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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Honorable Marvin F. Kittrell, Chief Administrative Law Judge

On Certiorari to the Court of Appeals of South Carolina
Unpublished Opinion No. 2010-UP-232 (S.C. Ct. App. filed April 7, 2010)

Case Nos. 07-ALJ-17-0299-CC; 07-ALJ-17-0300-CC;
07-ALJ-17-0301-CC; 07-ALJ-17-0302-CC;
07-ALJ-17-0303-CC; 07-ALJ-17-0304-CC

Alltel Communications, Inc.; Alltel Mobile Communications of the Carolinas, Inc.;
New York Newco Subsidiary; Telespectrum, Inc.;
360 Communications Co. of SC No. 1; and
360 Communications Co. of SC No. 2, ...Petitioners,

v.

South Carolina Department of Revenue, ...Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

I. Did the Court of Appeals fail to apply the legal principle that tax statutes must be construed against the State only where there is "substantial doubt?"

II. Did the Court of Appeals properly address the Department's request to correct the ALC's erroneous application of the plain and ordinary meaning analysis of § 12-20-100?

III. Did the Court of Appeals properly reverse and remand the matter under the guidance of § 1-23-610(B) and (C)?

IV. Did the ALC fail to give proper consideration to other issues raised under its jurisdiction?

STATEMENT OF THE CASE

This matter arose in 2004 as the result of the Department of Revenue's (Department) audit of Alltel Communications, Inc.; Alltel Mobile Communications of the Carolinas, Inc.; New York Newco Subsidiary; Telespectrum, Inc.; 360 Communications Co. of SC No. 1; and 360 Communications Co. of SC No. 2 (collectively taxpayers). The taxpayers were engaged in the business of providing wireless communications in South Carolina and other states. (R., p. 290). Therefore these taxpayers were at all times companies regulated by the FCC. (R., p. 297). And, the taxpayers paid property taxes in South Carolina as a "utility." (R., p. 45). However, the taxpayers denied that they were a "telephone company" under S.C. Code Ann. § 12-20-100 (2000), and instead filed their corporate income taxes under S.C. Code Ann. § 12-20-50 (2000). The Department disagreed, applied the tax calculations provided for under § 12-20-100, and made a proposed assessment of $4,709,671, in additional corporate income taxes and license fees. (R., p. 462). The taxpayers protested, and a contested case was filed with the Administrative Law Court (ALC). The litigation culminated in the cross filing of motions for summary judgment, along with replies and responses. Exhibits were filed with the ALC to support the various motions and memoranda as well as stipulations of fact and law- to the extent the parties could agree- pursuant to ALC Rule 25(C). (R., pp. 122-137 "Stipulations").

The ALC heard the motions of both parties and denied the motion of the Department while granting the motion of the taxpayers. (R., pp. 1-24). The Department took issue with numerous issues within the ALC's Order and filed a Notice of Appeal. The most significant issue on appeal was the ALC's failure to base its findings on the

evidence and arguments raised before it, namely the ALC misinterpreted Stipulation 50. Both parties filed briefs (R., pp. 352-458), wherein the taxpayers alleged that the Department failed to file a motion for reconsideration under ALC Rule 29(D). (R., pp. 419 and 426). Consequently, the Court of Appeals heard oral arguments and reversed the ALC's order and remanded the case for further development of the facts and law. (R., pp. 459-471).

SUMMARY OF ARGUMENTS

This Court should affirm the reversal and remand issued by the Court of Appeals as the ruling is supported by the record from the ALC.

First, the taxpayers place an undue reliance upon the Court of Appeals' finding that the application of § 12-20-100 to wireless providers "was not absolutely clear as a matter of law." However, the taxpayers previously cited binding law issued by this Court which requires that only when a taxing statute is found to be in "substantial doubt" in its application to a taxpayer, can the taxpayer prevail.[1]

In fact, the Court of Appeals ruling of "not absolutely clear as a matter of law" is strong fortification for the Department's argument that the ALC's granting of summary judgment was an abuse of discretion. And, the ensuring application of the rules of statutory construction, as required by this Court, would have supported the position of the Department. Further, the ALC's order as to factual issues was in serious error. To that end, although the taxpayers lament the Court of Appeals ruling for not giving a thorough analysis of the ALC's ruling, to do so would be meaningless as the ALC's order was

[1] SCANA Corp. v. South Carolina Dept. of Revenue, 384 S.C. 388, 683 S.E.2d 468 (2009); see fn 3; and Cooper River Bridge, Inc. v. South Carolina Tax Comm'n. 182 S.C. 72, 188 S.E. 508 (1936).

contradictory, without factual support, legal support, and any effort to discern the numerous errors would have yielded the exact result- further finding of law and fact would be needed. Indeed, the Court of Appeals committed no reversible error.

Secondly, the taxpayers raise the matter of issue preservation. However, the taxpayers have previously argued that the Department had a duty to file a Motion for Reconsideration pursuant to ALC Rule 12(D). And, as has been shown, ALC Rule 29(D) clearly states that "**The filing of a motion for reconsideration is not a prerequisite to filing a notice of appeal from a final decision of an administrative law judge.**" (Emphasis added). And, the taxpayers failed to acknowledge this portion of ALC Rule 29(D) in their brief to the Court of Appeals.[2] If the taxpayers posed this argument to the Court of Appeal by urging it to find error pursuant to ALC Rule 29(D), they cannot now propose a different standard as a basis for any error.

ARGUMENTS

I. THE COURT OF APPEALS CORRECTLY APPLIED THE LEGAL PRINCIPLE THAT TAX STATUTES MUST BE CONSTRUED AGAINST THE STATE ONLY IN CASES OF "SUBSTANTIAL DOUBT" AS TO THE MEANING OF A TAX STATUTE (§ 12-20-100).

