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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson, III, Chief Administrative Law Judge

Case No. 19-ALJ-17-0153-CC

2020-001542

Duke Energy Corporation..... Appellant,

v.

South Carolina Department of Revenue..... Respondent.

RECORD ON APPEAL

VOLUME I [Pages 1-250]

Samantha K. Trencs (Bar No. 101882)
EVERSHEDS SUTHERLAND (US) LLP
700 Sixth Street, NW Suite 700
Washington, DC 20001-3980
(202) 383-0534

Eric S. Tresh (*pro hac vice*)
Maria M. Todorova (*pro hac vice*)
Chris R. Lee (*pro hac vice*)
EVERSHEDS SUTHERLAND (US) LLP
999 Peachtree Street, NE, Suite 2300
Atlanta, GA 30309
(404) 853-8000

*Attorneys for Appellant
Duke Energy Corporation*

C. Anthony Harris, Jr. (Bar No. 2745)
Associate Counsel
Jason P. Luther (Bar No. 78021)
Chief Legal Officer
P.O. Box 12265
Columbia, SC 29211-9979
(803) 898-5278

*Attorneys for Respondent
South Carolina Department of Revenue*

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

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

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.

FILED

October 27, 2020

SC ADMIN. LAW COURT

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	<u>4,955,817</u>	<u>-0-</u>	<u>1,937,887</u>	<u>4,955,817</u>	20,551,921	701,194
	<u>24,850,727</u>	<u>5,000,000</u>	<u>4,298,806</u>	<u>19,850,727</u>		

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 do 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 Commc'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 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 interpreted 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 is 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 Randolph 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

The South Carolina Court of Appeals

Duke Energy Corporation, Appellant,

v.

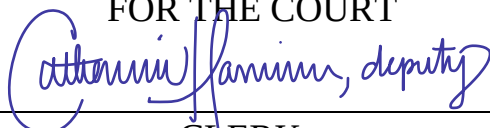
South Carolina Department of Revenue, Respondent.

Appellate Case No. 2020-001542

The Honorable Ralph King Anderson, III
Trial Court Case No. 2019ALJ170153CC

ORDER

The time for serving and filing the appellant's initial brief and designation of matter is hereby extended until February 10, 2021.

FOR THE COURT
BY  CLERK

Columbia, South Carolina

FILED
Dec 29 2020

cc:
Samantha Katharina Trencs, Esquire
Jason Phillip Luther, Esquire
Charles A. Harris, Jr., Esquire
Eric S. Tresh, Esquire
Maria M. Todorova, Esquire
Chris R. Lee, Esquire

The South Carolina Court of Appeals

Duke Energy Corporation, Appellant,

v.

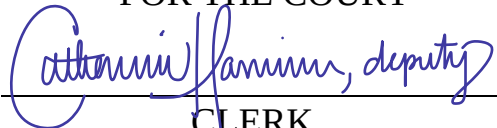
South Carolina Department of Revenue, Respondent.

Appellate Case No. 2020-001542

The Honorable Ralph King Anderson, III
Trial Court Case No. 2019ALJ170153CC

ORDER

The time for serving and filing the respondent's initial brief and designation of matter is hereby extended until April 12, 2021.

FOR THE COURT
BY 
CLERK

Columbia, South Carolina

cc:
Samantha Katharina Trencs, Esquire
Jason Phillip Luther, Esquire
Charles A. Harris, Jr., Esquire
Eric S. Tresh, Esquire
Maria M. Todorova, Esquire
Chris R. Lee, Esquire

FILED
Mar 02 2021

The South Carolina Court of Appeals

Duke Energy Corporation, Appellant,

v.

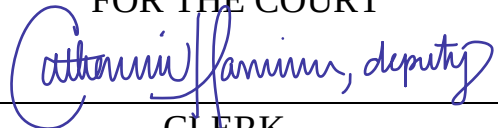
South Carolina Department of Revenue, Respondent.

Appellate Case No. 2020-001542

The Honorable Ralph King Anderson, III
Trial Court Case No. 2019ALJ170153CC

ORDER

The time for serving and filing the respondent's initial brief and designation of matter is hereby extended until April 22, 2021. No further extensions will be granted absent extraordinary circumstances.

FOR THE COURT
BY  CLERK

Columbia, South Carolina

FILED
Mar 18 2021

cc:

Samantha Katharina Trencs, Esquire
Jason Phillip Luther, Esquire
Charles A. Harris, Jr., Esquire
Eric S. Tresh, Esquire
Maria M. Todorova, Esquire
Chris R. Lee, Esquire

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Corporation,	)	
	)	
Petitioner,	)	
	)	
vs.	)	DOCKET NO. 19-ALJ-17-0153-CC
	)	
	)	
South Carolina Department of Revenue,	)	
	)	
Respondent.	)	
_____	)	

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rules 19 and 68 of the Rules of Procedure for the Administrative Law Court and Rule 56 of the South Carolina Rules of Civil Procedure, Petitioner Duke Energy Corporation (“Duke Energy”), by and through its undersigned counsel, hereby moves the Court for an Order granting summary judgment in Duke Energy’s favor, and allowing Duke Energy’s Credits as claimed, in this matter on the issue of the calculation of Petitioner’s Capital Investment Tax Credit allowed under S.C. Code Ann. § 12-14-60 for purposes of South Carolina’s corporation income tax. As set forth in more detail in the memorandum of law filed contemporaneously herewith, the grounds for this motion are that the material facts are not in dispute and Petitioner is entitled to summary judgment as a matter of law because S.C. Code Ann. § 12-14-60(G) allows Petitioner to claim up to \$5 million in Capital Investment Tax Credit per tax year, and not \$5 million for the lifetime of the taxpayer.

This motion is based on the pleadings, depositions, applicable law, and memorandum of law filed contemporaneously herewith.

[Signature Appears on the Following Page]

RESPECTFULLY SUBMITTED,

July 31, 2020



Samantha K. Trencs (South Carolina Bar No. 101882)

Eric S. Tresh (*pro hac vice*)

Maria M. Todorova (*pro hac vice*)

Chris R. Lee (*pro hac vice*)

EVERSHEDS SUTHERLAND (US) LLP

700 Sixth Street, NW Suite 700

Washington, DC 20001-3980

Phone: (202) 383-0534

samanthatrencs@eversheds-sutherland.com

erictresh@eversheds-sutherland.com

mariatodorova@eversheds-sutherland.com

chrislee@eversheds-sutherland.com

Attorneys for Petitioner

Duke Energy Corporation & Affiliates

**STATE OF SOUTH CAROLINA
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	)	
	)	
South Carolina Department of Revenue,	)	
	)	
Respondent.	)	
_____	)	

**MEMORANDUM OF LAW IN SUPPORT OF DUKE ENERGY CORPORATION’S
MOTION FOR SUMMARY JUDGMENT**

Duke Energy Corporation (“Duke Energy”) submits this memorandum of law in support of its Motion for Summary Judgment in this matter.

INTRODUCTION

This case stems from the South Carolina Department of Revenue’s (“Department”) disallowance of Duke Energy’s capital investment tax credit under S.C. Code Ann. § 12-14-60 (hereinafter referred to as the “Credit”) for the corporate income tax years 2010 through 2014 (“Tax Years at Issue”). Section 12-14-60 allows a taxpayer that makes a qualified capital investment in South Carolina to take a credit against its annual South Carolina corporate income tax liability. Section 12-14-60(G) limits the Credit for taxpayers like Duke Energy, that are subject to the State’s license tax, to \$5 million per taxable year (hereinafter referred to as the “Credit Limitation”).

Contrary to the plain language of the statute and in contravention of its own longstanding written policies, the Department now claims that taxpayers like Duke Energy can only claim up to \$5 million in Credit for their lifetime. The Department is wrong. The statute allows taxpayers

like Duke Energy to claims up to \$5 million in Credit for every tax year and Duke Energy is entitled to summary judgment in this case.

During the 2010 tax year at issue in this case, the Credit statute 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. S.C. Code Ann. § 12-14-60(A)(1) (emphasis added).

Effective for the 2011 through 2014 tax years at issue in this matter, the term “economic impact zone” was deleted from subsection (A)(1) and the subsection provided:

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. S.C. Code Ann. § 12-14-60(A)(1) (emphasis added).

The amount of the Credit was determined by applying the Credit statutory rate against the basis of the particular capital improvement. S.C. Code Ann. § 12-14-60(A)(2).

Subsection (G) of the same statute imposed the Credit Limitation at issue in this case.

During the Tax Years at Issue, that provision provided:

The credit allowed by this section [12-14-60] 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. S.C. Code Ann. § 12-14-60(G) (emphasis added).

Reviewing these subsections together, the plain language of the Credit statute provides that “for investments made after June 30, 1998,”¹ “the credit allowed by this section”, “**for any taxable year**”, is limited to \$5 million. The statute says nothing about a lifetime limitation.

¹ As discussed below, the Credit Limitation was first enacted in June 30, 1998.

For fifteen years the Department interpreted the Credit statute to allow taxpayers like Duke Energy to claim up to \$5 million in Credit each year. Each year the Department published forms instructing taxpayers that they could claim up the \$5 million of Credit per tax year and provided taxpayers with a step-by-step formula that calculated the Credit Limitation annually. And each time the Department conducted an audit, they allowed taxpayers to claim up to \$5 million in Credit per tax year. Consistent with the plain language of the statute and following the Department's longstanding practice, Duke Energy computed its Credit by applying the Credit Limitation on an annual basis.

However, in 2014, without any change in the law, and in contradiction with the views of some of its most senior representatives, the Department changed its position regarding the amount of the Credit taxpayers like Duke Energy could claim. Following a series of private meetings among a few members of the Department's income tax staff, the Department changed the form it required taxpayers to use to calculate the Credit. The new form created a \$5 million lifetime limitation to the amount of Credit taxpayers like Duke Energy could claim. No formal minutes of these meetings were taken, no notes were saved. The only evidence of the Department's change to its position was a short internal memo by a Department employee and the new Credit form. However, the effects of the Department's change to the Credit were immediate and severe. Taxpayers like Duke Energy were assessed for millions of dollars in additional tax or denied millions of dollars in Credit, and were no longer eligible for the Credit. And the Legislature's effort to incent investment in the State was significantly thwarted.

The change in the Department's position was especially shocking for several reasons. First, the relevant language of the Credit statute has remained substantially the same since the Credit

Limitation was first enacted in 1998. Since that time, the statute has always stated that the Credit was an annual credit and contained no reference to a lifetime limitation.

Second, from 1998 until 2014, the Department published an annual tax form instructing taxpayers that they were entitled to claim up to \$5 million in Credit each year. The Department's guidance included a detailed formula that instructed taxpayers to calculate the Credit by applying the Credit Limitation separately to each tax year. Taxpayers were required to complete the form using the Department's calculations to claim the Credit. The Department's staff deposition testimony in this case shows that they knew that, prior to 2014, the Department was instructing taxpayers that the Credit Limitation was an annual limitation (not a lifetime limitation) and that they believed the forms, the calculation methodology, and their advice to taxpayers were correct.

Third, prior to 2014, the Department conducted a detailed audit of Duke Energy's Credits and agreed Duke Energy was entitled to Credits in excess of \$5 million. The Department's representatives testified during depositions in this case that at the time of that audit, the Department believed that the Credit Limitation was an annual limitation and applied the Credit Limitation to any qualified taxpayer on an annual basis.

Shortly after the Department changed its longstanding position regarding the application of the Credit Limitation, the Legislature attempted to clarify that the Credit Limitation applies annually. As part of this process, the South Carolina Revenue and Fiscal Affairs Office ("RFA") conducted an analysis of the proposed legislation and concluded that that the Credit limitation applied annually would have no fiscal impact to the State. In other words, the Credit Limitation was already an annual limitation on the amount of Credit a taxpayer could claim each year, not a lifetime limitation.

The Department's reaction to the Legislature's attempt to clarify the law was astonishing. The Department immediately began lobbying the Legislature not to clarify the law. As part of its lobbying efforts, the Department took the highly unusual and inappropriate step of specifically disclosing the impact of the legislation on Duke Energy. Deposition testimony and documents produced during discovery in this case revealed that the Department sent a memorandum to the South Carolina House Ways and Means Committee reminding the Legislature of the Department's ongoing corporate income tax litigation with Duke Energy, the amount of tax at issue in that litigation, the amount of Duke Energy's earned and unused (carryover) Credits, and the amount of earned and unused (carryover) Credits for all South Carolina taxpayers.

After extensive depositions in this case, the Department was unable to explain why it had to lobby the General Assembly not to clarify the Credit Limitation, and why it specifically disclosed information about Duke Energy's income taxes and Credits to members of the General Assembly as part of its lobbying efforts.

Duke Energy believes that the plain language of the Credit statute in this case is clear. Section 12-14-60 allows a Credit of up to \$5 million per "any taxable year." This reading is further supported by the Department's own longstanding interpretation, the Legislature's intent, and the RFA's fiscal impact statement of the proposed clarification of the law.

However, if the Court were to conclude that the annual Credit Limitation was not clear based on the plain language of the statute, a review of the legislative history in this case, the background surrounding the efforts to clarify the law, and the Department's own longstanding position, require a finding that the Credit Limitation is an annual limitation. For these reasons, and the reasons set forth below, Duke Energy respectfully requests that this Court grant it summary judgment in this case and allow Duke Energy's Credits as claimed.

STATEMENT OF THE CASE

I. Section 12-14-60. The Capital Investment Tax Credit

Section 12-14-60 establishes an income tax credit for taxpayers making qualified capital investments in the State. The credit is often referred to as the “capital investment tax credit.”

The Credit was first enacted in 1995 when the General Assembly passed the Economic Impact Zone Community Development Act of 1995 (the “1995 Act”) (effective April 4, 1995), which was codified in S.C. Code Ann. § 12-14-10 *et seq.* 1995 South Carolina Laws Act 25 (H.B. 3534). The 1995 Act was designed to “to revitalize economically and physically distressed areas ... by encouraging the formation of new businesses and the retention and expansion of existing businesses.” S.C. Code Ann. § 12-14-20. The Credit was originally limited to businesses making qualified investments in designated “economic impact zones” in South Carolina. Specifically, subsection (A) of Section 12-14-60 provided as follows:

There is allowed a credit against the tax imposed pursuant to Chapter 7 [Income Tax Act] of this title an economic impact zone investment tax credit for any taxable year in an amount equal to five percent of the aggregate bases of economic impact zone qualified manufacturing and productive equipment properties placed in service during such taxable year in the economic impact zone.

The 1995 Act did not limit the amount of the Credit or the amount of tax liability the Credit could offset.

On February 2, 1996, the General Assembly passed the Economic Development Industrial Cluster Act of 1996 (the “1996 Act”) (effective February 12, 1996), which, in relevant parts, expanded the definition of “economic impact zone” for purposes of the Credit available under section 12-14-60. 1996 Act No. 231, § 10A (amending S.C. Code § 12-14-30 (1996)). Section 12-14-60 itself was not amended by the 1996 Act.

On June 24, 1997, the General Assembly amended the Credit in section 12-14-60 by incorporating a ten-year carryforward limitation. 1997 South Carolina Laws Act 151 (H.B. 3919) (effective June 24, 1997). Specifically, new subsection (D) stated that, effective for tax years beginning after 1996, “[u]nused credit allowed pursuant to this section [12-14-60] may be carried forward for ten years from the close of the tax year in which the credit was earned.” S.C. Code § 12-14-60(D) (1997).

Section 12-14-60 was amended twice again in 1998. On June 30, 1998, the South Carolina General Assembly added new subsection (G), which provided:

The credit allowed by this section for investments made after June 30, 1998, is limited to no more than one million dollars for any entity subject to the license tax as provided in Section 12-30-100.

1998 Act. No. 419, pt. II, § 49II.B; S.C. Code Ann. § 12-14-60(G) (1998) (effective July 1, 1998).

Two months later, on August 31, 1998, the General Assembly recodified subsection (G) as new subsection (H) and increased the one million dollar credit limitation to five million:

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.

1998 South Carolina Laws Act 442 (H.B. 4853); S.C. Code Ann. § 12-14-60(H) (1998) (effective August 31, 1998). These amendments to Section 12-14-60 **did not change Section 12-14-60(A)** which continued, and to this day continues, to allow the Credit for “any taxable year.”

Finally, section 12-14-60 was amended two more times. In 2005, the General Assembly added an indefinite Credit carryforward for qualifying taxpayers. 2005 Act. No. 113 (H.B. 3067), § 1; S.C. Code § 12-14-60(D)(2) (2005) (effective June 1, 2005). And on June 23, 2010, the South Carolina Economic Development Competitiveness Act of 2010 (the “2010 Act”) was signed into law, effective with the 2011 tax year, expanding the Credit to apply to the entire state, not just

specific economic impact zones. 2010 South Carolina Laws Act 290 (H.B. 4478) (2010) (effective January 1, 2011). As a result of the changes in the 2010 Act, the phrase “economic impact zone” was deleted from subsection (A)(1), which as amended read as follows:

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. S.C. Code § 12-14-60(A)(1)(emphasis added).

The 2010 Act also recodified the Credit Limitation from subsection (H) to subsection (G); however the language of the subsection remained the same:

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. S.C. Code § 12-14-60(G).

II. The Department’s Application of the Credit Limitation

A. Form SC SCH. TC-11

The Department drafts and publishes tax forms to ensure the proper application of the laws as intended by the General Assembly. (Thomas Tr. at 22:7-22:9, Exhibit 2; Taylor Tr. at 39:8-39:10, Exhibit 3.) The Department intends for taxpayers to rely on its forms in computing their South Carolina tax liability. (Thomas Tr. at 22:11-22:13, Exhibit 2.)²

Shortly after the 1995 Act was passed, the Department drafted and published Form SC SCH. TC-11 (“Form TC-11” or the “Form”) in 1995. The Form states that it “must be completed and filed with the income tax return in order to claim an investment tax credit” (Form, Exhibits

² See also guidance published by the Department instructing taxpayers that “[t]he credit is claimed on Form TC-11.” (Tax Incentives for Economic Development, pp. 80, Exhibit 4.)

6-23.)³ The Form calculated the amount of a taxpayer's Credit by multiplying the cost basis of the taxpayer's qualifying property by the statutory rate of the Credit. *Id.*

In 1998, the Department amended Form TC-11 twice to include the General Assembly's addition of the Credit Limitation, initially as a one-million-dollar limitation and subsequently as a five-million-dollar one. (Form, Exhibits 8 and 9.) In each case, the TC-11 required taxpayers to calculate the Credit Limitation annually. No lifetime limitation on the amount of Credit claimed by a taxpayer was listed on the Form or applied in the Department's calculation methodology.

The Department agrees that for more than fifteen years, it instructed and allowed taxpayers to apply the Credit Limitation annually, for every taxable year. (Donovan Tr. at 55:9-55:18, 64:4-65:1, Exhibit 24; Thomas Tr. at 34:4-34:7, 44:12-44:15, Exhibit 2; Taylor Tr. at 38:3-38:5, Exhibit 3; VanStory Tr. at 67:21-68:5, Exhibit 25; Form, Exhibits 9-18.)

B. The Department's First Audit of Duke Energy

The Department audited Duke Energy's corporation income tax returns including its Credits for tax years 2008 through 2011 and issued its audit report on November 26, 2013. (Audit Report, Exhibit 26.) The Department's audit report provided that the "maximum [capital investment tax] credits" **for each tax year** was \$5 million. (*Id.* at Schedule C 1 of 1.) The Department's audit of Duke Energy was conducted by Mr. Orville Sharpe, one of the Department's most senior auditors and someone regarded as an expert in South Carolina income tax by others within the Department. (Sharpe Tr. at 14:11-15:5, Exhibit 27; Taylor Tr. at 26:8-26:13, Exhibit 3.) Mr. Sharpe concluded that the \$5 million Credit Limitation should be applied annually consistent with Form TC-11. (Sharpe Tr. at 67:6-67:25, Exhibit 27.) In the 2008-2011 audit

³ Mr. Timothy Donovan, a former nonresident audit manager and manager of nexus and discovery who retired in August 2018 after 28 years with the Department, testified that taxpayers were required to complete Form SC SCH. TC-11 in order to be allowed the Credit. (Donovan Tr. at 53:9-53:14, Exhibit 24).

report, the Department applied the Credit Limitation to each of the tax years at issue separately and allowed a carryover Credit in excess of \$5 million. (Audit Report, Exhibit 26; Sharpe Tr. at 66:8-66:10, 73:11-73:20, 92:12-92:17, 106:9-106:12, Exhibit 27; Donovan Tr. at 40:7-41:4, Exhibit 24.) For example, in 2011 where Duke Energy's actual Credit was \$6,130,395, the Department's Audit Schedule C allowed Credit of \$5 million for 2011 even though Duke Energy generated Credits in prior years. (Audit Schedule, Schedule C 1 of 1, Exhibit 26.)

C. The Department Changes Its Interpretation of the Credit Limitation

In 2014, Ms. Jerilynn VanStory, a tax manager for the Department, took it upon herself to draft a memo stating that she believed the Credit Limitation should be a lifetime limitation. (VanStory Memorandum, Exhibit 28.) Ms. Van Story believed that the Credit was too broad. (VanStory Tr. at 90:1-91:14, Exhibit 25.) Ms. VanStory did not discuss her views about the Credit or memo that would change the Department's application of the Credit with the Department's Director, Legal Counsel, or other Department leadership. (VanStory Tr. at 34:12-35:5, 77:5-77:24, 79:21-80:25, Exhibit 25). The Department did not issue any public guidance informing taxpayers of its new interpretation of the Credit Limitation. (VanStory Tr. at 35:23-35:25, Exhibit 25.) Notwithstanding Ms. Van Story's view, senior employees of the Department continue to believe that the Credit Limitation should be applied annually (Sharpe Tr. at 85:19-86:13) or that the statute is unclear (Cleland Tr. at 78:20-78:24, Exhibit 29.)

On July 24, 2014, at the direction of Ms. VanStory, the Department's staff revised Form TC-11 to apply the Credit Limitation as a lifetime limitation instead of an annual limitation. (Form, Exhibit 23; Thomas Tr. at 18:16-19:6, Exhibit 2.)

III. 2017 Legislative History

Soon after the Department changed its longstanding interpretation and application of the Credit Limitation, on February 16, 2017, the South Carolina Senate introduced Bill S. 428 (the “Bill”), clarifying section 12-14-60(G) to state that:

This credit allowed by this section for investments made after June 30, 1998, is limited to no more than five million dollars **annually** for an entity subject to the license tax as provided in Section 12-20-100.” (Bill, Exhibit 30) (emphasis in the original.)

The General Assembly asked the RFA to conduct a fiscal analysis regarding the estimated revenue impact of the Bill. Revenue impact statements are intended to inform legislators of any state and local revenue changes that might result from the passage of legislation. S.C. Code Ann. § 2-7-71. On March 10, 2017, Mr. Craig Parks, Senior Research and Budget Analyst for the Senate Finance Committee, informed the Executive Director of the RFA that:

[The Bill will] **clarify** an almost 20 yr tax credit for utilities **that the credit is annual which was DORs stance for 15+ yrs** – DOR and utilities want this change and DOR and Meredith [Cleland Director of Policy at the Department] is ready to assist you here as well. This portion is conform to policy and practice only or is at least the intent.” (Senate Finance Committee Email, Exhibit 1) (emphasis added.)

Subsequently, on March 20, 2017, the RFA issued a Statement of Estimated Fiscal Impact (“Fiscal Impact Statement”) estimating that the Bill would have no fiscal impact. (Fiscal Impact Statement, Exhibit 31.) The Fiscal Impact Statement concluded that:

This amended section would amend Section 12-14-60(G) to limit the total dollar amount of an investment tax credit allowed by a taxpayer to no more than \$5,000,000 “annually” for a single taxpayer subject to the corporate license tax. **This clarifying amendment does not alter any current practices by the Department of Revenue**, and therefore, would not affect state General Fund income tax revenue in FY 2017-18, and later fiscal years.” (Fiscal Impact Statement, Exhibit 31) (emphasis added.)

On March 21, 2017, the South Carolina Senate passed this Bill unanimously. (Bill, Exhibit 30.)

In September 2017, the Department began its lobbying effort against the bill. In or about September 5, 2017, the Department sent a memorandum to the Chairman of the House Ways and Means Committee lobbying against clarifying the law. (Talking Points Memo, Exhibit 32.) In the memorandum, the Department stated that it “has determined there to be \$127 million in unused carryforward based on the Tax Year 2015.” (*Id.* at 1.) The Memorandum also described the pending litigation between the Department and Duke Energy, and advised the Committee of the amount of Credits in issue in this case. (*Id.* at 3.)

One day later, on or about September 6, 2017, the Department drafted and sent another memorandum to the House Ways and Means Committee’s Chairman that stated: (Objective Memo, Exhibit 33.)

Objective:

Clarify that the investment tax credit can be taken for any tax year limited to \$5 million per year.

Proposed language:

Section 12-14-60 of the 1976 Code, is further amended to read: (G) The credit allowed by this section for investments made after June 30, 1998, is limited to no more than five million dollars for any taxable year for an entity subject to the license tax as provided in Section 12-20-100.” (Cleland Tr. 57:1-58:3, Exhibit 29; Objective Memo, Exhibit 33) (emphasis in the original.)

The Bill was not voted on in the South Carolina House. (Bill, Exhibit 30.)

IV. The Department’s Determination for the Tax Years at Issue.

Duke Energy is an electric power and energy company that generates, distributes, and transmits electricity in South Carolina. (Duke Energy 2014 10-K, p. 18, Exhibit 34.) As part of its electric service operations, Duke Energy owned several power generating facilities in South Carolina. (Duke Energy 2014 10-K, pp. 26, Exhibit 34.) It invested substantial capital in these locations and placed in service significant amounts of qualified manufacturing and productive

equipment property throughout the State. (Monroe Tr. at 11:18-12:9, Exhibit 35.) It is undisputed that those investments qualified for the Credit. Duke Energy submitted a properly completed Form TC-11 with its South Carolina Corporate income tax return, which calculated the amount of qualified capital investments made in the State and corresponding amount of Credit for each tax year.

The Department audited Duke Energy's corporate income tax returns, including its Credits, for the tax years 1996 through 2014 ("Audit Period"). For those tax years, Duke Energy's Credits totaled \$24,850,727, as summarized in Column A of Table 1 below. (Department Determination, Exhibit 36.)

On July 19, 2018, the Department issued a Notice of Adjustment limiting Duke Energy's Credits to \$5 million and disallowing \$19,850,727 of Credit carryover related to tax years ending December 31, 2010 through and including December 31, 2014. (Notice of Adjustment, Exhibit 37.) This was the first time since the enactment of the Credit Limitation in 1998, the Department applied the Credit Limitation on a lifetime basis.

The Department testified that the worksheet template used by the audit team in computing the amount of the taxpayer's Credit for prior years was wrong (Sharpe Tr. at 21:7-21:10, 106:6-106:12, Exhibit 27); that the Credit Form required to be used by taxpayers for more than fifteen years, was wrong (Donovan Tr. at 55:9-55:23, 64:4-65:1, Exhibit 24; Thomas Tr. at 34:4-34:7, 44:12-44:15, Exhibit 2; Taylor Tr. at 38:3-38:5, Exhibit 3; VanStory Tr. at 67:21-68:5, Exhibit 25); and that the results of the prior Duke Energy audit were wrong. (Donovan Tr. at 55:24-55:13, Exhibit 24; Sharpe Tr. at 66:8-67:16, 106:3-106:19, Exhibit 27.)

Duke Energy timely filed its protest to the Notice of Adjustment on October 16, 2018. (Protest of Notice of Adjustment, Exhibit 38.) On April 26, 2019, the Department issued a

Department Determination for Corporate Income Tax for 1996 through 2014 disallowing \$19,850,727 of Duke Energy's Credits. (Department Determination, Exhibit 36.) Duke Energy timely filed its Request for Contested Case Hearing and Statement of the Case on May 24, 2019 with this Court. (Request for Contested Case Hearing and Statement of the Case, Exhibit 39.)

Table 1 below summarizes Duke Energy's computations of its Credits for each tax year and the Department's adjustments to those Credits:

A		B	C	D	E
Tax Credit Per Return		Tax Credit Used by Taxpayer	Tax Credit Disallowed by Department	Tax Credit Carryforward Per Taxpayer	Tax Credit Carryforward Per Department
1996	208,415	208,415	0	0	
1997	332,120	332,120	0	0	
1998	382,454	382,454	0	0	
1999	194,718	194,718	0	0	
2000	450,347	450,347	0	0	
2001	156,034	156,034	0	0	
2002	346,795	346,795	0	0	
2003	290,036	290,036	0	0	
2004	640,665		0	640,665	640,665
2005	210,450		0	851,115	851,115
2006	180,785		0	1,031,900	1,031,900
2007	438,966		0	1,470,866	1,470,866
2008	387,240		0	1,858,106	1,858,106
2009	436,294		0	2,294,400	2,294,400
2010	501,741		157,060	2,796,141	2,639,081
2011	4,832,741		4,832,741	7,628,885	2,639,081
2012	4,951,427		4,951,427	12,580,309	2,639,081
2013	4,953,682		4,953,682	17,533,991	2,639,081
2014	4,955,817	1,937,887	4,955,817	20,551,921	701,194
	24,850,727	4,298,806	19,850,727		

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate only if “it is clear there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.” *Summer v. Carpenter*, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997). However, summary judgment is not appropriate when

“further inquiry into the facts of the case is desirable to clarify the application of law.” *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009). Even if the evidentiary facts are not disputed, but the conclusions or inferences to be drawn from them are, summary judgment should be denied. *Id.*; see also *Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004) (“Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts.”). An issue is “material” if “the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action.” *Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 388, 701 S.E.2d 776, 779 (Ct. App. 2010) (citation omitted).

Summary judgment is a “drastic remedy” and “should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues.” *Rife v. Hitachi Constr. Mach. Co.*, 363 S.C. 209, 215, 609 S.E.2d 565, 568 (Ct. App. 2005). In determining whether any triable issue of fact exists, the evidence and all inferences must be viewed in the light most favorable to the nonmoving party. *Pee Dee Stores*, 381 S.C. at 240, 672 S.E.2d at 802. “All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party.” *Ellis*, 358 S.C. at 518, 595 S.E.2d at 821. The party seeking summary judgment has the burden of “clearly establishing the absence of a genuine issue of material fact.” *Rife*, 363 S.C. at 214, 609 S.E.2d at 568.

ARGUMENT

Duke Energy is entitled to summary judgment for four reasons. First, under the plain language of section 12-14-60, the Credit Limitation applies on an annual basis. The Credit is available under subsection 12-14-60(A) for “any taxable year” in which a taxpayer makes a qualified capital investment, in an amount determined by applying the Credit statutory rate to the

taxpayer's investment basis. The Credit Limitation in subsection 12-14-60(G) applies to the Credit in subsection 12-14-60(A) and simply limits the amount of Credit a taxpayer can claim in each tax year in which it makes qualifying investments to \$5 million. This plain reading of the Credit statute is further supported by the Department's own longstanding interpretation, the Legislature's intent, and the RFA's fiscal impact statement of the proposed clarification of the law

Second, even if the Court were to determine that the Credit statute were not clear, the Legislature's own actions, the interpretations by the RFA, and the Department's own longstanding practices and guidance prove that the Credit Limitation should be applied on an annual basis.

Third, the Department's change to its interpretation of the Credit Limitation violates South Carolina's rulemaking procedures and law, and the Taxpayer's Bill of Rights.

Finally, the Department is estopped from retroactively changing its longstanding practice and guidance to deny Duke Energy's Credits for years in which Duke Energy has already made capital investments in the State in reliance of the Department's representations. Moreover, because of the Department's long-held practice and guidance of applying the Credit Limitation annually, the Department will be unjustly enriched if it were permitted to change its position, without any notice or change in the law.

