STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Duke Energy Corporation, Petitioner, vs. South Carolina Department of Revenue, Respondent.	Docket No. 19-ALJ-17-0153-CC **ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

This case comes before the South Carolina Administrative Law Court (Court or ALC) pursuant to a request for contested case filed by Duke Energy Corporation (Petitioner or Duke) challenging the decision of the South Carolina Department of Revenue (Respondent or Department) to deny Duke a capital investment tax credit under section 12-14-60 of the South Carolina Code for tax years 2010-2014. Duke and the Department disagree whether subsection (G) of section 12-14-60 limits the capital investment tax credit to $5 million per taxable year or whether the $5 million limitation represents a lifetime limitation. Both parties filed cross motions for summary judgment on this legal issue. On September 24, 2020, the Court held a hearing on the motions. Having entertained counsels' arguments at the hearing and having thoroughly reviewed the parties' motions and filings, I conclude the Department's motion should be granted and Duke's motion should be denied for the reasons stated below.

BACKGROUND

The Department audited Duke's South Carolina corporate tax returns for income tax years 1996 through 2014 to determine the amount of tax credit Duke claimed pursuant to § 12-14-60. As a result of this audit, on July 19, 2018, the Department issued a Notice of Adjustment to Duke notifying Duke that it had used $4,298,806 of tax credit through December 31, 2014, and a balance of $701,195 was available to carry forward. The total of these amounts is $5 million, which the Department asserts is the lifetime limit of the tax credit at issue.

MATERIAL FACTS NOT IN DISPUTE

1. Duke is a utility company providing electrical power to South Carolina citizens and, as such, is allowed to claim certain investment tax credits under § 12-14-60, provided it meets the eligibility requirements and subject to the tax credit limitations imposed by the statute.
2. Duke is an entity subject to the license tax under S.C. Code Ann. § 12-20-100 (2014).
3. Duke filed its South Carolina corporate income tax returns for each year of the audit period and claimed a total of $24,850,727 in tax credit.
4. The Department conducted an audit Duke's South Carolina corporate income tax returns for the audit period.
5. The Department audited Duke's South Carolina corporate income tax returns for the audit period to determine the amount of tax credit claimed by Duke under § 12-14-60. The Department's audit showed that $4,298,806 of tax credit was used by Duke through December 31, 2014, and Duke had a carry-forward balance of $701,195.
6. The underlying basis for all of the tax credit was not audited and the audit report was compiled by accepting the tax credit claimed by Duke as filed on its South Carolina corporate income tax returns for the audit period.[1]
7. On July 19, 2018, the Department issued its Notice of Adjustment allowing Duke a total of $5,000,000 in tax credit for the audit period, and disallowing tax credit of $19,850,727.
8. The table below lists the amounts of tax credit as computed by Duke and the Department for the audit period:

Tax Credit Per Return		Tax Credit Allowed by DOR	Tax Credit Used by Taxpayer	Tax Credit Disallowed	Tax Credit Carry Forward Per Taxpayer	Per Department
1996	208,415	208,415	208,415	-0-	-0-	-0-
1997	332,120	332,120	332,120	-0-	-0-	-0-
1998	382,454	382,454	382,454	-0-	-0-	-0-
1999	194,718	194,718	194,718	-0-	-0-	-0-

[1] Solely for the purpose of a Summary Judgment Motion or trial of this case, the Department qualifiedly agrees with the amount of tax credit claimed by Duke on its South Carolina corporate income tax returns for the audit period. The Department has raised in its Prehearing Statement that it has not audited the underlying basis for the tax credit during the audit period and has reserved the right to do so.

2000	450,347	450,347	450,347	-0-	-0-	-0-
2001	156,034	156,034	156,034	-0-	-0-	-0-
2002	346,795	346,795	346,795	-0-	-0-	-0-
2003	290,036	290,036	290,036	-0-	-0-	-0-
2004	640,665	640,665	-0-	-0-	640,665	640,665
2005	210,450	210,450	-0-	-0-	851,115	851,115
2006	180,785	180,785	-0-	-0-	1,031,900	1,031,900
2007	438,966	438,966	-0-	-0-	1,470,866	1,470,866
2008	387,240	387,240	-0-	-0-	1,858,106	1,858,106
2009	436,294	436,294	-0-	-0-	2,294,400	2,294,400
2010	501,741	344,681	-0-	157,060	2,796,141	2,639,081
2011	4,832,741	-0-	-0-	4,832,741	7,628,882	2,639,081
2012	4,951,427	-0-	-0-	4,951,427	12,580,309	2,639,081
2013	4,953,682	-0-	-0-	4,953,682	17,533,991	2,639,081
2014	4,955,817	-0-	1,937,887	4,955,817	20,551,921	701,194
	24,850,727	**5,000,000**	**4,298,806**	**19,850,727**		

9. Duke claimed a net-operating loss for tax years 2004 through 2013, which is the reason none of the tax credit claimed by Duke was used during those years. Duke used $1,937,887 in tax credit in 2014 to offset its South Carolina corporate income tax for that year, leaving unused carry-forward credit of $701,195 per the Department's audit report.
10. On October 16, 2018, Duke timely protested the Notice of Adjustment.
11. The Department issued its Department Determination on April 26, 2019, upholding the Notice of Adjustment.
12. Petitioner timely filed its Request for a Contested Case Hearing on May 24, 2019.