The taxpayers are alleging that the Court of Appeals committed reversible error when it failed to apply the "substantial doubt" standard when issues of tax compliance arise against a taxpayer.[3] The basis for this position is in the Court of Appeals finding that the application of § 12-20-100 to the taxpayers was "not absolutely clear." The Department points out that the two standards are different legal principles, with one being applied to assess the ALC's error in granting summary judgment, and the other when a

[2]See Final Brief of Respondents at p. 24, first para. (R., p. 419).

[3]SCANA Corp. v. South Carolina Dept. of Revenue.

tax statute's terms reveal substantial doubt. In short, the Court of Appeals committed no error.

The Court of Appeals found the application of § 12-20-100 to the taxpayers was not "absolutely clear as a matter of law," and it properly overruled the ALC's grant of summary judgment to the taxpayers and remanded to develop the facts necessary to clarify the application. A trial court may properly grant a motion for summary judgment when "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. Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). Here, the uncertainty of whether the taxpayers are a telephone company within the statute, justifies remanding for further factual inquiry. Thus, the standard for summary judgment rulings is clearly stated.

However, the taxpayers are confusing the standard for summary judgment with the rule of interpreting tax statutes. The taxpayers correctly rely on the long standing position espoused in Cooper River Bridge, Inc. v. South Carolina Tax Commission,[4] which holds that any taxpayer showing "substantial doubt" as to the application to that taxpayer, would prevail. Indeed, this is the standard sought to be applied by the taxpayers.

The taxpayers are arguing that this Court should change the established standards for applying the rules of statutory interpretation. This Court has held that:

[4]182 S.C. 72, 188 S.E. 508 (1936).

> The primary purpose in interpreting statutes is to ascertain the intent of the Legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "We cannot construe a statute without regard to its plain and ordinary meaning, and this Court may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope." New York Times Co. v. Spartanburg County Sch. Dist. No. 7, 374 S.C. 307, 310, 649 S.E.2d 28, 29-30 (2007). "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." Hodges, 341 S.C. at 85, 533 S.E.2d at 581. The statute's language is considered the best evidence of legislative intent. Id. However, the Court will reject the plain meaning of the words used in a statute if it would lead to an absurd result and will "construe the statute so as to escape the absurdity and carry the intention into effect." Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998).[5]

In Sonoco,[6] the State Supreme Court resolved an issue of plain and ordinary meaning of an undefined term in a statutory provision. The Court referred to the dictionary definition of the disputed term in Webster's New Collegiate Dictionary and Black's Law Dictionary,[7] and other South Carolina statutes, both related and unrelated, to discern some intent of how the General Assembly views undefined terms. And, if the statutory language lends itself to:

> . . . two equally logical interpretations, this Court must apply the rules of statutory interpretation to resolve the

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[5]Ventures South Carolina, LLC v. S.C. Department of Revenue, 378 S.C. 5, 8, 661 S.E.2d 339, 341 (2008).

[6]Sonoco Productrs Co. v. SC Dep't of Revenue, 378 SC 385, 662 SE2d 599 (2008). at fn. 17.

[7]Id. at p. 3.

> ambiguity and to discover the intent of the General Assembly. Where the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. The Lite House, Inc. v. J.C. Roy, Co., 309 S.C. 50, 53, 419 S.E.2d 817, 819 (Ct. App. 1992).[8]

At this point, the taxpayers would then have this Court to automatically apply the rule of U.S. v. Merriam,[9] which construes any ambiguities, or doubts, in favor of the taxpayers. The taxpayers' strongly advocated application of this case as it relied upon Cooper River Bridge, Inc. v. South Carolina Tax Commission,[10] which held: "And has said that where the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any **substantial doubt being resolved in his favor**."[11] (Emphasis added).

The taxpayers allege the proper standard to be employed is "not absolutely clear as a matter of law."[12] The taxpayers then seek to equate it with the proposed standard "there is doubt."[13] This is in clear derogation of the taxpayers' previous acknowledgement of this Court's requirement that a statutory ambiguity must be "**substantial.**" The taxpayers' argument ignores the clear standards adopted by this

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[8]Kennedy v. The S.C. Retirement Systems, 345 S.C. 339, 549 S.E.2d 243 (2001).

[9]U.S. v. Merriam, 263 U.S. 179 (1923).

[10]182 S.C. 72, 188 S.E. 508 (1936).

[11]Id. at p. 74, court citing Fuller v. South Carolina Tax Commission, 128 S.C. 14, 121 S.E. 478 (1924).

[12]Application for Petition of a Writ of Certiorari, p. 6.

[13]Id. at p. 7, para. 1.

Court and would prejudice the spirit of Rule 56, SCRCP, by discouraging a more thorough exploration of the facts and law. To that end, the Court of Appeals committed no error.

The taxpayers allege further error by the Court of Appeals based upon its failure to find that § 12-20-100 only applies to companies regulated by the South Carolina Public Service Commission (PSC). The legal authority supporting this argument is In re: ABC Telephone Co., S.C. Tax Comm'n Dec'n No. 91-41. However, the Department has pointed out previously that the holding of this case was fact specific to the issue in that case, and cannot stand for the broad proposition that only companies regulated by the PSC are subject to the taxing principles of § 12-20-100. To that end, the Court of Appeals would not have erred as the case does not stand for the proposition that a prerequisite to being taxed under § 12-20-100 is PSC regulation.

The taxpayers stated to this Court that the Tax Commission has previously decided that "a corporation providing communications services was only obligated to pay corporate license tax under § 12-20-100 if it was regulated by the PSC."[14] This is not correct. The cited case was a matter that arose out of an audit of the ABC Tel. Co. (ABC) for the tax years 1987, 1988, and 1989.[15] ABC was a regulated telephone company in South Carolina regulated by the PSC, and carried on businesses regulated by the PSC and various other services.[16] That case arose out of ABC's failure to pay income taxes on "long distance access charges." That is, ABC did not include access charges it

[14]Taxpayers' Petition for Writ of Certiorari, p. 2, 4th indented statement.

[15]See In re: ABC Telephone Co., p. 1, para. 5.