I. The plain language of section 12-14-60 imposes an annual limitation on the amount of Credit that can be claimed by Duke Energy, not a lifetime limitation.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). In doing so, the words found in a statute their "plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 640 S.E.2d at 459. "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous

statute.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citation omitted). “If a statute’s language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning.” *Eagle Container Co., LLC v. Cty. of Newberry*, 379 S.C. 564, 570-571, 666 S.E.2d 892, 896 (2008) (citation omitted).

Section 12-14-60 authorizes the Credit at issue in this case. The statute was amended in 2010 to expand the availability of the Credit from designated economic impact zones to the entire State. 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. S.C. Code Ann. § 12-14-60(A)(1) (emphasis added).

During the 2011 through 2014 tax years at issue in this matter, the term “economic impact zone” was deleted from subsection (A)(1), which provided:

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. S.C. Code Ann. § 12-14-60(A)(1) (emphasis added).

Subsection (A)(2) determined the amount of Credit by applying the Credit rate to the basis of the capital investment made by the taxpayer. S.C. Code Ann. § 12-14-60(A)(2).

Subsection (G) imposes a limitation on the amount of the Credit allowed in subsection (A). During the Tax Years at Issue, that provision provided:

The credit allowed by this section [12-14-60] 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. S.C. Code Ann. § 12-14-60(G) (emphasis added).

Read together, subsection (A) of the statute and subsection (G) of the statute state that in **any taxable year** where a taxpayer subject to the license tax makes a qualifying investment, the taxpayer is permitted a tax credit of up to \$5 million for that year. “The language of a tax statute must be given its plain ordinary meaning in the absence of an ambiguity therein ... [I]f a legislative intent is clearly apparent from the language of the statute there is no occasion for resort to the rule of statutory construction.” *Beach v. Livingston*, 248 S.C. 135, 139, 149 S.E.2d 328, 330 (1996) (citation omitted). The only logical, plain reading of section 12-14-60 is that Duke Energy is allowed the Credit for any taxable year up to \$5 million. The Department’s novel interpretation of the statute conflicts with that plain reading and should be rejected. *Brown v. Bi-Lo, Inc.* 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) (citation omitted) (holding that “where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation.”)

a. When the legislature intends to enact a lifetime limitation on a credit it does so explicitly.

If the Legislature intends to provide a lifetime limitation on the amount of a credit it does so explicitly. This has been demonstrated time and time again. For example, S.C. Code Ann. § 12-6-3530(B)(1) provides that “[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.” (emphasis added.) Similarly, S.C. Code Ann. § 12-6-3570 provides that: “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.” (emphasis added). S.C. Code Ann. § 12-6-3588(G) states that: “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**. (emphasis added). Prior

versions of S.C. Code Ann. § 12-6-3510 state that “the total credit for a project is limited to \$15,000 **for all years**” and that “the total credit claimed by all investors for a single investment is limited to \$5 million **for all years**. (emphasis added.)

In each of these credit statutes, the Legislature used specific, plain language concerning the time period for which the credit applies – “for all years” or “in all years” – to establish a lifetime credit. No such language was used in the Credit statute. Indeed, nothing in the plain language of the Credit statute even suggests that the Credit Limitation is a lifetime limitation.

The Legislature is well aware of how to enact a lifetime limitation on tax credits. It could have done so in this case but did not. Instead, it enacted an annual limitation as demonstrated by the plain language of section 12-14-60 and the legislative history of the statute.

b. Reading a lifetime limitation into the Credit leads to an absurd result.

Reading a lifetime limitation into the Credit statute would lead to an absurd result. See, e.g., *Kiriakides v. United Artists Commns., Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (holding that a statutory construction would be rejected if 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.”) The Credit was originally enacted as part of an effort to incent investment in certain economic impact zones. S.C. Code Ann. § 12-14-20. Over time, it was expanded to apply to investments made across the entire state. S.C. Code Ann. § 12-14-60(A) At the same time the Legislature was expanding the reach of the Credit, are we to believe that the Legislature did not want to encourage investments by taxpayers that had already invested significant amounts in South Carolina? From an economic impact perspective, one would expect that the value of additional investments by taxpayers that had previously invested in the State be as valued as those that had not invested in the State at all. The Department’s new interpretation frustrates the

legislative purpose of the Credit and leads to an absurd result by only incenting investment by taxpayers that did not previously make significant investments in South Carolina.

c. The Department interpreted and applied the Credit Limitation as an annual limitation for more than fifteen years.

The plain language of section 12-14-60 imposing the Credit Limitation as an annual limitation is further supported by the Department's own practice and guidance. 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. (Form TC-11 as published by the Department during the 1995-2014 period, Exhibits 5-23; Donovan Tr. at 53:9-53:14, Exhibit 24.) The Department amended Form TC-11 twice before the enactment of the Credit Limitation in 1998. (Form TC 11 (Rev. 7/97), Exhibit 6, and Form TC-11 (Rev. 9/98), Exhibit 7.)

After the enactment of the Credit Limitation, the Department revised and published Form TC-11 on two separate occasion in 1998. (Form TC 11(Rev. 9.98), Exhibit 8, and Form TC 11 (Rev. 9/98), Exhibit 9.) The first revision included the Credit Limitation as originally enacted by the Legislature in the amount of \$1 million. (Form, Exhibit 8.) The second revision followed the Legislature's amendment to the Credit Limitation from \$1 million to \$5 million. (Form, Exhibit 9.) On both of these versions of Form TC-11, the Department required taxpayers to apply the Credit Limitation on an annual basis.

The Department continued to amend Form TC-11 to comport with the legislative changes to section 12-40-60 discussed above. Since the enactment of the Credit Limitation in 1998 and until 2014, the Department amended and published Form TC-11 eleven times. And every time, the Department required taxpayers to apply the Credit Limitation on an annual basis. The Department testified that prior to 2014, Form TC-11 applied the Credit Limitation as an annual

limitation. (Taylor at 38:3-38:5, Exhibit 3; VanStory Tr. at 67:21-68:5, Exhibit 25; Thomas Tr. at 34:4-34:7, 44:12-44:15, Exhibit 3.)

The Department also testified that Form TC-11 was intended to reflect South Carolina law and the intent of the General Assembly, (Taylor Tr. at 39:8-39:10, Exhibit 3; Thomas Tr. at 22:7-22:9, Exhibit 2). As a result, the Department expected taxpayers to rely on Form TC-11 in computing the amount of Credit to which they were entitled. (Thomas Tr. at 22:11-22:13, Exhibit 2.)

That Department's audits also reflected its application of the Credit Limitation as an annual limitation. As discussed above, the Department audited Duke Energy for tax years 2008 through 2011. In that audit, the Department used standardized workpaper template used for auditing any other taxpayers with similar issues. ((Schedule C, Economic Impact Zone Property Investment Credit), Audit Report, Exhibit 26; Sharpe Tr. at 21:7-21:10, 22:4-22:16, Exhibit 27.) In so doing, the Department applied the Credit Limitation on an annual basis and computed Duke Energy's Credit to amount to more than \$5 million.

d. The Department's new interpretation is contrary to the language of the statute and legislative intent.

"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." *Etiwan Fertilzier Co. v. S.C. Tax Comm'n*, 217 S.C. 354, 360, 60 S.E.2d 682, 684 (1950). As discussed above, the General Assembly amended section 12-14-60 numerous times since its enactment in 1995. If the General Assembly believed that the Department was misapplying the Credit Limitation for fifteen years, as the Department contends, it had ample opportunity to amend the Credit statute to change that interpretation. Instead, not only did the

Legislature not make such an amendment, it considered amending the Credit Limitation to make clear that it had always intended for the limitation to apply to each tax year separately. Based on the language provided by the House Ways and Means Committee to the RFA, we know at least some in the Legislature believed that the Credit Limitation was an annual limitation.

Despite its longstanding practice and guidance applying the Credit Limitation on an annual basis, in 2014, without any public notice or change in the law, the Department abruptly changed course. On or about July 24, 2014, the Department created a new version of Form TC-11 that instructed license tax taxpayers like Duke Energy to calculate the Credit Limitation on a lifetime basis. (Form TC-11 (Rev. 7/24/14), Exhibit 23.)

The Department's new interpretation of the Credit Limitation was not based on an informed decision made by Department leadership, but rather, it was formed based on the beliefs of one or two employees. Ms. Jerilynn VanStory, prepared a short memorandum expressing her belief that the Credit Limitation was a lifetime limitation. (VanStory Memo, Exhibit 28; VanStory Tr. at 31:12-32:7, Exhibit 25.) Ms. VanStory then convinced others in the Department that the Department's long standing interpretation that Credit Limitation was applied annually was incorrect. (Sharpe Tr. at 92:18-93:20, Exhibit 27; Cleland Tr. at 78:20-79:12, Exhibit 29; Thomas Tr. at 18:16-19:6, Exhibit 2.) Ms. VanStory's lobbying campaign ended with her changing the Credit Form TC-11.⁴

The Department's change in position did not change the plain meaning of the section 12-14-60, or the Legislature's original intent to establish an annual limitation. In fact, three years after the Department change the Form, the original intent of S.C. Code Ann. § 12-14-60(G) was

⁴ Ms. VanStory also personally believes that while the original purpose of the Credit was to encourage investment in Economic Impact Zones, South Carolina applied the Credit broader than just distressed areas of South Carolina. (VanStory Tr. at 90:7-91:14, Exhibit 25)

confirmed by legislators when they explained that the 2017 Bill’s “**clarifying** amendment” to the Credit Limitation provision “... **does not alter any current practices** by the Department” (Fiscal Impact Statement, Exhibit 31, § 2) (emphasis added.) The Legislature was well aware that the Department had a longstanding policy of applying the Credit Limitation annually because the Department told them that was how they were applying the Credit Limitation. (Cleland Tr. at 69:12-69:17, 70:12-70:25, 74:18-74:25, Exhibit 29.) Then, at the request of the General Assembly, the Department drafted the Bill’s amendment language. As drafted by the Department, the proposed language stated that:

Objective:

Clarify that the investment tax credit can be taken for any tax year limited to \$5 million per year.

Proposed language:

Section 12-14-60 of the 1976 Code, is further amended to read: (G) The credit allowed by this section for investments made after June 30, 1998, is limited to no more than five million dollars for any taxable year for an entity subject to the license tax as provided in Section 12-20-100.” (Objective Memo, Exhibit 33; Cleland Tr. 57:1-58:3; Exhibit 29) (emphasis in the original.)

Once the Department realized that the legislature intended to clarify the Credit Limitation provision and confirm it was an annual limitation, the Department went began its lobbying efforts. One day before sending the proposed clarifying language, the Department sent a memorandum to the General Assembly expressing its opposition to the proposed amendment. (Talking Points Memo, Exhibit 32.) In the memorandum, the Department explained that it “has determined there to be \$127 million in unused carryforward [Credit] based on the Tax Year 2015,” and even specifically referred to the then pending litigation between the Department and Duke Energy as

well as to the specific amount of Duke Energy's Credits in issue in this case. (Talking Points Memo, Exhibit 32.)

Despite this sequence of events, the Department continues to describe the beliefs of one of its employees as the Department's new interpretation of the Credit Limitation. (VanStory Tr. at 31:12-32:7, 89:17-90:25, Exhibit 25.) In doing so, the Department makes the astonishing claim that for fifteen years: it made a mistake in requiring taxpayers to compute their Credit Limitation on annual basis on Forms TC-11; it made a mistake in applying the Credit Limitation as an annual limitation in its audits; and it made a mistake in when it told Duke Energy that the Credit Limitation applied annually for the 2008- 2011 tax years. Regardless of how it tries to characterize its longstanding practice and guidance of applying the Credit Limitation on an annual basis, the Department's new interpretation of the limitation conflicts with the language of the statute and the Legislature's intent to enact the credit Limitation as an annual limitation.

e. The 2017 Proposed Clarification of the Credit.

The plain language of section 12-14-60 applying the Credit Limitation for each tax year is also supported by the Legislature's own actions. The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature. *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). The best evidence of legislative intent is the text of the statute but in some cases legislative history may be probative in determining the Legislature's intent. *Palmetto Co. v. McMahon*, 395 S.C. 1, 5 (2011).

As discussed above, in 2017, the Legislature considered an amendment to the Credit Limitation in the form of the 2017 Bill. (Bill, Exhibit 30.) The Bill would have amended the statute to provide that "[t]he credit allowed by this section for investments made after June 30,

1998 is limited to no more than five million dollars annually for an entity subject to the license tax as provided in S.C. Code Ann. 12-2-100. (emphasis in original).

In considering the amendment, the South Carolina Legislature’s RFA, in consultation with senior policy staff at the Department, evaluated the estimated expenditure costs and revenue impact of the amendment in accordance with Title 2, Chapter 7 of the South Carolina Code. The RFA published its findings in the Fiscal Impact Statement dated March 20, 2017. (Fiscal Impact Statement, Exhibit 31.) The Fiscal Impact Statement explained that “[t]his clarifying amendment **does not alter current practices** by the Department of Revenue, and therefore would not affect state General Fund income tax revenue in FY 2017-2018.” (*Id.*, emphasis added). The RFA thus confirmed the Legislature’s original intent and Respondent’s longstanding practice of applying the Credit Limitation on an annual basis.

“A subsequent statutory amendment may be interpreted as clarifying original legislative intent.” *See Stuckey v. State Budget & Control Bd.*, 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000). The 2017 Bill’s proposed addition of the word “annually” to the statute was not a change but was a clarification of the existing Credit Statute and of the Respondent’s own practice and guidance of applying the statute.

In an effort to justify its interpretation of the Tax Credit, the Department Determination claims that the appearance of the phrase “total credit” in the title of the bill that enacted the Credit Limitation in 1998 evidences a purported legislative intent to limit the investment tax credit a taxpayer can claim to \$5 million on a lifetime basis. (Department Determination, Exhibit 36, at 4.) The Department is wrong for multiple reasons. First, the Department takes the phrase “total credit” out of its context. As discussed above, subsection (A)(1) of section 12-14-60 authorizes the Credit “for **any taxable year** in which the taxpayer places in service qualified manufacturing and

productive equipment.” S.C. Code Ann. § 12-14-60(A)(1) (emphasis added). Subsection (G) limits only the amount but not the time period of the Credit. Therefore, under the plain reading of the statute, the “total credit” allowed “for any taxable year” under subsection (A)(1) is limited to \$5 million under subsection (G).

Second, the South Carolina Supreme Court has opined that “[a]lthough the title and headings are part of the statute, they may not be construed to limit the plain meaning of the text.” *See, e.g., Garner v. Houck*, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993). The Court has further reasoned that “[f]or interpretive purposes, the title of a statute and heading of a section are 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.” *Id.* Therefore, the Department’s argument has no merit.

II. Even if the Court finds the language of section 12-14-60 is unclear, the Credit Limitation should be construed as annual limitation.

a. The purpose and words of section 12-14-60 show that the Legislature intended that the Credit Limitation apply to each tax year separately, not to all tax years combined.

Even if the Court finds that the language of Section 12-14-60(G) is not entirely clear the words and purpose of section 12-14-60 and the statute’s legislative history demonstrate that the Legislature intended the Credit Limitation to be an annual limitation.

“Generally, a court must apply the rules of statutory interpretation to resolve the ambiguity and discover the intent of the legislature.” *Mead v. Beaufort Cty. Assessor*, 419 S.C. 125, 139, 796 S.E.2d 165, 173 (S.C. Ct. App. 2016). A “statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect.” *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (internal citations omitted). “We therefore should not concentrate on isolated phrases within the

statute. *Id.* Instead, we read the statute as a whole and in a manner constant and in harmony with its purpose.” *Id.* at 74, 881.

When read together, subsections (A) and (G) allow Duke Energy to claim the Credit on an annual basis limited to \$5 million per tax year. While subsection (G) modifies the amount of the Credit determined under subsection (A)(2), it does not modify the time period (“any taxable year”) set forth in subsection (A)(1). Accordingly, when subsection (A) is read in harmony with subsection (G), section 12-14-60 should be construed to apply the Credit Limitation on an annual basis.

“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.” *Eagle Container Co., LLC v. Cty. of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 895-896 (2008) (citations omitted). “The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose.” *Id.* at 570, 896 (citation omitted). The general purpose of Section 12-14-60 was to revitalize capital investment, formation, expansion and retention of new businesses, and to promote of meaningful employment. S.C. Code Ann. § 12-14-20. When the General Assembly amended Section 12-14-60 in 2010 and expanded the availability of Credit generation to all areas of the state, it also expanded the purpose of the Credit by amending Section 12-14-20. The Department’s interpretation of the Credit Limitation contradicts the purposes of the Credit statute.

Further, when the General Assembly amended section 12-14-60 in 1998 to impose the Credit Limitation in subsection (G), it was aware of the language of subsection (A) that established the Credit for each tax year. *Centex Intern., Inc. v. S.C. Dep’t of Revenue*, 406 S.C. 132, 145, 750 S.E.2d 65, 72 (2013) (“[T]he legislature is presumed to be aware of prior legislation....”). By

including the phrase “[t]he credit allowed by this section [12-14-60]” in subsection (G), the Legislature demonstrated that for purposes of the Credit Limitation, the Credit was still for each tax year up to \$5 million per year. Nothing in the language of subsection (G) changes the Credit from a credit for “any taxable year” to a credit for all taxable years.

Indeed, in 2017, in considering the proposed clarifying amendment to subsection 12-14-60(G), the Legislature once again confirmed its original intent in enacting the Credit Limitation as an annual limitation. The Department understood the Legislature’s intent and for fifteen years, it required taxpayers to apply the Credit Limitation on an annual basis.

III. The Department’s Determination conflicts with South Carolina’s rulemaking procedures and laws and it violates the South Carolina Taxpayer’s Bill of Rights.

It bears repeating that for more than fifteen years after the enactment of the Credit statute, the Department instructed taxpayers to apply the Credit Limitation on an annual basis. However, sometime on or around July 24, 2014, the Department abruptly revised its Credit Form to require the computation of the Credit Limitation on a lifetime basis. The Department made this change without providing public notice, without permitting public comment, without conducting a public hearing, without preparing reports on the impact of the change, and without following any rulemaking procedures pursuant to S.C. Code Ann. §§ 1-23-110 to 160. Indeed, Department leadership including its Director and General Counsel were not even consulted on this drastic change in position. The Department’s approach to this matter raises significant due process concerns and violates South Carolina’s rule-making laws such that it constitutes invalid “administrative overreach that attempts to end run the legislative process.” *Joseph v. S.C. Dep’t of Labor, Licensing & Reg.*, 417 S.C. 436, 454, 790 S.E.2d 763, 773 (2016).

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. As a result, a taxpayer has the right to "receive forms ... in plain, easy-to-understand language." See Business Tax Guide 2017 Edition at 3 (S.C. Dep't of Rev. July 1, 2017). (Business Tax Guide, Exhibit 40.) Department's Form TC-11 that was in effect for over fifteen years plainly instructed Duke Energy to compute the Credit Limitation on an annual basis. Duke Energy justifiably relied on the Department's representations reflected in Form TC-11.

In the Determination, the Department ignores its own form and alleges summarily that it is "not binding on the Department." (Department Determination, Exhibit 36.) This statement and the Department's actions are in direct conflict with the Department's obligations under the Taxpayers' Bill of Rights. The Department does not dispute that its Form contained an annual limitation for fifteen years, it agrees that forms should reflect South Carolina statute, it agrees Taxpayers rely on these forms, and it agrees that filing of these forms is required to claim the Credit. (Donovan Tr. at 53:9-53:14, Exhibit 24; Taylor Tr. at 39:8-39:10, Exhibit 3; Thomas Tr. at 22:7-22:13, Exhibit 2.) As a result, the Department failed to comply with the requirements of the South Carolina Taxpayer's Bill of Rights.

IV. The Department should be estopped from retroactively changing its interpretation and denying Duke Energy's Credit, and the Department is unjustly enriched by retroactively changing its interpretation.

Duke Energy invested substantial capital in the state of South Carolina and significantly contributed to the economy and infrastructure in this State. (Monroe Tr. at 11:18-12:9, 62:10-62:15, Exhibit 35.) In making the decision to invest in South Carolina, Duke Energy relied, in part, on the Department's fifteen-year interpretation of S.C. Code Ann. § 12-14-60(G) as an annual

limitation. (Monroe Tr. at 14:15-14:22, 32:24-33:6, 34:7-35:2, Exhibit 35.) Then, long after Duke Energy made its investment in South Carolina, the Department wants to change its longstanding practice **retroactively** and seeks to apply the Credit Limitation on a lifetime basis, not an annual basis as it has done in the past.

Even assuming, *arguendo*, that Department's new interpretation of S.C. Code Ann. § 12-14-60(G) were valid (which it is not), the Department should be estopped from retroactively applying that interpretation. In South Carolina, "[c]ourts apply the doctrine of equitable estoppel when one party, by his actions, conduct, words or silence which amounts to a representation, or a concealment of material facts, causes another to alter his position to his prejudice or injury." *State Acc. Funds v. S.C. Second Injury Fund*, 388 S.C. 67, 76-77, 693 S.E.2d 441, 446 (2010). Such misrepresentation need not be intentional and reasonable reliance is sufficient. *Dillon Cty. School Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 218, 332 S.E.2d 555, 561 (1985), *overruled on other grounds*, *Atlas Food Systems & Servecs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 462 S.E.2d 858 (1995). The Department represented for many years that the limitation in S.C. Code Ann. § 12-14-60(G) applied annually. Duke Energy reasonably relied on the Department's representation based on the Department's Forms TC-11 instructing Duke Energy to apply the limitation on an annual basis. Accordingly, the Department is estopped from changing its interpretation of S.C. Code Ann. § 12-14-60(G).

Furthermore, the Department would be unjustly enriched by the Department's retroactive application of its new interpretation of the Credit Limitation. Unjust enrichment is an equitable doctrine, akin to restitution, which contemplates that a person who is unjustly enriched at the expense of another must make restitution to the other. *Barrett v. Miller*, 283 S.C. 262, 321 S.E.2d 198 (S.C. Ct. App. 1984). To recover on a theory of restitution, the plaintiff must show: (1) that

he conferred a nongratuitous benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff its value. *JASDIP Props. SC, LLC v. Estate of Richardson*, 395 S.C. 633, 640, 720 S.E.2d 485, 489 (2011).

Duke Energy conferred significant benefits on the State of South Carolina by making significant investments in the State. (Monroe Tr. at 35:7-35:22, 38:21-38:25, 62:7-62:12, Exhibit 35.) During the Audit Period, Duke Energy invested substantial amounts in its power generating facilities in South Carolina and placed in service significant amounts of qualified manufacturing and productive equipment property throughout the state. (Monroe Tr. at 12:5-12:16, 38:21-38:25, 53:12-54:4, Exhibit 35.) For tax years 2010-2014 alone, Duke Energy invested over \$1 billion into the state as seen in its South Carolina corporate income tax returns and Credit Forms. (Duke Credit Forms, Exhibit 41.) South Carolina realized value from this investment as evidenced by its willingness to provide the Credits. Duke Energy reasonably relied on the Department's representations to pay for the benefit and made investment decisions in South Carolina based on this representation. (Monroe Tr. at 38:21-38:25, Exhibit 35.)

Duke Energy has optionality concerning whether to invest in South Carolina or other states and the availability of tax credits impact its decisions. (Monroe Tr. at 14:15-15:4, 58:15-59:6, Exhibit 35.) 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. (Monroe Tr. at 34:7-35:2, Exhibit 35.) Duke Energy understood the Credit Limitation to be annual based on its read of Subsection (G) in harmony with Subsection (A) of Section 12-14-60. (Monroe Tr. at 47:17-47:24, Exhibit 35.) Given the Department's long held practice of calculating the Credit Limitation annually, and not as a lifetime cap, the

Department understood that Duke Energy expected to receive annual Credits of up to \$5 million per year from its nearly two decades of investment in South Carolina. The Department's reversal of its position on the interpretation of the limitation and the reduction to previously generated and accrued credits, financially impacts Duke Energy's earnings, financial statements, shareholders, and customers. (Monroe Tr. at 29:23-30:4, 59:7-59:23, Exhibit 35.) Accordingly, Duke Energy would be financially harmed and the Department would be unjustly enriched by the Department's retroactive application of this new interpretation to deny Duke Energy's Credits.

CONCLUSION

Duke Energy is entitled to summary judgment because Section 12-14-60 is clear in that the Credit Limitation is an annual limitation of the amount of Credit Duke Energy is allowed per tax year, not a lifetime limitation. Even if the Court determined that the language of section 12-14-60 is not plain and unambiguous, the Credit Limitation must be applied on an annual basis because the Department's practice and guidance of applying the Credit Limitation on an annual basis for fifteen years, the Legislature's own actions in enacting tax credits statutes, generally, and section 12-14-60, specifically, and section 12-14-60's legislative history demonstrate that the intent of the General Assembly was to impose the Credit Limitation as an annual limitation. Duke Energy is also entitled to summary judgment because by applying a new interpretation of the Credit Limitation, absent any change in the law or notice or guidance from the Department, the Department violates the rule-making procedures and the Taxpayer's Bill of Rights. Finally, the Department should be estopped from denying Duke Energy's Credits, and the Department will be unjustly enriched from the retroactive removal of Duke Energy's Credits.

For the foregoing reasons, Duke Energy's Motion for Summary Judgment should be GRANTED.

Respectfully submitted this 31st day of July, 2020



Samantha K. Trencs (South Carolina Bar No. 101882)

Eric S. Tresh (*pro hac vice*)

Maria M. Todorova (*pro hac vice*)

Chris R. Lee (*pro hac vice*)

EVERSHEDS SUTHERLAND (US) LLP

700 Sixth Street, NW Suite 700

Washington, DC 20001-3980

Phone: (202) 383-0534

samanthatrencs@eversheds-sutherland.com

erictresh@eversheds-sutherland.com

mariatodorova@eversheds-sutherland.com

chrislee@eversheds-sutherland.com

Attorneys for Petitioner

Duke Energy Corporation & Affiliates

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Corporation,	)	DOCKET NO. 19-ALJ-17-0153-CC
	)	
Petitioner,	)	
	)	CERTIFICATE OF SERVICE
vs.	)	
	)	
South Carolina Department of Revenue,	)	
	)	
Respondent.	)	
_____	)	

I hereby certify that the foregoing MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT, has been served by depositing a copy in the United States mail, postage paid, and by electronic mail this 31st day of July, 2020 upon the following:

C. Anthony Harris, Jr.
Counsel for Litigation
Jason P. Luther
General Counsel for Litigation
P.O. Box 12265
Columbia, SC 29211-9979
Charles.Harris@dor.sc.gov



Chris R. Lee

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Corporation,	)	Docket No. 19-ALJ-17-0153-CC
	)	
Petitioner,	)	
	)	
vs.	)	MOTION FOR
	)	SUMMARY JUDGMENT
	)	
South Carolina Department of Revenue,	)	
	)	
Respondent.	)	
	)	

TO: SAMANTHA K. TRENCES, ESQUIRE; MARIA M. TODOROVA, ESQUIRE; ERIC S. TRESH, ESQUIRE; AND CHRIS R. LEE, ESQUIRE

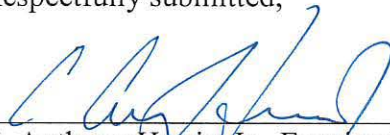
PLEASE TAKE NOTICE that pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure (SCRCP) and Rules 19 and 68 of the Rules of Procedure for the Administrative Law Court (SCALC), the Respondent, South Carolina Department of Revenue (Department), by and through its undersigned attorneys, will not sooner than ten days from the date of service of this Motion, or as soon thereafter as counsel may be heard, move for an order for summary judgment in the above-referenced matter. This Motion is based on the grounds that the Court should enter judgment in favor of the Department and against Duke Energy Corporation (Petitioner) because there is no genuine issue as to any material fact, and the material facts demonstrate that the Petitioner is limited to a \$5,000,000 investment tax credit on a lifetime basis under S.C. Code Ann. § 12-14-60 (2014). Accordingly, the Department is entitled to judgment as a matter of law.

Rule 56(c), SCRCP, provides that a trial court shall grant a motion for summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to a judgment as a matter of law.” See Bovain v. Canal Ins., 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). As explained more fully in the Memorandum of Law included herewith, the material facts related to whether the Petitioner is limited to a \$5,000,000 investment tax credit on a lifetime basis under § 12-14-60 are not in dispute. Moreover, the Department is entitled to judgment as a matter of law on this issue and, therefore, summary judgment is appropriate.

WHEREFORE, the Department moves that the Court enter summary judgment in favor of the Department and for such other and further relief as the Court deems just and proper.

Respectfully submitted,



C. Anthony Harris, Jr., Esquire (Bar No. 2745)

Counsel for Litigation

Jason P. Luther, Esquire (Bar No. 78021)

General Counsel for Litigation

P.O. Box 12265

Columbia, SC 29211-9979

803-898-5278 (Telephone)

803-896-0171 (Fax)

Charles.Harris@dor.sc.gov

Court.orders@dor.sc.gov

Attorneys for S.C. Department of Revenue

Columbia, South Carolina
July 31, 2020

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Corporation,	)	Docket No. 19-ALJ-17-0153-CC
	)	
Petitioner,	)	MEMORANDUM IN SUPPORT
	)	OF RESPONDENT'S MOTION FOR
vs.	)	SUMMARY JUDGMENT
	)	
South Carolina Department of Revenue,	)	
	)	
Respondent.	)	
_____	)	

The Respondent, South Carolina Department of Revenue (Department), submits this Memorandum in Support of its Motion for Summary Judgment. For the reasons below, the Department respectfully requests that the Administrative Law Court (ALC) grant the Department's Motion because the material facts not in dispute demonstrate that Duke Energy Corporation (Petitioner) is limited to a five million (\$5,000,000) dollar investment tax credit on a lifetime basis under S.C. Code Ann. § 12-14-60 (2014). Accordingly, the Petitioner is not entitled to a \$5,000,000 investment tax credit on an annual basis under § 12-14-60 as claimed in its Contested Case Hearing, and the Department is entitled to judgment as a matter of law.

BACKGROUND

The Department examined the Petitioner's South Carolina corporate tax returns for income tax years ended December 31, 1996 through and including December 31, 2014 (audit period), to determine the amount of tax credit claimed by the Petitioner under § 12-14-60. The Department issued its Notice of Adjustment to Petitioner dated July 19, 2018, stating that the Petitioner used \$4,298,806 of tax credit through December 31, 2014, leaving the Petitioner with a carry-forward balance of \$701,195. The Petitioner timely protested the Department's Notice of Adjustment on October 16, 2018.

The material facts, which are not in dispute, demonstrate the Petitioner is limited to \$5,000,000 in tax credit on a lifetime basis under § 12-14-60.

MATERIAL FACTS NOT IN DISPUTE

1. The Taxpayer 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 the Petitioner meets the eligibility requirements and subject to the tax credit limitations imposed by the statute.

2. The Petitioner is an entity subject to the license tax under S.C. Code Ann. § 12-20-100 (2014).

3. The Petitioner filed its South Carolina corporate income tax returns for each year of the audit period and claimed tax credit totaling \$24,850,727.

4. The Department conducted an audit examination of the Petitioner's South Carolina corporate income tax returns for the audit period.

5. The Department audited the Petitioner's South Carolina corporate income tax returns for the audit period to determine the amount of tax credit claimed by the Petitioner under § 12-14-60. The Department's audit showed that \$4,298,806 of tax credit was used by the Petitioner through December 31, 2014, and that the Petitioner 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 the Petitioner as filed on its South Carolina corporate income tax returns for the audit period. 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 the Petitioner 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.

7. On July 19, 2018, the Department issued its Notice of Adjustment allowing the Petitioner a total of \$5,000,000 in tax credit for the audit period, and disallowing tax credit of \$19,850,727. A copy of the Notice of Adjustment and corresponding audit schedule are marked as Exhibit A and by reference incorporated herein.