DISCUSSION

This Court has jurisdiction over this case pursuant to section 12-60-460 of the South Carolina Code (2014) and section 1-23-600 of the South Carolina Code (Supp. 2019).

Both parties have filed motions for summary judgment pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedures. The Rules of Procedure for the Administrative Law Court (SCALC Rules) provide that the South Carolina Rules of Civil Procedure (SCRCP) "may, in the

discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules." SCALC Rule 68. Rule 56(c), SCRCP, provides that summary judgment is properly granted 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 any party is entitled to a judgment as a matter of law." "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

"[B]ecause summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues." *Lord v. D & J Enterprises, Inc.*, 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014). "Summary judgment is not appropriate where further inquiry into the facts is desirable to clarify the application of the law." *Rothrock v. Copeland*, 305 S.C. 402, 405, 409 S.E.2d 366, 368 (1991). Moreover, "[s]ummary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000).

In this case, because both parties have filed cross-motions for summary judgment, "the parties concede the issue before us should be decided as a matter of law." *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011); *see also 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."). The sole legal issue before the Court is how to interpret the amount of tax credit that can be claimed under § 12-14-60. This is an issue of law that is appropriate for summary judgement. To resolve the issue, the Court must engage in statutory construction.

General Rules of Statutory Construction

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "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 v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will" and "courts are bound to give effect to the expressed intent of the legislature." *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012).

There are special rules of statutory construction for tax matters such as this one. In this case, the tax credit works as a tax deduction. Tax deductions "are a matter of legislative grace" and to receive them "the taxpayer must establish compliance with the statutory conditions imposed." *Davis Mech. Contractors, Inc. v. Wasson*, 268 S.C. 26, 29, 231 S.E.2d 300, 301 (1977); *see Allied Corp. v. S.C. Tax Comm'n*, 288 S.C. 197, 199, 341 S.E.2d 139, 140–41 (1986) ("It is settled that a deduction is not a matter of right but is one of legislative grace."); *S. Soya Corp. of Cameron v. Wasson*, 252 S.C. 484, 488, 167 S.E.2d 311, 313 (1969) ("The deduction and benefit is allowed as a matter of legislative grace."). More specifically, "in order for a taxpayer to avail himself of a deduction in the calculation of a tax, the taxpayer must bring himself squarely within the terms of that statute authorizing such deduction." *AVCO Corp. v. Wasson*, 267 S.C. 581, 588, 230 S.E.2d 614, 617 (1976). Furthermore, although ambiguities in tax statutes are generally construed in favor of the taxpayer, this rule "does not apply in the construction of a statute authorizing deductions; rather, the ambiguity will be resolved against the taxpayer." *S. Soya Corp. of Cameron*, 252 S.C. at 489, 167 S.E.2d at 313; *Centex v. S.C. Dep't of Revenue*, 406 S.C. 132, 140, 750 S.E.2d. 65, 73 (2013) ("In conjunction with these rules of statutory construction, we must also be cognizant of our policy to strictly construe a tax credit against the taxpayer as it is a matter of legislative grace."). "This rule of strict construction simply means that constitutional and statutory language will not be strained or liberally construed in the taxpayer's favor" and "[i]t does not mean that we will search for an interpretation in [DOR]'s favor where the plain and unambiguous language leaves no room for construction." *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74–75, 716 S.E.2d 877, 881 (2011). Therefore, Duke has the burden to show its

interpretation of the tax credit is correct and any ambiguity will be construed in the Department's favor.

Section 12-14-60

Section 12-14-60 is part of a larger piece of legislation called the Economic Impact Zone Community Development Act of 1995. S.C. Code Ann. § 12-14-10 (2014). The purpose of this legislation is to establish a program of providing tax incentives for the creation of capital investment in order: (1) to revitalize capital investment in this State, primarily by encouraging the formation of new businesses and the retention and expansion of existing businesses; and (2) to promote meaningful employment." S.C. Code Ann. § 12-14-20 (2014). Section 12-14-60 describes the tax credit and how it is administered. The two subsections at issue, in particular, are subsection (A)(1) and (G). Subsection (A)(1) was amended during the tax years subject to the audit, but its meaning remained essentially unchanged. During the 2010 tax year at issue in this case, subsection (A)(1) provided:

> There is allowed an economic impact zone investment tax credit against the tax imposed pursuant to Chapter 6 [Income Tax Act] of this title for any taxable year in which the taxpayer places in service economic impact zone qualified manufacturing and productive equipment property.

During the 2011 through 2014 tax years, the term "economic impact zone" was deleted from subsection (A)(1), which now read:

> There is allowed an investment tax credit against the tax imposed pursuant to Chapter 6 [Income Tax Act] of this title for any taxable year in which the taxpayer places in service qualified manufacturing and productive equipment property.

Subsection (G) did not change during the tax years in question and provided:

> (G) The credit allowed by this section for investments made after June 30, 1998, is limited to no more than five million dollars for an entity subject to the license tax as provided in Section 12-20-100.[2]

§ 12-14-60.