[16]Id. at p. 1.

received from long distance carriers for calls it accommodated to the Charlotte, North Carolina, area, which were within its service area, but beyond the jurisdiction of the PSC.[17] The Department assessed taxes on these access charges and ABC protested.

ABC argued that under the language of then S.C. Code Ann. § 12-19-110 (1987), that only income from its business, which was regulated by the PSC, was includible in the corporate tax calculation.[18] The Tax Commission agreed, but its decision stated:

> The above language indicates the only receipts included in the taxpayer's tax base are those derived from activities that are regulated in some aspect. **In the taxpayer's case**, such regulation would be by the Public Service Commission since that is the regulating agency for telephone companies.[19]

(Emphasis added). The holding was case specific. The word "regulated" in the statute did not require specific regulation by the PSC, and the decision did not require it. The issue of "by whom you must be regulated" was not before the Tax Commission. Further, in footnote 6 of its decision, the Tax Commission was stating that the named corporations under that statute were in the nature of "public service corporations" without limiting the regulatory authority to the PSC. Therefore, for the taxpayers to argue that only a communications company regulated by the PSC is taxable under § 12-20-100 is incorrect.

Moreover, the Tax Commission's decision was rendered in 1991 at a time when widespread Communication Mobile Radio Service (CMRS) was used at a minimum and

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[17] Id. at p. 2.

[18] Id. at "Issue 2" *4, p. 3.

[19] Id.

CMRS providers, like these taxpayers, are now regulated exclusively by the FCC.[20] So, in this case, the taxpayers are nonetheless "regulated" within the meaning of § 12-20-100. The ALC neglected to make a definitive ruling on this issue.[21] And, this was duly noted by the Court of Appeals in its opinion.[22]

Finally, the taxpayers allege error because the Court of Appeals failed to consider legislative history in construing § 12-20-100. The taxpayers equate a history of legislation with legislative history. No legislative history can be found within the record. In short, there is no legislative history to consider. Therefore, the Court of Appeals could not have committed error.

II. THE COURT OF APPEALS PROPERLY RULED THAT THE ALC MISAPPREHENDED AND MISAPPLIED ITS ANALYSIS OF § 12-20-100.

An open review of the record supports the fact that the Department unequivocally and continually argued the taxpayers were indeed taxable pursuant to § 12-20-100 as a "telephone company." The taxpayers never challenged this position and never raised Stipulation 50 as a defense to the Department's arguments. This was because the stipulation was not an agreement that the taxpayers could not be a "telephone company" pursuant to § 12-20-100, and the taxpayers were cognizant of the limits of the stipulation. Indeed, the first and only misinterpretation of Stipulation 50 was by the ALC.

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[20]R., p. 297 last para. "REGULATION," first sentence.

[21]R., p. 023.

[22]R., p. 469.

Further, both the taxpayers and the Department agreed that ALC Rule 29(D) governed post trial motions at all times that this matter is in litigation.[23] And, although the taxpayers now state that the Department failed to file a Rule 59(e), SCRCP, motion to alter or amend a judgment, they never raised this issue before the Court of Appeals. Instead, they argued vehemently that the Department had a duty to file a motion to reconsider pursuant to ALC Rule 29(D),[24] which clearly states "[t]he filing of a motion for reconsideration is not a prerequisite to filing a notice of appeal from a final decision of an administrative law judge." Clearly, the taxpayers did not find it appropriate to rely upon Rule 59(e), SCRCP,[25] and cannot now raise the issue.

The taxpayers now improperly try to revise their challenge to the Department's filing of an appeal in this matter, from ALC Rule 29(D) to Rule 59(e), SCRCP, in light of this Court's February 20, 2009, Opinion in Home Medical.[26] In that case, the Department did file a Rule 59(e), SCRCP, motion to alter or amend judgment, which was disputed by the taxpayers. In this case, the taxpayers never raised Rule 59(e), SCRCP, and the Home Medical ruling has since clarified the Court's position on the issue. This was not the case at the time of the appeal in this case.

The taxpayers next allege error, in conjunction with their first argument (preservation), in that the Department argued an alternative explanation for Stipulation

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[23]See Final Brief for Respondents, p. 24, para. 1 (R., p. 419).

[24]See Final Brief of Appellant, pp. 24, 31, and 41.

[25]The taxpayers, by now citing Rule 59(e), SCRCP, are attempting to apply this Court's decision in Home Medical Systems, Inc. v. S.C. Department of Revenue, 382 S.C. 556, 677 S.E.2d 582 (2009).

[26]Id.

50. Again, the record is the best evidence of the parties' understanding of the intent of all of the stipulations.

Significantly, it is important to emphasize that both parties were, and remain, in agreement that "**cellular and landline services operate on patently different technologies**." It is equally important to emphasize that this agreement does not contradict the Department's argument that both types of service providers are to be taxed pursuant to § 12-20-100. In fact, the record will illustrate the support for the Department's argument that the ALC misinterpreted Stipulation 50, not the parties to this appeal. Therefore, the Department is only seeking to be relieved of the ALC's misinterpretation of Stipulation 50. As the record indicates, the taxpayers never presented Stipulation 50 in the manner announced by the ALC.

The Department raised numerous objections to the taxpayers' Motion for Summary Judgment on both legal and factual grounds.[27] The Department also filed a Motion for Summary Judgment in which it took issue with the fact that a cellular provider was somehow excluded from the common definition of a "telephone company;" to which the taxpayers had the opportunity to argue that Stipulation 50 resolved the case in their favor, but they did not. Again, the taxpayers have misapprehended the record. After the ALC Rule 25(C) stipulations were submitted to the ALC, the Department argued in its Motion for Summary Judgment, that the taxpayers were clearly a "telephone company" within the meaning of § 12-20-100.[28] This firmly established that the Department continued to argue that the taxpayers were a "telephone company" under §

[27]See, Department's Motion for Summary Judgment. (R., pp. 25-42). Also, Department's Response to taxpayers' Motion for Summary Judgment. (R., pp. 74-92).