8. The table below lists the amounts of tax credit as computed by the Petitioner and 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-
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	<u>4,955,817</u>	-0-	<u>1,937,887</u>	<u>4,955,817</u>	20,551,921	701,194
	<u>24,850,727</u>	<u>5,000,000</u>	<u>4,298,806</u>	<u>19,850,727</u>		

9. Petitioner claimed a net-operating loss for tax years 2004 through 2013, which is the reason none of the tax credit claimed by the Petitioner was used during those years. The Petitioner 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, the Petitioner timely protested the Notice of Adjustment.

11. The Department issued its Department Determination on April 26, 2019, upholding the Notice of Adjustment. A copy of the Department's Determination is marked as Exhibit B and incorporated herein by reference.

12. Petitioner timely filed its Request for a Contested Case Hearing on May 24, 2019.

13. Section 12-14-60 was amended twice in 1998 by *S.C. Act No. 419* and *S.C. Act No. 442*. A copy of the two acts provided in discovery, as well as a complete copy of both acts, are marked as Exhibit C and incorporated herein by reference.

ARGUMENTS

Summary Judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Young v. S.C. Dep't of Disabilities & Special Needs*, 374 S.C. 360, 649 S.E.2d 488 (2007); *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007); *Pittman v. Grand Strand Entm't, Inc.*, 363 S.C. 531, 611 S.E.2d 922 (2005); *Eagle Container Co., LLC v. County of Newberry*, 366 S.C. 611, 622 S.E.2d 733 (Ct. App. 2005); and *B & B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 603 S.E.2d 629 (Ct. App. 2004). In determining whether any genuine issue as to any material fact exists, the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the non-moving party. *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 642 S.E.2d 751

(2007); *Med. Univ. of S.C. v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004); *Moore v. Weinberg*, 373 S.C. 209, 216, 644 S.E.2d 740, 743 (Ct. App. 2007); and *Rife v. Hitachi Constr. Mach. Co., Ltd.*, 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005). “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). “A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

The material facts listed above are not in dispute, and those facts viewed in the light most favorable to the Petitioner establish that the Petitioner is limited to a \$5,000,000 investment tax credit on a lifetime basis under § 12-14-60. Therefore, the Court should grant the Department's Motion for Summary Judgment.

I. The Petitioner is limited to a \$5,000,000 investment tax credit on a lifetime basis under § 12-14-60.

A. Statutory construction of § 12-14-60.

The matter before the Court is whether the investment tax credit afforded utilities under § 12-14-60 is limited to \$5,000,000 on a lifetime basis as set forth by the Department in its Determination, or whether the credit is an annual one as contended by the Petitioner. The issue is a legal one and turns on the rules of statutory construction.

The cardinal rule employed by South Carolina Courts in statutory construction is to first ascertain the plain meaning of the language in the statute. “It is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question.” *Smith v. Norman*

K. Tiffany, 419 S.C. 548, 556, 799 S.E.2d. 479, 587 (2017). “The text of a statute as drafted by the legislature is considered the best evidence of the legislative intent or will.” *Hodges v. John S. Rainey*, 341 S.C. 79, 85, 533 S.E.2d. 578, 581 (2000). “The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (quoting *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007)). “In doing so, we must give the words found in the statute their ‘plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation’”. *Id.* at 74, 716 S.E.2d at 877 (quoting *Sloan*, 371 S.C. at 499, 640 S.E.2d at 459). “Thus if the words are unambiguous, we must apply their literal meaning.” *Id.* at 67, 716 S.E.2d at 881 (quoting *Sloan*, 371 S.C. at 498, 640 S.E.2d at 459). “If a statute is clear and explicit in its language, then there is no need to resort to statutory interpretation or legislative intent to determine its meaning.” *Timmons v. S.C. Tricentennial Commission*, 254 S.C. 378, 401, 175 S.E.2d. 805, 817 (1970).

Thus, the first rule of statutory construction is to examine the text of a statute to determine its plain and ordinary meaning.

B. The clear and unambiguous language of § 12-14-60(A)(1), (D)(1) and (G) limits the Petitioner to \$5,000,000 in investment tax credit on a lifetime basis.

Chapter 14 of Title 12 of the South Carolina Code provides for an investment tax credit for certain companies that place in service qualified manufacturing and productive equipment property. Section 12-14-60(A)(1) provides:

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

Section 12-14-60(A)(1). Any unused tax credit may be carried forward for ten years from the close of the tax year in which the credit was earned under § 12-14-60(D)(1). The lifetime limitation of \$5,000,000 is imposed by § 12-14-60(G) which reads:

[t]he 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 by Section 12-20-100.**

Section 12-14-60(G) (emphasis added). The Petitioner is subject to the license tax under S.C. Code Ann. § 12-20-100 (2014) and, therefore the limitation imposed by § 12-14-60(G) applies.

The limitation on the amount of the tax credit for which the Petitioner is eligible is imposed solely by § 12-14-60(G) (“no more than five million dollars”). No other subsection of the statute contradicts the limitation imposed, and this is a concise and definite phrase which clearly conveys the intent of the General Assembly. Moreover, § 12-14-60(G) provides that the limitation applies to “**The credit allowed by this section**”, which is a clear reference to § 12-14-60 as a whole. The General Assembly also established a marker clearly defining that the credit is limited to no more than \$5,000,000 for investments made after June 30, 1998. Therefore, the plain language of § 12-14-60(G) limits the Petitioner to no more than five million dollars in credit under the **entirety** of § 12-14-60, and no other meaning is conveyed by the General Assembly’s use of this language.

The controlling statute is § 12-14-60 and the pertinent language of the applicable subsections defines the time period, duration and limitation for the allowable tax credit. Section 12-14-60(A)(1) provides the time period for which the credit may be taken (any taxable year in which the taxpayer places in service qualified equipment); § 12-14-60(D)(1) defines the duration over which the credit may be taken (the taxpayer may carry forward unused credit for a period of ten years from the close of the tax year in which the credit was earned); and § 12-14-60(G) sets

forth the limitation on the total amount of credit a taxpayer may claim (the credit allowed by this section is limited to no more than five million dollars). The statute's language is plain and unambiguous, and conveys a clear and definite meaning, and no other meaning should be imposed. *See SCANA Corp. v. S.C. Dep't of Rev.*, 384 S.C. 388, 391, 683 S.E.2d 468, 469 (2009) (construing § 12-14-60(D)). When the subsections are read together as a whole, the clear meaning of the language is that the statute provides a lifetime limit of \$5,000,000 in tax credit, which may be used in a single tax year, earned over multiple tax years or carried forward if unused over a period of ten years.

C. The clear language in the title to the act establishing the credit limitation further evinces the General Assembly's intent to limit the total tax credit to \$5,000,000 on a lifetime basis.

If there is any resort to matters outside the plain text of the statute, the title to the act amending the statute in this instance is a clear indication of the legislative intent. Outside of the statute itself, the title to the act is the text most closely related to the statute. The statute in question was first enacted in 1995 and has been amended on several occasions since. *See 1995 S.C. Act No. 25* (Economic Impact Zone Community Development Act of 1995). In 1998, the statute was amended and for the first time the General Assembly included language to specifically limit the credit for an entity subject to the license tax under § 12-20-100, to which the taxpayer, as a utility company, is subject. *See 1998 S.C. Act No. 419*; *See 1998 S.C. Act No. 442*. During the 1998 legislative session, the General Assembly passed *Act No. 419* to limit the credit for utility companies to \$1,000,000; later that same session, *Act No. 442* was passed to increase the credit to \$5,000,000. However, under both acts, the title clearly states that its purpose is “[t]o limit the **total credit** allowed a utility for investments made after June 30, 1998”. *See 1998 S.C. Act No. 419*;

1998 S.C. Act No. 442. (Emphasis added). 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); *Nathaniel Garner v. William S. Houck, Jr.*, 312 S.C. 481; 435 S.E.2d 847 (1993). “It is proper to consider the title or caption of an act in aid of construction to show the intent of the legislature.” *Lindsay v. S. Farm Bureau Cas. Ins. Co.*, 258 S.C. 272, 277 188 S.E.2d 374, 376 (1972), citing *Univ. of S. Carolina v. Elliott*, 248 S.C. 218, 221, 149 S.E.2d 433, 434 (1966).

The word “total” is not defined in § 12-14-60 and, therefore, it must be given its plain and ordinary meaning. *See Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). “Total” is defined as “compromising or constituting a whole: ENTIRE”. *See Merriam-Webster* (July 20, 2020, 11:08 a.m.), <https://meriam-webster.com/dictionary/total>. Here, total is an adjective used to modify “credit” to indicate the whole or entire credit is limited to \$5,000,000. It is entirely consistent with the phrase “no more than five million dollars” used by the General Assembly in the text of § 12-14-60(G).

The plain and unambiguous language in § 12-14-60(G) is consistent with, and bolstered by, the plain and unambiguous language in the title to the 1998 amendment, and further evinces the General Assembly’s clear intent to **limit the total credit a taxpayer (like the Petitioner) may claim after June 30, 1998 to \$5,000,000 on a lifetime basis.**

II. The General Assembly’s use of language to limit a tax credit in other statutes is instructive to the case at hand.

There are numerous statutes throughout the South Carolina Code of Laws which provide qualifying taxpayers with tax credits. An examination of the General Assembly’s use of language

limiting tax credits demonstrates that it is well aware of how to limit a tax credit on an annual basis when that is the legislative intent.

S.C. Code Ann. § 12-6-3420(B)(1)(2) and (3) (2014) allows tax credit for construction or infrastructure projects and provides in pertinent part:

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

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

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

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

S.C. Code Ann. § 12-6-3420(B)(1)(2) and (3) (emphasis added). Similarly, S.C. Code Ann. § 12-6-3790(D)(1)(a) (Supp. 2018) limits tax credits for educational credit for exceptional needs children by 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....” (emphasis added). The statute also limits “annually” tax credits authorized by other subsections of the statute. *See* § 12-6-3790(D)(1)(b).

There are other examples of the General Assembly using language to specify a credit limit is to be taken on an annual basis. S.C. Code Ann. § 12-6-3620(B) (2014 and 2018 Supp.) allows a tax credit against income tax for the use of biomass resource and provides:

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.

Section 12-6-3620(B) (emphasis added). In similar fashion, S.C. Code Ann. § 12-6-3470(A)(2) (2014) defines the limit for an income tax credit allowed an employer who employs a person receiving Family Independence payments as follows:

(A)(2) Except for employees employed in distressed counties, **the maximum aggregate credit that may be claimed in a tax year** for a single employee pursuant to this subsection and Section 12-6-3360 is five thousand five hundred dollars.

Section 12-6-3470(A)(2) (emphasis added).

When enacting the language in § 12-14-60(G) imposing the limit for the tax credit allowed the Petitioner, the General Assembly chose not to use the word “annually”. Likewise, the General Assembly chose not to use the phrases in a “single taxable year” or “the maximum aggregate credit which may be claimed in a tax year” to define the tax credit limitation. Clearly, the General Assembly has knowledge of the use of this language. Instead, the General Assembly chose to use the phrase “no more than five million dollars” to define the credit limit – a clear and unambiguous expression on the part of the General Assembly to limit the **total** credit to \$5,000,000 under any circumstance.

Our Courts have consistently held that the legislature intends for the words in a statute to have meaning. “The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something.” TNS Mills, 331 at 620, 503 S.E.2d at 476 (citing State ex rel. v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964)). If the General Assembly intended to allow the Petitioner to claim an annual credit of \$5,000,000 it would have included that language in the statute. Simply stated, it did not.

III. The tax credit at issue must be strictly construed against the Petitioner.

As the moving party in this matter, the Petitioner bears the burden of proving the tax credit should be applied on an annual basis. Importantly, § 12-14-60 provides a tax credit, which is a legislatively-created special circumstance that lessens the overall tax burden of the Petitioner. South Carolina Courts have long held that any statute which lessens the tax burden, whether by

exemption, deduction or tax credit, is a matter of legislative grace and must be strictly construed against the taxpayer. “The language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption.” *TNS Mills, Inc. v. South Carolina Dep’t of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998); *Southeastern-Kusan, Inc. v. South Carolina Tax Comm’n*, 276 S.C. 487, 489, 280 S.E.2d 57, 58 (1981) (“As a general rule, tax exemption statutes must be strictly construed against the taxpayer.”); *Thayer v. S.C. Tax Comm’n*, 307 S.C. 6, 413 S.E.2d 810 (1992); *Home Medical Systems, Inc. v. South Carolina Department of Revenue*, 382 S.C. 556, 677 S.E.2d 582 (2009) (“a statutory tax exemption must be strictly construed against the taxpayer”). The taxpayer bears the burden of bringing itself squarely within the statute authorizing the exemption. *M. Lowenstein & Sons, Inc v. S.C. Tax Comm’n*, 277 S.C. 561, 290 S.E.2d 812 (1982); cf. *SCANNA Corp. and Subsidiaries v. S.C. Dep’t of Revenue*, 384 S.C. 388, 683 S.E.2d 468 (2009) (Beatty J., dissenting) (“[I]n cases involving a tax deduction, any ambiguity is strictly resolved against the taxpayer.”) “It has been said on numerous occasions by our Courts that 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. Robert C. Wasson, Chairman, et al.*, 267 S.C. 581, 588, 230 S.E.2d 614, 617 (1976).

In *Matthews v. South Carolina Tax Commission*, 267 S.C. 548, 230 S.E.2d. 223 (1976), the taxpayer sought to recover taxes paid under protest, citing a statute which allowed carry-forward losses for taxpayers who had started a new business in the state. In ruling against the taxpayer, the Court held:

However, this case and Chronicle Publishers recognize a principle that applies in the present case: that a deduction is a matter of

legislative grace; and that a statute allowing a deduction, if ambiguous, is construed strictly against the taxpayer. The language of section 65-259(12) does leave room for interpretation. What it takes to ‘establish a new business’ is admittedly not obvious. The present case is therefore one to which the above stated principle applies.

Matthews, at 548, 557, 230 S.E.2d. at 223, 232. This same reasoning was applied in denying a tax credit claimed by the taxpayer in *Centex v. South Carolina Department of Revenue*, 406 S.C. 132, 750 S.E.2d. 65 (2013), as the Court noted “[i]n 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.” *Centex* at 140, 750 S.E.2d. at 73.

The opinion in *Home Medical Systems* is illustrative of our Courts’ adherence to the view that a statute which lessens the tax burden of a taxpayer should not be read broadly but should be strictly construed against the taxpayer. The issue in *Home Medical* was whether the taxpayer’s durable medical equipment was exempt from sales tax under S.C. Code Ann. § 12-36-2120(28)(a) (2000 and Supp. 2008). The Administrative Law Court (ALC) found the equipment was entitled to the tax exemption. In reversing the decision of the ALC, the Supreme Court held the ALC had applied an expansive definition to the statute, contrary to the long-standing view of our Courts that a tax exemption statute should be narrowly construed against a taxpayer. Central to the Court’s ruling is the following language from the opinion:

Finally, we note the ALC’s ruling that the regulatory definition was not sufficiently expansive goes against the rule that a statutory tax exemption must be strictly construed against the taxpayer. *TNS Mills, Inc. v. South Carolina Dep’t of Revenue*, *supra*.

In sum, we hold that the ALC erred in applying its own, broad definition of prosthetic device to find that Taxpayer’s durable products were prosthetic devices.

Home Medical Systems, 382 S.C. at 565, 677 S.E.2d at 587.

In the case at hand, the Petitioner attempts to claim the tax credit on an annual basis by broadening the clear and unambiguous language of § 12-14-60. “Subtle or forced construction of statutory words for the purpose of expanding a statute’s operation is prohibited.” *TNS Mills*, 331 S.C. at 624, 503 S.E.2d at 478 (citing *Walton v. Walton*, 282 S.C. 285, 318 S.E.2d 14 (1984)). The Petitioner has failed to bring itself squarely within the “annual limitation” for which it argues. *Avco Corp.*, 267 S.C. 581, 588, 230 S.E.2d 614, 617 (1976). Thus, the plain language of § 12-14-60 must be strictly construed against the Petitioner. Accordingly, the Petitioner is not entitled to claim the tax credit on an annual basis.

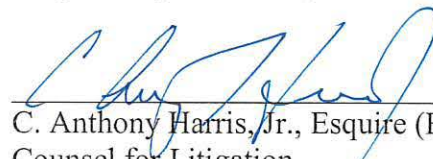
CONCLUSION

As the material facts are not in dispute, the Petitioner is limited, on a lifetime basis, to no more than \$5,000,000 in tax credit under § 12-14-60. The plain and unambiguous language of § 12-14-60 imposes this limitation, as does the clear language in the title to *1998 S.C. Act No. 442* establishing the limitation. Moreover, the General Assembly has demonstrated an ability to use language allowing an annual limitation when that is its intent, and it did not do so in this case.

WHEREFORE, the Department respectfully requests that this Court enter an order finding that the tax credit allowed the Petitioner, pursuant to § 12-14-60, is limited to no more than five million dollars on a lifetime basis; that the Petitioner is not allowed to carry forward \$19,850,727 in tax credit for the audit period; that the Department’s Motion for Summary Judgment is granted; and for such other relief as this Court may deem just and proper.

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Respectfully submitted,



C. Anthony Harris, Jr., Esquire (Bar No. 2745)

Counsel for Litigation

Jason P. Luther, Esquire (Bar No. 78021)

General Counsel for Litigation

P.O. Box 12265

Columbia, SC 29211-9979

803-898-5278 (Telephone)

803-896-0171 (Fax)

Charles.Harris@dor.sc.gov

Court.orders@dor.sc.gov

Attorneys for S.C. Department of Revenue

Columbia, South Carolina
July 31, 2020

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Corporation,

)

DOCKET NO. 19-ALJ-17-0153-CC

)

Petitioner,

)

)

PROOF OF SERVICE

vs.

)

)

South Carolina Department of Revenue,

)

)

Respondent.

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)

I, the undersigned employee of the South Carolina Department of Revenue, Office of General Counsel, do hereby certify that I have served the Respondent's Motion for Summary Judgment and Memorandum in Support of Respondent's Motion for Summary Judgment in connection with the above-captioned matter by causing a copy of the same to be deposited in the United States Mail on the below date, postage prepaid, *and electronically transmitted*, to the following parties at their address of record:

Samantha K. Trencs, Esquire - samtrencs@eversheds-sutherland.us
Eversheds Sutherland (US) LLP
700 Sixth Street, NW, Suite 700
Washington, DC 20001-3980

Maria M. Todorova, Esquire - MariaTodorova@eversheds-sutherland.us
Eric S. Tresh, Esquire - erictresh@eversheds-sutherland.us
Chris R. Lee, Esquire - ChrisLee@eversheds-sutherland.us
Eversheds Sutherland (US), LLP
999 Peachtree Street, NE, Suite 2300
Atlanta, GA 30309-3996
Attorneys for Petitioner



Tonie M. Miranda, Paralegal
Office of Litigation & Appeals Division
South Carolina Department of Revenue

Columbia, South Carolina
July 31, 2020

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Corporation,	)	
	)	
Petitioner,	)	
	)	
vs.	)	DOCKET NO. 19-ALJ-17-0153-CC
	)	
	)	
South Carolina Department of Revenue,	)	
	)	
Respondent.	)	

**MEMORANDUM IN RESPONSE TO THE DEPARTMENT’S MOTION FOR
SUMMARY JUDGMENT**

Pursuant to the Rules 19 and 68 of the Rules of Procedure for the Administrative Law Court and Rule 56 of the South Carolina Rules of Civil Procedure, Duke Energy Corporation (“Duke Energy”) submits this memorandum of law in response to the motion for summary judgment filed by the South Carolina Department of Revenue (“Department” or “Respondent”) on July 31, 2020 (“Respondent’s Motion”). For the reasons discussed herein and in the memorandum of law in support of Duke Energy’s motion for summary judgment filed on July 31, 2020 (Duke Energy’s Motion”), Duke Energy is entitled to summary judgment in this case and the Department’s motion for summary judgment should be denied.

I. The Department’s interpretation of Section 12-14-60(G) as a lifetime limitation conflicts with the plain language of Section 12-14-60.

The Department argues that the plain language of the Credit Limitation under Section 12-14-60(G), when read together with Sections 12-14-60(A)(1) and (D) “as a whole,” creates “a lifetime limit of \$5,000,000 in tax credit.” (Department’s Motion 7-8.) Duke Energy agrees that the entirety of Section 12-14-60 must be read as a whole. (Duke Energy’s Motion 27.) However,

the Department's interpretation of Sections 12-14-60 fails to do exactly that which they say is required.

Section 12-14-60(A)(1) provides:

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.

S.C. Code Ann. § 12-14-60(A)(1) (emphasis added). Under the plain language of this section, a taxpayer earns the Credit for any taxable year in which the taxpayer makes the requisite investment in the State (“places in services economic impact zone qualified manufacturing and productive equipment property”). *Id.* The Credit can then be applied against the taxpayer's income tax liability (“against the tax imposed pursuant to Chapter 6”), which is also computed on an annual basis. *See, e.g.,* S.C. Code Ann. 12-6-530 (“an income tax is imposed annually”). If the taxpayer is not able to utilize all of its Credit (“Unused credit allowed pursuant to this section [12-14-60]”) earned in a given taxable year (if for example, the Credits exceed the taxpayer's income tax liability), it can carry forward that Credit “for ten years from the close of the tax year in which the credit was earned,” pursuant to Section 12-14-60(D). In other words, if the taxpayer makes the requisite investment in Year 1 and Year 2, it earns the Credit in each of those years and can then carry forward the Credit earned for Year 1 until Year 11, and the Credit for Year 2 up until Year 12. This simple example illustrates that the Credit is an annual credit: it is earned for each tax year in which the taxpayer meets the investment requirements; it is applied against the taxpayer's annual liability; and its carryforward period is measured from the close of each tax year in which the Credit is earned.

For taxpayers who are subject to the State's license tax like Duke Energy, Section 12-14-60(G) limits the amount of the annual Credit authorized under Section 12-14-60(A)(1):

The credit allowed by this section [12-14-60] 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.

(Emphasis added.)

Nowhere in Section 12-14-60 does the statute state that it provides a lifetime limitation. Indeed, given that the rest of the statute calculates all aspects of the Credit annually, calculating a limitation on a lifetime basis is incongruous with the reading of the statute as a whole. Especially, where the legislature does not explicitly provide for a lifetime limitation. This is even more apparent when time after time the legislature has shown that when it wants to enact a lifetime limitation on a credit it has done so explicitly. (Duke Energy's Motion 18-19.)

The Department next argues that Section 12-14-60(G) "sets forth the limitation on the total amount of credit a taxpayer may claim . . ." and is therefore a lifetime limitation. (Department's Motion 7-8.) However, the Department's misquotes and reads words into the statute. The word "total" does not appear anywhere in the statute. Perhaps this error was inappropriate but it essentially proves Duke Energy's point that, as written, no total limitation or lifetime limitation appears anywhere in the plain language of Section 12-14-60. "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

Furthermore, the Department itself emphasizes in its Motion that "the limitation applies to **'The credit allowed by this section', which is a clear reference to §12-14-60 as a whole.**" (Department's Motion 7 (emphasis added).) Duke Energy agrees. However, the Department's brief then proceeds to analyze Section 12-14-60(G) in isolation from the rest of the statute, without

reference to the impact of Sections 12-14-60(A)(1) and (D). South Carolina courts “do not look at statutes in isolation. Instead, we consider how the statutes operate with each other when striving to arrive at any one statute’s proper meaning.” *Fairfield Waverly, LLC. v. Dorchester Cty. Assessor*, Op. No. 5769 (S.C. Ct. App. filed Aug. 26, 2020), 2020 WL 5032524, at *3. “[T]he Court should not concentrate on isolated phrases within the statute, but rather, read the statute as a whole and in a manner consonant and in harmony with its purpose.” *Duke Energy Corp. v. S.C. Dep’t of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016); *see also S.C. State Ports Auth. v. Jasper Cty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (“In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.”)

There is nothing in Section 12-14-60(G) or the entire statute that would suggest that after an application of the limitation, the Credit is converted from an annual to a lifetime credit. The limitation simply limits the amount of annual Credit to which a taxpayer can be entitled. Accordingly, the Department’s interpretation of Section 12-14-60(G) as a lifetime limitation is inconsistent with the plain language of the statute and should be rejected.

II. The Department’s interpretation of Section 12-14-60(G) as a lifetime limitation on the Credit leads to an absurd result.

The only logical reading of the plain text of Section 12-14-60(A)(A) is that the Credit can be earned for each tax year in which a taxpayer makes the requisite investment in the State. The Credit Limitation does not change the annual nature of the Credit; it merely limits it to \$5 million for utilities. To conclude otherwise would offend the spirit and policies of the State’s income tax statutes and lead to absurd results. *See, e.g., Kiriakides v. United Artists Commns., Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (holding that a statutory construction would be rejected if 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.”)

Section 12-14-60(A) provides that the Credit is applied against a taxpayer’s South Carolina corporate income tax liability. The corporate income tax is “imposed annually.” S.C. Code Ann § 12-6-530. South Carolina income is determined based on federal taxable income, which is calculated on an annual basis. S.C. Code Ann. § 12-6-1110. The addition and subtraction modifications to determine South Carolina income are based on certain federal income tax adjustments and thus are determined on an annual basis. S.C. Code Ann. § 12-6-1120; S.C. Code Ann. § 12-6-1130. Thus, by its very nature, 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. “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.” *Eagle Container Co., LLC v. Cty. of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 895-896 (2008) (citations omitted). Therefore, construing the words of the Credit statute in the context of the States’ corporate income tax that is computed on an annual basis further supports the conclusion that the Credit is an annual credit subject to a limitation on the annual amount of the Credit.

Moreover, not only is the Department’s reading of Section 12-14-60(G) inconsistent with the rest of Section 12-14-60 and the corporate income tax structure, but it would lead to an absurd result. For example, S.C. Code Ann. 12-6-1140 provides for certain deductions from individual taxable income. Specifically, Subsection (7)(a) allows a deduction of “[t]wo thousand dollars for each adopted special needs child . . .” who meets certain conditions specified therein. The plain text of subsection (7)(a) does not specify whether the deduction applies each year or once for the

lifetime of the taxpayer. If one were to apply the Department’s proposed interpretation in this case and read the particular subsection authorizing the deduction or credit in a vacuum and out of context, it would lead to the absurd result that the deduction is forever lifetime deduction. Yet, construing the statute as a whole, and in harmony with the purpose of the personal income tax, which is calculated on an annual basis and against which the deduction is applied, the deduction applies on an annual basis. (Instructions – South Carolina Form SC 1040, Exhibit 42 to Duke Energy’s Motion (“If you have adopted a special needs child, you may subtract \$2,000 per year per child as long as the adopted child qualifies as a dependent on your federal return.”)).

Similarly, in the present case, Section 12-14-60(G) does not specifically state whether the Credit Limitation is annual or lifetime. However, it needs not to, because Section 12-14-60(G) must be read together with the entire Section 12-14-60, “in a manner consonant and in harmony with its purpose” and the purpose of the corporate income tax. *Fairfield Waverly*, 2020 WL 5032524, at *3 (quoting *Duke Energy Corp.*, 415 S.C. at 355, 782 S.E.2d at 592. Section 12-14-60(G) expressly states that the limitation applies to “[t]he credit allowed by this section.” This section – i.e., 12-14-60 – allows a taxpayer to earn a credit, to be applied against its annual corporate income tax liability, for every tax year in which the taxpayer makes the requisite investment in the State. All Section 12-14-60(G) does is it limits the Credit a utility earns in a particular tax year to \$5 million. The carryforward period for the Credit is measured from the particular tax year in which it was earned, i.e., in which the taxpayer made the requisite investment. These “features of the law” – the corporate income tax is an annual tax; the 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 Credit for that tax year was generated – demonstrate that the limitation in Section 12-14-60(G) limits the amount of the

annual Credit authorized under the statute. *Fairfield Waverly*, 2020 WL 5032524, at *4. Nothing in Section 12-14-60 states otherwise. Therefore, not only is the Department's reading of Section 12-14-60(G) out of context, but it would also lead to absurd results.

III. Any ambiguity in Section 12-14-60(G) must be resolved in the context of Section 12-14-60 and the State's corporate income tax regime.

As discussed in Duke Energy's Motion, even if the Court concluded that Section 12-14-60 is ambiguous, principles of statutory construction and the legislative history of the statute demonstrate that the Legislature intended the Credit Limitation to be an annual limitation. (Duke Energy's Motion 26-28.) For over 200 years, South Carolina courts have recognized the statutory construction principle of *noscitur a sociis*. *Dunlap v. Dunlap*, 4 S.C. Eq. 305, 4 Des. 305 (S.C. Ct. App. Eq. 1812). "According to the doctrine of *noscitur a sociis*, the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute." *Southern Mutual Church Insurance Company, v. South Carolina Windstorm and Hail Underwriting Association*, 306 S.C. 339, 342, 412 S.E.2d 377, 397 (1991). "Further, statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction." *Hudson ex rel. Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 124-125, 754 S.E.2d 486, 492-493 (2014). As explained above and in Duke Energy's Motion, reading Section 12-14-60(G) in the context of the entire statute and the State's income tax regime leads to the only logical conclusion that the Credit Limitation is an annual limitation. (Duke Energy's Motion 27.) This conclusion is consistent with the Department's longstanding practice of requiring taxpayers to apply the limitation on an annual basis as well as with the 2017 actions of the General Assembly, reaffirming the Legislature's intent to enact the limitation as an annual limitation. (Duke Energy's Motion 20-21, 24-25.)

IV. The Department’s interpretation of the title to the 1998 legislation enacting and amending the Credit Limitation is wrong.

The Department’s Motion makes no mention of the Credit statute’s recent legislative history and its own longstanding practice of applying the Credit Limitation on an annual basis. It fails to explain its own Credit instructions and audit workpapers and deposition testimony of the Department, its former employees, the State Legislature’s Revenue and Fiscal Affairs Office confirming that the Department viewed and applied Section 12-14-60(G) as an annual limitation for over fifteen years. (Duke Energy’s Motion 9-12.) Also, Respondent makes no attempt to explain the reason for the recent change to its interpretation and practice, and makes no attempt to explain why this longstanding interpretation of Section 12-14-60 is no longer supported by the plain and unambiguous language of the Credit statute.

Instead, reading certain sections of the Credit statute out of context, the Department points to the use of the term “total” in the title of the 1998 legislation amending Section 12-14-60 – “[t]o limit the total credit allowed a utility for investments made after June 30, 1998.” 1998 South Carolina Laws Act 419 (HB 4700), pt. II, § 49II.B, S.C. Code Ann. § 12-14-60(G) (1998) (effective July 1, 1998); 1998 South Carolina Laws Act 442 (H.B. 4853), §14B, S.C. Code Ann. § 12-14-60(H) (1998) (effective August 31, 1998) (“1998 Bills”). In so doing, the Department claims that “is a clear indication of the legislative intent.” (Department’s Motion 8.) The Department’s contention is misplaced.

First, “[f]or interpretative purposes, the title of a statute and heading of a section are 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). The title and headings of a bill “may not be construed to limit

the plain meaning of the text.” *Id.* As discussed herein, Section 12-14-60 is unambiguous and its plain language imposes an annual limitation on the Credit for utilities like Duke Energy.

Second, the use of the term “total” must be read in harmony with the text of the statute. The Credit is an annual credit. A limitation to “the total credit,” when the credit is an annual one, is still an annual limitation.

Moreover, this is not the first time when the General Assembly has used the word “total” in the context of an annual limitations. For example, Section 12-6-3790 provides that credits authorized “annually may not exceed cumulatively a total of two million dollars.” Sections 12-6-3775 and 12-6-3515 similarly limit the “total” credit that may be taken or used in a “taxable year.” Thus, even if the court were to give weight to the use of the word “total” in the title of the bill, given the context behind the Credit statute as a whole, the limitation should be construed to apply annually – just like all of the other provisions in the statute.

Finally, for more than fifteen years, the Department instructed taxpayers to compute their Credit by applying the limitation in Section 12-14-6(G) on an annual basis. (Duke Energy’s Motion 9.) The Department’s now claims that the use of the term “total” in the title of the 1998 legislation – a term that does not otherwise appear in the text of the statute – is “clear language” that makes the Credit Limitation a lifetime limitation. For the reasons discussed above, not only the Department mistaken, but its position is disingenuous. If the language is so “clear” how come the Department, including some of its most experienced staff, got it wrong for some many years?

