

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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SC Court of Appeals

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

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

ORDER DENYING MOTION FOR
RECONSIDERATION IN PART AND
GRANTING RECONSIDERATION
IN PART

Appearances:

- For the Petitioners: Burnet R. Maybank, III, Esq.; Eric S. Tresh, Esq.; Jeffrey A. Friedman, Esq.; and Maria M. Todorova, Esq.
- For the Respondent: Tracey C. Green, Esq.; John W. Roberts, Esq.; Harry Hancock, Esq.; and J. Abraham Gutting, Esq.

This matter was initially before the Administrative Law Court (ALC or Court) upon a Motion for Summary Judgment filed by Respondent Department of Revenue (Department) and a Cross-motion for Partial Summary Judgment filed by Petitioner Duke Energy Corporation (Duke Energy). The underlying case arises from the Department’s denial of amended corporate income tax returns filed by Duke Energy in 2002 for income tax years 1978-2001. On August 9, 2012, the Court issued an Order in which it granted the Department’s Motion for Summary Judgment as to the timeliness of Duke Energy’s amended refund claims for tax years ending 1978-1993; denied the Department’s Motion for Summary Judgment as to whether Duke Energy is considered a “manufacturer” under the applicable apportionment statute; and granted the Department’s Motion for Summary Judgment as to Duke Energy’s inclusion of the return of principal in its apportionment formula and denied Duke Energy’s Cross-Motion for Partial Summary Judgment on this issue.

On August 20, 2012, Duke Energy filed a Motion for Reconsideration of the Court’s Order Granting the South Carolina Department of Revenue’s Motion for Summary Judgment as to the Waiver and Gross Receipts Issues. The Department filed its Memorandum in Opposition to Duke Energy’s Motion for Reconsideration on September 14, 2012. Some of the arguments warrant reconsideration and clarification of the original Order. Accordingly, I am issuing an

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Amended Order Granting Summary Judgment in Part and Denying Summary Judgment in Part in this case addressing those issues. The remaining arguments will be addressed below.¹

DISCUSSION

In its Memorandum in Opposition to the Department's Motion for Summary Judgment and in Support of its Cross-Motion for Partial Summary Judgment, Duke Energy argues that in 2007, the South Carolina Legislature made a "drastic" change in the law when it specifically excluded from its definitions of "sales" and "gross receipts" the principal from bonds, loans, or similar marketable instruments. See 2007 S.C. Laws Act 110 § 51.A (enacted as S.C. Code Ann. § 12-6-2295(B)(1)) (Setting forth that "[t]he terms 'sales' as used in Section 12-6-2280 and 'gross receipts' as used in Section 12-6-2290 do not include: (1) repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument."). According to Duke Energy, the addition of that exclusion created a material change to the law, and thus "there is a presumption that the Legislature intended to change the existing law rather than to clarify its original intent." It is true that "[w]hen the Legislature adopts an amendment to a statute, th[e] Court recognizes a presumption that the Legislature intended to change the existing law. **Nonetheless, a subsequent statutory amendment may also be interpreted as clarifying original legislative intent.**" Duvall v. South Carolina Budget and Control Bd., 377 S.C. 36, 659 S.E.2d 125 (2008) (Internal citations omitted) (emphasis added).

In its Motion for Reconsideration, Duke Energy further explained that: "**Presumably**, the South Carolina Legislature was **troubled** by the inclusion of the principal in the sales factor, which led to its changing the statute to exclude receipts." (Emphasis added). I find no support for such a presumption. If the Legislature was so troubled by an interpretation that would allow inclusion of principal in the sales factor, it is just as likely, if not more so, that this troublesomeness would motivate the Legislature to clarify the existing law so as to avoid an application that it never intended. Duke Energy instead relies on an unsupported statutory

¹ The Court notes that Duke Energy filed an appeal of the Court's original decision granting partial summary judgment "out of an abundance of caution." Following Duke Energy's filing of a Motion to Reconsider, this Court issued an Order staying its decision granting partial summary judgment. Therefore, there was no valid decision regarding the issues addressed in the parties' cross motions for Summary Judgment until the issuance of the Amended Order Granting Summary Judgment In Part and Denying Summary Judgment in Part entered simultaneously with this Order on October 11, 2012

interpretation premised on the notion that because principal is excluded in S.C. Code Ann. §12-6-2295 (2007) (effective for tax years beginning after 2006), then principal must necessarily have been included in the gross receipts/sales factor prior to the enactment of this statute. On the contrary, the Department asserts that it has had a longstanding interpretation that principal was not included in gross receipts, an assertion that Duke Energy did not dispute. In light of the reasons discussed in the Amended Order Granting Summary Judgment in Part and Denying Summary Judgment in Part as to why the return of principal was excluded from the apportionment formula prior to the enactment of Section 12-6-2295, as well as the Department's longstanding policy of excluding principal from the apportionment formula,² it is clear that the Legislature intended Section 12-6-2295 to clarify the existing law.