[28](R., p. 35, para. 29).

12-20-100. The import of Stipulation 50 is that both parties believed that a landline company was a telephone company, but the taxpayers did not agree that a cellular company was a "telephone company." Both parties made arguments that were supported factually and by common definitions of "telephone" and legally which companies were and were not encompassed by § 12-20-100. Although each argued there were no issues of fact, by the fact that both presented two views of the facts and law, there were inherent material issues of fact and law.

The taxpayers never presented to the ALC that Stipulation 50 was a definitive agreement, in that both parties believed cellular companies were excluded from tax treatment under § 12-20-100, which makes it impossible for the ALC's ruling to have substantial support within the record. The record clearly demonstrates that the taxpayers did not present Stipulation 50 to the ALC as it was misinterpreted by the ALC, and therefore the Department had no occasion to refute such "interpretation" until the ALC issued its Final Order and Decision.

Stipulation 50 was entered into as recognition of the limits of the regulating authority of the PSC. This is supported by the plain language of the stipulation. That is, under Title 58 of the South Carolina Code of Laws, the PSC directly regulates telephone utilities or telephone companies using wire technologies, but not radio common carriers. Under various federal laws, the PSC cannot regulate radio common carriers. This is all that Stipulation 50 (R., p. 132) was meant to encompass. Section 12-20-100(A)(2) is a requirement that a business earn income from a "regulated business" before it may be taxed under § 12-20-100(A). As such, in all motions and oral arguments of this case, the taxpayers never argued that Stipulation 50 was an agreement that all telephone

companies, as listed in § 12-20-100(A), were limited to those transmitting via wire technology. Only on appeal, has the taxpayers endorsed this position while alleging that the Department never announced restriction and limitations to this unauthorized interpretation of Stipulation 50. Indeed, a clear and objective review of the record will reveal that the ALC's misuse of this stipulation was the only misuse of this stipulation. And, now that the taxpayers have chosen to endorse this finding, which raises the real issue that the entire stipulation lacked mutual assent.

Although the taxpayers allege that the Department is attempting to imply limitations and unwritten restrictions onto Stipulation 50, it is clear that the taxpayers are attempting to re-write the stipulation by ratifying the misinterpretation contained in the ALC Order.

The first use of Stipulation 50 (R., p. 132) is found in the taxpayers' Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment (Memorandum). Most illustrative of its use, or lack thereof, can be seen on page 7, paragraph 2, in taxpayers' memorandum in support.[29] It reads:

> Based on the plain language of the statute, none of the Alltel Entities is a "telephone company" because they provide communications services via radio, not telephone. *See, e.g.*, Jt. Stips. ¶¶ 2, 3, 4, 44, 45, 46, 47, 52. As such, these entities are defined as a "radio common carrier" under state law, not as a telephone company. Jt. Stip. ¶ 46; *see* S.C. Code Ann. §§ 58-9-10(6) (defining "telephone utility"), 58-11-10(f) (defining "radio common carrier" and expressly excluding "telephone utilities or services regulated by Articles 1 through 13 of Chapter 9 of Title 58 of the 1976 Code.").

[29](R., p. 56, 2nd para.).

This is the only portion of taxpayers' Memorandum which addresses the issue of the interpretation of "telephone company" as used in § 12-20-100, and their position is made clear. The taxpayers cannot be a telephone company because, under Title 58 they are not a telephone utility, but instead a radio common carrier. If Stipulation 50 was indeed an agreement that all telephone companies "transmitted intelligence over a vast network of wires located in public rights of way" it would have certainly been offered to the ALC. Instead, the taxpayers clearly link their understanding of "telephone company" to "telephone utility." Although this is accurate for regulatory purposes, with its narrow use of the term, it is incorrect for the purposes of taxation under § 12-20-100, which relies upon the common understanding of "telephone company."

Stipulation 50 is cited only four times in the Memorandum, and each time it was cited, it was illustrative of the Title 58 requirements of a "telephone utility."[30]

In the Department's response to the positions of the taxpayers, the focus was to rebut the relevance of Title 58's jurisdictional principles to the application of a tax statute. Paragraphs 14 and 15 of the Department's response objected to the taxpayers' focus on Title 58 as follows:

> 14) In this case, the targeted term is "telephone company." (see § 12-20-100(A) of the SC Code Annotated (2006). The statute most relevant in applying this unambiguous term is to be found in Title 12 of the Code, section 12-43-335(C)(7), which specifically directs the Petitioner to file property tax returns as a "telecommunications" company.

[30]See taxpayers' Memorandum of Law in Support of Motion for Summary Judgment (R., p. 58, para. 2) (bases differentiation of radio common carriers under Title 58); (R., p. 53, para. 2) (cited Stipulation 50 to illustrate Title 58 requirements of a radio common carrier); (R., p. 59, para. 1) (cites Stipulation 50 to illustrate companies encompassed in 1904 utility tax); and (R., p. 59, para. 1) (refers to companies under the 1904 utility tax).

> 15) In attempt to avoid the "telecommunications" label, the Petitioners attempt to make the conceptual leap from taxation to "public utility" by first erroneously implicating the applicability of Title 58 of the Code and then differentiating wireless technology from land line technology. Nowhere in section 12-20-100 of the Code are the words "**utility**" or "**public service**" used. Hence, depriving the Petitioners of any necessary link to legitimize their argument that the employment of wireless technology by a telephone service provider would therefore exclude it from the requirements of section 12-20-100.

(R., p. 79) (emphasis is in original).

This was the most appropriate response merited by the taxpayers' use of Stipulation 50 (R., p. 132) at the time pleadings were filed in the case. Again, the taxpayers had not sought to interpret Stipulation 50 as an agreement, that under § 12-20-100(A) all telephone companies employed wired telecommunications services.