V. Strict construction does not permit the Court to search for an interpretation in the Department’s favor or to ignore the plain language of the statute.

The Department argues that the Credit should be construed strictly against Duke Energy as a lifetime limitation. (Department’s Motion 11.) The Department is mistaken.

First, the strict construction principle does not apply when a statute is unambiguous, as Section 12-14-60 is. *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 76, 716 S.E.2d 877, 882 (2011) (“Even under the principles of strict construction, we cannot ignore the plain language”) The South Carolina Supreme Court has held that “[t]his rule of strict construction simply means that constitutional and statutory language will not be strained or liberally construed in the taxpayer’s favor. It does not mean we will search for an interpretation in [DOR]’s favor where the plain and unambiguous language leaves no room for construction.” *Centex Int’l, Inc. v. S.C. Dep’t of Revenue*, 406 S.C. 132, 140, 750 S.E.2d 65, 69 (2013) (citation omitted). “It is only when the literal application of the statute produces an absurd result will we consider a different meaning.” *Id.* Accordingly, strict construction does not require courts to automatically construe exemption and credit statutes in favor of the Department. It merely requires that the court does not strain or liberally construe such statutes for the benefit of the taxpayer.

As discussed above, the plain text of the Section 12-14-60 authorizes an annual credit against the State’s annual corporate income tax. Section 12-14-60(G) does not change the annual nature of the Credit, but it merely limits the amount of Credit a utility could claim for any tax year for which it earns the Credit (based on requisite investment in the state). There is nothing in the language of Section 12-14-60 to suggest otherwise. As a result, the Department’s position in this litigation would require this court to search for an interpretation in Respondent’s favor that is not otherwise supported by the text or intent of the statute.

Further, application of the Credit Limitation as annual will not produce an absurd result and is consistent with the intent of Section 12-14-60 to promote investments in the state by new businesses and the expansion of investments in the state by existing businesses. Accordingly, the strict application rule is not applicable in this case.

CONCLUSION

For the reasons stated herein, Duke Energy is entitled to an annual Credit of up to \$5 million per tax year. Accordingly, Duke Energy's motion for summary judgment should be GRANTED and the Department's Motion for Summary Judgment should be DENIED.

Respectfully submitted this 31st day of August, 2020



Samantha K. Trencs (South Carolina Bar No. 101882)

Eric S. Tresh (*pro hac vice*)

Maria M. Todorova (*pro hac vice*)

Chris R. Lee (*pro hac vice*)

EVERSHEDS SUTHERLAND (US) LLP

700 Sixth Street, NW Suite 700

Washington, DC 20001-3980

Phone: (202) 383-0534

samanthatrencs@eversheds-sutherland.com

erictresh@eversheds-sutherland.com

mariatodorova@eversheds-sutherland.com

chrislee@eversheds-sutherland.com

Attorneys for Petitioner

Duke Energy Corporation & Affiliates

CERTIFICATE OF SERVICE

I hereby certify that the foregoing MEMORANDUM IN RESPONSE TO THE DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT, has been served by depositing a copy in the United States mail, postage paid, and by electronic mail this 31st day of August, 2020 upon the following:

C. Anthony Harris, Jr.
Counsel for Litigation
Jason P. Luther
General Counsel for Litigation
P.O. Box 12265
Columbia, SC 29211-9979
Charles.Harris@dor.sc.gov



Chris R. Lee

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Corporation,	)	Docket No. 19-ALJ-17-0153-CC
	)	
Petitioner,	)	
	)	
vs.	)	RESPONDENT SOUTH CAROLINA
	)	DEPARTMENT OF REVENUE'S
South Carolina Department of Revenue,	)	RESPONSE IN OPPOSITION
	)	TO PETITIONER'S MOTION FOR
Respondent.	)	SUMMARY JUDGMENT
	)	

Pursuant to Rules 19 and 68 of the Rules of Civil Procedure for the Administrative Law Court and Rule 68 of the South Carolina a Rules of Civil Procedure, Respondent South Carolina Department of Revenue (Department) submits this Response to the Motion for Summary Judgement of Duke Energy Corporation (Petitioner) dated July 31, 2020. For the following reasons, the Court should deny the Petitioner's Motion and grant the Department's Motion for Summary Judgement filed July 31, 2019, and rule as a matter of law that the Petitioner is limited to \$5,000,000 in tax credit on a lifetime basis under S.C. Code Ann. § 12-14-60 (2014).

The Petitioner advances four arguments in support of its Motion for Summary Judgment: 1) its interpretation of the tax credit limitation under § 12-14-60; 2) the General Assembly's actions, fiscal impact statement of the South Carolina Office of Revenue Fiscal Affairs (RFA), and the Department's practices; 3) the Department has violated South Carolina's rule-making process and the South Carolina Taxpayers' Bill of Rights (Taxpayer Rights); and 4) the Department is estopped and/or unjustly enriched by its actions. The Petitioner's arguments are unpersuasive, for the following reasons, and the Petitioner's Motion for Summary Judgment should be denied, and the Department's Motion for Summary Judgment should be granted as a matter of law.

ARGUMENTS

I. The Petitioner's interpretation of the credit limitation as stated in § 12-14-60 is wrong.

The Petitioner focuses exclusively on the phrase “any taxable year” (§ 12-14-60(A)(1)) in its construction of the statute (*See* Petitioner's Motion for Summary Judgment, pp. 17-18), while largely ignoring the credit limitation imposed by § 12-14-60(G) (“no more than five million dollars”). Petitioner also asserts that the credit should be applied annually because “any taxable year” means “where a taxpayer subject to the license tax makes a qualifying investment, the taxpayer is permitted a tax credit of up to five million dollars for that year” (*See* Petitioner's Motion for Summary Judgment, p. 18). This language is not in the statute.

The intent of the General Assembly is expressed through the language of a statute, and any undefined, ordinary word in a statute must be given its plain and ordinary meaning. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). The word “any” is defined by Merriam-Webster as “one, some or all indiscriminately of whatever quantity.” *See* Merriam-Webster (August 30, 2020, 12:40 p.m.), <https://meriam-webster.com/dictionary/any>. Here, the word any is an adjective which modifies the phrase “taxable year” in § 12-14-60(A)(1), and it is consistent with applying the credit limitation on a lifetime basis: the Petitioner is allowed the tax credit for any (one, some or all) of its applicable taxable years, and may carry forward unused credits for ten years, but it is limited under any circumstance to no more than five million dollars by the plain language of § 12-14-60(G).

The Department has in fact allowed the Petitioner to use credits earned for “any taxable year,” subject to the lifetime limitation imposed by § 12-14-60(G), as illustrated by the chart demonstrating the Petitioner's credits for the audit period (*See* Department's Motion for Summary

Judgment, p. 3). Moreover, partly as a result of the legislative grace in allowing the tax credit, the Petitioner has paid no corporate income taxes for the greater portion of the credit period, that being tax years 2004 - 2014 (Monroe Tr. pp. 24:1-25; 25: 1-24), and following the Department's issuance of its Notice of Adjustment, the Petitioner had carry-forward credits of \$701,195 at the end of the audit period.

There is no argument about the plain meaning of "*no more than five million dollars*" in § 12-14-60(G), or "*to limit the total credit allowed a utility*" as expressed in 1998 S.C. Act No. 419 and 1998 S.C. Act No. 442. This language clearly reflects the intent of the General Assembly to limit the tax credit to \$5,000,000 under any circumstance.

The Petitioner persists that the credit limitation is an annual one, and argues throughout its Motion that the General Assembly has consistently provided a tax credit under § 12-14-60 on an annual basis. The General Assembly is well aware of the use of language allowing a tax credit on an annual basis (*See Department's Motion for Summary Judgment*, pp. 9, 10, 11). However, despite amending the statute six times since its enactment, the General Assembly has chosen not to include the word "annual" in the credit limitation of subsection (G), despite having ample opportunity to do so. Furthermore, when given the specific opportunity to include the word "annual" to describe the credit limitation during the Legislative Session 2017 - 2018, the General Assembly again chose not to do so (*See Department's argument below regarding S. 428*).

The South Carolina case law is clear and longstanding that the tax credit at issue in a matter of legislative grace and must be strictly construed against the Petitioner. "The language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption." *TNS Mills, Inc. v. South Carolina Dep't of Revenue*, 331 S.C. 611, 620,

503 S.E.2d 471, 476 (1998); *Southeastern-Kusan, Inc. v. South Carolina Tax Comm'n*, 276 S.C. 487, 489, 280 S.E.2d 57, 58 (1981) (“As a general rule, tax exemption statutes must be strictly construed against the taxpayer.”); *Thayer v. S.C. Tax Comm'n*, 307 S.C. 6, 413 S.E.2d 810 (1992). The logic of our Court’s long-standing position that a tax exemption should be narrowly construed against a taxpayer is self-evident. One of the primary duties of the General Assembly is to establish a budget by enacting laws which create tax revenue. Any law which carves out an exemption for a taxpayer necessarily lessens the tax revenue of the State. Therefore, when interpreting a statute which, through legislative grace, grants an exemption, the Court should narrowly construe the exemption so that it reduces state revenues by less, not more. If there is any ambiguity with the lifetime credit limitation imposed by § 12-14-60, and there is none, the tax credit nevertheless must be strictly construed against the Petitioner.

Petitioner claims that interpreting the statute to provide a lifetime limitation leads to an absurd result (*See* Petitioner’s Motion for Summary Judgement, pp. 19-20). In support of this argument, the Petitioner claims that the 2010 amendment to § 12-14-60, allowing the credit to be used over a broader portion of the State, suggests the credit limitation should be annual so that all taxpayers would be allowed to benefit equally from the tax credit, even those who previously availed themselves of the tax credit. The Petitioner takes license with its argument in pretending to know the intent of the General Assembly. Nevertheless, the Petitioner’s argument is without merit.

The Petitioner’s position is non sequitur. The Petitioner has benefited from the tax credit afforded under § 12-14-60 during the entire audit period, whether the credit was taken as an Economic Impact Zone Credit (prior to 2011) or a Capital Investment Credit (after 2011). The

General Assembly in its wisdom defined the geographic areas of the State in which the tax credit would apply. Consequently, the Petitioner has been allowed the credit since the enactment of § 12-14-60 while other taxpayers have not. All of the investments which have qualified for the tax credit under § 12-14-60 have been valued by the State, and the General Assembly has consistently limited the tax credit to “no more than five million dollars” regardless of whether the tax credit was an Economic Impact Zone Credit or a Capital Investment Credit. That the Petitioner may have nearly exhausted the lifetime limitation imposed by § 12-14-60 is of no consequence. It is reasonable to conclude the General Assembly broadened the geographic area to which the tax credit would apply *because* the credit limitation is on a lifetime basis and would not create a significant disruption to State revenue by affording the tax credit to other taxpayers. Contrary to the Petitioner’s argument, reading an annual limitation into the tax credit would lead to an absurd result under the plain language of § 12-14-60 imposing the limitation, and consequently, would allow the Petitioner to claim \$5,000,000 a year in tax credit, year after year, as far as the eye can see.

II. Nothing in the actions of the General Assembly, the fiscal impact statement of the RFA or practices of the Department changes the lifetime limitation imposed by § 12-14-60.

- a. The actions (or inactions) of the General Assembly and the impact statement of the RFA.

In support of its interpretation of § 12-14-60, the Petitioner relies on a bill introduced in the Senate, S.428 (which was never passed by the General Assembly), and a fiscal impact statement prepared by Revenue Fiscal Affairs (RFA) associated with the bill. The Petitioner argues the un-enacted version of S.428 speaks to the legislative intent of § 12-14-60, and that the

fiscal impact statement as written reflects the Department's position. These arguments are in error and not supported by the discovery conducted in the case.

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). The taxpayer cites to *Dale C. Stuckey v State Budget & Control Board*, 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000) for the proposition that "[a] subsequent statutory amendment may be interpreted as clarifying original legislative intent." *Id.* However, in *Stuckey*, the Court was addressing a statute with a subsequent amendment which *had in fact passed the legislature* and was law. In this instance, the amendment cited by the taxpayer *did not pass the legislature* and, therefore, is not law. To the extent any of this is relevant to the meaning of the current statute, it is to show the legislature did not include the word "annually" in the 1998 version of the bill which was passed, and likewise it chose not to pass the 2017-2018 bill which did include the word.

Moreover, even if the proposed legislation had been enacted, the inclusion of the word "annually" in § 12-14-60(G) would not have been a simple clarification, but instead would have changed the current limitation completely. The General Assembly is well aware of how to use the word "annual" as it relates to a tax credit, as it has chosen to utilize this language in other statutes. (See Department's Motion for Summary Judgment, pp. 9, 10, 11). However, the General Assembly chose not to include "annual" in § 12-14-60, so a subsequent decision to amend the statute to insert "annual" would have represented a wholesale change, not merely a clarification.

Mr. Frank Rainwater with the RFA testified that most of the information used to prepare the fiscal impact statement came from Senate staff (Rainwater Tr. p. 36:20-25). Mr. Rainwater

also testified there was no communication with the Department in the process of preparing the fiscal impact statement (Rainwater Tr. pp. 20, 37:14-19; 1-13).¹ Testimony from Mr. Rainwater further established that in the fall of 2019 he spoke with Meredith Cleland (Deputy Director of Government Services with the Department) and Mr. Cleland indicated the Department disagreed with the fiscal impact statement in question, and the Department viewed the credit “as a one-time credit” (Rainwater Tr. pp. 29, 37, 40:11-12; 2-13; 7-13). Mr. Rainwater also testified that the proposed amendment to § 12-14-60 in S.428 would affect the State general tax revenue in 2017 and 2018 under the Department’s view that the credit was allowed on a lifetime basis (Rainwater Tr. p. 42:16-20). The Department’s position was firmly established by a decision of the Policy Division and the subsequent issuance of the Department Determination in this matter. It cannot be, as argued by the Petitioner, that the Department’s position on the credit limitation is somehow established by un-enacted legislation and a fiscal impact statement which was prepared without any input from or communication with the Department.

The Petitioner contends an e-mail from a Senate staffer, Craig Parks, to RFA is evidence of the Department’s position as to S.428 (*See* Petitioner’s Motion for Summary Judgment, p. 11). The e-mail is largely uncorroborated and is hearsay and not reliable evidence, and the Department would respectfully assert it should not be considered by the Court. Moreover, the affidavit is directly contradicted by the testimony of the Department employees and Mr. Rainwater as to the Department’s position.

¹The Petitioner asserts in its Motion for Summary Judgment that the RFA prepared its analysis “in consultation with senior policy staff at the Department” (*See* Petitioner’s Motion for Summary Judgment, p. 25). This statement is inconsistent with the testimony of Mr. Rainwater.

The entirety of the Petitioner's argument related to un-enacted legislation (S.428) and fiscal impact statements associated with this legislation is unfounded. There are dozens of bills introduced in the South Carolina Legislature every year which are not passed by the General Assembly because there is no consensus to do so among legislators. The absurdity of the Petitioner's argument is that to allow litigants to argue events surrounding un-enacted legislation would be to allow litigants to argue matters which in fact are not law - which is the case with S.428.

b. Form SC SCH. TC-11 and the Department's practices.

The Department is authorized to issue forms as part of its administration of the South Carolina tax laws. S.C. Code Ann. § 12-60-1720 (2014). The form used to compute the tax credit under § 12-14-60 is Form SC SCH.TC-11 (Form TC-11 or the "Form"). On July 24, 2014, the Department revised Form TC-11 to ensure the language of the form more clearly reflected the lifetime limitation of the credit afforded under § 12-14-60(G) and to better assist taxpayers in the computation of the credit. Contrary to the Petitioner's argument, the Form in use in this case prior to 2014 does not establish the Department's position regarding the tax credit limitation, nor is it dispositive as to the meaning of the tax credit limitation.

Form TC-11 was revised in 1998 following the amendment to § 12-14-60 confirming the tax credit limitation. Regardless of the manner in which the Form suggested the tax credit be computed from 1998 through 2014, the Form in use for each of these years conspicuously stated that the credit is limited to "no more than five million dollars" for an entity such as the Petitioner. Therefore, the language of the form for all years of the audit period imposed the lifetime credit

limitation set forth in § 12-14-60(G). Will need to make reference here to form exhibit. (Donovan Tr. pp. 86:8-25; 87:1-25; 88:1-25; 89:1-25; 90:1-15; Donovan dep. exhibits 10-25).

There are different levels of guidance provided by the Department. The deposition testimony of the Department is consistent that the official position is expressed through the Department's Policy Division (Policy) or a Department Determination. (Sharpe Tr. p. 96:6-9; Thomas Tr. p. 50:17-22; Taylor Tr. p. 41:5-12; VanStory Tr. pp. 86:19-25; 87:1-10; Cleland Tr. p. 82: 7-15). Forms are guidance but not authoritative (Taylor Tr. p. 42: 4-6; Thomas Tr. p. 59: 8-12; VanStory Tr. p. 84:19-22). The form as originally drafted in 1988 was not approved by Policy, and Policy reviewed the form in conjunction with § 12-14-60 for the first time in 2013. As is its function within the Department, Policy carefully researched the issue and determined the form 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 Office of General Counsel for Litigation and Appeals reviewed the Petitioner's protest and issued its Department Determination confirming the view of Policy, thus establishing its official position on the credit limitation. The Department has consistently applied the credit limitation on a lifetime basis since the review of the form by Policy and the issuance of the Department Determination.

The Petitioner argues that the calculation of the credit in a prior audit of the Petitioner is conclusive of the Department's position as to the credit, and cites to excerpts from the deposition of Orville Sharpe. Mr. Sharpe was one of the auditors involved in the prior audit covering the period from 2008 – 2011 (Sharpe Tr. p. 22: 10-16). The specific issue of the application of the tax credit was not addressed in the Department Determination issued as a result of this audit, nor was it an issue in the dispute or a consideration in the resolution of the case (which dealt with an

adjustment to license fees-the tax credit in § 12-14-60 applies only to corporate income taxes) (Sharpe Tr. pp. 96: 10-25; 97:1-16; 100:2-13; Donovan Tr. p. 85:14-18). The findings related to the tax credit in the prior audit represented the Mr. Sharpe's beliefs, not those of the Department. (Sharpe Tr. p. 98:13-19). Moreover, the audit from 2008 – 2011 was conducted prior to official Department position being established by Policy and Litigation. The Petitioner mischaracterizes the evidence in this case by asserting "senior employees" continue to believe that the credit limitation should be applied annually." (*See* Petitioner's Motion for Summary Judgment, p. 10). The testimony of Mr. Sharpe reveals he knew of only one employee in the Department who believed the credit limitation was annual, and that employee was not in Policy or Litigation, and that the employee's opinion did not express the official Department position.² (Sharpe Tr. p. 99:7-25). Mr. Sharpe testified that after reviewing § 12-14-60, he agreed with the decision of Policy. (Sharpe Tr. p. 99:4-6).

Jerilynn VanStory is a Tax Policy Manager with Policy and twenty-six (26) year employee of the Department (VanStory Tr. pp. 4:18-25; p. 5:2-20). Policy Department received an inquiry regarding the credit limitation under § 12-14-60 in 2013 or 2014 (VanStory Tr. p. 32:14-22). Policy is responsible for interpreting the tax laws of the State and writing policy documents (VanStory Tr. pp. 6:6-25; 7:2-23). Ms. VanStory reviewed § 12-14-60 and conducted research, including examining the title to 1998 *S.C. Act No. 419* and *442*, and analyzed other tax credit statutes to determine language used by the General Assembly in imposing limits on the amount of

²It would not be unusual for Department employees to have different opinions on a tax related matter, given the fact that the Department has approximately six hundred employees. This is all the more reason that the Department's official position on a matter is developed through Policy and Litigation.

credit a taxpayer was allowed. She also consulted with others in Policy and the Forms Division and the group reached a consensus that the tax credit limitation under § 12-14-60 was limited to \$5,000,000 on a lifetime basis (VanStory Tr. pp. 80:12-25; p. 81:1-25; p. 82:1-25; p. 83:1-18; VanStory dep. exhibit 31)). Contrary to the Petitioner's assertion that Ms. VanStory operated in a "star chamber" fashion (*See* Petitioner's Motion for Summary Judgement, p. 22), Policy operated as it should and provided guidance to the Department when the question regarding the Form arose.

Meredith Cleland (Deputy Director of Government Services) is a long-time employee of the Department (Cleland Tr. p. 10:10-17). Mr. Cleland's role with the Department is to provide assistance to the General Assembly regarding tax legislation when requested (Cleland Tr. pp. 10:21-25; p. 11:1-5). He is not a lobbyist.³ Mr. Cleland was requested by the Chairman of the House Ways and Means Committee to draft legislation to change the credit limitation in § 12-14-60(G) to an "annual" basis.⁴ As is his practice when requested by the General Assembly to assist in legislation, Mr. Cleland had the legislation drafted and forwarded the draft to the Chairman on September 6, 2017 (Cleland Tr. p. 47:3-18; Bates DOR 250). Mr. Cleland provided the draft to the Chairman as requested, although he was aware at the time the Department's position was the credit limitation was on a lifetime basis (Cleland Tr. pp. 47:25; p. 48:1-23). The Department will assist in drafting legislation when requested by the General, even if the draft is in opposition to the

³The Petitioner argues the Department began "lobbying" the legislature not to pass S.428. The Department does not employ a lobbyist, although the Petitioner does and Mr. Monroe "couldn't list them all." (Monroe Tr. p. 40:13-17). Mr. Monroe was advised by the Petitioner's lobbyists as to the status of S.428 and spoke with one of the Petitioner's lobbyists "for or five, six, a dozen times" about the bill (Monroe Tr. pp. 42: 12-15; 43: 1-6).

⁴Mr. Cleland does no establish policy positions for the Department (Cleland Tr. p. 82:2-6).

Department's view on a particular matter. (Cleland Tr. pp. 47:19-25; p. 48:2-23; p. 83:14-25; p. 84:1-7).

The evidence shows that the Department acted responsibly when the question of the Form arose. Even the Petitioner agrees that the Department's forms should accurately reflect the law and be revised if necessary (Monroe Tr. p. 56:13-25). Clearly, if the Department issues a form which misinterprets a law or is ambiguous it has a duty to revise the form in order to effectively administer the tax laws of the State. No form issued by the Department would ever be considered law, and if in conflict with a statute, the meaning of the statute will always prevail, even if the Department were advancing a deference argument.

III. The Department has not violated the South Carolina rule making process or the Taxpayer's Rights.

a. The South Carolina rule making process.

The Petitioner argues the Department inappropriately changed its Form related to the tax credit under § 12-14-60. As noted above, the Department revised the Form to ensure the language of the form more clearly reflected the lifetime limitation of the credit afforded under § 12-14-60(G) and to better assist taxpayers in the computation of the credit. The Petitioner contends that the change to the form is tantamount to the passage of an unauthorized regulation and violates the APA.

Under S.C. Code Ann. § 1-23-10(4) (2014) of the APA, a regulation is defined as "each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency."⁵ The issuance of a form, or revision of a form, to assist a

⁵See 1977 S.C. Op. Atty. Gen. No. 77-378, 1977 WL 24715, advising that estate tax forms issued by the South Carolina Tax Commission do not constitute a regulation of the agency.

taxpayer is not a regulation. Furthermore, § 1-23-10(4) also provides “[p]olicy or guidance issued by an agency other than in a regulation does not have the force or effect of law.” Therefore, the issue raised by the Petitioner regarding the Form is not dispositive of the underlying question of whether § 12-14-60(G) provides a lifetime or annual limitation on the available tax credit.

The Department was created to administer and enforce the revenue laws of this State. S.C. Code Ann. § 12-4-109 (2014). To that end, § 12-60-1720 provides “The department shall prescribe rules, procedures, forms, and instructions it considers appropriate and that are consistent with this article.” The Department may also provide guidance to taxpayers through instructions, private letter rulings, advisory opinions, and revenue rulings. While revenue rulings may be given deference by our Courts, none of these methods of guidance, including forms, carry the force of law. To the extent the Department determines a form should be revised to accurately reflect the law and better assist taxpayers, then it should do so under the charge given it pursuant to § 12-14-109.

The Petitioner cites *Joseph v. S.C. Dep’t of Labor, Licensing & Reg.*, 417 S.C. 436, 790 S.E.2d 763 (2016) in support of its argument that the Department’s revised form constitutes “administrative overreach that attempts to end run the legislative process.” *Joseph* at 454, 790 S.E.2d at 773. The issue in *Joseph* is dissimilar to the case at hand. In *Joseph*, the issue was whether the Board of the South Carolina Department of Labor, Licensing and Regulation was required to give public notice of a position statement regulating the practice of physical therapy prior to adoption at a regularly scheduled board meeting. The Department is charged with prescribing forms under § 12-60-1720, and to do so the statute does not require the Department to issue revenue rulings or otherwise conduct board meetings, as was the case in *Joseph*.

b. South Carolina Taxpayers' Rights.

Chapter 58 of Title 12 establishes the South Carolina Taxpayers' Bill of Rights (Taxpayers' Rights). The sections in Chapter 58 largely address the right of a taxpayer to be treated fairly, and S.C. Code Ann. § 12-58-30 (2014) establishes a Taxpayers' Rights Advocate (Advocate) to facilitate resolution of taxpayers' complaints and grievances. The Taxpayers' Rights addresses, among other things, implementation of taxpayer education (S.C. Code Ann. § 12-58-50 (2014)); evaluation of Department employee's performance (S.C. Code Ann. § 12-58-80 (2014)); timely release of levy or lien issued by the Department (S.C. Code Ann. §§ 12-58-120 and 12-58-160 (2014)); payment plans for tax obligation and extension of payment plans (S.C. Code Ann. § 12-58-185 (2014)); and noninterference of refunds by the Department (S.C. Code Ann. § 12-58-190 (2014)). The Taxpayers' Rights is laudable legislation and designed to remedy some common problems taxpayers may encounter, but it was not intended to be a panacea for all disputes with the Department or to supplant the administrative remedies available to a taxpayer.

The Petitioner points to S.C. Code Ann. § 12-58-60 (2014) in support of its argument that the Department's Determination is in conflict with the Taxpayers' Rights. Section 12-58-60 provides:

Explanatory statements of procedures, remedies, rights and obligations of department and taxpayers; when and how provided.

The 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. As 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. Additionally, the department shall include the statement in the tax booklets which are mailed annually to individuals and corporations.

S.C. Code Ann. § 12-58-60 (2014). Here, the Department's Notice of Adjustment (Notice) plainly stated the adjustment of the credits made by the Department, the resulting amount of credit carry forward and the time in which the Petitioner had to protest the Notice. (*See* Department's Motion for Summary Judgement, Exhibit A). The Petitioner obviously received the Notice, understand its import, and protested the findings in the Notice.

Although the Petitioner argues the Department's actions are contrary to the Taxpayers' Rights, it provided testimony that it was unaware of the name of the Advocate and had made no contact with the Advocate regarding this case (Monroe Tr. p. 33:7-22).

The Petitioner's arguments that the Department's actions were in conflict with both the South Carolina rule making process and the Taxpayers' Rights are without merit. These arguments fail because the Department plainly communicated through the Notice the substance of its decision and the rights of the Petitioner. The Petitioner has been afforded all of its administrative remedies and has chosen to file a Request for a Contested Case Hearing with this Court, as is its right, for a *de novo* trial in this case.

IV. The Petitioner's assertions of equitable estoppel and unjust enrichment are without merit.

a. Equitable estoppel.

The Petitioner argues the Department should be equitably estopped from requiring the tax credit to be taken on a lifetime basis (*See* Petitioner's Motion for Summary Judgement, pp. 29-30). In support of this position, the Petitioner cites two cases in which governmental entities were parties: *State Acc. Funds v. S.C. Second Injury Fund*, 388 S.C. 67, 693 S.E.2d 441 (2010), and *Dillon Cty. School Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 332 S.E.2d 555 (1985). Neither decision applies to the case at hand.

The dispute in *State Accident Funds* arose from an agreement reached between the State Accident Fund (Carrier) and the South Carolina Second Injury Fund (Fund) as to the amount of reimbursement the carrier would receive from the Fund in a worker's compensation case. *Dillon Cty. School District* concerned a dispute with a contractor over the design and construction of a roof for a school building. The decisions in both cases were largely grounded in principles of contract law, and neither case involved the State's right to collect or enforce a tax. In citing these cases, the Petitioner has merely recited the elements of equitable estoppel, while failing to show the application of this doctrine to the matter at hand. As an aside, in both *State Accident Funds* and *Dillon Cty. School District*, the Supreme Court held equitable estoppel did not apply.

The decision in *Heyward v. South Tax Commission*, 240 S.C. 347, 126 S.E.2d 15 (1962), is directly on point on the issue of asserting estoppel against the State. 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. Although the Court commented in dicta that the State may be estopped in its contractual matters (e.g., *State Accident Funds* and *Dillon Cty. School District*), 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.”

Heyward, S.C. at 351, 126 S.E.2d 17 (emphasis added).

b. Unjust enrichment.

The Petitioner cites *Barrett v. Miller*, 283 S.C. 262, 321 S.E.2d 198 (1984) in support of its argument that the State has been unjustly enriched as a result of the Department's actions. The

issue in *Barrett* was whether a deed to a church should be set aside. The Court held that “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 of the plaintiff.” *Barrett*, 283 at 264, 321 S.E.2d at 199. The decision also held “Where 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). Like the doctrine of equitable estoppel, unjust enrichment is an equitable argument. Here, the Petitioner has the rights and remedies afforded it under the Revenue Procedures Act, including the right to file a Requested Case hearing and have a *de novo* trial before the Administrative Law Court, which it has done. See S.C. Code Ann. § 12-60-10, et al. (2014). The Petitioner’s argument has no legal basis. Nevertheless, the Petitioner advances no credible argument for unjust enrichment in this case.

The Petitioner makes numerous references to the deposition testimony of Thomas Cooper Monroe, III, the Petitioner’s Vice President, in support of its unjust enrichment argument. This testimony is self-serving and undocumented. Nowhere does the Petitioner provide any company policy regarding the analysis or strategy of long-term capital investment based on the allowable credit limit of § 12-14-60; the Petitioner has submitted no documents or expert testimony to corroborate its claims as to the impact of the credit limit on Petitioner’s earnings or financial statements; nor has the Petitioner provided any evidence of the potential impact of the credit limitation on its stock price.

Conversely to the Petitioner’s position, Mr. Monroe testified the Petitioner has maintained a presence in South Carolina for approximately one hundred (100) years (Monroe Tr. p. 15:5-15); the Petitioner’s business requires constant upgrades and maintenance to its equipment (Monroe

Tr. pp. 10:19-25; p. 11:1-17); that for one year alone, the Petitioner spent approximately \$750 million dollars in qualifying equipment (Monroe Tr. pp. 11:18-25; 12:1-9); the Petitioner has made capital investments continuously during its 100 years in South Carolina (Monroe Tr. pp. 15:17-25; p. 16:1-14); the Petitioner claims tax credits in South Carolina in addition to the tax credit under § 12-14-60 (Monroe Tr. pp. 26:22-25; p. 1-17); and the Petitioner has paid no corporate income tax from 2004 – 2014, partly as a result of the benefit from the tax credit under § 12-14-60 (Monroe Tr. p. 26:14-21); and the Petitioner enjoys benefits provided by the State of South Carolina including infrastructure, roads, water, police protection, and customers (Monroe Tr. pp. 35:23-25; 36:1-13).

The testimony of Mr. Monroe clearly demonstrates the State of South Carolina has not been unjustly enriched should the Court conclude the tax credit under § 12-14-60 is limited on a lifetime basis. The Petitioner has maintained a presence in South Carolina for 100 years and has invested heavily because it must, not because of a tax credit. The Petitioner's business requires significant investment to maintain its equipment and facilities to service customers. While the Department views a five million dollar tax credit, granted through legislative grace, as significant, it is not the overriding consideration for a company like the Petitioner making investment decisions, particularly in light of the fact that it has invested billions during the audit period and \$750 million dollars during a single year of the audit period.