Plain Language

Regardless of which version of section 12-14-60(A)(1) is interpreted, this section plainly allows a taxpayer to earn and apply the tax credit every year the taxpayer places qualifying property into service. *State v. Sweat*, 379 S.C. 367, 375, 665 S.E.2d 645, 649 (Ct. App. 2008), *aff'd as*

[2] The parties agree Duke is subject to the license tax referenced here and subsection (G) applies in this case.

modified, 386 S.C. 339, 688 S.E.2d 569 (2010) ("The legislature's intent should be ascertained primarily from the plain language of the statute."). Section 12-14-16(G) limits the credit in this section to "no more than five million dollars." *Id.*

The parties disagree as to whether the limitation in subsection (G) should be read as an annual limitation or a lifetime limitation. Subsection (G) refers to "the credit allowed by this section," which could be read as establishing a limit to subsection (A)(1)—the subsection that describes "the credit allowed by this section." *See Eagle Container Co., LLC v. Cty. of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 895-896 (2008) ("Words in a statute must be construed in context, and the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute." (citations omitted)). If interpreted this way, subsection (G) would modify the credit allowed in subsection (A)(1), which is an annual credit; therefore, the $5 million dollar limitation would be an annual limitation. In other words, a taxpayer could earn and apply $5 million in tax credit each year it qualified indefinitely. This is the interpretation advanced by Duke.

In contrast, subsection (G) plainly states the legislature's intent that no taxpayers who are subject to the license tax as provided in section 12-20-100 is eligible for more than $5 million of tax credit. Undisputedly, subsection 12-14-60(G) does not address the treatment of the taxpayers who are more generally entitled to claim exemptions under section 12-14-60, but the specific class of taxpayers who are subject to the license. The Department interprets subsection (A)(1) to described when the credit can be earned and taken (annually), and it interprets subsection (G) to limit the total amount of tax credit that can be used for license tax taxpayers over its lifetime.

The overall conflict is created by the absence of a word directly modifying the $5 million in subsection (G). In other words, neither the word "annually" nor "lifetime" is used to describe the $5 million limitation in subsection (G). Both parties argue the absence of these terms in their favor. Duke contends that if the legislature intended the limitation to be a lifetime limitation, it would have expressly used the word "lifetime" or some version of "limited to $5 million total for all years" or "in all years"; and, without that express limitation, the Court must refer back to subsection (A)(1)'s description of the tax credit as an annual one. For example, Duke cites the following statutes that expressly create lifetime limitations: S.C. Code Ann. § 12-6-3530(B)(1) (providing "[t]he total amount of credits allowed pursuant to this section may not exceed in the aggregate five million dollars for all taxpayers and all calendar years and one million dollars for

all taxpayers in one calendar year"); S.C. Code Ann. § 12-6-3570 ("This credit is allowed over more than one taxable year but a taxpayer's total credit in all years, towards any such project, may not exceed one hundred thousand dollars."); S.C. Code Ann. § 12-6-3588(G) ("A taxpayer's total credit for all expenditures allowed pursuant to this section must not exceed five hundred thousand dollars for any year and five million dollars for all years.").

Similarly, the Department argues that if the legislature had intended the $5 million limitation to be an annual one, it would have included the word "annual" to describe the $5 million limitation in subsection (G), and its absence means it is a lifetime limitation. The Department cites to several instances in our state's laws where the legislature specified an annual limit for a tax credit: S.C. Code Ann. § 12-6-3420(B)(2) (providing "the credit is limited to ten thousand dollars annually"); S.C. Code Ann. § 12-6-3790(D)(1)(a) (Supp. 2018) (providing "[t]ax credits authorized by subsection (H)(1) and subsection (I) annually may not exceed cumulatively a total of twelve million dollars for contributions to the Educational Credit for Exceptional Needs Children's Fund"); S.C. Code Ann. § 12-6-3620(B) (2014 & Supp. 2018) ("A taxpayer may use up to six hundred fifty thousand dollars of credit for a single taxable year. The tax credit is nonrefundable but unused credits may be carried forward for fifteen years.").

Overall, § 12-14-60(G) does not plainly set forth whether the $5 million limitation is an annual limitation or a lifetime limitation. However, this conclusion does not necessarily mean the limitation is ambiguous and will be strictly construed against the taxpayer at this juncture. *Crescent Manufacturing Co. v. Tax Commission*, 129 S.C. 480, __, 124 S.E. 761, 765 (1924) ("That rule of strict construction of . . . tax statutes is subordinate to the rule of reasonable, sensible construction, having in view effectuation of the legislative purpose, and does not prevent the courts from calling to their aid all the other rules of construction and giving each its appropriate scope, etc." (internal quotation marks and citations omitted)). The Court must still consider the language of the statute in light of the purpose of the statute and the statutory scheme as a whole. *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("[W]e read the statute as a whole and in a manner consonant and in harmony with its purpose."); *State v. Sweat*, 379 S.C. 367, 376, 665 S.E.2d 645, 650 (Ct. App. 2008), *aff'd as modified*, 386 S.C. 339, 688 S.E.2d 569 (2010) ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers."); *Liberty Mut. Ins. Co. v. S.C. Second Injury Fund*, 363 S.C. 612, 622, 611 S.E.2d 297, 302 (Ct. App. 2005) ("Courts should consider not merely the

language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law."); *Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 140, 750 S.E.2d 65, 69 (2013) ("In conjunction with these rules of statutory construction, we must also be cognizant of our policy to strictly construe a tax credit against the taxpayer as it is a matter of legislative grace.").

Statutory Scheme and Statute as a Whole

Duke asserts § 12-14-60(G) should be read in congruence with the rest of the statute, in particular with reference to the impact of subsections 12-14-60(A)(1) and (D). Duke argues that when subsections 12-14-60(A)(1) and 12-14-60(G) are read in the context of the statutory scheme as a whole, and in the context of taxes more generally, it becomes clear that the limitation is an annual one. Duke notes the Department itself emphasizes in its Motion that "the limitation applies to '[t]he credit allowed by this section', which is a clear reference to § 12-14-60 as a whole."