However, Duke Energy further contends in its Motion for Reconsideration that this Court, presumably to avoid inconsistency, must interpret Section 12-6-2295 as reflecting a change in the existing law, not clarification of it, since "the Department (and this Court) allowed the sales of Duke Energy securities to be included at net – not excluded all together [sic] as the statutory regime now requires." The problem with this argument is that it misinterprets Section 12-6-2295, the current "statutory regime," as excluding the sales of Duke Energy's securities altogether from the definitions of "sales" and "gross receipts." Though Duke Energy did not in its Motion for Reconsideration cite to a specific subsection to support its position, it clarified in a written response, dated September 21, 2012, to a question posed by this Court that it was

² Duke Energy asserts in its responses to the inquiries presented by the Court on September 19, 2012 that the Department "recently abandoned" its position that it had a long-standing policy "to require only the inclusion of the net gain or interest from short-term investment transactions in the calculation of the apportionment formula," citing the Department's Memorandum in Support of Its Motion for Summary Judgment at 33. The Court finds no such abandonment by the Department – indeed, quite the opposite. On page 33 of the Department's Memorandum in Support of Its Motion for Summary Judgment, the Department states in the heading for section 3, in bold-face type, the following:

Because the Department's long-standing administrative policy excluding the return of principal from short-term investment transactions in the calculation of a taxpayer's apportionment formula is a reasonable application of the legislative intent and the allocation and apportionment statutes, Duke Energy is prohibited from including the return of principal from short-term investment transactions in the calculation of its sales factor or gross receipts factor.

Moreover, the very first sentence of the discussion under this heading states the following: "It has been the long-standing administrative policy of the Department to require only the inclusion of the net gain or interest from short-term investment transactions in the calculation of the apportionment formula regardless of whether a taxpayer files using the three-factor formula or the single factor gross receipts formula." The remainder of the Department's discussion is consistent with this position.

referring to Section 12-6-2295(B)(1).³ Also in its written response, Duke Energy likened the inclusions and exclusions set forth in Section 12-6-2295 to the amended language of S.C. Code Ann. § 12-50-150 (2000), which the South Carolina Supreme Court, in Key Corporate Capital, Inc. v. County of Beaufort, considered to be a change in the law, rather than a clarification. 373 S.C. 55, 644 S.E.2d 675 (2007). As Duke Energy correctly points out, the Court in Key Corporate Capital held that the subsequent amendment of the statute at issue, which added “plus interest in the amount actually earned by the county on the amount refunded” to “the amount paid” in determining the total amount refunded to a successful bidder when a tax sale is voided, constituted a change in the statute, not a clarification. The Court reasoned that the plain meaning of the original statute included only “the amount paid” in the refund, and that the “plus interest” language that was added “materially changed the terminology of the statute, [and that] a departure from existing law [, therefore,] clearly was intended, rather than a clarification of original intent.”

Unlike the Court in Key Corporate Capital, which “s[aw] no reason not to apply the presumption[,]” this Court has set forth in its Amended Order reasons not to apply the presumption but instead finds that Section 12-6-2295(B)(1) was “a subsequent statutory amendment . . . clarifying original legislative intent.”⁴ Key Corporate Capital, 373 S.C. at 60, 644 S.E.2d at 678 n.3 (quoting Stuckey v. State Budget and Control Bd., 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000)). An amendment to the language of a law does not necessarily mean a change in the meaning of that law, for an amendment may also be interpreted as a clarification by the legislature of its original intent. See Duvall, 377 S.C. at 46, 659 S.E.2d at 130 (“[A] subsequent statutory amendment may also be interpreted as clarifying original legislative intent.”). Rather, the Court must look at whether an amendment to the language of a statute alters the meaning of the statute to determine whether a change, rather than a mere clarification, was intended by the Legislature.

³ In its Motion for Reconsideration, Duke Energy made the following statement: “This legislative change made clear that the sales of securities are excluded from the factor entirely.” In response to this statement, the Court posed two questions to the parties: “(1) To which subsection of 12-6-2295 is ‘legislative change’ referring? (2) How, specifically, does this subsection exclude Duke Energy’s sales of securities, e.g. municipal bonds and commercial paper?”

