12-6-2290, and their predecessors.

"Manufacturing" is not defined in the tax code. We find, however, Duke Energy's undisputed activity meets the plain and ordinary meaning of the word. *See Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 99, 705 S.E.2d 28, 33 (2011) ("When faced with an undefined statutory term, the Court must interpret the term in accordance with its usual and customary meaning."). According to Webster's New Collegiate Dictionary, "manufacture" is defined as "to make into a product suitable for use," and "to produce according to an organized plan and with division of labor." *Webster's New Collegiate Dictionary* 695 (spec. ed. 1981). The ALC defined manufacturing as "the process of making wares by hand or by machinery especially when carried on systematically with division of labor," "productive industry using mechanical power and machinery," and "the act or process of producing something."

The ALC discussed the nature of Duke Energy's business, stating,

> Duke Energy operates plants in both South Carolina and North Carolina to produce electricity. In South Carolina, Duke Energy has two nuclear power plants, four coal power plants, three hydroelectric power plants, and several oil or gas power plants. The electricity that is produced and consumed by its customers is created at Duke Energy generation facilities. A generator is a "mechanical device" that uses mechanical energy to produce electric energy or, as it is more commonly known, electricity. Generators have been used to produce electricity in substantially the same manner for over 100 years. Many, though not all, of Duke Energy's generation facilities use a turbine driven by steam power to turn the generator. Although the sources or inputs (e.g., coal, uranium, water) used at these different types of generation facilities may vary, all use a generator to produce electricity. The result, however, is the same: Duke Energy employs a mechanical device to produce and generate electricity using a process that has not changed significantly since the early 20th century.

As described by the ALC, Duke Energy utilizes mechanical power, usually to generate steam, which is then used to create electricity. We find Duke Energy's business fits the definitions of "manufacture" stated above. Although Duke Energy would disagree with the word "create," it is undisputed that Duke Energy generates electricity, or an electrical charge, that did not previously exist. As the ALC stated, "No matter what moniker [is] used to describe the product produced by Duke Energy, the electric current that generates that field, or even the field itself, is produced through a mechanical process run by Duke Energy." We therefore hold that what Duke Energy does to generate electricity is "manufacturing" as that term is used in section 12-6-2252.

Our conclusion is supported by previous decisions of our supreme court, in which the court defined "manufacturer" and "manufactory" and held Duke Energy and other electric utilities to be manufacturers, for purposes of the tax code. In *Columbia Railway, Gas & Electric Co. v. Query*, 134 S.C. 319, 132 S.E. 611 (1926), an electric company challenged a tax assessed against it under the "Manufacturer's Tax Act." 134 S.C. at 321, 132 S.E. at 612. The circuit court upheld the tax assessment, and on appeal, "the single question [was] whether the plaintiff is 'engaged in the business of manufacturing,' with reference to its gas and power business." *Id.* The supreme court affirmed, stating, "We do not think that there is any doubt that the appellant is engaged in the business of manufacturing gas and electricity . . . ." 134 S.C. at 324, 132 S.E. at 612. Duke Energy argues the *Columbia Railway* decision is distinguishable because it was "issued in other contexts more than eighty years ago" and "under a different set of tax statutes." We disagree and find *Columbia Railway* is controlling.

In *Duke Power Co. v. Bell*, 156 S.C. 299, 152 S.E. 865 (1930), our supreme court made a specific determination that Duke Energy is a manufacturer. 156 S.C. at 304-06, 152 S.E. at 868. Relying on *Columbia Railway*, the *Bell* court addressed whether a state law that exempted "manufactories" from county taxes applied to an electric power plant acquired by Duke Energy. 156 S.C. at 304-05, 152 S.E. at 867-68. The court explained the power plant constituted a "manufactory," stating,

> The word "manufactory" means, primarily, a physical plant, or a place or building, where manufacturing is carried on. If a company engaged in the generation of electricity is a "manufacturer" for the purposes of a statute imposing a tax, the plant or structure wherein the process of generating such electricity is carried on is a *manufactory* for the purposes of a tax exempting statute.

156 S.C. at 306, 152 S.E. at 868. *Bell* is important for two reasons: (1) it applied directly to Duke Energy, and (2) the court relied on *Columbia Railway* in a different context of tax law.

Because we find Duke Energy is a "manufacturer" of electricity, we need look no further than the introductory words of section 12-6-2252—"A taxpayer whose principal business in this State is (i) manufacturing"—to determine it applies to Duke Energy. Duke Energy argues, however, section 12-6-2252 is inapplicable because it does not manufacture anything "tangible," and the terms of section 12-6-2252 apply only if the taxpayer manufactures something tangible. Duke Energy points to the "goods and materials" language of section 12-6-2252 to argue it applies only to taxpayers whose business is "manufacturing . . . goods and materials." Thus, Duke Energy contends the statute does not apply to it unless electricity is physical or tangible.