The Petitioner goes to great lengths to extoll the benefits conferred upon South Carolina by its presence in our State. Like other industries in our State, South Carolina appreciates the contributions of the Petitioner. As a result, South Carolina provides Petitioner with roads, infrastructure and police protection, as well as numerous tax credits, including a five million

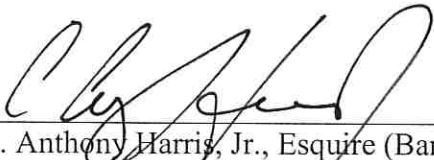
lifetime credit under § 12-14-60. The Petitioner argue fairness, but it would be inherently unfair to other taxpayers in this State for the Petitioner to enjoy a tax credit greater than allowed by the statute.

The disagreement in this case is over the interpretation of a statute, which is often the case in litigation involving tax matters. The decision is not grounded on unjust enrichment, which has not occurred, but rather the meaning of § 12-14-60.

CONCLUSION

The Petitioner has gone to great lengths to argue matters not at all germane to the issue in this case: the meaning of the credit limitation applicable to it under § 12-14-60. Further, Petitioner's Motion misstates facts and asks the Court to draw erroneous conclusions of law. If there is any ambiguity in the credit limitation imposed by § 12-14-60, and there is none, then nevertheless the language limiting the tax credit must be strictly construed against the Petitioner, and to that end, the Petitioner has failed to meet its burden of proof. To allow the Petitioner to claim \$5,000,000 annually in tax credit under § 12-14-60 is plainly contrary to the clear language of the statute and the intent of the General Assembly.

The material facts are not in dispute that the Petitioner is limited, on a lifetime basis, to no more than \$5,000,000 in tax credit under § 12-14-60. For the reasons set forth above, the Department respectfully requests that this Court deny the Petitioner's Motion for Summary Judgment, grant the Department's Motion for Summary Judgment, uphold the Department's Determination in this matter, and for such other and further relief this Court may deem just and proper.


C. Anthony Harris, Jr., Esquire (Bar No. 2745)

Counsel for Litigation
Jason P. Luther, Esquire (Bar No. 78021)
General Counsel for Litigation
P.O. Box 12265
Columbia, SC 29211-9979
803-898-5278 (Telephone)
803-896-0171 (Fax)
Charles.Harris@dor.sc.gov
Court.orders@dor.sc.gov
Attorneys for S.C. Department of Revenue

Columbia, South Carolina
August 31, 2020

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Corporation,	)	DOCKET NO. 19-ALJ-17-0153-CC
	)	
Petitioner,	)	
	)	PROOF OF SERVICE
vs.	)	
	)	
South Carolina Department of Revenue,	)	
	)	
Respondent.	)	
	)	

I, the undersigned employee of the South Carolina Department of Revenue, Office of General Counsel, do hereby certify that I have served the South Carolina Department of Revenue's (Respondent's) Response to Petitioner's Motion for Summary Judgment in connection with the above-captioned matter by causing a copy of the same to be deposited in the United States Mail on the below date, postage prepaid, *and electronically transmitted*, to the following parties at their address of record:

Samantha K. Trencs, Esquire - samtrencs@eversheds-sutherland.us
Eversheds Sutherland (US) LLP
700 Sixth Street, NW, Suite 700
Washington, DC 20001-3980

Maria M. Todorova, Esquire - MariaTodorova@eversheds-sutherland.us
Eric S. Tresh, Esquire - erictresh@eversheds-sutherland.us
Chris R. Lee, Esquire - ChrisLee@eversheds-sutherland.us
Eversheds Sutherland (US), LLP
999 Peachtree Street, NE, Suite 2300
Atlanta, GA 30309-3996
Attorneys for Petitioner



Tonie M. Miranda, Paralegal
Office of Litigation & Appeals Division
South Carolina Department of Revenue

Columbia, South Carolina
August 31, 2020

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Corporation,	)	
	)	
Petitioner,	)	
	)	
vs.	)	DOCKET NO. 19-ALJ-17-0153-CC
	)	
	)	
South Carolina Department of Revenue,	)	
	)	
Respondent.	)	
_____	)	

**MEMORANDUM IN REPLY TO THE DEPARTMENT’S RESPONSE IN OPPOSITION
TO PETITIONER’S MOTION FOR SUMMARY JUDGMENT**

Duke Energy Corporation (“Duke Energy”) submits this memorandum of law in reply to the South Carolina Department of Revenue’s (“Department” or “Respondent”) response in opposition to Duke Energy’s motion for summary judgment (“Department’s Response”). For the reasons discussed below, Duke Energy is entitled to summary judgment in this case, and the Department’s motion for summary judgment should be denied.

I. Section 12-14-60 establishes an annual income tax credit and the \$5 million limitation imposed under section 12-14-60(G) on the amount of credit claimed is applied annually.

The plain text of Section 12-14-60 entitles a taxpayer to earn an annual income tax credit (“Credit”). Section 12-14-60(A)(1) provides that the taxpayer can earn the Credit for “any taxable year in which the taxpayer places in service qualified manufacturing and productive equipment property.” S.C. Code Ann. § 12-14-60(A)(1). The Credit can then be applied against the taxpayer’s annual income tax liability (“against the tax imposed pursuant to Chapter 6,” *id.*). See S.C. Code Ann. § 12-6-530 (“an income tax is imposed annually”).

Section 12-14-60(A)(2) (“[t]he amount of credit allowed by this section is equal to ...”) provides that the amount of Credit is computed on an annual basis because the amount of the Credit earned during a particular tax year is based on the investment made during that tax year, (e.g., for three year property, the amount of the Credit equals one-half percent of total aggregate bases of all three-year property that qualifies). S.C. Code Ann. § 12-14-60(A)(2).¹ Section 12-14-60(D) provides the Credit earned during a particular tax year can be carried forward if not fully utilized that year “for ten years from the close of the tax year in which the credit was earned.” S.C. Code Ann. § 12-14-60(D). Section 12-14-60(E) provides a Credit recapture mechanism such that “[i]f during any taxable year and before the end of the recovery period” of an investment the taxpayer disposes or removes the investment, any previously earned Credit is recaptured by increasing the taxpayer’s income tax liability.

Each of these attributes of the Credit has one thing in common: they are all applied on an annual basis. However, the Department’s Response conveniently ignores each and every one of these parts of the statute and instead asks this Court to read a lifetime limitation into one subsection of the statute. This approach is not only illogical, it ignores one of the central tenets of statutory construction, which requires a reading of the entire statute as a whole. *Duke Energy Corp. v. S.C. Dep’t of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) (“[T]he Court should not concentrate on isolated phrases within the statute, but rather, read the statute as a whole and in a manner consonant and in harmony with its purpose.”).

Indeed, nothing in Section 12-14-60 provides that the \$5 million limitation be applied on a lifetime basis. Moreover, interpreting the \$5 million limitation on the amount of Credit as a

¹ Section 12-14-60(B) defines “qualified manufacturing and productive equipment property” and section 12-14-60(C) provides that “[t]his section does not apply to any property to which the other tax credits would apply unless the taxpayer elects to waive the application of the other credits to the property.” S.C. Code Ann. §§ 12-14-60(B), (C).

lifetime limitation is incongruous with the reading of the statute as a whole, which computes all aspects of the Credit on an annual basis.

The Department argues that because subsection 12-14-60(G) does not use the word “annual,” the \$5 million limitation is a lifetime limitation. (Department’s Response 3.) The Department is wrong for three reasons. First, the statute does not state that the limitation is a lifetime limitation. Second, strict construction does not apply because the statute is unambiguous. Third, the Department misconstrues the principle of strict construction.

The Department itself emphasizes in its Motion that “the limitation applies to ‘The credit allowed by this section’, which is a clear reference to §12-14-60 as a whole.” (Department’s Motion for Summary Judgment (“Department’s Motion”) at 7 (emphasis added).) Duke Energy agrees. As discussed above, Section 12-14-60 establishes an annual Credit whose annual amount is limited to \$5 million for utilities like Duke Energy. There is nothing in Section 12-14-60(G) or the entirety of Section 12-14-60 that suggests that once the limitation on the Credit amount is applied, the Credit is converted from an annual to a lifetime credit. As discussed herein, the other parts of Section 12-14-60 are calculated on an annual basis and nothing in Subsection (G) suggests that there is a lifetime limitation on the Credit amount. Moreover, the General Assembly has, on a number of occasions, used phrases like “any taxable year” or “any year” to establish an annual limitation, just as it has done in Section 12-14-60. *See, e.g.*, S.C. Code Ann. § 12-6-3310 through § 3800. The General Assembly has used entirely different phrases to establish a lifetime limitation. (Memorandum of Law in Support of Duke Energy’s Motion for Summary Judgment (“Duke Energy’s Motion”) at 18-19.)

The Department also argues that although Section 12-14-60 is unambiguous, it should be construed “narrowly ... so that it reduces state revenues by less, not more.” (Department’s

Response at 4.) However, the Department misstates the law. “Under the plain meaning rule, it is not the court’s place to change the meaning of a clear and unambiguous statute.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citation omitted). “If a statute’s language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning.” *Eagle Container Co., LLC v. Cty. of Newberry*, 379 S.C. 564, 570-571, 666 S.E.2d 892, 896 (2008) (citation omitted).

Even if strict construction were necessary, it does not require this Court to search for an interpretation of Section 12-14-60 that minimizes the impact to South Carolina tax revenue. (Duke Energy’s Response at 9-10.) Instead, “[t]his rule of strict construction simply means that constitutional and statutory language will not be strained or liberally construed in the taxpayer’s favor. It does not mean we will search for an interpretation in [DOR]’s favor where the plain and unambiguous language leaves no room for construction.” *Centex Int’l, Inc. v. S.C. Dep’t of Revenue*, 406 S.C. 132, 140, 750 S.E.2d 65, 69 (2013) (citation omitted).

By asking the court to interpret the statute narrowly so it “reduces state revenues by less, not more,” the Department is also asking the court to ignore the text and context of the Credit statute. The purpose of the Credit was to incent business to invest more in the state. Construing the statute narrowly would certainly have the effect of increasing taxes, but it would also have the effect of frustrating the intent of the legislature, which sought exactly the types of investments that Duke Energy made in South Carolina.

II. The Department’s position is contrary to its longstanding practice and guidance, and conflicts with the plain text of Section 12-14-60.

The Department testified during depositions that for fifteen years it allowed taxpayers, including Duke Energy, to claim up to \$5 million in Credit each tax year. (Duke Energy’s Motion

at 8-10.) The Department would have this Court believe that it simply made an error on a form and asks the court to find that it had a “longstanding” position. The facts of this case show otherwise. The Department’s most-senior auditor, the one relied on by others in the Department for guidance, interpreted the Credit limitation as a lifetime limitation. (Duke Energy’s Motion at 9-10.) He and the Department’s audit team assigned to Duke Energy, treated the Credit limitation as an annual limitation for years. In fact, the Department’s own audit workpaper templates, obtained through discovery in this case, show that the Department applied the Credit limitation annually for years. (Duke Energy’s Motion at 21.)

In addition, the Department drafted, amended, and published Form TC-11 eleven different times since the enactment of the Credit limitation in 1998. Each time, the Department required taxpayers to apply a specific formula that computed the \$5 million Credit limitation annually. Many of Department’s amendments to the form were not just cursory, they contained substantive changes that were reviewed by senior personnel within the Department.² And each time, the form contained the same instruction to taxpayers to apply the \$5 million Credit limitation annually. The Department’s representatives even testified that Form TC-11 reflected their understanding of South Carolina law and the intent of the General Assembly. (Duke Energy’s Motion at 21.) Therefore, the Department’s own practice and guidance for fifteen years was consistent with the plain text of Section 12-14-60.

In an effort to justify its new construction of the Credit statute, the Department now claims that its longstanding guidance and its longstanding practices should be ignored because they were not established by the Department’s Policy Division (Policy) or a Department Determination. (Department’s Response at 9.) The Department’s contention is inconsistent with the testimony in

² For example, the Department changed Form TC-11 in 1998 to reflect the Legislature’s change to the Credit limitation from \$1 million to \$5 million. (Duke Energy’s Motion at 9.)

this case and with the Department's own past practices. The Department testified that its Policy Division researched and analyzed the Credit limitation application for the first time in or about 2013 or 2014, which led to the revision of Form TC-11 to apply the Credit limitation on a lifetime basis in 2014. (Department's Response 10-11.) Therefore, the revised Form TC-11 was the only guidance to the public that reflected the Department's "official position" regarding the Credit limitation. Why would the forms published in 2014 constitute the Department's official position and the forms published in each of the prior years would not constitute the Department's official position? Indeed, to this day, the Department or Policy has not issued a regulation, policy document, or anything other than Form TC-11 communicating its new "official position" regarding the Credit limitation to taxpayers. Regardless of how it characterizes its longstanding guidance and practices, there could be no question that for fifteen years the Department applied the Credit limitation on an annual basis. Taxpayers were required to compute the amount of Credit by applying a formula provided by the Department that applied the Credit limitation annually. And the Department's audit team applied the limitation on an annual basis. Such an application was consistent with the plain language of Section 12-14-60 as discussed above and in Duke Energy's Motion and Response. Therefore, the Department's latest "official position" is contrary to plain text of the statute and should be rejected.

III. The Department's position is contrary to legislative intent.

As discussed in Duke Energy's Motion, the General Assembly amended Section 12-14-60 numerous times since its enactment in 1995. (Duke Energy's Motion 6-8.) If the General Assembly believed that the Department was misapplying the Credit limitation for fifteen years, as the Department contends, it had ample opportunity to amend the Credit statute to change that interpretation. Instead, not only did the Legislature not make such an amendment, in 2017 it

considered amending the Credit limitation – by adding the word “annually” - to make clear that it had always intended for the limitation to apply to each tax year separately. (Duke Energy’s Motion at 10-12, 24.)

The Department argues that the proposed 2017 amendment “would have changed the limitation completely.” (Department’s Response at 6.) However, documents obtained in discovery in this case show that the South Carolina Senate, South Carolina House of Representatives, South Carolina Revenue and Fiscal Affairs Office (“RFA”), and even the Department own employees thought otherwise. Several documents show that employees from each of these state agencies reviewed the proposed amendment to the statute that would have clarified that the Credit limitation was to be applied annually and concluded that the proposed amendment would have no revenue impact. How could an amendment that would have no revenue impact have “changed the limitation completely.” The Department’s conclusory statements are simply not supported by the evidence. (Duke Energy’s Motion at 11.)³ Also, the Department has still not explained why it needed to lobby the legislature against amending Section 12-14-60 to add the word “annually” or why it needed to provide specific information concerning Duke Energy’s credits, refund claims, and tax liabilities to the General Assembly. (Duke Energy’s Motion at 12.)

IV. The Department’s Determination conflicts South Carolina rulemaking procedures and the Taxpayer’s Bills of Rights.

³ The Department argues that the RFA prepared the fiscal impact statement concerning the 2017 amendment without input from or communication with the Department. (Department’s Response at 7.) The Department is wrong. The evidence shows that a representative of the South Carolina Senate Finance Committee in an email to Frank Rainwater of the RFA represented that it was the Department’s stance for more than 15 years that the Credit is annual, that the addition of the word “annual” to the statute was a clarification, that the Department supports the amendment, that the amendment conforms to the policy and practice of the Department, and that Meredith Cleland is ready to assist. (Duke Energy’s Motion 11.) Meredith Cleland testified that the information in this email could have come from him or that the Senate very likely got information from him concerning the Credits. (Cleland Tr. at 69:7-70:25, Exhibit 29.) Frank Rainwater of the RFA also acknowledged that the RFA employee responsible for drafting the fiscal impact statement for the Bill spoke with Senate staff and that Senate staff stated that the amendment was a clarification and a continuation of the Department’s current practices. (Rainwater Tr. at 25:8-25:21, Exhibit 43.) Frank Rainwater also stated that Meredith Cleland is the primary contact at the Department and that Mr. Martin, the drafter of the fiscal impact statement, would have reached out to Meredith Cleland at the Department concerning the Bill. (Rainwater Tr. at 22:20-23:18, Exhibit 43.)

A. South Carolina rulemaking procedures

The Department argues that the requirements of the Administrative Procedures Act cannot apply to the Department's Credit Form. (Department Response at 12-13.) Section 1-23-10(4) defines "Regulation" as "...each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency." "Whether a particular agency creates a regulation or simply announces a general policy statement depends on whether the agency action establishes a binding norm." *Joseph v. S.C. Dep't of Labor, Licensing & Reg.*, 417 S.C. 436, 454, 790 S.E.2d 763, 772 (2016). For fifteen years the Department's Credit Form applied the credit limitation annually, the Department intended the Credit Form to reflect the intent of the General Assembly, and the Department expected taxpayers to rely on the Credit Form. (Duke Energy's Motion at 9, 21.)

The key inquiry is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm. *Joseph, Id. at 462, 776-777.*

The Department's consistent publication of the Credit Form describing how to calculate an annual limitation established a binding norm. The Credit Form "fills out" the statutory scheme by showing that once a taxpayer falls within the Credit limitation's criteria as a taxpayer subject to the license tax, the Credit limitation is calculated at \$5 million per year, regardless of the taxpayer's specific facts. The Department's Credit Form that existed without change for fifteen years was a statement of general public applicability that implemented and prescribed the policy and practice of the Department to apply the Credit limitation on an annual basis.

Further, Section 12-60-1720 requires that “...taxpayers shall comply with the department’s regulations, rules, and procedures, and shall use the forms the department prescribes.” Duke Energy complied with the Department’s rules and procedures and requirement to use the Department’s Credit Form, by calculating the Credit limitation annually as required by the Credit Form for fifteen years. (Duke Energy’s Motion at 9.) Then without warning the Department changed procedures, its form, and its rules contained in the Credit Form, and began applying the limitation on a lifetime basis. “When 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.” *Joseph Id.* at 454, 772.

B. South Carolina Taxpayer’s Bill of Rights

The Department states that because it provided notices of the tax adjustments and appeal rights and because Duke Energy was aware of the taxpayer advocate, the Department’s actions were not in conflict with the South Carolina Taxpayer Bill of Rights. (Department’s Response at 14-15.) South Carolina statute requires the Department to publish statements that “explain procedures, remedies, and the rights and obligations of the department and taxpayers” and Department publications provide that taxpayers have the “right to request and receive forms, instructions and other written materials in plain, easy-to-understand language.” (Duke Energy’s Motion at 29.)

The Department did not comply with this requirement. The Department concedes that for fifteen years it published a form that applied the Credit limitation on an annual basis and now argues that its own form and the several revisions that occurred over fifteen years were incorrect. (Duke Energy’s Motion at 9, 13.) The Department concedes that its own audit workpapers provided that the Credit limitation applied annually and that it allowed Duke Energy to generate

more than \$5 million of Credit. (Duke Energy's Motion at 9-10.) Duke Energy had the right to receive a form with plain and easy to understand language concerning how to compute the \$5 million Credit limitation. Because the Department itself argues that it published several incorrect versions of the Credit Form over fifteen years, the Credit Form cannot be plain and easy to understand, and the Department did not comply with its obligations under the Taxpayer's Bill of Rights.

V. The Department is unjustly enriched by changing its interpretation and practice concerning the Credit limitation.

In arguing that unjust enrichment has not occurred, the Department claims that the Credit is not an overriding consideration for a company like Duke Energy and that Duke Energy invests heavily in the state out of necessity and not because of a tax credit. (Department's Response at 18.) The Department effectively argues that the Credit does not impact the amount of investment Duke Energy makes in South Carolina. The Department's assertion is in conflict with Section 12-14-20 providing that the very purpose of Section 12-14-60 is to revitalize capital investment in the state and encourage the retention and expansion of existing businesses. The General Assembly intended this statute to incentivize companies like Duke Energy to make additional capital investments in the state by allowing a credit of up to \$5 million per year.

Duke Energy makes investment decisions based on long term economic impacts including the existence of tax credits, Duke Energy has optionality concerning where to make investments, and Duke Energy relied on the Department's longstanding position concerning the Credit limitation when making investment decision in South Carolina. (Duke Energy's Motion at 31-32.) Based on Duke's credit forms and deposition testimony in this matter, Duke invested substantial amounts in this state and had optionality concerning where to make certain investments. (Duke Energy's Motion at 31.)

Now years after Duke Energy made substantial investment in the state, the Department changes its position and seeks to remove credits from several prior years by asserting that the limitation is lifetime. Although Duke Energy's investments in the state are substantial, the difference between a \$5 million onetime credit and \$5 million per year credit is significant and will impact the investment decisions of taxpayers.

Duke Energy conferred a non-gratuitous benefit on the state of South Carolina by making significant investments in the state in reliance on an incentive provided by the state to encourage such investment, the state received value from such investments including property tax, license fees, infrastructure, and jobs in the state, and it would be inequitable for the state to retain these benefits without allowing the Credits Duke Energy claimed on its return when it relied on the Department's Credit Forms and other guidance. *JASDIP Props. SC, LLC v. Estate of Richardson*, 395 S.C. 633, 640, 720 S.E.2d 485, 489 (S.C. Ct. App. 2011) ("To recover on a theory of restitution, the plaintiff must show (1) that he conferred a non-gratuitous benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value").

CONCLUSION

For the reasons stated herein, Duke Energy is entitled to an annual Credit of up to \$5 million per tax year. Accordingly, Duke Energy's motion for summary judgment should be GRANTED and the Department's Motion for Summary Judgment should be DENIED.

Respectfully submitted this 15th day of September, 2020



Samantha K. Trencs (South Carolina Bar No. 101882)
Eric S. Tresh (*pro hac vice*)
Maria M. Todorova (*pro hac vice*)
Chris R. Lee (*pro hac vice*)
EVERSHEDS SUTHERLAND (US) LLP
700 Sixth Street, NW Suite 700
Washington, DC 20001-3980
Phone: (202) 383-0534
samanthatrencs@eversheds-sutherland.com
erictresh@eversheds-sutherland.com
mariatodorova@eversheds-sutherland.com
chrislee@eversheds-sutherland.com
Attorneys for Petitioner
Duke Energy Corporation & Affiliates

CERTIFICATE OF SERVICE

I hereby certify that the foregoing MEMORANDUM IN REPLY TO THE DEPARTMENT'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT, has been served by depositing a copy in the United States mail, postage paid, and by electronic mail this 15th day of September, 2020 upon the following:

C. Anthony Harris, Jr.
Counsel for Litigation
Jason P. Luther
General Counsel for Litigation
P.O. Box 12265
Columbia, SC 29211-9979
Charles.Harris@dor.sc.gov



Chris R. Lee

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Corporation,	)	Docket No. 19-ALJ-17-0153-CC
	)	
Petitioner,	)	
	)	
vs.	)	RESPONDENT’S
	)	REPLY TO PETITIONER’S
	)	RESPONSE IN OPPOSITION TO
South Carolina Department of Revenue,	)	RESPONDENT’S MOTION FOR
	)	SUMMARY JUDGMENT
Respondent.	)	
	)	

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure and Rules 19 and 68 of the Rules of Procedure for the Administrative Law Court (ALC), the undersigned, as attorneys for the Respondent South Carolina Department of Revenue (Department), submit this Reply to Duke Energy Corporation’s (Petitioner) Response in Opposition to the Department’s Motion for Summary Judgement. As a matter of law, the Petitioner is not entitled to claim a \$5,000,000 investment tax credit on an annual basis under S.C. Code Ann. § 12-14-60 (2014) and, therefore, the Department’s Motion for Summary Judgement should be granted.

ARGUMENTS

I. The Department’s interpretation of the credit limitation imposed by § 12-14-60 results from a fair reading of the plain language of the statute.

The Department’s interpretation of the credit limitation imposed by § 12-14-60 is based on the plain and unambiguous language of the statute which establishes the time period, duration and limitation of the credit. Subsection (A)(1) provides the credit may be taken in any taxable year in which the taxpayer places in service qualified equipment (time period); subsection (D)(1) allows the taxpayer to carry forward unused credits for a period of ten years (duration); and subsection (G) imposes an absolute limitation of “no more than five million dollars” under any circumstance

(limitation). This interpretation represents a fair reading of the plain language of the statute and is consistent with the intent of the General Assembly expressed therein. “It is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question.” *Smith v. Norman K. Tiffany*, 419 S.C. 548, 556, 799 S.E.2d 479, 587 (2017). “The text of a statute as drafted by the legislature is considered the best evidence of the legislative intent or will.” *Hodges v. John S. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

The Petitioner’s contention that the credit limitation is applied annually is not supported by the plain language of the statute. For example, only subsection (G) addresses the credit limitation. The phrase “five million dollars” is modified only by the phrase “no more than.” The General Assembly included no other modifiers to describe the limitation, and no other meaning is conveyed. It is a harmonious interpretation of the clear language of § 12-14-60 to allow the Petitioner a credit for any taxable year in which it qualifies, while imposing a lifetime limitation of \$5,000,000 pursuant to subsection (G).

Moreover, the General Assembly is quite capable of imposing an annual limitation on a tax credit if that is what it intends (*See* Department’s Motion for Summary Judgment, pp. 9, 10, 11). When imposing the credit limitation, the General Assembly could have modified the limitation by providing the credit allowed is “no more than five million annually”, but it did not (*See* S.C. Code Ann. §§ 12-6-3420(B)(1)(2) and (3) (2014) and 12-6-3790 (D)(1)(a) and (b) (Supp. 2018)); it could have modified the limitation by allowing the credit to be “no more than five million dollars in a single taxable year”, but it did not (*See* S.C. Code Ann. § 12-6-3620(B) (2014 and Supp. 2018)); and it could have modified the limitation by providing “the maximum aggregate credit that may be claimed in a tax year is no more than five million dollars”, but it did not (*See*

S.C. Code Ann. § 12-6-3470(A)(2) (2014)). Instead, when imposing the credit limitation, the General Assembly chose to state plainly that “The credit allowed by this section [§ 12-14-60] is limited to no more than five million dollars”, a clear statement that the limitation is \$5,000,000 under any circumstance. Furthermore, the General Assembly subsequently amended § 12-14-60 on two occasions after imposing the lifetime limitation and chose not to allow the credit on an annual basis, and as recently as 2017, the General Assembly rejected legislation (S.432) to change the limitation from lifetime to annual.

The Department’s position is consistent with the unambiguous language of § 12-14-60 which allows the Petitioner a credit for any taxable year in which it qualifies, a limited carry forward of unused credit, and imposes a lifetime limitation on the tax credit available to the Petitioner.

II. Contrary to the Petitioner’s view, the title to the 1998 legislation imposing the credit limitation is relevant to the General Assembly’s intent and bolsters the plain meaning of § 12-14-60.

The Petitioner dedicates a great deal of its briefs addressing recent legislative history, fiscal impact statements issued by the South Carolina Revenue Fiscal Affairs Office, and the practices of the Department. Those issues have been addressed by the Department in its Response. Matters involving recent legislative history concerning un-enacted legislation is not relevant and probative of nothing – except that the General Assembly chose not to change the lifetime limitation of the credit when it had an opportunity to do so. What is relevant to the legislative intent of the credit limitation is the title to the 1998 legislation which *did pass* the General Assembly.

The title to the 1998 legislation imposing the credit limitation is the most reliable evidence presented by either party regarding the intent of the General Assembly. Unlike un-enacted

legislation, our Courts recognize the title to enacted legislation is instructive as to legislative intent. “It is proper to consider the title or caption of an act in aid of construction to show the intent of the legislature.” *Lindsay v. S. Farm Bureau Cas. Ins. Co.*, 258 S.C. 272, 277, 188 S.E.2d 374, 376 (1972); *Univ. of S.C. v. Elliott*, 248 S.C. 218, 221, 149 S.E.2d 433, 434 (1966). The title in this case is the text most closely related to the act, and it is a direct and clear expression of the General Assembly regarding the purpose of the legislation and the limitation to be imposed on the amount of tax credit allowed the Petitioner. The title in this instance clearly establishes the purpose of the act is “[t]o limit the **total credit** allowed a utility for investments made after June 30, 1998, to five million dollars”. See *1998 Act No. 442* (emphasis added).

The plain language in the title to *Act No. 442* serves to undergird the legislative intent of the credit limitation imposed by subsection (G) (“no more than five million dollars”), and supports the Department’s view that the Petitioner is limited to a “total” or “no more than five million dollars” in tax credit under any circumstance.¹

III. South Carolina law dictates that the credit limitation imposed by § 12-14-60 must be strictly construed against the Petitioner.

It is black letter law in South Carolina that any statute which otherwise lessens what would be the tax burden of the taxpayer is a matter of legislative grace and must be strictly construed against the taxpayer. *Matthews v. South Carolina Tax Commission*, 267 S.C. 548, 230 S.E.2d 223 (1976). In the matter of the tax credit under § 12-14-60, the Petitioner is being allowed a deduction

¹The Petitioner references the use of the word “total” in other statutes allowing tax credits to suggest § 12-14-60 provides a total annual tax credit. However, unlike the credit limitation imposed by § 12-14-60, the Petitioner refers to statutes which expressly provide for an annual limitation. See S.C. Code Ann. § 12-6-3790 (2014) which provides credits authorized “**annually** may not exceed cumulatively a total of two million dollars.”

from its income tax liability not afforded to all other taxpayers. The Petitioner argues that the principle of strictly construing the tax credit in this case against it does not apply because the credit under § 12-14-60 is clearly applied on an annual basis. The word “annual” does not appear in the credit limitation imposed by subsection (G), nor does it otherwise define the credit limitation in the statute.

Our Courts have consistently held that the legislature intends for the words in a statute to have meaning. “The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something.” *TNS Mills, Inc. v. S.C. Dep’t of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998); *State ex rel. McLeod v. Montgomery*, 244 S.C. 308, 136 S.E.2d 778 (1964). As noted above, the General Assembly is well aware of language necessary to implement a tax credit on an annual basis. That the General Assembly chose not to use the word “annual” (or similar language such as “in a single year” or “maximum aggregate credit in a tax year”) when imposing the credit limitation is consequential to the meaning of the statute. The language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption. *John D. Hollingsworth On Wheels, Inc. v. Greenville County Treasurer*, 276 S.C. 314, 278 S.E.2d 340 (1981). The General Assembly chose to write the statute as it did and, therefore, the tax credit afforded the Petitioner under § 12-14-60 is limited to \$5,000,000 on a lifetime basis. “[T]he wisdom of tax policy is exclusively within the preview of the legislature and may not be supplanted by this Court.” *Centex Intern, Inc. v. South Carolina Department of Revenue*, 406 S.C. 132, 151, 750 S.E.2d 65, 75 (2013).

The Petitioner bears the burden of proving that it has brought itself squarely within the expanded tax credit it seeks. “It has been said on numerous occasions by our Courts that 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. Robert C. Wasson, Chairman, et al.*, 267 S.C. 581, 588, 230 S.E.2d 614, 617 (1976). In doing so, it cannot force construction of the statute or broaden the plain language of the credit limitation. Subtle or forced construction of statutory words for the purpose of expanding a statute’s operation is prohibited. *Walton v. Walton*, 282 S.C. 165, 318 S.E.2d 14 (1984). Section 12-14-60 clearly limits the application of the tax credit on a lifetime basis, but even in the event the Court were to conclude there was any ambiguity in the statute, that ambiguity must be strictly construed against the Petitioner and the Department’s Motion for Summary Judgment should be granted.

IV. The Petitioner’s interpretation of the tax credit limitation is forced.

a. Absurd result.

Petitioner claims that limiting the tax credit to \$5,000,000 on a lifetime basis leads to an absurd result not intended by the General Assembly. In support of this argument Petitioner cites *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 440 S.E.2d 364 (1994).