Then, in the Department's Motion for Summary Judgment, arguments concerning the interpretation of "telephone company" under § 12-20-100(A) in its plain language, focused on dictionary definitions and the related tax statute, S.C. Code Ann. § 12-43-335(C)(7) (Supp. 2007).

Instead, in the taxpayers' responsive filing, they attack the Department's position by alleging "DOR's Memorandum Improperly Attempts to Argue Factual Matters Not Supported by the Parties' Stipulations."[31] Then, they challenge the Department's positions that the taxpayers owned 100% interests in one or more partnerships; that affiliated corporations were also engaged in unregulated businesses; that the taxpayers are a Delaware Corporation owning subsidiaries that provide wireless and wireline local

[31]See Reply Memorandum in Opposition to Department's Motion for Summary Judgment (R., p. 95, heading I).

and long distance services; and that the taxpayers were regulated by the FCC.[32] The taxpayers did not challenge the Department's position as unsupported by, or contradicting, Stipulation 50.

The taxpayers then offer more evidence that it objectively limited Stipulation 50 to an agreement that a "telephone company" or "telephone utility" was regulated by the PSC pursuant to Title 58 of the South Carolina Code of Laws. In Section II of their opposition to the Department's Motion for Summary Judgment, the taxpayers state: "Although its argument is couched in misleading assertions of 'plain language,' Department's Memorandum leaves no doubt but that it is engaged in an extra-legislative effort to amend § 12-20-100 to read 'telecommunications company' instead of 'telephone company.'"[33]

If the taxpayers believed Stipulation 50 was the agreed upon standard for taxation under § 12-20-100(A), they would have been compelled to bring it to the attention of the ALC. Instead, the taxpayers continued defining themselves as a "telecommunications company" and took issue with the Department's attempts to use the dictionary definitions of "telephone" and "telecommunications" to demonstrate the common language links between the two terms. The taxpayers again supported their opposition to the Department's insistence that they could be a "telephone company" in § 12-20-100(A) by using the provisions of Title 58 which differentiate between a "telephone utility" and a "radio common carrier." The taxpayers wrote:

> Had the General Assembly wished for Section 12-20-100 to apply to a "telecommunications company" instead of a

[32]See Reply Memorandum in Opposition (R., pp. 95-97).

[33](R., pp. 98-100).

> telephone company, it would have done so. And, because it specifically excluded a telephone company from its definition of a radio common carrier, *see* S.C. Code Ann. § 59-11-10(f) (1977) (defining "radio common carrier" and expressly excluding "telephone utilities or services regulated by Articles I through 13 of Chapter 9 of Title 58 of the 1976 Code."), it is evident that the legislature recognizes the distinction between the two types of entities.

Indeed, if the taxpayers objectively believed that Stipulation 50 did more than to acknowledge that a "telephone company" referred to a "telephone utility," they would have readily challenged the Department's position.

The final opportunity to use Stipulation 50 was at the motions hearing before the ALC. At the inception of the hearing, the ALC announced that the issue before it was the interpretation of the word telephone as used in a particular tax statute. Also, the ALC indicates that it will resolve the issue of the plain meaning of "telephone company" by reference to the history of the tax statute. The taxpayers refer to Stipulation 50 when the ALC inquired as to why the taxpayers were not regulated by the PSC. (R., p. 242, line 10 through p. 243, line 25). The taxpayers' argument states: "But, its been stipulated also that radio common carriers providing wireless communication service like the taxpayers in this case, do not use wires to provide their service, telephone companies do. Additionally, under South Carolina law, specifically citing to Your Honor, 58-9-2020 and 58-9-2030, ..."[34]

In furtherance of their argument, the taxpayers continued to respond to an inquiry from the ALC about any statutory definition of the term "telephone company;" (R., p. 246, lines 4 through 6) and, after referring to the statutory heading and the absence of the word "utility" in the statute, the argument is:

[34]See (R. p. 244, lines 7 through 14).

> A radio common carrier is not a telephone utility. 58-11-10(f) specifically excludes telephone company and telephone utility. Both of those words are used and the phrases telephone company and telephone utility are interchangeably used in Chapter 9 of Title 58. But 58-11-10(f) specifically excludes a telephone company or telephone utility from the definition of a radio common carrier.[35]

This is a clear application of the limits of Stipulation 50, and again it in no way was presented as an agreement that it meant all telephone companies, under § 12-20-100, had to use wire technology. And, again, the Department disagreed that the issue in this case was whether or not the taxpayers were regulated by the PSC. Once again, this was the appropriate objection to the use of Stipulation 50 beyond what was intended.

Nowhere else in the transcript was Stipulation 50 mentioned, alluded to, or intimated as relevant. Now, the question becomes how this stipulation can provide the "substantial evidence" for the ALC's finding that Stipulation 50 was somehow an agreement that all telephone companies, under § 12-20-100, used wired technology.

The ALC's critical error can be found at page 14 of its Order, the final paragraph and footnote number 2. At this point, the ALC alluded to Stipulation 50 almost verbatim. The Court then grafts that conclusion into the language of the Massachusetts Appellate Tax Board's decision which the ALC purports to rest on the plain and ordinary meaning of a "telephone company." This clearly ignores the plain meaning of the stipulation by finding that the stipulation meant that a "telephone company," employing wired technology, was the only kind of telephone company. By paying close attention to footnote 2, the ALC correctly refers to Stipulation 2, but incorrectly interprets Stipulation 50, in its final decision. This is the critical error of the ALC- interpretation that

[35]See (R., p. 247).

Stipulation 50 is an agreement all telephone companies relied on wired networks. Stipulation 50 was never presented as such in writing or oral arguments. Therefore, the ALC had no facts to rely upon in making this finding; instead this finding was the result of an error by the Court. Hence, there is no substantial evidence to support this finding.

It is also unfortunate that the taxpayers now wish to ratify this unauthorized reading of Stipulation 50. As the Department has always acted on the belief that this stipulation was no more than an agreement that a telephone company, not all telephone companies, used wire technology, and that this was the basis for jurisdiction of the PSC. The adoption of this position by the taxpayers now raises the issue of the necessary mutual consent needed to support this stipulation.