Duke observes that section 12-14-60(A)(1) provides that the credit is applied against a taxpayer's South Carolina corporate income tax liability, which is "imposed annually." S.C. Code Ann § 12-6-530. It also notes that income, for tax purposes, is calculated by making modifications and adjustments on an annual basis, thus indicating that additions, deductions, credits, and other tax attributes impacting the calculation of the corporate income tax liability should be calculated on an annual basis unless otherwise specifically stated in a statute. *See* S.C. Code Ann. § 12-6-1120; S.C. Code Ann. § 12-6-1130. Duke maintains that these "features of the law"—the corporate income tax is an annual tax, the tax credit is earned for each tax year in which the taxpayer makes the necessary investment in the State, and the carryforward period is measured from the particular tax year in which the tax credit for that tax year was generated—demonstrate that the limitation in section 12-14-60(G) is an annual limitation. Thus, Duke contends that given the rest of the statute calculates all aspects of the tax credit annually, calculating a limitation on a lifetime basis is incongruous with the reading of the statute as a whole.

This argument is unpersuasive considering practically all taxes are computed on an annual basis. Indeed, under Duke's theory, any limitation could violate the principle of taxes being calculated and paid annually if the limitation extended beyond one year. Obviously, the legislature has enacted lifetime limitations for some tax credits, as noted by Duke, despite the annual calculation of taxes. *See, e.g.*, § 12-6-3530(B)(1) (providing "[t]he total amount of credits allowed pursuant to this section may not exceed in the aggregate five million dollars for all taxpayers and

all calendar years and one million dollars for all taxpayers in one calendar year"). Furthermore, there is no question that this tax exemption applies to some taxpayers on an annual basis. The extent to which the exemption may be taken on that annual basis, however, is limited by the formula expressed in subsection (A)(2). Also, the carryforward of the exemption earned in any one tax year is regulated by subsection (D)(2). However, again, the question for this Court is not the treatment of the taxpayers who are typically entitled to annually claim exemptions under section 12-14-60, but the treatment of taxpayers who are subject to the license tax as provided in section 12-20-100. In the instance of those subject to the license tax, subsection 12-14-60(G) addresses the tax credit not from the perspective of how it is earned (annually) or when it is taken (annually), but the extent to which it can be utilized, similar to how the carryforward is taken annually but its utilization is capped at ten years (generally). *See* § 12-14-16(D).

Duke also argues subsection 12-14-60(D)(1) illustrates that the credit is an annual credit because once the credit is earned in a tax year in which the taxpayer satisfies the investment requirement, it is applied against the taxpayer's annual liability and it is annually carried forward as allowed by law. Subsection 12-14-60(D)(1) provides that once the credit is earned by a taxpayer, the unused credit "may be carried forward for ten years from the close of the tax year in which the credit was earned." Subsection (D)(2) further provides that any amount of credit that is unused in the initial ten-year period can be used afterward under certain circumstances. § 12-14-60(D)(2). Subsection (D), overall, thus reenforces that the tax credit can be earned or accrued every year and carried forward from there. However, the right to carry forward an earned credit is not probative of whether the $5 million limitation is either limited to yearly earnings or is a total limitation for an entity. Indeed, under the Department's interpretation, Duke would be entitled to annually earn an exemption credit subject to the limitations of section 12-14-60(A)(2) and then carryforward that credit as allowed by 12-14-60(D(1). In other words, there is no dispute that taxes are imposed annually and that the calculation of this credit is in keeping with that yearly determination. The carryforward simply operates within that undisputed framework.

Finally, Duke argues that reading a lifetime limitation into section 12-14-60 would lead to an absurd result because it would frustrate the purpose of the statutory scheme, which is to encourage investment in South Carolina. More specifically, Duke argues a lifetime limitation would favor new investment over continuing investment because once a company like Duke, who has been investing in the state for many years, reaches the lifetime limitation, it would no longer

be incentivized to invest in South Carolina. Duke contends that from an economic impact perspective, it would be reasonable to expect additional or continuing investments to be valued and appreciated the same as new investments in the state. To support valuing all investments equally, Duke points the legislature's decision to amend § 12-40-60 in 2010 to expand the availability of the tax credit to all areas of the state.

Prior to 2010, the tax credit was limited to property investments in designated "economic impact zones." 2010 S.C. Act No. 290. After the amendment, the tax credit was no longer limited to "economic impact zones" but was applicable to the whole state. *See id.* I do not find it persuasive that a **geographic** expansion of the tax credit necessarily indicates the interpretation of subsection 12-14-60(G) **was** or **should** likewise be expansive, or that the 2010 amendment somehow reflected an expansive interpretation of 12-14-60(G) to allow for an annual $5 million credit. The geographic expansion of a tax credit has nothing to with the actual dollar limit of the tax credit. And, as the Department notes, subsection 12-14-60(G) remained the same before and after the geographic expansion of the tax credit in 2010, suggesting the interpretation of the limitation would not change either.

Ultimately, Duke's argument must be based upon valuing investors differently. Even under Duke's interpretation of section 12-14-60, it is statutorily subject to a different treatment because it is subject to the license tax as provided in § 12-20-100. The distinction is Duke contends that the different treatment should only be on an annual basis as opposed to a lifetime basis. However, either interpretation would lessen the incentive of a taxpayer who is subject to the license tax to invest in this State. Furthermore, for those subject to the license tax, a lifetime limitation would apply equally to the new and old investors.