We do not believe the outcome of this appeal should turn on whether electricity is "tangible." First, as we previously explained, our supreme court has ruled the production of electricity is manufacturing, and Duke Energy is a manufacturer. *See Bell*, 156 S.C. at 306, 152 S.E. at 868; *Columbia Railway*, 134 S.C. at 324, 132 S.E. at 612. Those rulings are not distinguishable, and therefore binding on us. Second, the word "manufacturing" in subsection 12-6-2252(A) stands alone. Duke Energy argues the phrase "goods and materials within this State" and the words "tangible personal property" in subsection 12-6-2252(A) modify "manufacturing" so that the statute applies only when the taxpayer manufactures a tangible good or product. We read "goods and materials within this State" to modify only "collecting, buying, assembling, or processing." Further, we find the words "tangible personal property" in subsection (A)(ii) should not be read to modify the word "manufacturing" in subsection (A)(i).

Duke Energy and the department extensively address in their briefs the question of whether electricity is "tangible personal property" under section 12-6-2252, and the ALC went to great lengths to justify its conclusion that "[e]lectricity is a physical product with physical characteristics." Given our conclusion regarding this issue, however, we reject Duke Energy's argument that the intangible quality of electricity renders section 12-6-2252 inapplicable.

We also base our holding on the intent of the Legislature in drafting section 12-6-2252. Subsection 12-6-2210(B) provides "the South Carolina income tax is [to be] imposed upon a base which reasonably represents the proportion of the trade or

business carried on within this State." Section 12-6-2252 contemplates that, for some businesses, considering sales alone will not yield an allocation of income between states that "reasonably represents the proportion of the trade or business carried on within this State." § 12-6-2210(B). This is true of businesses that sell in other states a high percentage of the product they manufacture in this state. Those businesses have a more significant presence in South Carolina—i.e. "the proportion of the trade or business carried on within this State"—than their sales here reflect. Under that circumstance, the Legislature indicated its intent to consider capital investment and employment in this state, in addition to sales. Applied to this situation, we hold the Legislature intended a taxpayer like Duke Energy, whose business depends on significant capital investment and employment, to apportion "the trade or business [it] carrie[s] on within this State" using the multi-factor apportionment formula. In this case, calculating the apportionment based on sales alone would not reasonably represent the taxpayer's business because Duke Energy has significant capital investment and employment in South Carolina. Thus, for the same reasons the Legislature drafted section 12-6-2252 to apply to any manufacturer, the section applies to Duke Energy.

Duke Energy also argues it provides a "service" under section 12-6-2290, and thus it should have its income tax apportioned according to the formula in that section. We agree the usual and customary meaning of "service" includes selling electricity. In its order, the ALC initially began its discussion of the manufacturing issue by referring to Duke Energy's "service" of electricity:

> The metered *service* plan is based on usage, ... Regardless of the *service* plan, a portion of each Duke Energy customer's *service* charge recovers Duke Energy's costs associated with maintaining the infrastructure that Duke Energy uses *to provide electric service*.

(emphasis added). Additionally, the department's own expert witness testified Duke's provision of electricity on a flat-fee basis is a service. Thus, Duke Energy is fairly characterized as a "manufacturer" that provides electric "service." We do not believe, however, that Duke Energy's provision of electric service changes its status as a manufacturer or the applicability of section 12-6-2252.

Sections 12-6-2252 and 12-6-2290 require the court to focus on the taxpayer's "principal" business. Duke Energy argues we should determine which component of Duke Energy's business is manufacturing and which is service, and from that conclude Duke Energy's "principal business in this State" is providing a service.

We disagree for the reasons explained above—Duke Energy is a manufacturer and section 12-6-2252 applies to manufacturers. Even if we were to accept Duke Energy's argument, however, we must affirm. The ALC found, "After considering the evidence in the record and the pertinent legal authorities, . . . Duke Energy has failed to establish by the preponderance of the evidence that its principal business in South Carolina is not manufacturing . . . ." The ALC's finding is supported by substantial evidence, the most important of which is (1) Duke Energy's charter, which states it is a "manufacturer," and (2) Duke Energy's designation of itself as a manufacturer in its original tax return for each of the tax years applicable to this appeal. *See Comm'rs of Pub. Works*, 372 S.C. at 358, 641 S.E.2d at 766-67 (Ct. App. 2007) ("[W]e may not substitute our judgment for that of the AL[C] as to the weight of the evidence on questions of fact unless the AL[C]'s findings are clearly erroneous in view of the reliable, probative and substantial evidence.").

IV. The Gross-Receipts Issue

Regardless of which formula is used to apportion a taxpayer's income between states, the formula contains a variable in its denominator for the taxpayer's sales from all states in which it does business. Under either formula, the larger the denominator, the less income tax the taxpayer owes in this state.