Finally, the taxpayers oppose the Department's challenge to the use of Stipulation 50 on appeal by alleging that the Department did not present its challenges in the ALC. What is evident from all of the foregoing paragraphs is that the misinterpretation of Stipulation 50 by the ALC occurred in its Final Order and Decision. And, with ALC Rule 29(D) not requiring a motion for reconsideration, the most appropriate venue to urge correction of this error is in the Appeals Court. Further, as the taxpayers never mischaracterized the stipulation in its filings or arguments, there was no need to urge corrections in the ALC. Hence, the "unwritten restriction and limitations" as stated by the taxpayers, of Stipulation 50 were embedded in the stipulation, as is objectively apparent by the taxpayers' filings and arguments before the ALC. It is understandable that the taxpayers can now benefit from the ALC's misinterpretation of the Stipulation 50 in its final decision, and that they wish to defend that interpretation, but their position is not supported by the record.

Indeed, where is the evidence that the parties agreed that CMRS providers like the taxpayers were excluded from taxation pursuant to § 12-20-100?

III. THE COURT OF APPEALS PROPERLY REVERSED AND REMANDED THIS MATTER PURSUANT TO § 1-23-610(C) BECAUSE THE ALC ABUSED ITS DISCRETION, AND ITS DECISION WAS CLEARLY ERRONEOUS IN VIEW OF THE RECORD OF FACTS.

The taxpayers argue the Court of Appeals committed reversible error by finding the ALC findings "were not sufficiently detailed to enable proper review." As argued to the Court of Appeals, the ALC seemingly abdicated its responsibilities pursuant to S.C. Code Ann.§ 1-23-350 (2005) by failing to adhere to the facts or law in reaching its decision, and therefore wrongfully granted summary judgment pursuant to Rule 56, SCRCP.

A. The ALC Failed To Make Findings Of Fact To Support A Finding That § 12-20-100(A) Is Ambiguous.

Interestingly, after the ALC ruled that § 12-20-100's "plain and ordinary meaning" resolved the issues in this case in favor of the taxpayers, it contradicts this ruling in assuming that this same statute is ambiguous. However, the ALC made no findings to substantiate its analysis.

The ALC is granted subject matter jurisdiction over the appeals of taxpayers who have exhausted prehearing remedies and are aggrieved by a department determination.[36] And, in the conduct of contested case hearings, the ALC is required to make factual and legal findings. The ALC's duties are defined by § 1-23-350, which states:

> A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. **A final decision shall include findings of fact** and conclusions of law, separately stated. **Findings of fact**, if set forth in

[36]S.C. Code Ann. § 12-60-460 (Supp. 2003).

> statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

(Emphasis added).

Therefore, any ruling by the ALC which does not include findings of fact is invalid. Here, the ALC makes an assumption to create a pretext as to explore an improper issue before it. The ALC's Order reads, "Alternatively, if it is assumed that the statute is ambiguous as applied to the Alltell Entities based on the arguments presented, the Court nevertheless finds that resolution of the assumed ambiguity leads to the same conclusion as that set forth above . . . ."

The court further notes a "purported ambiguity" and pursues an unsanctioned discussion of authorities of statutory interpretation. Further, the ALC cites legal authority which sanctions the reliance upon legislative history to ascertain legislative intent. Then, the ALC recites excerpts from a relative Law Review article as the legislative history.

To begin, an assumption is not sanctioned under § 1-23-350. Webster's Revised Unabridged Dictionary defines "*assume*" as "[t]o take for granted, or without proof; to suppose as a fact; to suppose or take arbitrarily or tentatively." Likewise, "purport" is defined as "to have the often specious appearance of being, intending, or claiming (something implied or inferred)." Clearly, the ALC's grant of power does not recognize assumptions or purported conclusions. Therefore, the entire ruling relevant to the purported ambiguity of § 12-20-100 is invalid, because a ruling without factual findings

by the ALC is not permitted. In order to justify its analyses, the ALC would have to find that reasonable minds can differ on whether or not "telephone company" includes both cellular and landline providers, and it failed to do so.

The State Supreme Court has previously ruled that the ALC is required to make "specific, express findings of fact when faced with an issue in which there is a dispute."[37] In this case, although the parties did enter into factual stipulations, no stipulation relates to the ambiguity of § 12-20-100 or § 12-20-50. It is true that in their Motion for Summary Judgment, the taxpayers state that § 12-20-100 is both unambiguous and ambiguous, but the Reply filed by Department argued that the statute was clear and unambiguous, and that the Motion for Summary Judgment misapplied the law interpreting ambiguous statutes. Hence, the issue was raised and a dispute resulted. However, the ALC seemed to resolve the dispute, albeit incorrectly, by finding § 12-20-100 was clear and unambiguous, and the use of the term "telephone company," as used by the General Assembly, did not include cellular providers. To that end, the factual findings were that the statute was not ambiguous. No findings were made to suggest otherwise. Indeed, the ALC's ruling concerning the ambiguity of the § 12-20-100 is unsupported by factual findings and in violation of § 1-23-350.

B. The ALC Erred In Finding "Telephone Company" To Be Both Clear And Unambiguous And Ambiguous.

The ALC properly cites the authority of the South Carolina Supreme Court, which holds that a statute is ambiguous if it is capable of more than one reasonable

[37] Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue, 342 S.C. 34, 535 S.E.2d 642 (2000); The Island Packet v. Kittrell, 365 S.C. 332, 617 S.E.2d 730 (2005).

interpretation.[38] However, the ALC has simultaneously ruled that under the "plain meaning rule," "telephone company" was clear and unambiguous. In determining that "telephone company" was plain and unambiguous, the ALC looked to other statutory provisions, albeit incompletely, in reaching its conclusions. Hence, although the ALC did employ the proper mode of analysis, it failed to employ that analysis properly. As pointed out herein, the General Assembly has specifically used the term "telephone company" in S.C. Code Ann. §§ 16-13-400(4), 16-17-445(G) (2003), and § 12-20-100(A). Therefore, the ALC merely has to look at the usage of that term by the General Assembly in order to ascertain its intended meaning.