Moreover, I do not find that interpreting section 12-14-60(G) as a lifetime limit would create a result so contrary to the purposes of the statute to render it absurd. *See Kiriakides v. United Artists Comme'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) ("However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention."). It is not unreasonable that the legislature would seek, at some point, to limit the tax credit as it has in other statutes, especially for license tax taxpayers who are treated differently from other taxpayers. *See, e.g.*, S.C. Code Ann. § 12-6-3530(B)(1) (providing "[t]he total amount of credits allowed pursuant to this section

may not exceed in the aggregate five million dollars for all taxpayers and all calendar years and one million dollars for all taxpayers in one calendar year").

Title of the Act

The Department contends the title of one of the amending acts to § 12-14-16 shows that the limitation was intended to a be a lifetime limitation. During the 1998 legislative session, the Legislature passed Act No. 419 limiting the tax credit for utility companies to $1,000,000; later that same session, the legislature passed Act No. 442 to increase the credit to $5,000,000. 1998 S.C. Act No. 419; 1998 S.C. Act No. 442. The title of both Acts stated their purpose was "[t]o limit the total credit allowed a utility for investments made after June 30, 1998." *Id.* The Department argues the title's reference to "total credit" shows the limitation was intended to be a lifetime limitation and not an annual limitation.

Duke asserts the Department takes the phrase "total credit" out of context. Duke argues that within the proper context of 12-14-60(A)(1) and 12-14-60(G), the statute plainly reads that the "total credit" allowed "for any taxable year" under subsection (A)(1) is limited to $5 million under subsection (G). Duke further contends the plain language of the statute shows the limitation is an annual one and, therefore, there is no need to consult the title of the Acts to resolve doubt about the meaning of the limitation.

"Our Courts have held that the title is part of an act and while a title may not be used to alter the text of a duly enacted statute, it may be considered when construing legislative intent." *Alyce B. McInnis v. Estate of E.C. McInnis, Jr.*, 348 S.C. 585, 560 S.E.2d 632 (Ct. App. 2002). However, resorting to the title or a heading of a statute to aid in its interpretation is "of use only when they shed light on some ambiguous word or phrase and as tools available for resolution of doubt, but they cannot undo or limit what the text makes plain." *Garner v. Houck*, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993). Because the plain language of 12-14-60(G) is not determinative in this case, it is appropriate to consider the title of the Acts in question to discern legislative intent.

"Total" is not defined in the relevant statutory provisions. "Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning." *See Lee v. Thermal Eng'g Corp.*, 352 S.C. 81, 91–92, 572 S.E.2d 298, 303 (Ct. App. 2002). In Merriam-Webster's Online Dictionary, "total" is defined as "compromising or constituting a whole: ENTIRE". https://www.merriam-webster.com/dictionary/total (last visited Oct. 12, 2020). Here, "total" modifies "credit" to indicate the whole or entire credit is limited to $5 million.

Nevertheless, this interpretation does not clarify the issue because 12-14-60(G) could still be read to refer back to § 12-14-60(A)(1), in which case the word "total" could simply mean the entire or whole credit for "any taxable year" is limited to $5 million. As Duke notes, the legislature has used the word "total" in the context of an annual limitations. For example, section 12-6-3790(D)(1)(b) of the South Carolina Code (Supp. 2019) provides that "[t]ax credits authorized by subsection (H)(2) annually may not exceed cumulatively a total of two million dollars" and section 12-6-3515(C)(2) of the South Carolina Code (2014) similarly limits the "total credit a taxpayer may use under this section for any particular taxable year" to $52,500. Thus, the legislature's use of the word "total" to describe the tax credit in the 1998 Acts does not resolve the ambiguity.

Department's Prior Interpretation

In advancing its interpretation of § 12-14-60(G), Duke relies heavily on the Department's historic interpretation of the limitation prior to 2014. Duke maintains the Department consistently interpretated the limitation in § 12-14-60(G) to be an annual limitation for over a decade as evidenced by its form for the tax credit as issue, Form TC-11. Shortly after the enactment of section 12-14-60, the Department drafted and published Form TC-11, which taxpayers were required to complete in order to claim the Credit. Further, after the enactment of the limitation in § 12-14-60(G), the Department revised and published Form TC-11 on two separate occasions in 1998 to reflect the initial $1 million limitation and the revised $5 million limitation thereafter. Duke maintains that in both of these amended versions of Form TC-11, the Department required taxpayers to apply the limitation on an annual basis. Moreover, Duke claims that since the enactment of the limitation in 1998, and until 2014, the Department amended Form TC-11 eleven times and every time, the Department required taxpayers to apply the limitation on an annual basis. In what amounts to an inverse deference doctrine, Duke seeks to hold the Department to its formerly longstanding interpretation of § 12-14-60(G) and prevent it from adopting a "new" interpretation. *See Etiwan Fertilizer Co. v. S.C. Tax Comm'n*, 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950) ("We have held in many cases that where the construction of the statute has been uniform for many years in administrative practice, and has been acquiesced in by the General Assembly for a long period of time, such construction is entitled to weight, and should not be overruled without cogent reasons.").

The Department argues that its use of Form TC-11 prior to 2014 does not establish the Department's legal position regarding the tax credit limitation, nor is it dispositive as to the

meaning of the tax credit limitation. However, the Department agrees it revised Form TC-11 on July 24, 2014, but asserts it did so to ensure the language of the form clearly reflected the lifetime limitation of the credit afforded under § 12-14-60(G) and to better assist taxpayers in the computation of the tax credit.