⁴ The Court quite agrees that parts of Section 12-6-2295(B) reflect changes made by the Legislature to prior law, such as subsections (7) and (9), which respectively exclude from “sales” and “gross receipts” pension reversions and income from forgiveness of indebtedness, both of which had not been so excluded before.

The amendment to the statute in Key Corporate Capital constituted a clear change in the meaning of the statute at issue in that case by adding interest to “the amount paid” in calculating the total amount refunded to a successful bidder when a tax sale is voided. As a result of the new statutory language, the successful bidder would be refunded a higher amount than he/she originally paid, and therefore would receive more under the new statute than under the old statute, which only refunded the amount paid and did not include interest. Thus, because the meaning of the statute was altered by the “material[] change[s to] the terminology of the statute,” the Court held that “a departure from existing law clearly was intended, rather than a clarification of original intent. . . .” 373 S.C. at 61, 644 S.E.2d at 678. In the present case, however, Section 12-6-2295(B)(1) merely follows the existing law in South Carolina with regard to the treatment of principal, specifically that principal is excluded from “sales” and “gross receipts,” as has been previously discussed. Section 12-6-2295(B)(1) thus simply clarifies that exclusion of principal from “sales” and “gross receipts” for purposes of the apportionment formula applies to “repayment, maturity, or redemption of **the principal** of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument[.]” (Emphasis added).

Nevertheless, Duke Energy argues in its responses to the Court’s inquiries dated September 19, 2012 that the language of Section 12-6-2295(B)(1) “does not exclude the ‘sales’ of securities,” only “the repayment, maturity or redemption of a security,” and that the Department’s auditor, Joe Southard, created an ambiguity by stating in his deposition testimony that the exclusion did apply to the sales of securities. (Emphasis omitted). It must be noted from the outset that Duke Energy’s position that Section 12-6-2295(B)(1) does not exclude the sales of securities stands in complete contradiction to the position that Duke Energy took in its Memorandum in Support of Its Motion for Reconsideration, in which it stated: “This legislative change [set forth in S.C. Code Ann. § 12-6-2295(B)(1)] made clear that **the sales of securities are excluded from the factor entirely.**” (Emphasis added). Because Duke Energy’s initial argument was that the sales are excluded by the “change” Section 12-6-2295, and Duke Energy confirmed that it was relying on subsection (B)(1) when referencing that change, Duke Energy cannot now argue that sales of securities are **not** excluded by Section 12-6-2295(B)(1). See Cothran v. Brown, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004) (citations omitted) (“Judicial estoppel is an equitable concept that prevents a litigant from asserting position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding. The

purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary.”).

In response to Duke Energy’s initial argument, this Court finds that “sales” of securities are not subject to the exclusion under 12-6-2295(B)(1), but only to the extent of the net gains from those sales; the principal from those sales is excluded. The Court also disagrees with Duke Energy’s statement that “th[e] exclusion is limited to the repayment, maturity or redemption of a security,” because this statement excludes a key phrase in the language of the statute: “the principal of.” The statutory exclusion under (B)(1) applies only to “repayment, maturity, or redemption of **the principal of** a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument[.]” (Emphasis added).⁵ Hence, the exclusion only applies to the extent of the principal of the securities that have been repaid, have matured, or have been redeemed. Indeed, this was the understanding that the Department’s auditor had, as reflected in his response that only the net amount from the repayment, maturity, or redemption of the principal of a marketable instrument falling under (B)(1) would be included in the sales factor, not the principal. Thus, the auditor’s deposition testimony cited by Duke Energy in footnote 3 of its responses to the Court’s inquiries dated September 19, 2012 does not create an ambiguity, but rather echoes the Department’s long-standing policy of excluding principal from “sales” and “gross receipts” in the apportionment formula.

Finally, Duke Energy argues that “principal” in Section 12-6-2295(B)(1) modifies only “a loan, bond or mutual fund” and does not modify “certificate of deposit” and “similar marketable instrument.” Section 12-6-2295(B)(1) excludes from the definitions of “sales” and “gross receipts” “repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument.” Duke Energy maintains that “the word ‘or’ is a disjunctive particle [sic] and its use before ‘certificate of deposit’ and before ‘similar marketable instrument’ signifies an alternative.” Thus, “principal” modifies only “a loan, bond, or mutual fund.”