First, in § 16-13-400, the General Assembly criminalizes the defrauding of telecommunication providers of the costs for the transmission of a message, signal, or other telecommunication over a telephone or telegraph. In § 16-13-400(4), the law specifically forbids anyone from tampering with the technology infrastructure of a "telephone company" in order to avoid payment for telecommunication services. Indeed, the statute uses "telephone company" to apply to any telecommunications service provider.

Second, § 16-17-445 regulates the practice of unsolicited consumer telephone calls. This law forbids telemarketing to consumers who do not wish to receive calls from specific vendors. The law delineates between a "telephone solicitor" and a "telephone company." And, although this statute does not define "telephone company," its use clearly encompasses both landline and cellular companies, and uses the term "telephone" to mean landline and cellular services.

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[38] Kennedy v. S.C. Retirement Sys.

Third, when comparing the disputed language of § 12-20-100 with §§ 16-17-445 and 16-13-400, there is no statutory definition for "telephone company." Instead, it appears that the General Assembly is relying upon the common, plain, and indiscriminant use of the term. It is noted that the technological differences are unnecessary in these statutes because there are no federalism concerns relative to either taxation or public protections from the misuse of telephone services.

Fourth, the ALC unnecessarily propagates its position by implicating the case of Cooper River Bridge v. S.C. Tax Commission.[39] In Cooper River, the State Supreme Court was asked to determine if a toll bridge company was included in a group of companies being a " . . . form of public service." The court found that the toll bridge company was not included because the statutory language was ambiguous, and as such, must be construed against the tax commission. The critical error here is that the General Assembly has indeed announced, by example, its intended meaning of the term "telephone company." This is done in the unrelated sections discussed in this section. Thereby avoiding the circumstances for the employment of rules of interpretation. This rule of construction is employed when a term is ambiguous, and without assumptions of fact, the ALC had no authority to venture into this discussion. Again, the General Assembly's use of "telephone company" in various statutes to encompass both cellular and landline providers in non-regulatory matters, has obviated the ALC's need to employ this rule.

[39]Cooper River Bridge, Inc. v. South Carolina Tax Commission.

The ALC's reliance on Cooper River was also in error due to the application of Plantation Pipe Line.[40] The ALC correctly recites the facts of Plantation Pipe Line, but fails to properly analyze its holding. In this case, the State Supreme Court upheld an income tax on an interstate carrier of petroleum with almost identical language to § 12-20-100, yet the ALC erroneously distinguished this more relative holding by concluding that *ejusdem generis* would not apply in this case despite the fact it assumed that its terms were ambiguous. The ALC's critical error here is that it focuses on the language "other form of public service," when the statute at issue specifically used the term "telephone company." Indeed, the reader is forced to reconcile the ALC's view that a cellular company was not a "public service," when the more pertinent issue is whether or not a cellular provider is included in the term "telephone company" as the General Assembly has done. Again, in an attempt to force its analysis of an assumed ambiguity, the ALC was forced to make an unreasonable reading of all applicable precedent. The Department proposes that even assuming the statute's ambiguity, Plantation Pipe Line would have resolved the matter in favor of a unified taxing of cellular and landline companies as "telephone companies" not as "public service" companies.

Finally, instead of granting primacy to the Title 58 differences in landline and cellular technologies, the ALC had a duty to apply its knowledge of all uses of the term "telephone company." In any event, had the ALC properly employed the "plain and ordinary meaning" rule, it would have again concluded that the term "telephone company" was clear and unambiguous with the differences being that its plain meaning

[40]Plantation Pipe Line Company v. S.C. Tax Commission, 261 S.C. 358, 200 S.E.2d 79 (1973).

includes both landline and cellular services. Conversely, a finding of ambiguity would not have been supported.

C. The ALC Erroneously Determined The Purpose Of § 12-20-100 Was Based Upon A Quid-Pro-Quo For Privileges.

The ALC wrote "[t]he purpose of § 12-20-100 is to impose a higher tax on certain entities as 'a quid-pro-quo' for special privileges granted by the state."[41] This conclusion was based upon a Law Review article which focused on the history of telephone regulation in South Carolina. The ALC cited selective conclusions made by the authors regarding the historical development of the state's laws in regulating telephone service providers, in particular landline technologies. The critical error in relying on this article, is that the ALC accepts the article's conclusions as legislative history. A Law Review article is secondary and a nonbinding legal authority. And, to elevate this article to the mantle of legislative history is improper and erroneous. Indeed, the ALC confuses a history of legislation with legislative history.

The article cited discusses only the landline service providers. And, although Title 58's distinctions have a proper application in South Carolina regulatory law, it is a narrower application than is relevant to the plain and ordinary usage in today's consumer market. No legislative history has been produced that indicates that the General Assembly is forbidden to tax landline and cellular providers similarly. Again, the ALC erroneously relies on the fact that cellular providers are not regulated by the PSC. The regulation of cellular technology is a mandate of federalism, and federalism does not forbid South Carolina from protecting consumers from the misuses of cellular telephones (§ 16-17-445) from telephone marketers, nor does it forbid the state to punish those who

[41]See (R., p. 21, para. 2, third sentence).

seek to defraud the cellular providers (§ 16-13-400), and it does not prevent the state from taxing cellular providers similarly to landline providers. To that end, the ALC erred in finding that the purpose of § 12-20-100 was a remunerative measure to offset the quid-pro-quo of public resources being exploited for commercial gain. No findings are made to support this position.

D. The Department Complied With The Provisions Of ALC Rule 29(D).

The taxpayers agreed with the Department at all times during the litigation of this matter with respect to ALC Rule 29(D).[42] Although the taxpayerd now rely upon this Court's ruling in Home Medical, they never raised this objection at the time of the appeal, nor could the argument have been raised because the decision was entered after this matter was appealed.