The decision in *Kiriakides* involved a dispute over a lease agreement. The landlord mailed a past due notice for rent to an address not listed in the lease, and thereafter brought an action to eject the tenant, even though the tenant paid the past due amount on the same day the landlord instituted suit. In construing S.C. Code Ann. § 27-37-10 (2007), the Court found that ejectment under the statute, which provides for that remedy when a tenant fails or refuses to pay rent when due, would lead to an absurd result under the facts presented.

There is nothing absurd about interpreting § 12-14-60 to limit the credit on a lifetime basis because to do so is consistent with the text of the statute and the legislative intent of the General

Assembly. Further, the Department's interpretation is not offensive to any public policy nor is it inherently unfair to taxpayers who have been granted a tax credit through legislative grace. To the extent the decision in *Kiriakides* has any bearing on the statutory construction of the credit limitation under § 12-14-60, it is to illustrate the absurdity in allowing the Petitioner an annual tax credit of up to \$5,000,000 when the plain language of the statute states unequivocally that the credit allowed the Petitioner is "no more than five million dollars" on a lifetime basis.

b. Subtractions from income tax and the State's corporate income tax regime.

The Petitioner argues that because corporate income tax is imposed annually under S.C. Code Ann. § 12-6-530 (2014), by extension the credit limitation under § 12-14-60 is allowed on a forever annual basis. The Petitioner conflates subtractions from income tax on a tax return with the plain meaning of the tax credit limitation imposed in § 12-14-60(G).

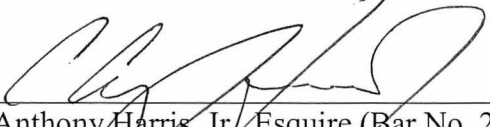
The Department has allowed the Petitioner to claim the tax credit "for any taxable year" as part of its annual corporate income tax return, and likewise, it has allowed the Petitioner to carry forward unused credit under § 12-14-60(D)(1), subject to the lifetime limitation imposed by subsection (G) (*See* Department's Motion for Summary Judgment, p. 3). These provisions in the statute do not in turn make the tax credit a forever annual one, nor do they alter the lifetime credit limitation imposed by subsection (G).² The Department would freely admit that the tax credit under § 12-14-60 is taken by a taxpayer (which makes a qualifying investment) upon the filing of an annual tax return, subject to the lifetime limitation imposed by subsection (G); otherwise the

²In Support of its theory, the Petitioner cites to a tax deduction allowed an individual taxpayer for an adopted special needs child under S.C. Code Ann. § 12-6-1140 (2014), arguing the Department's position in the instant case would allow this deduction only once. Yet, as the Petitioner points out, instructions regarding this deduction inform the taxpayer to subtract "\$2,000 *per year per child*." (Emphasis added).

credit would be of no benefit to the taxpayer. However, that a tax credit may be part of an annual return would never result in a credit being allowed ad infinitum as the Petitioner argues. While income tax returns may be filed annually, and certain subtractions from income tax claimed annually, it is against all logic that all tax credits are always allowed to be computed annually without limitation. The amount and duration of any tax credit is governed by the statute allowing the credit. In this case, the limitation on the tax credit is not determined by the fact that the credit is taken as part of a requirement to annually file a tax return, but rather by subsection (G) which imposes the lifetime limitation. Under the Petitioner's view, all tax credits would be allowed annually without any limitation as to duration or amount, which in itself is an absurdity. *See Kiriakides.*

CONCLUSION

For the reasons set forth above, the Petitioner is limited to a \$5,000,000 tax credit on a lifetime basis under § 12-14-60. The Department respectfully prays that this Court deny the Petitioner's Motion for Summary Judgment, that it grant the Department's Motion for Summary Judgment, and for such other and further relief it may deem just and proper.



C. Anthony Harris, Jr., Esquire (Bar No. 2745)
Counsel for Litigation
Jason P. Luther, Esquire (Bar No. 78021)
General Counsel for Litigation
P.O. Box 12265; Columbia, SC 29211-9979
803-898-5278 (Telephone); 803-896-0171 (Fax)
Charles.Harris@dor.sc.gov
Court.orders@dor.sc.gov
Attorneys for S.C. Department of Revenue

Columbia, South Carolina
September 15, 2020

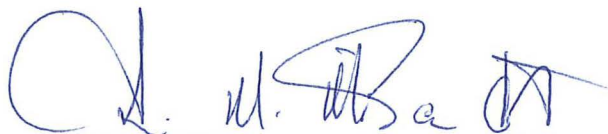
**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Duke Energy Corporation,	)	DOCKET NO. 19-ALJ-17-0153-CC
	)	
Petitioner,	)	
	)	PROOF OF SERVICE
vs.	)	
	)	
South Carolina Department of Revenue,	)	
	)	
Respondent.	)	
_____	)	

I, the undersigned employee of the South Carolina Department of Revenue, Office of General Counsel, do hereby certify that I have served the South Carolina Department of Revenue's (Respondent's) Reply to Petitioner's Response in Opposition to Respondent's Motion for Summary Judgment in connection with the above-captioned matter by causing a copy of the same to be deposited in the United States Mail on the below date, postage prepaid, *and electronically transmitted*, to the following parties at their address of record:

Samantha K. Trencs, Esquire - samtrencs@eversheds-sutherland.us
Eversheds Sutherland (US) LLP
700 Sixth Street, NW, Suite 700
Washington, DC 20001-3980

Maria M. Todorova, Esquire - MariaTodorova@eversheds-sutherland.us
Eric S. Tresh, Esquire - erictresh@eversheds-sutherland.us
Chris R. Lee, Esquire - ChrisLee@eversheds-sutherland.us
Eversheds Sutherland (US), LLP
999 Peachtree Street, NE, Suite 2300
Atlanta, GA 30309-3996
Attorneys for Petitioner



Tonie M. Miranda, Paralegal
Office of Litigation & Appeals Division
South Carolina Department of Revenue

Columbia, South Carolina
September 15, 2020

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson, III, Chief Administrative Law Judge

Case No. 19-ALJ-17-0153-CC

Duke Energy Corporation..... Appellant,

v.

South Carolina Department of Revenue..... Respondent.

NOTICE OF APPEAL

Duke Energy Corporation (hereafter “Appellant”) hereby appeals the Order on Cross-Motions for Summary Judgment, of the Honorable Ralph K. Anderson, III, of the Administrative Law Court (“ALC”), filed on October 27, 2020, a copy of which is attached hereto as Exhibit A.

Pursuant to S.C. Code Ann. §§ 12-60-3380 and 1-23-610, and Rules 201 and 203 of the South Carolina Rules of Appellate Practice, Appellant timely files this Notice of Appeal within 30 days of the decision of the Administrative Law Judge.

RESPECTFULLY SUBMITTED,



Samantha K. Trencs (Bar No. 101882)

Eric S. Tresh (*pro hac vice*)
Maria M. Todorova (*pro hac vice*)
Chris R. Lee (*pro hac vice*)
EVERSHEDS SUTHERLAND (US) LLP
700 Sixth Street, NW Suite 700
Washington, DC 20001-3980
Phone: (202) 383-0534
samanthatrency@eversheds-sutherland.com
erictresh@eversheds-sutherland.com
mariatodorova@eversheds-sutherland.com
chrislee@eversheds-sutherland.com

Attorneys for Appellant
Duke Energy Corporation

November 24, 2020

Other Counsel of Record:

C. Anthony Harris, Jr.
Counsel for Litigation
Jason P. Luther
General Counsel for Litigation
South Carolina Department of Revenue
P.O. Box 12265
Columbia, SC 29211-9979
Charles.Harris@dor.sc.gov

Attorneys for Respondent
South Carolina Department of Revenue

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson, III, Chief Administrative Law Judge

Case No. 19-ALJ-17-0153-CC

Duke Energy Corporation..... Appellant,

v.

South Carolina Department of Revenue..... Respondent.

PROOF OF SERVICE

This is to certify that the foregoing Appellant's Notice of Appeal was sent via US Mail
addressed as follows this 24th day of November 2020:

C. Anthony Harris, Jr.
Counsel for Litigation
Jason P. Luther
General Counsel for Litigation
South Carolina Department of Revenue
P.O. Box 12265
Columbia, SC 29211-9979
Charles.Harris@dor.sc.gov

The Honorable Ralph K. Anderson, III
Chief Administrative Law Judge
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201



Samantha K. Trencs (Bar No. 101882)
EVERSHEDS SUTHERLAND (US) LLP
700 Sixth Street, NW Suite 700
Washington, DC 20001-3980
Phone: (202) 383-0534
samanthatrencs@eversheds-sutherland.com
Attorney for Appellant

Exhibit A

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

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

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.

FILED

October 27, 2020

SC ADMIN. LAW COURT

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	<u>4,955,817</u>	<u>-0-</u>	<u>1,937,887</u>	<u>4,955,817</u>	20,551,921	701,194
	<u>24,850,727</u>	<u>5,000,000</u>	<u>4,298,806</u>	<u>19,850,727</u>		

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 do 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 Commc'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 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 interpreted 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 is 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 Randolph 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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM THE ADMINISTRATIVE LAW
COURT

Dec 22 2020

SC Court of Appeals

Ralph K. Anderson, III, Chief Administrative Law Judge

Case No. 19-ALJ-17-0153-CC
2020-001542

Duke Energy Corporation.....

Appellant,

v.

South Carolina Department of Revenue.....

Respondent.

MOTION FOR EXTENSION

Appellant Duke Energy Corporation moves the Court, pursuant to Rule 240, SCACR, for an Order granting a thirty (30) day extension--from January 11, 2021 to February 10, 2021--to file Appellant's Opening Brief and Designation of Matter to be included in the Record on Appeal in this matter.

Counsel certifies that opposing counsel has consented to the requested extension.

RESPECTFULLY SUBMITTED,

Samantha K. Trencs (Bar No. 101882)
Eric S. Tresh (*pro hac vice*)
Maria M. Todorova (*pro hac vice*)
Chris R. Lee (*pro hac vice*)
EVERSHEDS SUTHERLAND (US) LLP
700 Sixth Street, NW Suite 700
Washington, DC 20001-3980

Phone: (202) 383-0534
samanthatrency@eversheds-sutherland.com
erictresh@eversheds-sutherland.com
mariatodorova@eversheds-sutherland.com
chrislee@eversheds-sutherland.com

*Attorneys for Appellant Duke
Energy Corporation*

Dated: December 22, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

Dec 22 2020

SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW
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Ralph K. Anderson, III, Chief Administrative Law Judge

Case No. 19-ALJ-17-0153-CC

2020-001542

Duke Energy Corporation.....

Appellant,

v.

South Carolina Department of Revenue.....

Respondent.

PROOF OF SERVICE

This is to certify that the foregoing Motion for Extension to file Appellant's Opening Brief and Designation of Matter was sent via US Mail addressed as follows this 22nd day of December 2020:

C. Anthony Harris, Jr. - Counsel for Litigation
Jason P. Luther - General Counsel for Litigation
South Carolina Department of Revenue
P.O. Box 12265, Columbia, SC 29211-9979
Charles.Harris@dor.sc.gov



Samantha K. Trencs (Bar No. 101882)
EVERSHEDS SUTHERLAND (US) LLP
700 Sixth Street, NW Suite 700
Washington, DC 20001-3980
Phone: (202) 383-0534
samanthatrencs@eversheds-sutherland.com
Attorney for Appellant

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT
Docket No. 19-ALJ-17-0153-CC

Duke Energy Corporation,)
)
 Petitioner,)
)
v.)
)
South Carolina Department)
of Revenue,)
)
 Respondents.)
-----)

MOTION FOR SUMMARY JUDGMENT

Thursday, September 24, 2020
10:00 a.m. - 11:51 a.m.

The motion for summary judgment before the Honorable Ralph King Anderson, III was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 24th day of September, 2020 before Amanda J. Creel Godfrey, Court Reporter and Notary Public in and for the State of South Carolina.



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(803) 252-3445 / (800) 822-0896

APPEARANCES

Eric S. Tresh, Esquire
Chris Lee, Esquire
Maria M. Todorova, Esquire
Samantha K. Trencs, Esquire
 Eversheds Sutherland, LLP
 999 Peachtree Street, NE, Suite 2300
 Atlanta, Georgia 30309-3996
 Attorneys for the Petitioner

C. Anthony Harris, Esquire
Jason P. Luther, Esquire
 SC Department of Revenue
 300 A Outlet Pointe Boulevard
 Columbia, South Carolina 29211
 Attorney for the Respondent

Also Present:

Stephanie Perez, Judicial Law Clerk
 T. Cooper Monroe, III, Duke Energy
 Andrew W. Saleeby, Observer

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EXHIBITS

(There were no exhibits marked during the hearing.)

STIPULATIONS

It is stipulated and agreed that this hearing is being taken pursuant to the rules of the Administrative Law Court and the South Carolina Rules of Civil Procedure.



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1 **CALL TO ORDER:**

2 **COURT REPORTER:** All rise.

3 **THE COURT:** Y'all be seated. All right, this is a
4 summary judgment motions hearing in the matter
5 of Duke Energy Corporation, Petitioner versus
6 South Carolina Department of Revenue,
7 Respondent. And I haven't even logged on to my
8 computer yet, so hold on a moment before y'all
9 get started. Now, y'all have y'all's mask
10 down. You're supposed to wear them when you're
11 not speaking.

12 **MR. HARRIS:** Sorry, Your Honor.

13 **MR. TRESH:** Sorry, Your Honor.

14 **THE COURT:** That's fine. I'm doing it not just for
15 your safety, but just overall for everyone.

16 Okay, I'm going to pull up all the files.

17 **PRELIMINARY MATTERS:**

18 **THE COURT:** Before we proceed, I wanted to go
19 through just the statutes in 12-14-60 and just
20 make sure we're all on the same page. So, let
21 me just start with -- do y'all have them in
22 front of you?

23 **MR. TRESH:** Your Honor, a demonstrative, but yes, I
24 do.

25 **THE COURT:** All right. Stick it up there then. I



1 don't need it, so it will only be for your
2 benefit. I mean, I've got it sitting here
3 right in front of me.

4 **MR. TRESH:** Okay. Thank you, Your Honor.

5 **THE COURT:** All right. I recognize we look at the
6 statute as a whole. So when I go through this
7 scenario, I'm gonna be recognizing that. But
8 just for general logical thinking, let's just
9 start with (A)(1). If only (A)(1) existed and
10 no other provision existed, and we're just
11 gonna move down through them. All right,
12 "There is allowed an investment tax credit
13 against the tax imposed" in the South Carolina
14 income tax "for any taxable year in which the
15 ... places qualified equipment in service."
16 So, if I follow that provision, then anyone who
17 places the equipment into service gets the
18 credit for that year without any limitation for
19 the type of business or the -- for the type of
20 business or the amount. Do we all agree that
21 that's the ...

22 **MR. TRESH:** Yes, Your Honor.

23 **THE COURT:** Well, would you agree with that, Mr.
24 Harris?

25 **MR. HARRIS:** Yes, sir, Your Honor.



1 **THE COURT:** All right. So then we come next to a
2 limitation, and that is section (A)(2). It
3 says, "The amount of the credit allowed by this
4 section," but it really is limiting it to, you
5 know, three-year property at a half percent all
6 the way up to fifteen-year property at two and
7 a half percent. So that's obviously the next
8 step down the process, we hit a limitation.
9 Correct?

10 **MR. TRESH:** Yes, Your Honor.

11 **MR. HARRIS:** Yes, Your Honor.

12 **THE COURT:** And then -- I mean, this is all obvious.
13 I'm not trying to catch y'all; I'm just making
14 sure we're all on the same page. And then we
15 have section (D), which allows a company to
16 take a -- or to carryover is the term y'all
17 used, an unused tax credit. That's pretty
18 obvious.

19 And then now we get to section (G). So we've
20 already got the first limitation at (A)(2).
21 But we come to the next limit and the final
22 limitation in (G). And that limitation, you
23 know, relates to utilities.

24 **MR. TRESH:** That's right.

25 **THE COURT:** Correct?



1 **MR. TRESH:** Yes, sir, Your Honor.

2 **THE COURT:** All right. That may sound simple, but I
3 think it will help maybe down the road. So, I
4 will tell y'all I've read your -- and I might
5 just switch my mask so I can keep it on all the
6 time. I've read your pleadings, motions and
7 responses, so take that into account when you
8 start making your argument. So, go ahead.

9 Oh, I'll add one more thing. This is not
10 unusual, but y'all've argued, both of you,
11 about summary judgments, and then when we start
12 getting into the meat of everything I start
13 hearing all these -- or start reading all these
14 areas of disputed facts. So, it appears to me
15 that there's a fair amount of disputed facts.
16 So, I don't know where we're headed on the
17 summary judgment, but I'll see where we go on
18 all of that. But, just to let you know, when
19 you come to an area where there are disputed
20 facts, pipe up and let me know.

21 **MR. HARRIS:** Thank you, Your Honor.

22 **THE COURT:** All right.

23 **MOTION/PETITIONER'S POSITION BY MR. TRESH:**

24 **MR. TRESH:** Thank you, Your Honor. My I stand at
25 the podium?



1 **THE COURT:** Yes.

2 **MR. TRESH:** May it please the Court, good morning,
3 Your Honor. Mr. name is Eric Tresh and I
4 represent Duke Energy. And I'd like to thank
5 the Court for allowing me to appear here today.

6 Your Honor, as we discussed, this case is
7 about the application of Section 12-14-60. And
8 I think it is important to note our beginning
9 analysis that up until -- from the time that
10 statute -- the statute was enacted, through the
11 year 2018, the Department's position, it's a
12 public position, was that the statute had an
13 annual limitation.

14 **THE COURT:** All right. Why does that matter? It
15 only matters for me in one area, and that is
16 they don't get -- they're not entitled to
17 agency deference. They just shot that wad, if
18 indeed you are correct. And I don't know if
19 you're a hunter, shooting wad is what comes out
20 of a shotgun shell. So, I don't -- I don't get
21 the significance of that other than it -- from
22 an equitable standpoint, I will say y'all's
23 arguments are pretty well a waste of my time,
24 or some of your arguments are a waste of my
25 time when you start jumping into things like



1 the unjust enrichment.

2 I'll hear from you on those arguments and
3 hopefully during the hearing your attempt to
4 explain what I perceive to be a waste of time
5 will not be a waste of time. But, with that
6 said, I'd like to hear you respond to that
7 right now.

8 **MR. TRESH:** Your Honor. So, the reason why the
9 Department's practices are especially relevant
10 in this case is because we believe that as a
11 matter of law the legislature has acquiesced to
12 the treatment of the statute as an annual
13 limitation. And we believe that for a couple
14 of reasons. And there are facts in this case
15 that are very germane to that issue.

16 I'll start by noting that if you go back to
17 2012 the Department of Revenue in a dispute
18 that Your Honor heard involving Duke Energy,
19 they made in their arguments, the Department
20 spent several pages of their briefs and they
21 said, Your Honor, the reason why we win, this
22 is the Department of Revenue in 2012, is that
23 the Department had a long-standing published
24 position on who's a manufacturer and who's not.
25 And Duke Energy filed their returns in accord



1 with the Department's long-standing position.
2 And the legislature has deemed, because it knew
3 what the Department's position was, and that's
4 how taxpayers were filing the return, the
5 legislature is deemed to have acquiesced to
6 that position. In Your Honor's ruling in that
7 case, you went and looked at that testimony and
8 noted that yes, this had been a long-standing
9 Department position and it was something that
10 Duke Energy and others had filed returns on
11 this manufacturing position. And, therefore,
12 the legislature is deemed to have acquiesced to
13 the position.

14 **THE COURT:** All right. That is a well-reasoned
15 argument but that takes me right back to what
16 I just said a while ago. The concept of long-
17 standing or uniform if you go back to Analog
18 Fertilizer, they uniform over many years, long-
19 standing construction and all of those concepts
20 are under what principle or doctrine?

21 **MR. TRESH:** They would be under the doctrine that if
22 this Court were to find that the statute was
23 ambiguous as opposed to having a plain meaning,
24 that this legislative acquiescence would be
25 instructive to the Court in construing the



1 statute in favor of the annual limitation.

2 **THE COURT:** Well, that's somewhat correct. But
3 because of the Santee case, I'm going to move
4 down to statutory construction. But the
5 concepts that you just laid out are under the
6 doctrine of agency deference, which is just
7 what I said a while ago. They will not get
8 that. So, they don't get agency deference.
9 So, now I move on to looking at the statute
10 itself. Is it A, plain and unambiguous. If it
11 is, then, you know, if it comes out on your
12 side on that, you win. If it is ambiguous,
13 then I have to launch into all the other
14 principles of statutory construction but not
15 the agency deference one because they don't get
16 that particular one because it's not a long-
17 standing construction.

18 **MR. TRESH:** We would agree with that, Your Honor.
19 And we do think the statute is plain and
20 unambiguous.

21 **THE COURT:** I've interrupted you. Look at your
22 notes and start back from where you were.

23 **MR. TRESH:** Okay. And so, Your Honor, the starting
24 point is exactly what you just said. We've got
25 a plain and unambiguous statute, and our belief



1 of that statute, as you've seen in the briefs,
2 is that when you look at the words for any
3 taxable year in section (A)(1), that that tells
4 us how the credit is applied for any taxable
5 year. And that subsection (G) modifies and is
6 construed in conjunction with, I think both
7 parties agree and you said you construe the
8 statute as a whole, subsection (G), "The credit
9 allowed by this section" relates to the annual
10 credit that's described in subsection (A)(1).
11 And that seems pretty plain on its face to us.
12 I understand the Department has a different
13 view. The Department's read in this regard
14 seems to read subsection (G) in isolation. It
15 reads out of the statute these words the credit
16 allowed by this section and simply focuses on
17 the limitation of the five million dollars in
18 the back half of the statute.

19 **THE COURT:** All right. So, the credit allowed by
20 this section refers to section (A), I think we
21 can all agree on that. But now where I need to
22 understand your argument is you infer that the
23 credit allowed by this section means the annual
24 credit, and you infer that based on the fact
25 that you believe section (A)(1) limits it to an



1 annual credit because A, any taxable year, and
2 B, for some reasoning based on corporate tax
3 law, which I think will take you back to any
4 taxable year, but let me hear that.

5 **MR. TRESH:** That's exactly right, Your Honor. So,
6 the use of the word -- words "any taxable year"
7 in subsection (A)(1) is pretty explicit. So
8 when I make this reference about the credit
9 allowed by this section, talking about for any
10 taxable year, and then as you work your way
11 through the rest of the statute what we see is
12 an annual credit. We see that in subsection
13 (2), that the amount of the credit determining
14 how much is determined annually based on this
15 formula. And we also know that the credit
16 carryforward provision that we were talking
17 about in subsection (D), that this carryforward
18 is calculated annually and is applied each and
19 every year for ten years. And so every aspect
20 of the statute, and I'm talking about the
21 credit allowed by this section, indicates that
22 it's an annual credit and not any sort of
23 lifetime credit.

24 **THE COURT:** All right. Well, is there a potential
25 defect in your argument? And I'm gonna ask you



1 about it and you tell me where that -- my
2 question would be wrong. And that is, your
3 theory is referring to the annual credit, but
4 could it be stating that the annual credit is
5 limited to a lifetime amount and why not?

6 **MR. TRESH:** So, a couple of reasons why we don't
7 believe that's the case, Your Honor. First,
8 and perhaps most importantly, nowhere in this
9 statute does it say that it's a lifetime
10 limitation. Now, if I look at the other
11 credits that South Carolina has enacted, when
12 the State wants to put in a lifetime credit,
13 they've done so. They know how to use that
14 word when they want to limit a credit. The
15 words they use are for all taxable years or for
16 all years.

17 **THE COURT:** I found that interesting because y'all
18 had four examples where they have utilized that
19 lifetime limitation. They have five examples
20 where they explicitly set forth that it was an
21 annual credit. You know, by math you end up
22 losing, but no, I'm just kidding on that,
23 that's not the way it works. But it seems to
24 cancel out because -- and I say that because I
25 want you to respond to it, it seems to cancel



1 out because both of your applications of the
2 law -- not applications, that would be examples
3 in the law in which they failed -- they could
4 give a lifetime credit if they want to or they
5 can limit it to an annual if they want to, just
6 exemplifies the ambiguity. At least it can be
7 argued that. So, I'm hitting you with stuff
8 for you to respond.

9 **MR. TRESH:** Yeah, yeah. And I think there's a good
10 answer. I think there's a way to rationalize
11 because we did note he's got some examples,
12 we've got some examples maybe they do balance
13 one another out, but when you look further into
14 the examples, here's what you see.

15 **THE COURT:** Okay.

16 **MR. TRESH:** In all of the cases where there is a
17 lifetime limitation, what we see is that the
18 credit relates to a facility or it relates to
19 a specific project of some type as opposed to
20 in the annual limitations what you see is that
21 the annual limitations all relate to a taxpayer
22 being able to grant the credit. So, drilling
23 down -- and why does that make sense?

24 **THE COURT:** Yeah, cause I want to understand that
25 because in these cases you really are a



1 taxpayer and your facility is a taxpayer, so.

2 **MR. TRESH:** Right.

3 **THE COURT:** Drill down.

4 **MR. TRESH:** So, in the facility-based credits, which
5 a lot of them are lifetime limited, you look at
6 those facility based credits and it strikes us
7 that one legislative purpose, one reason for
8 differentiating between a lifetime credit and a
9 credit that is simply available to a taxpayer
10 who makes -- who does certain types of things
11 is that in a facility I may be trying to
12 encourage investment in a particular place, you
13 know, a particular type of investment. So,
14 I've got this one project, this one facility,
15 and I am going to cap out what somebody can
16 pour into this facility and get a credit for.
17 Contrast that with a credit like the capital
18 investment tax credit at issue in this case and
19 what you see is the purpose of the legislature
20 which was well documented to have investment
21 throughout the state, that's in a different
22 portion of the statute.

23 **THE COURT:** Well, the transition into that.

24 **MR. TRESH:** Yes. And incenting investment
25 throughout the state, whether it be the



1 investment tax credit or any other of the tax
2 credits that are available to taxpayers
3 annually, it wouldn't make sense to cap those
4 as a lifetime amount in the same way because
5 I'm incenting investment at multiple projects
6 and at multiple locations throughout the state.
7 I want more and more of this as opposed to a
8 target investment for a specific facility.

9 There's another reason why that's relevant,
10 as well, and this goes in -- a bit towards this
11 -- leading to an absurd result or why the
12 credit shouldn't be construed as a lifetime
13 limitation. It would be easy enough for a
14 taxpayer if the credit was lifetime limited to
15 simply set up a new entity and make more
16 investments in that new entity. I've got a new
17 taxpayer and I can just bypass the lifetime
18 limitation with a fair amount of ease. That is
19 a much tougher thing to do if I've got a credit
20 that is based on a specific project or a
21 specific facility.

22 **THE COURT:** I'm not following that one. Explain it
23 a little bit more.

24 **MR. TRESH:** So, in the -- you know, if I -- again,
25 bifurcating these facility-based credits from



1 the taxpayer-based credits.

2 **THE COURT:** Okay.

3 **MR. TRESH:** If you have a taxpayer-based credit.

4 **THE COURT:** I think you're -- you're saying
5 facility-based, you mean a specific facility
6 base?

7 **MR. TRESH:** Yes, Your Honor.

8 **THE COURT:** All right. Let's add that term in
9 there. It makes your reasoning more clear, I
10 think.

11 **MR. TRESH:** So if I have a specific facility-based
12 credit, comparing those to credits where a
13 taxpayer can get the credit if it does the
14 activity without reference to a specific
15 facility, a taxpayer, as we know, is an entity,
16 a corporation. Duke Energy Corporation is a
17 taxpayer. Duke Energy could go ahead and set
18 up Duke Investment Corporation tomorrow and
19 that taxpayer would then be able to have a
20 wholly new ---

21 **THE COURT:** Okay. Now, I get you.

22 **MR. TRESH:** On a facility-based -- on a specific
23 facility-based credit, that is a much more
24 difficult and less likely thing to do. In
25 other words if I'm incenting a plant, specific



1 facility, the idea that somebody is going to
2 have a plant owned by a different entity, that
3 becomes a very hard and perhaps impossible
4 thing to do.

5 **THE COURT:** Okay.

6 **MR. TRESH:** So we think that's indicative of how the
7 credit should be construed here. And, as
8 importantly, it's a way to look at the
9 different credits that the legislature has
10 enacted and perhaps one reason why the
11 taxpayer-based credits contain annual
12 limitations versus the facility-based credits,
13 which more often contain lifetime limitations.

14 **THE COURT:** Okay. I will cogitate upon that one.

15 **MR. TRESH:** Thank you, Your Honor. We do think that
16 those differences in the credit make a big
17 difference.

18 Your Honor mentioned that, you know, in terms
19 of what we are inferring into the statute as a
20 -- I'll note that as I read the Department's
21 briefs, in almost every instance that they have
22 referred to the lifetime credit and why it
23 should be, they seem to read the word "total"
24 or the word "lifetime" somewhere into the
25 statute, and neither appears.



1 **THE COURT:** I think if you read the word "lifetime,"
2 or you insert the word "lifetime," you're
3 creating a totality to accomplish your goals
4 but then if you do the same with "annually,"
5 you're doing the same exact thing, you've just
6 got the -- so, I don't think either approach is
7 a sound approach, we just have to look at what
8 the statute says and try to figure out what it
9 means.

10 **MR. TRESH:** Okay. And that's where -- not to
11 belabor this, but that's where we come back to
12 this any taxable year in the structure of the
13 rest of the statute which is an annual credit.

14 Your Honor I would like to note -- and so
15 from a plain language perspective, concluding
16 that piece of the presentation, we think that
17 there are, you know, obviously, we look at the
18 statute itself and we can look at how it's
19 positioned with respect to other credits and
20 what the legislature has done when it's enacted
21 other credits. And we think we don't read
22 words into the statute other than these words
23 up here, any taxable year and the reference to
24 any credit allowed by that section. That's the
25 gist of the plain language argument that we



1 have, Your Honor.

2 **THE COURT:** I follow that.

3 **MR. TRESH:** If Your Honor were to get into the
4 ambiguity issue, we think that there are a
5 couple of things that are relevant. And some
6 of this goes to the Department's long-standing
7 position. I know you said that that's just not
8 entitled to weight and that's off the table,
9 but we think it goes further than that. First,
10 there's this legislative acquiescence point
11 that I would like to make. But second, we
12 would go the opposite way, Your Honor,
13 consistent with what the Department argued in
14 2012 and what this Court ruled, we think that
15 the Department did have a long-standing
16 position and that for 20 years that long-
17 standing position told us that they construed
18 the limitation as an annual limitation.

19 **THE COURT:** That's interesting. A reverse agency
20 deference doctrine.

21 **MR. TRESH:** Yeah.

22 **THE COURT:** Well, that certainly hasn't ever been
23 laid out, but it's something to think about.

24 **MR. TRESH:** I think in this case it has particular
25 relevance and for a couple of reasons. So one



1 ---

2 **THE COURT:** I guess we get a negative inference when
3 the -- from that, but go ahead.

4 **MR. TRESH:** Yeah. I think that's exactly right,
5 Your Honor, that where the Department has a
6 long-standing policy that has been published
7 for 18 years, that has been audited in that way
8 for 18 years, and that was well known by the
9 legislature and communicated to the legislature
10 so this is where we get into some facts that I
11 think are important ---

12 **THE COURT:** That's what I was about to tell you.
13 You're ahead of me on that. I think we're --
14 there's some disputed evidentiary facts
15 regarding all of that, so I may or may not be
16 able to make that decision now. But go ahead.

17 **MR. TRESH:** And I'm not quite sure how much of this
18 the Department will dispute, but here's what we
19 know. We know in depositions that the
20 Department had this form, the credit form, it's
21 Form TC-11. And that TC-11, when it was
22 enacted, when it was first published, it was
23 put out at the time the credit limitation was
24 put into place. And we know, and I think the
25 Department agrees with this that Form TC-11



1 instructed taxpayers that the credit was an
2 annual credit and that they should treat it as
3 such for purposes of filing their tax returns.