The Department is mandated to "prescribe rules, procedures, forms, and instruction it considers appropriate." S.C. Code Ann. § 12-60-1720 (2014). Similarly, taxpayers are mandated to "comply with the department's regulations, rules, and procedures, and shall use the forms the department prescribes." *Id.* However, forms do not have the same force and authority as law. S.C. Code Ann. § 1-23-10(4).

By seeking to hold the Department to its long-standing administrative interpretation, Duke is ultimately seeking to invoke an inverse agency deference doctrine that would allow it to seek deference based upon its assertion of the Department's interpretation. This is made even more interesting by the fact that the Department disclaims any official interpretation prior to 2014. The Department asserts that its Form TC-11 was not officially reviewed by its Policy Department until 2013 when the application of § 12-14-60(G) became an issue related to the audit in this case. The Department further asserts that its Policy Department then carefully researched the issue and determined Form TC-11 did not accurately reflect the credit limitation expressed in § 12-14-60 and, as a result, suggested a revision to the form which was implemented in 2014. Subsequently, the Department's Office of General Counsel issued the department determination in this case consistent with its interpretation that § 12-14-60(G) requires a lifetime limitation. Since its Policy Department's determination, the Department has consistently applied the credit limitation on a lifetime basis ever since.

The Court is not aware of an inverse application of the deference doctrine and further recognizes the many problems that could arise out of such a doctrine. Likewise, even if there were an inverse agency deference doctrine, the Department is not bound by its prior interpretations, particularly when they were in error. As noted by the South Carolina Supreme Court in *Fennell v. South Carolina Tax Commission*:

> We are not unmindful that the former construction of the law by the Commission and its 1943 ruling with respect to the income earned by residents by the practice of their profession in other states is entitled to weight, for which respondent cites *G. E. Moore Co. v. Walker, S.C.*, 102 S.E.2d 106, and earlier authorities. However, here there was a reversal in 1950 by the Commission of its former ruling. It was

> not bound by the former error of its way and neither is the court. An administrative ruling is not so sacrosanct as to be beyond the correction of error; it need not perpetuate error.

233 S.C. 43, 47–48, 103 S.E.2d 424, 427 (1958); *see also TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 621, 503 S.E.2d 471, 477 (1998) ("Although [the Director of the Department's Property Division] believed the Department had the authority to grant retroactive exemptions, and exemptions may have been granted under this erroneous view, neither the Commission nor the courts are bound by his erroneous interpretation.").

In sum, the Court finds no authority to bind the Department to a prior interpretation that was in error. *See Fennell, supra.* Similarly, even if the Department previously applied what it now deems to be an incorrect interpretation of § 12-14-60(G) to a prior audit of Duke, that does not bind the Department to the same interpretation in the future if the prior interpretation was in error. *Id.* Duke's attempt to bind the Department to its prior interpretation is thus unpersuasive.

Failed Legislation

Duke argues the limitation in § 12-14-60(G) should be interpreted as an annual limitation because the legislature previously considered amending § 12-14-60 to "clarify" that it the $5 million limitation was an annual one. Duke cites to *Stuckey v. State Budget & Control Board* for the principle that "[a] subsequent statutory amendment may be interpreted as clarifying original legislative intent." 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000).

In response, the Department argues that despite amending the § 12-14-60 six times since its enactment, the legislature has chosen not to include the word "annual" in the credit limitation of subsection (G). Moreover, when given the specific opportunity to include the word "annual" to describe the credit limitation during the 2017-2018 Legislative Session, the legislature chose not to do so. Further, Duke's argument is based upon un-enacted legislation (S. 428) and fiscal impact statements associated with that legislation that cannot be relied upon since the bill never became law.

Senate Bill S. 428 was introduced during the spring of the 2017-2018 Regular General Assembly Session. The proposed amendment would have placed the word "annually" after the phrase "no more than five million dollars" found in § 12-14-60(G). However, this bill never became law. Because the bill never became law, *Stuckey* does not support Duke's position because *Stuckey's* holding dealt with an enacted amendment. *See Stuckey*, 339 S.C. at 401, 529 S.E.2d at

708. Moreover, the perils of relying on un-enacted legislation were succinctly summarized in *CFRE, LLC v. Greenville County Assessor*:

> We have stated, however, that failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute. Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.

395 S.C. 67, 80, 716 S.E.2d 877, 884 (2011) (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994)) (internal quotations marks omitted). Part of the danger of relying on failed legislation is that it invites inferences supporting opposing views. *See CFRE, LLC*, 395 S.C. at 81, 716 S.E.2d at 884 (noting the folly of relying on un-enacted legislation was demonstrated by the fact that both CFRE and the Assessor could use the General Assembly's failure to enact Senate Bills 1313 and 230 equally to their advantage.) Since this bill never passed, the Court declines to draw any inferences or conclusions from this failed legislation because to do so would invite an exercise in folly. *See id.*

Conclusion

I conclude the application of the limitation described in 12-14-60(G) is ambiguous. It is both reasonable, and plausible, for the $5 million limitation to be either an annual limitation or a lifetime limitation. Because I find it is ambiguous, the ambiguity must be resolved against the taxpayer and in favor of the Department. *S. Soya Corp. of Cameron*, 252 S.C. at 489, 167 S.E.2d at 313 (holding although ambiguities in tax statutes are generally construed in favor of the taxpayer, this rule "does not apply in the construction of a statute authorizing deductions; rather, the ambiguity will be resolved against the taxpayer" (citing 47 C.J.S. Internal Revenue 230)); *Centex*, 406 S.C. at 140, 750 S.E.2d. at 73 ("In conjunction with these rules of statutory construction, we must also be cognizant of our policy to strictly construe a tax credit against the taxpayer as it is a matter of legislative grace.").