ALC Rule 29(D) requires:

> "**Motion for Reconsideration.** Any party may move for reconsideration of a final decision of an administrative law judge in a contested case to alter or amend the final decision, subject to the grounds for relief set forth in Rule 59, SCRCP, as follows:
>
> (1) Within ten (10) days after notice of the order concluding the matter before the administrative law judge, a party may move for reconsideration of the decision, provided that a notice of appeal from the decision has not been filed.
>
> (2) The administrative law judge shall act on the motion for reconsideration within thirty (30) days after it is filed, and if no action is taken by the administrative law judge within that period, the inaction shall be deemed a denial of the relief sought in the motion.
>
> (3) The filing of a motion for reconsideration shall not, of itself, stay the order of the administrative law judge or excuse or delay compliance with the order of the administrative law judge.

[42]See fn. 21, supra.

> (4) The time for appeal for all parties shall be stayed by a timely motion for reconsideration, and shall run from receipt of an order granting or denying such motion, or if no order is filed regarding the motion, thirty (30) days from the date the motion is deemed denied pursuant to subsection (D)(2).
> **The filing of a motion for reconsideration is not a prerequisite to filing a notice of appeal from a final decision of an administrative law judge."**

(Emphasis added)

The ALC issued its Final Order on April 22, 2008. This Court issued its ruling in Home Medical in 2009. Home Medical was issued to resolve questions resulting from the interactions of ALC Rule 29(D) and Rule 59(e), SCRCP. Until this ruling an attorney could reasonably expect that ALC Rule 29(D) was the primary procedure in all matters within the subject matter jurisdiction of the Administrative Law Court. Clearly, both parties to this matter relied on the guidance of ALC Rule 29(D). And, the taxpayers cannot now allege error by introducing a new standard for consideration, and they certainly cannot benefit from the retroactive application of the Home Medical decision. Moreover, this Court's holding merely recognized the interaction of the rules of the Administrative Law Court and civil courts, and concluded that "[w]e therefore hold Rule 59(e), SCRCP, motions are permitted in ALC proceedings."

IV. THE ALC FAILED TO GIVE PROPER CONSIDERATION TO OTHER ISSUES RAISED UNDER ITS JURISDICTION.

Although the Taxpayers allege because the Court of Appeals ordered a remand on all issues before the ALC, it is clear that the ALC order granting summary judgment has invited remand. That is, for all remaining issues before it, the ALC thought it would suffice to state "If the Court were to reach these issues . . .". Clearly, this is not a definitive ruling, and there is no record of consideration of facts or law.

The ALC was asked to determine if "substantial authority" had been presented by the taxpayers. Also, the ALC failed to give due consideration as to whether or not the taxpayers had income from a "regulated business" in South Carolina as a part of the requirements of § 12-20-100. Further, issues regarding the inclusion of partnership credits and assets were not given due consideration. Instead, the ALC ruled that because it found § 12-20-100 did not apply to the taxpayers, that it was unnecessary to reach such findings. However, the ALC again reaches an unsupported and erroneous finding as it wrote, "If the Court were to reach these issues, however, it would find for the Alltell Entities on each of these issues for the reasons set forth above."

The ALC then cites, as authority for its conclusion, a citation from Learned Hand which it selectively excerpted to explain that taxes are "enforced exactions." This is done, according to the ALC, to disagree with the Department's position that taxes are a civic duty. Again, however, the ALC failed to consider the legal authority for this position:

> Taxes are what we pay for civilized society . . . . A penalty on the other hand is intended altogether to prevent the thing being punished. It readily may be seen that a State may tax things that under the Constitution as interpreted it can not prevent. The constitutional right asserted in Allgeyer v. Louisiana to earn one's livelihood by any lawful calling certainly is consistent, as we all know, with the calling being taxed.[43]

Clearly, further findings of law and fact will be needed on the issues unresolved by the ALC.

[43]Justice Oliver Wendell Holmes dissenting in Compania General De Tabacos De Filipina v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927).

CONCLUSION

The Court of Appeals made no reversible error in ruling on this case. It relied upon the record and legal conclusions of the ALC. An order which makes the contradictory findings that a statute is both clear and unambiguous and ambiguous cannot be supported by the record on at least one of the conclusions. Further, the analysis employed by the ALC was incorrect in reaching both of its conclusions. And, when the ALC abused its discretion by issuing its summary fiat of "If the Court were to reach these issues . . .", the Court of Appeals was merely restraining the unrestrained usurpation of authority by the ALC. This is the same ALC which this Court has had to remind of its statutory limits of authority.[44] Again, this Court is called upon to correct the plethora of errors in the Order issued by the ALC.

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March 16, 2012

[44] The Island Packet v. Kittrell.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

The Honorable Marvin F. Kittrell, Chief Administrative Law Judge

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On Certiorari to the Court of Appeals of South Carolina
Unpublished Opinion No. 2010-UP-232 (S.C. Ct. App. filed April 7, 2010)

Case Nos. 07-ALJ-17-0299-CC; 07-ALJ-17-0300-CC;
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07-ALJ-17-0303-CC; 07-ALJ-17-0304-CC

Alltel Communications, Inc.; Alltel Mobile Communications of the Carolinas, Inc.;
New York Newco Subsidiary; Telespectrum, Inc.;
360 Communications Co. of SC No. 1; and
360 Communications Co. of SC No. 2, ...Petitioners,

v.

South Carolina Department of Revenue, ...Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Wanda C. Grubbs, certify that I have caused to be mailed, postage prepaid, a copy of the Brief of Respondent in the above-referenced case, on March 16, 2012, to John M.S. Hoefer, Esq., and Tracey C. Green, Esq., Willoughby & Hoefer PA, PO Box 8416, Columbia, SC 29202-8416.

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Wanda C. Grubbs

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