4 **THE COURT:** They seem to dispute that, so show me
5 where that -- where the form says that in
6 accordance with your viewpoint.

7 **MR. TRESH:** Your Honor, I'm putting up the
8 demonstrative, Your Honor, and this is one of
9 the Form TC-11s that were submitted.

10 **THE COURT:** Wait a second, she ---

11 **MR. TRESH:** I'm sorry, what are you pointing to
12 there?

13 **MS. TORODOVA:** 2013.

14 **MR. TRESH:** Yeah. So, this is one of the Form TC-
15 11s that was submitted as an exhibit in this
16 case. It relates to the year 2013 in this
17 upper right-hand corner.

18 **THE COURT:** Okay.

19 **MR. TRESH:** And the way -- what this form does is it
20 gives you a calculation to go ahead and compute
21 how the credit is applied. This form has to be
22 submitted annually with -- for a taxpayer to
23 claim the credit. And when you work through
24 these calculations that largely map subsection
25 (D) of the statute, you'll see that the



1 Department, this five million dollar limitation
2 ---

3 **THE COURT:** (D) is the carry over provision?

4 **MR. TRESH:** Correct, Your Honor.

5 **THE COURT:** Go ahead.

6 **MR. TRESH:** This five million dollar limitation,
7 that number we didn't put in there. That's
8 part of the Department's form where they tell
9 you that each year the maximum amount of the
10 credit for utility filers, SC 1120U, is five
11 million dollars. In the depositions in this
12 case, Your Honor, that was not disputed. We
13 deposed the Department's representatives ---

14 **THE COURT:** I don't know how they could dispute that
15 anyway.

16 **MR. TRESH:** That's -- that's right. And so this
17 form was one where it wasn't just a form that
18 they published and it sat out. This form was
19 amended eleven times in the intervening period.
20 And the amendments the Department made were
21 substantive. In some cases when the statute,
22 an example would be the statute, the limitation
23 in the statute went from one million dollars to
24 five million dollars. If you looked at those
25 two different forms, and I have an example of



1 that, you'll see that the form that was
2 published in 1998 had a one million dollar
3 limitation. So this isn't an example that the
4 Department -- of a case where the Department
5 publishes instructions to the taxpayer and
6 tells taxpayers how to do something and it just
7 sits old and cold for 15 years. Eleven
8 amendments. They were all substantive, all
9 documented in the exhibits that we submitted
10 into this case, and in every one of them the
11 Department kept telling the taxpayers to go
12 ahead, that this was an annual limitation. But
13 the Department's policy of this sort of reverse
14 agency position that we were talking about, it
15 gets even more interesting in that the
16 Department audited Duke Energy for the years
17 2008 through 2011. Mr. Orville Sharpe, one of
18 the Department's most senior auditors, working
19 there for a long time, he conducted the audit.
20 And Mr. Sharpe and his colleagues applied the
21 credit in concert with this form on an annual
22 basis. Duke Energy was allowed the credit on
23 an annual basis for the periods 2008 through
24 2011. Now the Department claims, Department
25 says, well, these forms and that audit, that



1 didn't really reflect the Department's
2 position. The Department's position was
3 reflected for the first time in the Notice of
4 Determination for this case because throughout
5 this period, there was never anything other
6 than the form and the guidance that the
7 Department was giving on audit. But what we --
8 and they make light of the audit in their
9 briefs because they say, well, the audit wasn't
10 reviewed by anybody. As a factual matter, Your
11 Honor, that's not true. The results of the
12 audit form the basis of the settlement that
13 Duke Energy entered into with the Department of
14 Revenue for the periods 2008 through 2011. So
15 in addition to the review that the Department's
16 determination got during that period, the
17 settlement allowing the credits on an annual
18 basis was reviewed by the Department's General
19 Counsel and its director.

20 The third piece of this, so we've got the
21 only guidance out there to taxpayers tells us
22 the Department's position is annual. We have
23 them following through on an audit and that
24 audit result being blessed by the highest
25 levels within the Department. Then we have



1 this business with the Revenue Affairs Office,
2 the RFA. There was a time in this case where
3 the legislature was considering but didn't
4 enact a clarification to the law. That's
5 important because as part of that process, the
6 RFA is required to conduct and produce a fiscal
7 revenue report showing what the impact of any
8 proposed change would be. So the RFA consulted
9 with the Department of Revenue and it concluded
10 ---

11 **THE COURT:** We go back into a disputed evidentiary
12 fact here.

13 **MR. TRESH:** Yes, Your Honor.

14 **THE COURT:** They're arguing that the RFA did it on
15 their own and you're saying they consulted with
16 them, so.

17 **MR. TRESH:** And we've got emails, Your Honor,
18 between the Department of Revenue and the
19 Office of Fiscal Affairs showing there was
20 communication.

21 **THE COURT:** I'm not -- just where you'll understand.
22 I don't ever -- at the summary judgment stage,
23 I don't judge whether you've got a sound case
24 or not. My standard that I have to consider is
25 whether there's a genuine -- a genuine -- no



1 disputed -- what is it? No genuine dispute of
2 material fact.

3 **MR. TRESH:** Yes, Your Honor.

4 **THE COURT:** So.

5 **MR. TRESH:** I think here you could -- in terms of
6 this reverse agency position, I think you could
7 conclude that the form is undisputed. The
8 Department -- and this was -- and you could
9 conclude that the only written guidance to
10 taxpayers for -- through at least 2014 was a
11 form that told us it was an annual limitation.
12 I think it's undisputed, the results of the
13 audit and the subsequent settlement with Duke
14 Energy. I don't think that's a cause for
15 dispute knowing that that calculated the amount
16 of the credit on an annual basis. And I think
17 it's -- well, and it is undisputed that the
18 RFA's fiscal affairs note said that there was
19 no fiscal impact.

20 **THE COURT:** Yeah, but that's an out of court
21 statement. Go ahead.

22 **MR. TRESH:** Yeah. So, that is undisputed. Now,
23 whether the Department actually talked to RFA
24 about this, I think that would be a disputed
25 fact.



1 So, we think that all of these indicia
2 support two legal arguments, which is, one, a
3 construction in our favor if the Court were to
4 find ambiguity in accord with that principle of
5 legislative acquiescence.

6 **THE COURT:** Okay.

7 **MR. TRESH:** We also think that in that context, the
8 Department has argued sort of against this idea
9 of legislative -- that the reverse deference,
10 if you will, they've argued against it and
11 they've said, well, when our folks looked at
12 this sometime in 2014, that that was the first
13 time we really looked at this statute and made
14 an opinion about it. I'd say that's a disputed
15 fact, as well, in that we believe that the
16 Department was very knowledgeable and very
17 purposeful in concluding that this limitation
18 was an annual limitation. And I believe we
19 have the evidence to back it up, but, of
20 course, that would be a disputed fact, Your
21 Honor.

22 **THE COURT:** Yeah. So you're preemptively shooting
23 them down on the disputed evidentiary fact?

24 **MR. TRESH:** Yes, Your Honor.

25 **THE COURT:** Okay.



1 **MR. TRESH:** So, probably the last piece of this, and
2 it's factual and perhaps it's only optics, but
3 if the Court will humor me for a moment on
4 this, the way that this case arose was very odd
5 in that you've had this long-standing position
6 for all these years and then there's a change
7 in policy. And so how -- what happened. What
8 was the lightbulb that went off? And these
9 would be disputed facts, and so I'll -- or
10 maybe, I don't know. The deposition, it's in
11 the deposition testimony, but the change in the
12 Department's policy was orchestrated by one
13 person. It was the tax manager in the
14 Department of Revenue and she thought -- she
15 testified that she thought that the credit was
16 too broad. And she looked at it and she went
17 ahead and lobbied some other tax managers in
18 the Department and said, you know what, we're
19 gonna change this thing. And they did. And
20 there wasn't any sort of administrative rule
21 making, there was any notice to the public,
22 they never told anybody about it. And I think
23 -- we think this is important, and I'm gonna
24 say one word about the equitable defenses. For
25 something as big as this with, you know, with



1 the money at stake and how it impacts
2 investment in the state to be done sort of in
3 the dark of night without consultation with the
4 Department's general counsel, without
5 consultation with the director, with no public
6 hearing, to then go ahead and assess a company
7 for back taxes based on that sort of, I'd call
8 it a whim, quite frankly, of some -- of a tax
9 manager in the Department, seems inappropriate.
10 And that was the reason we spent time on those
11 equitable defenses, Your Honor.

12 **THE COURT:** I understand that, just from a legal
13 standpoint. I'm trying to figure unjust
14 enrichment. Number one, it's an equitable
15 defense; this is a court of law; and number
16 two, this isn't the Court of Common Pleas in
17 South Carolina, so that's where I came off on
18 that is that it's a great summary to make, but
19 it's not one that I can act upon necessarily
20 unless you can show me a legal position that
21 justifies me acting upon that. So, I don't
22 discount your argument. I think you made some
23 other points in your pleadings which were
24 salient.

25 **MR. TRESH:** And I think that the standard that --



1 perhaps one way that the Court could act on it
2 would be to look at -- viewing these policies
3 for what they are, that this purported change
4 in policy where the Department argues today
5 that they have a long-standing policy, I think
6 those points the -- the facts in the optics
7 behind how the Department changed its position
8 do go as a legal matter towards, you know, what
9 would be a long-standing position. The long-
10 standing position that we argue would apply ---

11 **THE COURT:** Goes to the legal matter, why?

12 **MR. TRESH:** Because it's evidence that the
13 Department had a long-standing position.

14 **THE COURT:** Okay.

15 **MR. TRESH:** And if you view this sort of cursory or
16 -- cursory review and change by this single tax
17 manager in the light of not really being a
18 change in the Department's position at all
19 being unlawful, violative of the Taxpayer Bill
20 of Rights and an inappropriate rule making,
21 then you get back to the agency deference
22 argument that we're making.

23 **THE COURT:** All right. Do you want to -- you argued
24 two different things. The Taxpayer Bill of
25 Rights and rule making. This rule making



1 argument, to me, is a little weak. The whole
2 purpose of the rule making argument you've got
3 a regular -- you can't have a policy that is a
4 binding norm, and so the only thing that we
5 would accomplish by -- or the ultimate
6 accomplishment of your reasoning would be that
7 they had a binding norm that did not or should
8 not have the force and effect of law, which
9 would really go against the purposes for which
10 you are seeking because you're seeking that it
11 have a binding norm. So, I'm not so sure about
12 all that, but. And the Taxpayer Bill of
13 Rights, I'm not so sure. So they violated the
14 Taxpayer Bill of Rights, does that mean that I
15 ignore an interpretation of the law? And I
16 don't think you would argue that.

17 **MR. TRESH:** No, Your Honor.

18 **THE COURT:** So I'm not sure of the points on those.

19 **MR. TRESH:** On the binding norm, if I can express it
20 this way. So, the Department -- the
21 Department's original publication of Form TC11
22 over and over and over again, that was a
23 Department policy, okay. I don't know that it
24 rose to the level of a regulation.

25 **THE COURT:** You kind of argued that, but go ahead.



1 **MR. TRESH:** But when they go ahead and change the
2 policy and don't tell anybody about it ---

3 **THE COURT:** Okay.

4 **MR. TRESH:** All right. And they're saying that the
5 long-standing policy -- in their briefs they're
6 saying it doesn't come out until they issue a
7 Notice of Determination in the audit that's at
8 issue in this case in 2018, if that's their
9 version of a binding norm of a regulation, a
10 notice of determination issued to a single
11 taxpayer, that regulation or long-standing
12 policy ought not to supersede the previous
13 policy that was in effect for 18 years.

14 **THE COURT:** Okay.

15 **MR. TRESH:** And with that, Your Honor, I'll -- I
16 mean, I'll note also just optically the -- what
17 transpired during the legislature's attempt to
18 clarify the law, it was striking. And again,
19 I don't know that this has much legal
20 significance other than the optics surrounding
21 this case, that the Department of Revenue at
22 some point decided to begin lobbying the
23 legislature. And they sent a memorandum to the
24 legislature essentially arguing ---

25 **OBJECTION BY MR. HARRIS:**



1 **MR. HARRIS:** Your Honor, excuse me for interrupting,
2 I apologize. I know this is a Motion for
3 Summary Judgment, but with respect to what I
4 believe counsel's about to discuss is a memo
5 which was sent by a long-standing employee with
6 the Department, the legislative liaison, in the
7 process of communicating with the House Ways
8 and Means Committee. It's a memo that we've
9 had numerous discussions about. Your Honor, we
10 think the memo is completely irrelevant to
11 anything in this case. And it's -- to the
12 extent it's relevant, I think it's not, it's
13 probative of nothing. And, Your Honor, I think
14 with respect that what the petitioner attempts
15 to do is disparage the Department and to
16 prejudice the position of the Department
17 through the discussion of this memo.

18 **THE COURT:** When he says about the optics of this
19 case, he is trying to disparage the Department.

20 **MR. HARRIS:** I understand, Your Honor.

21 **THE COURT:** He's saying that the optics of this case
22 do disparage the Department.

23 **MR. HARRIS:** I understand, Your Honor.

24 **THE COURT:** All right.

25 **MR. HARRIS:** And I think the process of that



1 disparagement is to prejudice Your Honor in
2 terms ---

3 **THE COURT:** I disagree, but, I mean, that may be the
4 purpose but I disagree that it would accomplish
5 anything.

6 **MR. HARRIS:** I understand.

7 **THE COURT:** Y'all've been around -- I don't know if
8 you know much about my reputation, but I'm
9 gonna pretty well follow what I think the law
10 is. And so ---

11 **MR. HARRIS:** I understand, Your Honor. And I rose
12 to make the objection about the document ---

13 **THE COURT:** On what legal grounds?

14 **MR. HARRIS:** That it is not relevant, Your Honor.
15 It is a -- it is a document done in connection
16 with unenacted legislation. So I don't know
17 how in the world that is relevant to anything.

18 **THE COURT:** Okay.

19 **MR. HARRIS:** And number two, it doesn't -- even to
20 the extent it's relevant, it doesn't prove
21 anything. Your Honor, there's ---

22 **THE COURT:** Let me just address the first part. Do
23 you wish to respond? If the case law sets
24 forth that -- offering -- hold on. Pending
25 legislation is not relevant for my



1 consideration, then I assume what he's saying
2 is -- I think what he's saying is, the pending
3 legislation is not a consideration, therefore,
4 anything related to that pending legislation
5 would equally be not relevant. And I'll hear
6 your argument on that.

7 **MR. TRESH:** I do think the document is relevant,
8 Your Honor. I don't think we need to make all
9 that much of it, but I do think I -- given Mr.
10 Harris' objection, I will address the relevance
11 point. In that document, the Department stakes
12 out ground with respect to it's long-standing
13 position and how the statute should be
14 interpreted. And given that the Department has
15 argued that they should be granted deference,
16 I understand in the beginning, Your Honor said
17 they wouldn't -- you weren't going to grant
18 that deference.

19 **THE COURT:** I didn't say I wouldn't. I said if I
20 follow your theory, which I think is sound
21 right now, I wouldn't do that. I'm not
22 committing myself, is all I'm saying.

23 **MR. TRESH:** Understood, Your Honor. And especially
24 given that, I do think that this document is of
25 relevance in determining what the Department's



1 long-standing position and its intent was, so
2 I do think it's relevant, notwithstanding
3 whether the legislation's passed.

4 **THE COURT:** All right. I'm not trying to help out a
5 party.

6 **MR. HARRIS:** Yes, sir.

7 **THE COURT:** But he didn't make the argument quite
8 well enough maybe to convince me, but here's
9 where I'm gonna come down on this. And that is
10 simply because the law sets forth, and I do not
11 consider pending legislation that was not
12 enacted, does not mean the Department cannot
13 make an admission within the concept of doing
14 that which was not something to consider
15 because the admission stands upon it's own.
16 So, I will let him make that argument, but I
17 will note on your other arguments, and that is
18 something that would go to the weight of the
19 evidence.

20 **MR. HARRIS:** Yes, Your Honor. We would ask, Your
21 Honor -- I understand Your Honor's ruling, I
22 believe, but we would ask that this document be
23 excluded from any consideration by the Court.

24 **THE COURT:** All right. I'll take that into
25 consideration. At this stage, I'm gonna hear



1 him out, especially since I'm both the judge
2 and the fact finder.

3 **MR. HARRIS:** Yes, sir. Which is why I made the
4 objection, Your Honor, since you are the fact
5 finder here.

6 **THE COURT:** Okay. Well, I'll -- I'll take my fact
7 finder hat off and listen to the legal aspects
8 of it and then I'll decide later.

9 **MR. HARRIS:** All right, sir.

10 **THE COURT:** Thank you.

11 **MR. HARRIS:** No, thank you, Your Honor.

12 **THE COURT:** Go ahead.

13 **MR. TRESH:** Thank you, Your Honor. So, the
14 Department -- what transpired, and then I'll
15 say the legal relevance of this, what
16 transpired is that the Department sent this
17 memorandum to the General Assembly and the
18 Department went ahead and it said, well, we
19 don't think -- and the document speaks for
20 itself, but I'll summarize it as the
21 legislature shouldn't pass this clarification
22 of the law because it would cost a lot of
23 money, and -- and that was in opposition to
24 what RFA had determined, but, more importantly,
25 because we've got this pending litigation with



1 Duke Energy that has nothing to do with this
2 case.

3 **THE COURT:** Let me see if I follow this.

4 **MR. TRESH:** Yeah.

5 **THE COURT:** They said they shouldn't add the
6 amendment because it would cost a lot of money.

7 **MR. TRESH:** Uh-huh.

8 **THE COURT:** Now, the amendment was going to set
9 forth an annual deduction, which would've
10 expanded beyond the lifetime. So, would that
11 not cost more money to the state? I mean, I --
12 it seems like that follows their reasoning.

13 **MR. TRESH:** Well, the amendment would have -- yes.
14 The amendment would have clarified that it was
15 an annual limitation and the Department at this
16 point ---

17 **THE COURT:** The amendment to the statute?

18 **MR. TRESH:** Correct.

19 **THE COURT:** You do know that goes against case law,
20 don't you?

21 **MR. TRESH:** That the clarif- -- that the legislature
22 styled the amendment ---

23 **THE COURT:** It depends on how -- if the legislature
24 specifically styled it that way. The case law
25 -- let me look at my rules again. I think I'm



1 a little bit off. But there's a presumption
2 that an amendment of the statute changes
3 existing law. Well, let's see, where would
4 that be?

5 **MS. PEREZ:** I think it's Duvall.

6 **THE COURT:** Duvall, yeah. Well done. Duvall versus
7 South Carolina Budget and Control Board, the
8 cite is 377 S.C. 36. So you've got that,
9 there's a presumption of it. But then it says
10 nevertheless a subsequent statutory amendment
11 may be interpreted as clarifying legislative
12 intent. And normally what they do is they,
13 they being the appellate courts, they look to
14 whether there's some statement by the
15 legislature or indication by the legislature
16 that there was clarification rather than
17 changes. So, with that said, proceed.

18 **MR. TRESH:** I think this falls -- well, I -- it
19 falls directly in that Duvall case and that the
20 proposed amendment used the word -- words to
21 clarify the statute so the ---

22 **THE COURT:** It did?

23 **MR. TRESH:** It did. That proposed amendment was
24 explicit that it was a clarification and
25 attached to it was the RFA's report that the



1 legislation would have zero fiscal impact based
2 on the Department of Revenue's long-standing
3 policy of interpreting the credit as an annual
4 limitation, not a lifetime limitation.

5 **THE COURT:** Okay. All right.

6 **MR. TRESH:** And so then the Department, they change
7 their position at this point. This is 2018 and
8 they've gone to -- they go to the legislature
9 and they send this memo. And the memo says,
10 well, we've changed our -- essentially we've
11 changed our position. This is going to cost
12 127 million dollars in unused credit
13 carryforwards, and -- that we had previously
14 allowed. Duke Energy has ongoing litigation
15 with the Department on other issues. Why that
16 was relevant, I don't know. The Department
17 felt it was important to remind the legislature
18 that Duke Energy was in this other litigation
19 and noting a bunch of other specific facts
20 about Duke Energy. And what struck us, and
21 perhaps this is optically, what struck us as
22 odd in this was that in the context of what is
23 or what is not an agency position, an agency
24 lobbying the legislature against sort of a
25 specific taxpayer to adopt its or support its



1 litigating position, 'cause remember they're
2 trying to defeat a clarification which is in
3 essence supporting its litigation position,
4 seems indicative of that long-standing position
5 that we're arguing that existed that they had
6 always interpreted this statute as a annual
7 limitation and not a lifetime limitation.

8 **THE COURT:** All right.

9 **MR. TRESH:** I don't want to make more of that memo
10 than it is. It's, again, part of the optics
11 and facts that are at issue here.

12 Your Honor, I'll conclude by -- maybe where
13 I started, unless Your Honor has further
14 questions, but that is -- we think if you go
15 back to -- well, the statute's not up, but if
16 you go back to the statute.

17 **THE COURT:** I've got it now.

18 **MR. TRESH:** Yeah.

19 **THE COURT:** You don't have to put it up.

20 **MR. TRESH:** Thank you. That the statute is
21 explicit. We think that every aspect of this
22 refers to that taxable year, and we think Your
23 Honor could rule on the plain language of the
24 statute. But we do think that if Your Honor
25 finds that there's some ambiguity here, all of



1 those facts that we said, many of which are
2 undisputed, would support a finding of
3 deferring to what was the Department's long-
4 standing position and looking at the credit in
5 the context of all the South Carolina credits,
6 that argument that we made around when there's
7 a lifetime limitation, their credits are
8 generally facility-based and where there is an
9 annual limitation -- or excuse me, a taxpayer-
10 based limitation that the credits are available
11 annually, that those factors move us out of the
12 ambiguity camp and into the camp that the
13 statute should be construed as an annual
14 limitation.

15 **THE COURT:** Okay. Go ahead. Thank you.

16 **MR. TRESH:** Thank you, Your Honor.

17 **RESPONDENT'S POSITION BY MR. HARRIS:**

18 **THE COURT:** Mr. Harris?

19 **MR. HARRIS:** Yes, sir; may it please the Court.
20 Thank you, Your Honor. I'm Anthony Harris and
21 I'm appearing on behalf of the Department
22 today. Thank you for hearing us.

23 Your Honor, let me just say from the outset
24 that there -- as Your Honor would know from the
25 briefings, that there are a great many facts in



1 dispute that are outside the plain meaning of
2 the statute. I got ready to come this morning
3 and I brought my boxes and all the discovery
4 that's gone on. The Department filed a Motion
5 for Summary Judgment in the case because it
6 believes summary judgment should be granted to
7 the Department and not because any of the
8 discovery that's gone on, not because of the
9 sort of thrashing about of the facts that's
10 gone on between the parties, but because the
11 sole question before Your Honor this morning is
12 a legal one, and that is the credit limitation
13 imposed by Section 12-14-60. And I think to,
14 Your Honor, to reach a decision in the case,
15 all you really need is Title 12 of the Code and
16 the statute and determine what it means,
17 whether that limitation is five million dollars
18 on a lifetime basis, which the Department
19 contends, or whether the limitation is five
20 million a year, each and every year, as the
21 Petitioner contends. And, of course, Your
22 Honor, we would begin by looking at the plain
23 language of the statute. The parties did not
24 stipulate to any facts. We attempted, in good
25 faith, I'm not knocking either side about that,



1 but I think there are certain facts that would
2 be uncontested or admitted. If I'm wrong,
3 certainly Duke can correct me, but one ---

4 **THE COURT:** They're not admitted because they
5 haven't been admitted.

6 **MR. HARRIS:** Yes, sir. I understand, Your Honor.

7 **THE COURT:** We'll stick with uncontested.

8 **MR. HARRIS:** All right. I'm just laying out a few
9 facts that I think are not contested. One is
10 that the Petitioner is an entity which
11 qualifies for the tax credits, assuming it
12 makes a qualified investment. Two, the audit
13 period is 1996 through 2014. The Department
14 did not, in its audit, audit the underlying
15 basis of the credits but instead accepted the
16 credits as filed. That during the audit
17 period, the Petitioner claimed almost 25
18 million dollars in tax credit. After the
19 audit, the Department allowed about 4,300,000,
20 leaving the Petitioner with a carryforward
21 credit of about 700,000 at the end of the audit
22 period, 2014. The Petitioner was allowed to
23 claim the tax credit for all years during the
24 audit period. And partly because of that
25 credit, the Petitioner paid no corporate income



1 tax from 2004 through 2014. The Department
2 issued its notice of adjustment ---

3 **THE COURT:** They paid no income tax?

4 **MR. HARRIS:** They paid no corporate income tax at
5 all from 2004 to 2014 partly as a result, not
6 solely but partly as a result of its credit,
7 particularly in the last year, which was 2014.
8 The Department issued its Notice of Adjustment
9 to the Petitioner allowing a total of five
10 million in credit on a lifetime basis, and
11 allowing the carryforward of about 700,000.
12 The Petitioner timely filed it's protest. The
13 Department issued its determination and the
14 Petitioner requested a contested case hearing.

15 Also, and lastly, Your Honor, is that the
16 Petitioner would be subject to the license tax
17 in 12-20-100, so it's, therefore, subject to
18 the credit limitation imposed by section (G).
19 So, I know those seem plain and obvious, but I
20 just wanted to state to the Court at least my
21 understanding of what -- of the facts that
22 nobody would argue in this case, I believe.

23 Your Honor, the Petitioner attempts to make
24 Your Honor's decision in the case about a lot
25 of things other than the statute. But the



1 Department would contend that Your Honor's
2 decision is solely to the language of the
3 statute and what it means. And the statute,
4 Your Honor, as you went through with counsel,
5 sets forth the time period in (A)(1), which is
6 any taxable year; the duration of the
7 carryforward in (D)(1); and then (G) provides
8 the limitation of the credit and it states very
9 simply, very plainly, the credit allowed by
10 this section is limited to no more than five
11 million dollars.

12 **THE COURT:** When you say (A)(1) sets forth the time
13 period, I mean, it sets forth the time period
14 in the -- sets forth, first, you've got, here's
15 how you earn it.

16 **MR. HARRIS:** Yes, sir.

17 **THE COURT:** And you can earn it in any taxable year.
18 So, I mean, the time period is any taxable
19 year. So that would be a -- if there's -- this
20 is to the outside of the limitation in (G) that
21 are not 12-20-100 type businesses. There is
22 really no time period in them, they just are
23 allowed to take the deduction in any taxable
24 year in which they do the event to earn it,
25 which is placing service, qualified



1 manufacturing and productive equipment
2 property. And they can take that for whatever
3 amount, as we discussed earlier. They get hit
4 with the limitation in (A)(2), isn't that
5 correct?

6 **MR. HARRIS:** Yes, sir. I think everybody's hit with
7 the limitation in (A)(2), Your Honor.

8 **THE COURT:** Yeah, I know. I'm just saying that
9 taxable -- that any taxable year is not really
10 binding upon them, they just -- I mean, I have
11 to go look up the word -- the definition of
12 taxable year, and I think that's in -- where
13 was it I saw that? There's a statute that
14 defines that. But that doesn't seem to be much
15 of a limitation. Oh, is it 12-6-4410? But
16 ... So, I'm just not quite sure I'm following
17 your argument about it being a -- the phrase
18 you used, it was a limitation to the tax year.
19 Is that how -- how did you word that?

20 **MR. HARRIS:** Well, I indicated, Your Honor, that
21 (A)(1) gives the ---

22 **THE COURT:** Yeah.

23 **MR. HARRIS:** --- the ---

24 **THE COURT:** The time frame.

25 **MR. HARRIS:** --- the time frame or it tells you when



1 you are allowed to make that -- to claim that
2 credit.

3 **THE COURT:** In any tax year.

4 **MR. HARRIS:** Yes, sir.

5 **THE COURT:** What's the significance of that then?

6 **MR. HARRIS:** Well ---

7 **THE COURT:** I mean as far as this case because in
8 this case your argument seems to me to lie all
9 in (G). It doesn't seem to lie, or lay, in
10 (A) (1).

11 **MR. HARRIS:** You're right, Your Honor. Our case --
12 our case relies on (G).

13 **THE COURT:** Okay.

14 **MR. HARRIS:** Which is the section of the statute
15 that unequivocally states the imposition of the
16 credit limitation.

17 **THE COURT:** Okay.

18 **MR. HARRIS:** No more than five million dollars.
19 Couldn't be much plainer. So, correct, Your
20 Honor.

21 I think the term any taxable year would allow
22 a qualifying taxpayer to make or to claim the
23 credit during any taxable year with the
24 limitation of five million dollars. And when
25 you get to five million dollars, you've run out



1 of credit that was allowed by the legislature
2 in drawing the statute.

3 **THE COURT:** Well, when you say (A)(1) limits the
4 taxpayer to five million dollars.

5 **MR. HARRIS:** Not (A)(1), Your Honor. (G).

6 **THE COURT:** Oh, (G). Okay, I'm sorry.

7 **MR. HARRIS:** (G), I'm sorry if I misspoke.

8 **THE COURT:** I think either you did or I misheard,
9 one of the two.

10 **MR. HARRIS:** Well, I apologize. But, no, sir. We
11 think the definitive portion of the statute as
12 it relates to the imposition of the credit
13 limitation is (G). That is the only part of
14 the statute, Your Honor, that discusses or
15 addresses the credit limitation. No other part
16 of that statute addresses the limitation except
17 (G). And (G) is ---

18 **THE COURT:** Well, (A)(1) -- (A)(2) does.

19 **MR. HARRIS:** Well, yes, sir, but those -- those are
20 -- those are portions of the statute that
21 address how much credit you would be allowed
22 based on your investment and percentages and
23 that sort of thing?

24 **THE COURT:** Okay.

25 **MR. HARRIS:** But it is (G) as it relates to a



1 utility that would address the limitation of
2 the tax credit at five million dollars.

3 **THE COURT:** The lifetime limitation?

4 **MR. HARRIS:** Yes, sir, Your Honor.

5 **THE COURT:** All right. And you're going to tell me
6 how I get there?

7 **MR. HARRIS:** Will I tell you how you get there?

8 **THE COURT:** Yes.

9 **MR. HARRIS:** Yes, sir. I think you get there by
10 reading (G), Your Honor, by reading case law
11 that tells us that with respect to a tax credit
12 case which is a matter of legislative grace,
13 that if there's any ambiguity in this statute,
14 and we think there's none, but if there is any,
15 it must be strictly construed or narrowly
16 construed against the Petitioner in this case.
17 They -- they are not allowed to broaden this
18 language or to force construction of this
19 language or to otherwise come within this
20 language unless they were squarely within that
21 language as it relates to the credit limitation
22 they seek, which -- which they just clearly
23 aren't, Your Honor. We really rely on the
24 plain language of the statute and particularly
25 (G) and I think you can get there, Your Honor.



1 I think it is a harmonious reading of the
2 statute.

3 **THE COURT:** You've got (A) and (B) here. You've got
4 plain reading and ambiguity.

5 **MR. HARRIS:** Yes, sir.

6 **THE COURT:** So let's go further over.

7 **MR. HARRIS:** Okay.

8 **THE COURT:** The plain reading.

9 **MR. HARRIS:** Yes, sir, Your Honor.

10 **THE COURT:** It says limited to no more than five
11 million dollars for an entity.

12 **MR. HARRIS:** Yes, sir.

13 **THE COURT:** It doesn't say is limited to no more
14 than a lifetime amount of five million dollars,
15 so where do I get the plain reading out of the
16 statute that it limits it to a lifetime?

17 **MR. HARRIS:** Yes, sir, Your Honor. I think you get
18 there by the words no more than which modified
19 five million dollars and which tell us it's no
20 more than that. And I think ---

21 **THE COURT:** That could be no more than 5 million
22 annually.

23 **MR. HARRIS:** But it doesn't say that, Your Honor.

24 **THE COURT:** Then you have to jump to ambiguity.

25 **MR. HARRIS:** Yes, sir.



1 **THE COURT:** But we're in (A) right now. We can go
2 to (B) if you want to go ahead and go to (B),
3 but I was asking about (A).