Specifically, I find the Department's determination is reasonable when considering the statute as a whole. In particular, subsection 12-14-60(A)(2) imposes a limit upon "[t]he amount of the credit allowed by this section"; however, subsection 12-14-60(G) imposes a limit upon "[t]he credit allowed by this section." Considering both of these subsections within the context of subsection 12-14-60(A), I find that imposing the limit upon the "amount" of the credit presumes a right to the credit. But limiting the credit "allowed" reflects an intention to limit the credit itself.

If subsection 12-14-60(G) is addressing the subject of the credit as a whole, then viewing subsection 12-14-60(G) as a lifetime limitation would be in keeping with that holistic perspective. Moreover, if it was the legislative intention to merely address the amount that a taxpayer could annually take as an exemption, it is reasonable to assume the legislature would have enacted the same $5 million limitation for all taxpayers, not just for licensees under § 12-20-100. Accordingly, I find the limitation described in 12-14-60(G) is a lifetime limitation and the Department is entitled to summary judgment as a matter of law.

Rule-making Procedures

Duke argues the Department's interpretation of § 12-14-60(G) in 2014 violated statutory rule-making procedures. Duke asserts that for fifteen years the Department's Form TC-11 applied the credit limitation annually. Nevertheless, Duke argues that sometime on or around July 24, 2014, the Department changed its interpretation without following any rulemaking procedures in violation of sections 1-23-110 to -160 of the South Carolina Code. Duke further cites to *Joseph v. S.C. Department of Labor, Licensing & Regulation*, 417 S.C. 436, 790 S.E.2d 763 (2016) in support of its argument that the Department's change to its form constitutes an invalid "administrative overreach" into the legislative process. Essentially, Duke argues the Department's interpretation should have been promulgated as a regulation because the Form TC-11 "fills out" the statutory scheme by showing that once a taxpayer falls within the credit limitation's criteria, the credit is capped at $5 million regardless of the taxpayer's specific factual situation.

The Department asserts its tax forms are not regulations because "[p]olicy or guidance issued by an agency other than in a regulation does not have the force or effect of law." S.C. Code Ann. § 1-23-10(4) (2005). The Department further cites to section 12-60-1720 of the South Carolina Code (2014) for its authority to "prescribe rules, procedures, forms, and instructions it considers appropriate and that are consistent with this article." The Department notes, without citing any law, that it may also provide guidance to taxpayers through instructions, private letter rulings, advisory opinions, and revenue rulings, and, while revenue rulings may be given deference by our courts, none of these methods of guidance, including forms, carry the force of law.[3]

[3] In some instances, the Department may adopt regulations, revenue rulings, revenue procedures, and technical advice memoranda without seeking review by the legislature but those instances relate to advice of Internal Revenue Service. S.C. Code Ann. § 1-23-120(H) (Supp. 2019).

In determining whether a particular statement of agency policy amounts to a "statement of general public applicability that implements or prescribes law or policy," the South Carolina Supreme Court has adopted the "binding norm" test established by a line of Federal cases. *See Home Health Serv. Inc. v. S.C. Tax Comm'n*, 312 S.C. 324, 440 S.E.2d 375 (1994) (citing *Ryder Truck Lines, Inc. v. U.S.*, 716 F.2d 1369 (11th Cir. 1983). The key factor in determining whether a policy statement establishes a "binding norm" is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not follow the policy at issue in a particular situation. *Joseph*, 417 S.C. at 454, 790 S.E.2d at 772. If the policy at issue "so fills out the statutory scheme" that the agency will only look to whether the policy's criteria are met in taking action or rendering a decision, the policy will be considered a "rule" or "regulation." *Id.* On the other hand, as long as the agency remains free to consider the individual facts in taking action or rendering a decision, the policy at issue will not be considered a "binding norm." *Id.* Thus, to determine whether a policy or guideline establishes a "binding norm," courts look to the actions of the agency, not to the labels given by the agency. *Columbia Broadcast Systems v. U.S.*, 316 U.S. 407, 416 (1942). "[W]hen there is a close question whether a pronouncement is a policy statement or regulation, the [agency] should promulgate the ruling as a regulation in compliance with the APA." *Home Health Serv., Inc.*, 312 S.C. at 329, 440 S.E.2d at 378.

In this case, the evidence did not establish the Department was filling in, expanding upon, or otherwise creating a binding norm; rather, it created a form based upon its interpretation of the statute at issue. Nevertheless, even if the Department's interpretation created a binding norm, a binding norm that was improperly executed is **not** enforceable. *See Captain's Quarters Motor Inn, Inc., v. South Carolina Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991) ("We are constrained, however, to find Coastal Council's damage assessment test invalid for purposes of permit evaluation because it was never promulgated by regulation.").

Here the Department does not contend its interpretation is a binding norm and, thus, enforceable. Furthermore, the Department is not seeking agency deference for its interpretation. Therefore, the only result of Duke's argument, to declare Department's interpretation unenforceable, has already been achieved. Accordingly, this argument is puzzling.