As an initial matter, because Duke Energy admits that “[t]he statute requires the exclusion of the ‘principal’ of ‘a loan, bond, or mutual fund,’” and admits that it “purchased and

⁵ According to Duke Energy’s letter dated July 17, 2012 in response to inquiries issued by the Court, the securities that Duke Energy purchased and sold as a part of its business included municipal bonds, loan repurchase agreements, and commercial paper.

sold securities[,] including municipal bonds . . .,” Duke Energy essentially concedes that the principal of at least some of the securities that it sold is excluded from “sales” and “gross receipts” in the apportionment formula under Section 12-6-2295(B)(1). However, as discussed in this Court’s Amended Order, the principal from the sales of securities was likewise excluded from the “sales” or “gross receipts” factor of the apportionment formula prior to the enactment of Section 12-6-2295(B)(1). Therefore, no change took place with respect to the exclusion of principal from the sales of securities under the “sales” or “gross receipts” factors of the apportionment formula. This stands in contradiction to Duke Energy’s contention that the apportionment formula was substantially changed based upon the language of Section 12-6-2295(B)(1) enacted by the Legislature in 2007.⁶

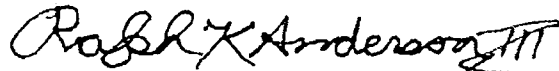
As to Duke Energy’s statutory interpretation of Section 12-6-2295(B)(1), the Court agrees that the “or” is a logical disjunction, coordinating conjunction, or disjunctive conjunction or disjunctive participle that signifies an alternative between the phrases “loan, bond, or mutual fund”; “certificate of deposit”; and similar marketable instrument.” See Garris v. Governing Bd. of the S.C. Reinsurance Facility, 333 S.C. 432, 440, 551 S.E.2d 48, 52 (1998) (recognizing “where a statute contains two clauses which prescribe its applicability and the clauses are connected by the disjunctive ‘or,’ application of the statute is not limited to cases falling within both clauses, but applies to cases falling within either”); Brewer v. Brewer, 242 S.C. 9, 14, 129 S.E.2d 736, 738 (1963) (holding the word “or” used in a statute or regulation is a disjunctive participle marking an alternative). However, the use of “or” here does not limit the application of “the principal of” to the first phrase – “loan, bond, or mutual fund.” Rather, “the principal of” modifies all three phrases in subsection (B)(1). The controlling language of this subsection is the first part of the subsection – “repayment, maturity, or redemption of the principal of.” “The principal” cannot be separated from “repayment, maturity, or redemption,” as the “repayment, maturity, or redemption” is “of the principal.” Likewise, the latter part of the subsection “a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument” cannot be separated from the controlling, first half of the subsection – “repayment, maturity, or redemption

⁶ Duke Energy infers that a distinction there exist between the sale of securities, and the repayment, maturity, or redemption of securities. I find no such distinction evident from the language of Section 12-6-2295(B)(1). Moreover, as explained above, Duke Energy in both its Memorandum in Support of its Cross-Motion for Partial Summary Judgment and in its Motion for Reconsideration contends that the sales of securities are **excluded** from the apportionment formula of Section 12-2-2295 entirely.

of the principal of.” Had the Legislature intended “certificate of deposit” and “similar marketable instrument” to be interpreted as separate items that were not modified by “repayment, maturity, or redemption of the principal of,” then the Legislature would have listed “certificate of deposit” and “similar marketable instrument” as separate, enumerated items, as it did in subsections (B)(2)-(10). Rather, the Legislature clearly put these various terms under one subsection because they were “similar marketable instrument[s].” Hence, each of the terms, “loan,” “bond,” “mutual fund,” “certificate of deposit,” and “similar marketable instrument” are all singular, all being modified by the same indefinite article “a.” Furthermore, from a practical standpoint, to adopt Duke Energy’s interpretation would be to endorse the absurd notions that the net gain from certificates of deposit or similar marketable instruments is excluded from “sales” and “gross receipts” for purposes of tax apportionment, and that certificates of deposit should be treated differently from bonds. The Legislature could hardly have intended such an absurd application. Therefore, this Court rejects Duke Energy’s interpretation of Section 12-6-2295(B)(1).

IT IS THEREFORE ORDERED that that the Petitioners’ Motion for Reconsideration is denied, in part, and granted, in part, in keeping with this Order.

AND IT IS SO ORDERED.



Ralph King Anderson, III
Administrative Law Judge

October 11, 2012
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

E. Harvin Belser Fair

E. Harvin Belser Fair
Judicial Law Clerk

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