4 **MR. HARRIS:** Yes, sir. Your Honor, any taxable year
5 would mean that the taxpayer could take the
6 credit in any taxable year in which they
7 otherwise qualify.

8 **THE COURT:** Yeah, they can take it for any amount as
9 limited by (A) (2).

10 **MR. HARRIS:** Yes, sir.

11 **THE COURT:** Okay.

12 **MR. HARRIS:** As limited by their investment.

13 **THE COURT:** Let's say they did an 800 -- they did a
14 800 million dollar purchase of a qualified
15 equipment and they were in the seven-year
16 category, that would be 1.5 percent. They can
17 take a twelve million dollar tax credit as long
18 as they had or owed twelve -- yeah, owed twelve
19 million dollars to the Department of Revenue.
20 If they owed only, what, six, then they could
21 carry over six, right?

22 **MR. HARRIS:** Six.

23 **THE COURT:** Million. Let me go through it again.
24 Eight hundred million dollar investment ---

25 **MR. HARRIS:** Yes, sir.



1 **THE COURT:** --- qualified property times 1.5
2 percent, you get twelve million dollars of
3 credit. They could take that credit up to the
4 extent of taxes they owe, so they only owe six
5 million dollars in taxes, they could take six
6 million that year and then carryover the other
7 six for -- as the statute allows.

8 **MR. HARRIS:** But -- I'm sorry.

9 **THE COURT:** Under ---

10 **MR. HARRIS:** A utility could not, Your Honor.

11 **THE COURT:** No, I was going to say, a regular one.

12 **MR. HARRIS:** Yes, sir.

13 **THE COURT:** But when we hit a utility, the issue is
14 can they take the five million dollars only
15 that year or can they take -- let's say, if
16 they did less, would it be five million only
17 that year or five million lifetime under (G)?

18 **MR. HARRIS:** Under (G), if they had five million
19 dollars, they would have exhausted ---

20 **THE COURT:** Yeah.

21 **MR. HARRIS:** --- their available credit, Your Honor.

22 **THE COURT:** Yeah.

23 **MR. HARRIS:** And they would take it that year and
24 they'd be five million dollars with tax credit
25 better off, but they -- that would -- our view



1 is that that would be limitation under (G) is
2 that they would be limited to five million
3 whether they take that in a single year,
4 whether that's earned over multiple years, or
5 part of the carryforward provision they would
6 -- they would be capped at 5 million.

7 Your Honor, I think another important aspect
8 of (G) is obviously in the way it's written,
9 sometimes what the legislature doesn't do is an
10 indication of what it means to do. And here,
11 what it didn't do is include any language to
12 modify five million dollars except no more
13 than. They -- I know Duke has pointed out
14 instances where the legislature has used
15 language to specifically provide ---

16 **THE COURT:** They didn't put any lifetime limit- --
17 they didn't put an annual limitation in there
18 and they didn't put a lifetime limitation
19 there.

20 **MR. HARRIS:** Right. And we, of course, have
21 provided Your Honor with a number of examples
22 of how the legislature knows how to provide for
23 an annual limitation and the legislature chose
24 not to do that. And with respect to the
25 unenacted legislation, Your Honor, which we



1 think is not relevant.

2 **THE COURT:** Yeah, I understand where you stand on
3 that one.

4 **MR. HARRIS:** Right. Its relevance is that the
5 legislature had it right in front of them to
6 wholesale change the statute, and change the
7 limitation, and chose not to do it to the
8 extent that speaks to any sort of legislative
9 intent.

10 **THE COURT:** Well, luckily for Duke, I'm going to
11 pretty well ignore that because I could take
12 your argument, the logical extension -- or
13 Duke's argument, even if it was a clarification
14 of the law and they were -- then they chose not
15 to clarify the law, then there's an argument to
16 be made that if they chose not to clarify the
17 law, the must did not think that there was --
18 that they wanted to clarify that law for
19 whatever reason.

20 **MR. HARRIS:** Yes, sir.

21 **THE COURT:** You could argue that they wanted to
22 leave it as you're interpreting it.

23 **MR. HARRIS:** Yes, sir.

24 **THE COURT:** But I'm not -- if that's a rabbit hole,
25 it's a mess for both of you, to be honest.



1 **MR. HARRIS:** Yes, sir. Your Honor, we think that
2 the plain language provides the limitation in
3 (G) to the extent that Your Honor were to look
4 at anything else outside of the statute, the
5 title to the statute in 1998, the two acts that
6 were passed, I think it's 419 and 442, are
7 important and from the standpoint of what Your
8 Honor can credibly rely on. Outside of the
9 statute, I think the title itself ---

10 **THE COURT:** I've got to first find there's an
11 ambiguity. So I guess we're jumping to (B)
12 now, because I don't get the title -- I don't
13 look at the title unless there is an ambiguity.

14 **MR. HARRIS:** Gotcha. We don't think there's any,
15 Your Honor.

16 **THE COURT:** I know; I get that.

17 **MR. HARRIS:** And I'm just saying that to the ex- ---

18 **THE COURT:** Well, you must be transitioning is what
19 I'm getting at.

20 **MR. HARRIS:** I am, Your Honor. And to the extent
21 Your Honor believes that there was some
22 ambiguity about (G), which we think is very
23 clear and unequivocal. If you look at the
24 title tag 419 and 442, the title states that
25 the purpose of the statute is to limit the



1 credit for a utility to a total of five million
2 dollars. It uses a slightly different word for
3 total, but obviously total and no more than I
4 think are synonymous. But the title itself
5 would we think undergird and support our
6 position in (G) when the title is a part of the
7 act in which the legislature amended the
8 statute.

9 **THE COURT:** Well, let me ask you about that. So,
10 I'm looking at it right now. To limit the
11 total credit allowed utility, am I not in the
12 same scenario I am with (G) because it doesn't
13 say total annual credit or it doesn't say total
14 lifetime credit? So would I not be right back
15 to an ambiguity and the title -- the title
16 using total? I'm asking.

17 **MR. HARRIS:** Well, no.

18 **THE COURT:** I'm going to treat you the same way.
19 I'm going to roll it out and make you respond.

20 **MR. HARRIS:** Yes, sir. No, I understand entirely
21 and I appreciate it, Your Honor. Your Honor,
22 we don't think so. We believe the title which
23 can be considered by Your Honor is ---

24 **THE COURT:** I recognize that.

25 **MR. HARRIS:** I mean, Yes. there's case law that says



1 that.

2 **THE COURT:** I'm clear on all that.

3 **MR. HARRIS:** That is something you could look at and
4 I know you would know that better than I as a
5 judge, but the language in the title to the
6 extent there's any ambiguity, Your Honor, we
7 think it -- it clarifies that. It supports our
8 position and sheds light on (G) that the
9 limitation at no more than five million dollars
10 for a utility or for a total of five million
11 dollars, that either view of those -- of that
12 language is an absolute limitation forever and
13 a day. If I say you are limited to five
14 million dollars -- to no more than five million
15 dollars or limited to a total of five million
16 dollars, I've pretty well staked out where that
17 limitation is, which is what we think the
18 legislature has done with the statute.

19 **THE COURT:** Right.

20 **MR. HARRIS:** And if we go a little further, Your
21 Honor, in talking about ambiguity, and we don't
22 think there's any ambiguity in the statute.

23 **THE COURT:** I get that, but go ahead and address the
24 issue.

25 **MR. HARRIS:** Yes, sir, but if you're moving to the



1 issue of whether there's any ambiguity and you
2 concluded that reasonable minds might disagree
3 with what the statute means, then under our
4 case law, which is almost black letter law, it
5 says that, for starters, a tax credit which is
6 a matter of legislative grace, it's a special
7 legislative action to allow a taxpayer to pay
8 something less than it should in taxes. That's
9 sort of the starting point of the logic I think
10 in those cases. And if you're considering
11 anything that subtracts the taxes due from a
12 taxpayer, it should be strictly construed or
13 narrowly construed against the taxpayer, Your
14 Honor. It can't be broadened. It can't be
15 forced. And the taxpayer's required to show
16 you clearly why it fits within the credit
17 limitation it argues before you today. And I
18 just don't think they get there, Your Honor.
19 I think if you're -- if you're narrowly ---

20 **THE COURT:** I can summarize that so we can move on.

21 **MR. HARRIS:** Sir?

22 **THE COURT:** I can summarize that so we can move on.

23 **MR. HARRIS:** All right, sir.

24 **THE COURT:** Similar -- your theory is that if there
25 is any ambiguity, and the law requires strict



1 construction against Duke Energy, they lose
2 because a 50-50 weighing goes in your favor?

3 **MR. HARRIS:** Yes, sir, Your Honor.

4 **THE COURT:** All right.

5 **MR. HARRIS:** Thank you, Your Honor.

6 Your Honor, I want to address sort of briefly
7 -- as briefly as I can some of the -- to the
8 extent Your Honor wants to hear from me about
9 it, we do have disagreements about facts on
10 what we believe are peripheral issues. So I
11 don't want Your Honor to believe that we
12 concede the points being made by Duke on those
13 peripheral issues because we don't. There
14 would be disagreement about those facts. But,
15 again, Your Honor, we don't think you have to
16 get to those facts or decide those facts to
17 decide this case. We think you can take the
18 statute and make a decision based on the
19 statute. But with respect to the Department's
20 long-standing position that Duke argues and the
21 deference doctrine, Duke is essentially
22 attempting to turn that doctrine on its head.
23 The deference doctrine as Your Honor would well
24 know provides that if an agency charged with
25 administering a certain provision of the law



1 has done so on a long-standing basis and
2 appears before Your Honor with that position
3 and says, Your Honor, we've done this this way
4 for many years; we're entitled to deference,
5 Your Honor can consider that. You're not bound
6 by it. Ultimately, the decision about any
7 legal matter is yours. I mean, there are many
8 cases in which there's been deference argued in
9 which the Court ---

10 **THE COURT:** I'm bound by -- unless it's arbitrary --
11 hold on. Arbitrary, something else and ---

12 **MR. HARRIS:** Capricious.

13 **THE COURT:** ---- manifestly contrary to the statute.

14 **MR. HARRIS:** Right.

15 **THE COURT:** So, I would be bound by it unless I can
16 through logic defeat those particular ---

17 **MR. HARRIS:** Yes, sir.

18 **THE COURT:** --- elements and I think about the only
19 way you can defeat that is just go back to
20 plain language.

21 **MR. HARRIS:** Right. But, ultimately, if Your Honor
22 believed that the agency before you had the
23 particular matter wrong, had the law wrong,
24 then Your Honor can -- is not bound to the
25 deference doctrine. Here, Duke says that the



1 Department had some long-standing position and
2 Duke attempts to argue that position on behalf
3 of the Department, which I don't think they're
4 entitled to do that, Your Honor. I don't think
5 they're entitled to make our deference argument
6 for us. First of all, we don't argue deference
7 in this case, Your Honor. I mean, clearly,
8 we're not -- we're not trying to tell you that
9 we should be given deference. I will tell you
10 that since the form was revised in 2014 until
11 today there has been no change in the
12 Department's position. The Petitioners argue
13 that we've been inconsistent since '14. We
14 have not. That's just not the case and that's
15 -- I think in some of the deposition testimony
16 and the -- even the memo to which I objected,
17 Your Honor, and we still object to the extent
18 Your Honor refers to it, the bottom, the last
19 paragraph of that memo clearly states what the
20 Department's position is, which is we believe
21 this is a lifetime limitation.

22 **THE COURT:** All right.

23 **MR. HARRIS:** But I don't think that -- that Duke can
24 argue that we had a position for some period of
25 time and, therefore, Your Honor, Duke says we



1 argue deference on behalf of the Department for
2 that position. I mean, I think it is only the
3 agency that can argue deference and we're not
4 trying to argue that today.

5 Your Honor, let me sort of -- certainly, Your
6 Honor, stop me when you want to or when you
7 feel like you've heard enough of any of this,
8 but I do want to address some of the factual
9 areas where we have some factual disputes. One
10 is clearly in the area deference.

11 **THE COURT:** I don't think any of y'all ever want to
12 give me the standard of being able to shut you
13 down when I feel like I've heard enough.

14 **MR. HARRIS:** Sir?

15 **THE COURT:** I don't think any of y'all want to be
16 able to give me the standard to be able to shut
17 you down when I feel like I've heard enough.

18 **MR. HARRIS:** Well, No, sir, Your Honor, I'll abide
19 by what you tell me to do.

20 Certainly the credit -- excuse me, that
21 deference doctrine and the proposition of that
22 on the part of Duke is something we would -- we
23 would disagree with and are unaware of any case
24 law that would allow ---

25 **THE COURT:** Okay. You can move on.



1 **MR. HARRIS:** Okay. Duke has made arguments that --
2 that the credit should be allowed on an annual
3 basis partly because the statute addresses
4 doing things on an annual basis, like claiming
5 the credit. But, Your Honor, any deduction of
6 credit or exemption is typically done on an
7 annual basis and is part of an annual return,
8 just like the examples that both sides have
9 given you with respect to how the legislature
10 can do this. Those statutes allow a credit,
11 which is part of an annual return. I mean,
12 that's how the credit is earned. And they
13 also, like this statute, Your Honor, provide
14 for carryforward provisions, but I don't think
15 the fact that the statute is implemented
16 annually in terms of the credit or in terms of
17 a return that might be required to be filed is
18 suggestive in and of itself that it's always
19 annual. That couldn't be the case. It would
20 always be the case that if there's a limitation
21 on the credit, it would be addressed in the
22 statute. Here, it's addressed in (G).

23 I'm also not altogether certain, Your Honor,
24 and Your Honor can certainly look at the
25 statutes that both sides have cited with



1 respect to tax credits that the credits that
2 have involved lifetime credits were always
3 facility credits. So, I'm not sure that I --
4 with respect to 12-14-60, I think you could
5 argue these are facility credits. They are
6 credits to property at facilities that they've
7 got. I don't know to the extent that's
8 important to Your Honor.

9 There's been a good bit of talk about the
10 form, Your Honor. And we would disagree with
11 the form, the import of the form and the
12 history of the form. At least we disagree in
13 some areas. The form was established in 1998
14 or was issued originally at least as it relates
15 to the credit. It then was revised a number of
16 times. We would disagree that the revisions to
17 the form were always significant or
18 substantial. They were not. They were in 2011
19 because the legislature opened this credit up
20 to other parts of the state, so there was more
21 done to the form then. Sometimes the changes
22 in the form were really quite minor. But in
23 any event, Your Honor, forms are a -- certainly
24 a means of guidance. The Department wants to
25 provide guidance to taxpayers. It's a means of



1 guidance. People calling into the Department
2 and asking questions is a means of guidance.
3 Obviously, a revenue ruling is a higher means
4 of guidance as is a department determination,
5 which is the Department's final position on a
6 matter. Forms fall somewhere I suppose in the
7 middle, Your Honor,. They certainly aren't a
8 revenue ruling; they certainly aren't a
9 department determination. And forms are often
10 the product of someone at the Department who is
11 well meaning and trying to do his or her job,
12 but the Department is not bound necessarily by
13 a form which is not vetted. This particular
14 form somehow got in the mix as it did. It
15 continued to be used. There was no reason
16 particularly to look at the form once it had
17 been prepared with respect to the lines and how
18 it would suggest someone compute the tax. And
19 then what happened in about 2013 there was a
20 call from an outside practitioner that said,
21 what does this mean, what does this statute
22 mean. And that was the point which Ms.
23 Vanstory with policy, a 20+ year very dedicated
24 employee, a tax manager, did what she was
25 supposed to do which is look at the law, look



1 at the form. She conferred with others within
2 the policy section, did what she was supposed
3 to do. This was not a star chamber decision,
4 Your Honor. Did a good bit of research and she
5 testified about that, and came to the
6 conclusion ---

7 **THE COURT:** Well, a star chamber decision is pretty
8 binding; it's just lack of due process.

9 **MR. HARRIS:** Well ---

10 **THE COURT:** Well, some would argue that.

11 **MR. HARRIS:** Right. I guess the point I'm trying to
12 make, Your Honor, Ms. Vanstory didn't in and of
13 herself by herself do this ---

14 **THE COURT:** All right.

15 **MR. HARRIS:** --- and testified. She conferred with
16 other folks, did what she was supposed to do,
17 and made the conclusion that the form didn't
18 accurately reflect the law, and that's when the
19 form was changed. Your Honor, I would -- Your
20 Honor has the form, so I would say this, that
21 the Department's view of the form is that it is
22 ambiguous. I'm not gonna tell Your Honor that
23 I would disagree with the computation section
24 of the form, but the second page of the form,
25 sometime -- the front page of the form on each



1 and every one of these forms that you have in
2 front of you, restates the imposition in the
3 statute and it says, utilities are limited to
4 no more than five million dollars in credit.

5 **THE COURT:** I would agree with you and I remember
6 when -- you can give the ambiguity of the form
7 if it was only used for one year. The problem
8 about the form is if you can use that form
9 every year, then -- year in and year out, then
10 the complication allows you to reach that five
11 million dollar threshold each and every year.
12 So, on its face, if you say only one year, look
13 at the form by itself, then you are correct, it
14 doesn't show -- it doesn't set it forth one way
15 or the other. He didn't take it the next step.
16 I think the next step is pretty obvious. And
17 the next step is that that form can be used for
18 multiple years and therein lies the difficulty
19 with the argument. But then that's back to
20 whether I'm going to consider agency deference
21 or not.

22 **MR. HARRIS:** Yes, sir. Right. I understand, Your
23 Honor. I just -- the form is -- and forms are
24 a matter of instruction.

25 **THE COURT:** Yes.



1 **MR. HARRIS:** It's an attempt by the Department to
2 aid and assist taxpayers. There are -- I'd
3 hate to even tell you how many forms there are
4 over there, Your Honor, and how often they are
5 looked at, how frequently they have to be
6 changed for various things.

7 **THE COURT:** Okay. I mean, there's a lot.

8 **MR. HARRIS:** It does and this was an instance in
9 which the form -- really, there was nothing to
10 alert the Department that there could be an
11 ambiguity in the form until we received the
12 call, and at that time we acted as we should.
13 Certainly, the form is not law; it doesn't
14 carry the weight of law. Nothing we do carries
15 the weight of the law, Your Honor. I mean,
16 obviously, a revenue ruling or department
17 determination would set forth our official
18 position, but even -- even in that instance,
19 the procedure to follow statute ---

20 **THE COURT:** --- the plain meaning of the law.

21 **MR. HARRIS:** Yes, sir. The prior audit -- again,
22 trying to just touch on a few things to let
23 Your Honor know. In 2008, 2011, that audit had
24 absolutely nothing to do with the tax credit in
25 this case. From the standpoint of the



1 overriding central issue -- in fact, it wasn't
2 even a sub issue, Your Honor. My understanding
3 of the dispute between the parties had to with
4 the license tags and Mr. Sharpe testified to
5 that. He said the tax credit audit portion of
6 that 2008, 2011 was tangential to the overall
7 issue of the audit itself. In fact, I believe
8 Mr. Sharpe's testimony was that the tax credit
9 portion of the audit did not even play in the
10 settlement. It wasn't even part of the
11 settlement of that audit or that dispute. Mr.
12 Tresh mentioned that there was an assessment
13 for back taxes in this case, and it may be a
14 simpler matter, I just wanted to comment on
15 that with how you view. We issued a notice of
16 adjustment, Your Honor. Duke left this audit
17 period under our view with seven hundred
18 thousand dollars of credit remaining. We have
19 not assessed Duke for any taxes. We issued a
20 notice of adjustment saying you now have use
21 credits as the audit appeared. We've allowed
22 every bit of it. You have seven hundred
23 thousand left. So there's a dispute about what
24 the carryforward is, but currently there's no
25 -- I mean, we haven't assessed them for



1 anything.

2 **THE COURT:** So I can be clear, you're saying as of
3 yet Duke has not reached its lifetime
4 limitation ---

5 **MR. HARRIS:** Yes, sir.

6 **THE COURT:** --- based on your viewpoint.

7 **MR. HARRIS:** Yes, sir. Through the audit period.

8 **THE COURT:** Yeah. Okay.

9 **MR. HARRIS:** I mean, based on their viewpoint, their
10 carryforward is greater than the seven hundred
11 thousand we allowed.

12 **THE COURT:** That's not ---

13 **MR. HARRIS:** Yes, sir.

14 **THE COURT:** That's not an issue before me.

15 **MR. HARRIS:** Sort of briefly about the revenue and
16 Fiscal Affairs and their fiscal impact
17 statement, again, I know Your Honor, has our
18 briefs. We ---

19 **THE COURT:** And read them.

20 **MR. HARRIS:** Sir?

21 **THE COURT:** And have read them.

22 **MR. HARRIS:** Well, bless your heart, Judge. I
23 appreciate you tolerating some of what I
24 probably wrote, but in any event, the fiscal
25 impact statement prepared by the RFA, the



1 deposition of the -- of Frank Rainwater, who is
2 the chief fellow over there, the director, I
3 think, but in any event, his testimony was very
4 clear that the impact statement prepared by the
5 RFA was done so without any contact with the
6 Department. None. And, in fact, he testified
7 that he saw Meredith Cleland, who is a
8 Department employee, about a year later and
9 they were chatting and Meredith said, you know,
10 we disagreed with your impact statement that
11 you did in 2017. This was 2018 when he saw Mr.
12 Cleland. So, just to point out to Your Honor,
13 there are a lot of disagreements about the
14 peripheral areas of the case.

15 **THE COURT:** Okay.

16 **MR. HARRIS:** Which we view -- we view the matter is
17 outside the plain meaning of the statute to be
18 peripheral areas.

19 **THE COURT:** Okay. I'm just curious, was that
20 statement by Mr. Cle- ---

21 **MR. HARRIS:** Cleland, yes, sir.

22 **THE COURT:** --- Cleland, made before this
23 litigation?

24 **MR. HARRIS:** It was made before this -- it was made
25 in 2018, Your Honor.



1 **THE COURT:** Okay.

2 **MR. HARRIS:** Our department determination was issued
3 in '19 ---

4 **THE COURT:** I was thinking through my Rules of
5 Evidence, that's all. Go ahead.

6 **MR. HARRIS:** I think it was the fall of '18.

7 **THE COURT:** Okay.

8 **MR. HARRIS:** Your Honor, I'll be obviously glad to
9 answer any questions you have of me.

10 **THE COURT:** I'm fine.

11 **MR. HARRIS:** I think our position is
12 straightforward; it's tied to the statute,
13 clear meaning of the words, supported by the
14 title. To the extent you get beyond that and
15 you think reasonable folks could disagree as to
16 the meaning of the statute and the case law is
17 wide and long with respect to how the Court
18 will view a credit, it's given as a matter of
19 grace, and it just -- it simply cannot be
20 broadened or taken beyond or extended in some
21 fashion or forced in some fashion to allow Duke
22 to take the credit in this case.

23 Thank you, Judge. I appreciate your time.

24 **THE COURT:** All right. You want to take a break or
25 are we -- we can take a little break. If



1 everybody's good, we'll keep on going.

2 **MR. HARRIS:** Whatever suits everybody, Judge.

3 **THE COURT:** All right.

4 **MR. TRESH:** Yes, Your Honor.

5 **PETITIONER'S REPLY BY MR. TRESH:**

6 **MR. TRESH:** Thank you. I don't think I'll be very
7 long subject to questions from the Court. I do
8 want to make a couple of points.

9 First, with respect to this strict
10 construction. We're working on the plain
11 language of the statute, there is no strict
12 construction. Strict construction only applies
13 when the statute is ambiguous. Now, to the
14 extent that the statute is ambiguous what the
15 courts have told us to do is we don't read
16 words into the statute; we don't read where
17 lifetime ends and we don't construe statutes in
18 violation of legislative intent. One of the
19 things that I thought was interesting in Mr.
20 Harris' presentation was that when you look at
21 the statute Section (A) through (E) as you've
22 noted, there is no limitation and that is the
23 aggregate at the credit that the five million
24 dollar limitation doesn't apply to anybody
25 else, but yet -- and the credit is annual, but



1 yet the Department argues that we have this
2 five million dollar limitation relating back to
3 that credit that's unlimited for everybody else
4 and not only is that five million dollar limit
5 applied annually, but we're gonna apply that
6 for all time. That seems a little incongruous.
7 Certainly, the legislature could have done
8 that, but it didn't say that.

9 On this point about Duke arguing what we call
10 reverse deference, I think it is a little bit
11 more nuance than that that. First, I'm not
12 aware of any case, perhaps there is, but that
13 speaks to if a court finds that a statute is
14 ambiguous and a court finds that the depart- --
15 that an agency had a long-standing policy that
16 one party or another is precluded from making
17 that argument. Mr. Harris said we can't do
18 that. I don't know of any case or any
19 authority that would support that proposition.
20 And in that regard, I do think it's important
21 that the cases that talk about long-standing
22 agency acquiescence speak to legislative
23 acquiescence. So, again, this isn't about which
24 party is making the argument, but in the
25 context of a legislative -- of an ambiguous



1 statute, if the Court is going to entertain
2 other evidence, what we're looking for is
3 whether the legislature is deemed to have
4 acquiesced to the position. In this case, the
5 legislature knew -- very well knew what this
6 position was and never made any changes. Put
7 aside that purposed clarification. The
8 legislature didn't do anything.

9 **THE COURT:** I've always found that an interesting
10 argument. The first element of that would be
11 at what point does the notoriety of the
12 position have to be in order for the
13 legislature to be aware of that position. Does
14 that notoriety rise to the level of revenue
15 ruling or department determination? I mean,
16 would that notoriety eve rise to the level of
17 forms. And the second is, along those lines
18 is, what aspect of the legislature is it, just
19 -- you've got evidence where there was a bill,
20 but how much knowledge -- where do I discern
21 that the entire legislature had knowledge of
22 that? It's always just been interesting to me.
23 You can respond to that if you want.

24 **MR. TRESH:** I'd like to, Your Honor. I'm not quite
25 sure where the bright line is. But here's what



1 I know ---

2 **THE COURT:** Well, there is no bright line. So,
3 you're right on that one.

4 **MR. TRESH:** I know in this case I've got a lot of
5 notoriety. I have the form. I have the
6 legislature amending the statute multiple times
7 during the period at issue and the DOR coming
8 out and amending the form in conjunction with
9 those legislative amendments. So, this isn't
10 a statute that the legislature never touched.
11 It actually made amendments multiple times
12 during the course of this case. We also have
13 the Department of Revenue, Meredith Cleland,
14 testify in a deposition that the legislature
15 was aware of the Department's view of credit as
16 an annual limitation. Now, Mr. Harris may
17 dispute that. I think that will be an
18 undisputed fact; I'll leave that to him. But
19 the Department's policy person, the liaison to
20 the legislature, said that the legislature
21 knew. I've also got the Office to Fiscal
22 Affairs attaching the newer revenue score to
23 this proposed bill and sending it to the
24 legislature. So put aside the impact of the
25 proposed bill. RFA is telling the legislature;



1 the forms are telling the legislature; the
2 Department is auditing and -- I mean, the level
3 of notoriety here, I'm not sure how much higher
4 it could be. It's pretty high in this case,
5 especially when folks are telling various
6 legislators that the Department is interpreting
7 the credit as an annual limitation.

8 Mr. Harris referenced the use of the term
9 total in the title of the bill and, of course,
10 as Your Honor pointed out, that doesn't tell us
11 much. It could be the total annual credit. As
12 a matter of fact, the title of the bill we'd
13 say doesn't shed any light on the situation to
14 the extent that the Department -- to the extent
15 that Your Honor finds it ambiguous,
16 particularly in the context of the word
17 aggregate here. When we're talking total, it
18 relates very nicely to the rest of the statute
19 that speaks to an annual limitation. So, at
20 best, that argument cuts both ways. We'd
21 suggest it cuts more in our favor.

22 A comment on Ms. Vanstory's changing of the
23 rules here, of the game, Ms. Vanstory in this
24 case testified that she thought that the credit
25 was too broad and that's why she changed it,



1 and she never went to the Department's General
2 Counsel and she never went to the Department's
3 Director and didn't consult anybody. So, I'm
4 kind of picking up on Mr. Harris's star chamber
5 comment. This was really done in the quiet of
6 night with just a few managers at the
7 Department exercising their authority.

8 **THE COURT:** At night, huh?

9 **MR. TRESH:** Well, I guess I don't know that, Your
10 Honor.

11 The last piece with regard to a few comments
12 on the settlement, that audit that occurred in
13 2008 through 2011, again relevance indicative
14 of the Department's position, they very clearly
15 looked at the credit. Maybe this is a fact in
16 dispute to the extent Your Honor thinks this is
17 highly relevant. The evidence we believe would
18 show that they very closely looked at the
19 credit. It most certainly formed a basis of
20 the settlement that was reached by the
21 Department and Duke Energy in 2008 through
22 2011. It was part of it. We documented what
23 the credit carryforwards would be. And so back
24 at the time we were doing that settlement, our
25 view would be that everybody including the



1 Department's Director, its General Counsel, and
2 a lot of folks that were involved in that
3 settlement, and a lot of folks that were
4 involved on the Duke Energy side, we were all
5 viewing that as blessing the annual limitation
6 that Mr. Sharpe concluded existed in the audit
7 determination.

8 I would note also, Your Honor, as to the
9 question about the timing of Mr. Cleland's
10 statement, that the Department disagreed with
11 the RFA analysis. I think Your Honor would see
12 that testimony in this case showed that Mr.
13 Cleland's statement was made long after this
14 dispute got started. It was before the
15 litigation was filed, but it was made in the
16 context of hearings and meetings Duke Energy
17 and the Department were having with respect to
18 this credit and so there was a dispute going
19 and all Mr. Cleland was doing was communicating
20 the litigation position of the Department.

21 One more comment on the notoriety in terms of
22 the legislative acquiescence. Your Honor, when
23 the Court made its ruling in the man- -- in
24 fact, when this Court made its ruling in the
25 Duke Energy Manufacturing issue case and cited



1 to the fact that there was legislative
2 acquiescence, one of the things that this Court
3 took into account in determining the notoriety,
4 I believe the Court said that the long period
5 of time in which Duke Energy filed returns
6 using the multi-factor apportionment formula
7 leads to the conclusion that the returns were
8 filed in accordance with the policies and
9 filing requirements promulgated by the
10 Department understood by Duke Energy. So, in
11 other words, in looking at legislative
12 acquiescence in prior cases, this Court has
13 looked to both the time that items went on and
14 the filing requirements prescribed by the
15 Department, both of which would suggest that
16 legislative acquiescence exists in this case.

17 **THE COURT:** I'd have to go back and look at that. I
18 may have been referring to the position of the
19 Department and the consistency of that position
20 raised as opposed to any acquiescence, so ---

21 **MR. TRESH:** I -- I -- I'm sorry.

22 **THE COURT:** I'll go back with a cogitation mode on
23 that one.

24 **MR. TRESH:** Thank you, Your Honor. And it was --
25 I'll note that that quote was in context at the



1 Court citing the Etowah case.

2 **THE COURT:** Yes, that has the entire concept in
3 there.

4 **MR. TRESH:** Yes, sir.

5 **THE COURT:** I think Etowah was very well stated.

6 **MR. TRESH:** We agree, Your Honor. And with that I
7 guess I'd come back to again where we started.
8 I think for any taxable year, the context of
9 the entire statute, read it all together, you
10 don't isolate (G). We think that can just --
11 invoke the plain language and we think that
12 that warrants any ambiguity being construed in
13 our favor.

14 **THE COURT:** Okay.

15 **MR. TRESH:** Thank you, Your Honor.

16 **THE COURT:** Thank y'all. I will issue a decision as
17 soon as I can. I've got a lot going on. But
18 thank y'all for your time.

19 **MR. HARRIS:** Well, thank you. Thank you.

20 **MR. TRESH:** Thank you, Your Honor.

21 **THE COURT:** I like your mask.

22 **MS. TORODOVA:** Thank you.

23 (There being nothing further, the motion for summary
24 judgment concluded at 11:51 a.m.)
25