For the multi-factor formula in section 12-6-2252, which we hold is applicable to Duke Energy, the "sales factor" is defined as "a fraction in which the numerator is the total sales of the taxpayer in this State during the taxable year and the denominator is the total sales of the taxpayer everywhere during the taxable year." S.C. Code Ann. § 12-6-2280(A) (2014).[5] Duke Energy takes the position the denominator should include gross-receipts from the sale of short-term investment instruments that Duke Energy purchases from other entities. The department disagrees, arguing the denominator should include only the smaller net receipts. The definition of "sales" in section 12-6-2280 does not include the term "gross

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[5] Section 12-6-2280 was enacted in 1995 and amended in 2007. Act No. 76, 1995 S.C. Acts 463; Act No. 110, 2007 S.C. Acts 593; *see also* Act No. 116, 2007 S.C. Acts 739 (duplicate of Act 110 in amending this section). Prior to tax year 1996, former South Carolina Code section 12-7-1170 (1976) provided that the sales factor consists of "[t]he ratio of sales made by such taxpayer during the income year which are attributable to this State to the total sales made by such taxpayer everywhere . . . ."

receipts." However, the definition does include "sales of intangible personal property."[6]

To understand whether Duke Energy's gross receipts from sales of short-term investments should be included in the formula, it is helpful to examine the investment transactions at issue. According to Sherwood L. Love, Duke Energy's Assistant Treasurer and General Manager of Long Term Investments, Duke Energy maintained a Cash Management Group within its treasury department that "provide[d] required liquidity support for Duke['s] commercial paper programs . . . for the short-term funding of additional electric generation, transmission and distribution facilities[.]" The Cash Management Group carried out this objective by "invest[ing] Duke['s] excess operating cash in various short-term marketable securities." These securities included municipal bonds, loan repurchase agreements, commercial paper, U.S. Treasury securities, and agency securities. According to Mr. Love, Duke Energy made these short-term investments "[p]retty much every day," and Duke Energy "typically [left] investments like this outstanding for [less] than 30 days."

Mr. Love provided the details of one particular transaction, which we find useful to illustrate how the transactions worked in general. This representative transaction consisted of the following actions taken by Duke Energy: (1) investing $14,982,900 in a short-term instrument on August 7, 1996, (2) selling the instrument eight days later on August 15, (3) collecting $17,100 in interest, and then immediately reinvesting the total $15,000,000 in another short-term instrument. This transaction demonstrates that Duke Energy's argument is contrary to the legislative intent of the apportionment statutes.

Under Duke Energy's theory, the transaction described above yields a $15 million dollar receipt that Duke Energy may use in the denominator of the apportionment formula. However, if Duke Energy decided to sell the instrument on August 10, immediately reinvest the money, and sell the second instrument on August 15, its "gross receipt" would be $30 million. If Duke Energy sold and reinvested the money on August 9, August 11, August 13, and August 15—a scenario Mr. Love testified was entirely reasonable—Duke Energy's "gross receipt" would be $60 million. These slight variations on this representative transaction illustrate that

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[6] The definition of "sales" in section 12-6-2280 is essentially the same as the definition in former section 12-7-1170, applicable before tax year 1996. The words are arranged differently, but the concept is the same.

allowing Duke Energy to include its gross receipts from short-term investment instruments would artificially reduce the "base which reasonably represents the proportion of the trade or business carried on within this State," *see* § 12-6-2210(B), by artificially inflating the denominator of the formula.

The ALC focused on the fact that the return of the principal from this and other similar transactions is not part of Duke Energy's "gross income." We find, however, the issue does not depend on the difference between "gross" and "net" receipts. Instead, the issue turns on whether the return of the principal of these investments is properly characterized as a "receipt" in the first place. Stated another way, the issue is whether the receipt Duke Energy received from these transactions is the total amount, including principal and return on investment, or just the return.

Generally, a "receipt" is "something received," *Webster's*, *supra*, at 956, and usually refers to money. In the business context, "receipt" means money the business receives for its products or services—for what it does in its business.[7] Duke Energy is in the business of selling electricity, which includes the sale of electricity itself on a wholesale or retail basis or the sale of capital it uses to conduct its business, such as a power plant. The money it takes in from such a sale is properly considered a "receipt." When Duke Energy invests the proceeds of its business in a short-term financial instrument and sells the investment for a profit, the profit generated may be considered a receipt. However, the principal of the investment is its own money—not money it received for its products or services. Thus, the return of the principal is not a receipt.

We affirm the ALC's determination that Duke Energy may not include gross receipts from the sale of short-term investments in the denominator of the formula used to apportion its income.

V. Conclusion

We find the ALC correctly ruled (1) Duke Energy is a "manufacturer" and thus must apportion its South Carolina income using the formula in section 12-6-2252; and (2) its gross receipts from sales of short-term investments in other states may

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[7] Duke Energy recites a similar definition from a decision of the tax commission: "gross receipts is a broad term which includes all proceeds received by the entity so long as such receipts resulted from any part of its business."

not be included in the denominator of the formula. Because our conclusions as to these two issues resolve the appeal, we need not address the timeliness of Duke Energy's refund claims. *See Futch,* 335 S.C. at 613, 518 S.E.2d at 598. We **AFFIRM.**

SHORT and GEATHERS, JJ., concur.