The Taxpayers' Bill of Rights

The South Carolina Taxpayers' Bill of Rights provides that "[t]he department shall publish brief but comprehensive statements in simple and nontechnical language which explain

procedures, remedies, and the rights and obligations of the department and taxpayers." S.C. Code Ann. § 12-58-60. Further, "[a]s appropriate, statements must be provided to taxpayers with the initial notice of audit, the notice of proposed additional taxes, any subsequent notice of tax due, or other substantive notices." *Id.* Duke argues that, consistent with this duty, a taxpayer has the right to receive forms in easy, non-technical language. Duke further asserts the Department's Form TC-11, which was in effect for over fifteen years, plainly instructed Duke Energy to compute the tax credit limitation on an annual basis and the Department cannot now summarily argue this form in not binding on the Department. Duke contends the Department's dismissal of its old form is in direct conflict with the Department's obligations under the Taxpayers' Bill of Rights.

The Department argues its Notice of Adjustment (Notice) to Duke plainly stated the adjustment of the tax credits made by the Department, the resulting amount of credit carry forward, and the time in which Duke had to protest the Notice in compliance with § 12-58-60. The Department observes Duke obviously received the Notice and understood its importance because it then protested the findings in the Notice. Accordingly, the Department asserts Duke's argument about the Taxpayers' Bill of Rights is without merit because the Department plainly communicated through the Notice the substance of its decision and Duke's rights and further, Duke has been afforded all of its administrative remedies and has chosen to file a Request for a Contested Case Hearing with this Court.

I conclude the Department complied with the Taxpayers' Bill of Rights in this case because the Department provided Duke with the initial notice of audit, the notice of how the audit results would affect its tax credit, and informed Duke of its rights. The Department thus fully complied with § 12-58-60. Moreover, the Court has agreed with Duke's argument that the Department's form cannot be a binding. Therefore, Duke's argument regarding the rulemaking procedures negates this contention. Since the previous iteration of Form TC-11 was, at most, a simple statement of the Department's policy, it was not binding upon anyone. And, as the Court has explained, the Department's revised Form TC-11 complies with the law.

Estoppel

Duke argues the Department should be estopped from changing its interpretation of § 12-14-60 because, in making the decision to invest in South Carolina, Duke Energy relied, in part, on the Department's fifteen-year interpretation of § 12-14-60(G) as an annual limitation.

Additionally, Duke argues that even assuming the Department's new interpretation is valid, the Department should be estopped from retroactively applying that interpretation.

Estoppel is not an appropriate action in this case. The decision in *Heyward v. South Tax Commission* is controlling. 240 S.C. 347, 126 S.E.2d 15 (1962). In *Heyward*, the taxpayer claimed the South Carolina Tax Commission was estopped from collecting additional tax because of its acquiescence in, and approval of, the taxpayer's election on reporting profit from the sale of stock. *Id.* at 351, 126 S.E.2d at 17. Although the Court commented in dicta that the State may be estopped in its contractual matters, the Court found that in the tax matter before it, there was no basis for estoppel, holding:

> "[t]he doctrine of estoppel will not be applied to deprive the government of the due exercise of its police power, **or to effect public revenues** or property rights, or to frustrate the purpose of its laws or thwart its public policy."

Id. (emphasis added). The Department's errant interpretation for a number of years cannot deprive the government of its authority to effect public revenues. *Id.*

Unjust Enrichment

Duke contends the Department would be unjustly enriched by its retroactive application of its new interpretation of § 12-14-60(G)'s credit limitation. Duke asserts it makes capital investment decisions based on the impact over a long time period and the reversal of a fifteen-year policy concerning application of the credit limitation impacts the economics of these decisions. Duke argues the Department's reversal of its position on the interpretation of the § 12-14-60(G) credit limitation financially impacts Duke Energy's earnings, financial statements, shareholders, and customers. Accordingly, the Department would be unjustly enriched by the Department's retroactive application of this new interpretation to deny Duke Energy's tax credits.

"Unjust enrichment is an equitable doctrine, akin to restitution, which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff." *Barrett v. Miller*, 283 S.C. 262, 321 S.E.2d 198 (S.C. Ct.App. 1984). Further, "[w]here a plaintiff has an adequate remedy at law, equitable relief is not normally in order." *Barrett*, 283 at 264, 321 S.E.2d at 199 (citing Am. Jur. 2d *Equity* § 87). Here, Duke has an adequate remedy afforded to it under the Revenue Procedures Act, including the right to request a contested case hearing and have a *de novo* trial before this Court. *See* S.C. Code Ann. §§ 12-60-10 *et seq.* (2014). Moreover, this Court does not have the authority to grant the relief requested. *S.C. Dep't of Consumer Affairs v.*

Foreclosure Specialists, Inc., 390 S.C. 182, 186–87, 700 S.E.2d 468, 470 (Ct. App. 2010) (citing Randolf R. Lowell, *South Carolina Administrative Practice and Procedure*, 152 (2d ed. 2008) ("The ALC has no authority to decide civil matters or to award monetary damages in cases.")).

ORDER

IT IS HEREBY ORDERED that the Department's Motion for Summary Judgment is **GRANTED,** and Duke's Motion for Summary Judgment is **DENIED**.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

October 27, 2020
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Stephanie Perez, 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, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

Stephanie Michelle Perez
Judicial Law Clerk

October 27, 2020
Columbia, South Carolina