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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

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

Duke Energy Corporation, ... Appellant,

v.

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

FINAL BRIEF OF RESPONDENT

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INTRODUCTION

Appellant Duke Energy Corporation (Duke) is an electrical utility operating in South Carolina. It is eligible for certain investment tax credit ("tax credit" or "credit") under S.C. Code Ann. § 12-14-60 (2014), provided the investment qualifies and subject to the five million dollar credit limitation imposed by the credit statute for a utility like Duke. For tax years 1996 – 2014 (Audit Period), the Respondent South Carolina Department of Revenue ("Department") audited Duke's tax records and determined Duke had exceeded the five million dollar lifetime limitation allowed under the credit statute. As a result, the Department issued Duke a Notice of Adjustment which limited the amount of carry-forward credit Duke could claim beyond the Audit Period. Duke was allowed to both claim and use the credit during the Audit Period and, due in part to the use of the credit, Duke paid no corporate income tax for a substantial portion of the Audit Period.

The central issue in the case is the meaning of the credit limitation imposed by § 12-14-60 for an entity like Duke, and specifically, the limitation imposed by S.C. Code Ann. § 12-14-60(G) (2014) which states that a utility is allowed "no more than five million dollars" in credit. The Department's final agency decision determined the five million dollar limitation is a lifetime limitation; Duke contends the limitation is five million dollars annually. The Department's position focuses on the text of § 12-14-60 and the rules of statutory construction, while Duke argues, in part, matters outside the language of the statute, including the Department's use of a form to calculate the credit and legislation introduced in the 2017 - 2018 Legislative Session to amend subsection (G), which would have changed the limitation from a lifetime to an annual limitation if passed.

The gist of Duke's appeal is that the Administrative Law Court (ALC) committed error in limiting the credit Duke could claim to five million dollars on a lifetime basis. Duke's arguments fail for several reasons: 1) § 12-14-60(G) plainly limits the credit Duke may claim to "no more than five

million dollars," and there is no other modifier to describe this limitation; 2) that if the statute is ambiguous, the ambiguity should not be construed strictly against Duke, contrary to well established case law in South Carolina; 3) that a prior version of the Department's form used to calculate the credit is dispositive of the meaning of the credit limitation, although the Department's forms do not carry the force or effect of law, and Duke argues the Department cannot revise the form, even if the revision is done to comport with the credit limitation imposed by the statute; 4) that proposed legislation in 2017 which would have changed the credit limitation to an annual basis, and which was not enacted by the General Assembly during a two year session, is nevertheless indicative of the legislative intent of the credit statute in its current form; 5) that the State of South Carolina has been unjustly enriched because Duke was not allowed to claim carry-forward credit of $19,850,727 beyond the Audit Period; 6) and that it was denied due process to contest the Department's position, notwithstanding Duke filed a protest to the Department's Notice of Adjustment and subsequently filed a request for a contested case hearing before the ALC challenging the Department's final agency decision and was allowed a *de novo* hearing pursuant to the South Carolina Administrative Procedures Act (APA).

The ALC issued its Order giving a cogent analysis of the statutory construction of § 12-14-60 and ruled correctly that Duke is limited to claiming no more than five million dollars in credit on a lifetime basis. Respectfully, this Court should affirm that ruling.

COUNTER-STATEMENT OF THE ISSUES ON APPEAL

I. **DID THE ADMINISTRATIVE LAW COURT CORRECTLY RULE THAT DUKE IS LIMITED TO NO MORE THAN FIVE MILLION DOLLARS IN TAX CREDIT ON A LIFETIME BASIS UNDER § 12-14-60?**

II. **DID THE ADMINISTRATIVE LAW COURT CORRECTLY REJECT DUKE'S ARGUMENTS THAT 1) THE DEPARTMENT ESTABLIHSED A BINDING INTERPRETATION OF THE CREDIT LIMITATION THROUGH THE USE OF**

ITS FORM, AND 2) THE LEGISLATURE ACQUIESCED IN THE DEPARTMENT'S FORM IN USE PRIOR TO 2014?

III. DID THE ADMINISTRATIVE LAW COURT CORRECTLY APPLY THE PRINCIPLES OF STATUTORY CONSTRUCTION IN DETERMINING THE CREDIT LIMITATION IMPOSED BY § 12-14-60?

IV. DID THE ADMINISTRATIVE LAW COURT CORRECTLY REJECT DUKE'S ARGUMENTS RELATED TO DUE PROCESS, ESTOPPEL, UNJUST ENRICHMENT, SOUTH CAROLINA'S RULE-MAKING PROCESS, AND THE TAXPAYERS' BILL OF RIGHTS?

STATEMENT OF THE CASE

This matter came before the ALC in accordance with the APA, S.C. Code Ann. § 1-23-310, et seq. (2005). Duke requested a contested case hearing to challenge a final agency decision issued by the Department on April 26, 2019. (R. pp. 1324-1329; Dep't MSJ Ex. B, pp. 1-6.) In the final agency decision, the Department concluded Duke was limited to claiming no more than five million dollars in investment tax credit on a lifetime basis under § 12-14-60. (R. p. 1329; Dep't MSJ Ex. B, p. 6.) The Department issued Duke a Notice of Adjustment dated July 19, 2018 (Adjustment) stating Duke used $4,298,806 of tax credit through the Audit Period, leaving it with a carry-forward balance of $701,195 beyond the Audit Period. (R. pp. 1320-1322, 1324-1325; Dep't MSJ Ex. A, pp. 1-3; Dep't MSJ Ex. B, pp. 1-2.) The Department disallowed $19,850,727 in carry-forward credit claimed by Duke on its corporate tax returns for the Audit Period. (R. pp. 1320-1322, 1324-1325; Dep't MSJ Ex. A, pp. 1-3; Dep't MSJ Ex. B, pp. 1-2.)

Duke and the Department filed Cross-Motions and Memoranda for Summary Judgment, Responses to the Motions and Replies to the Responses. (R. pp. 66-82; Department's Motion and Memorandum filed July 31, 2020, pp. 1-17); (R. pp. 30-64; Duke's Motion and Memorandum filed July 31, 2020, pp. 1-35); (R. pp. 84-95; Duke's Response filed August 31, 2020, pp. 1-12); (R. pp. 96-115; Department's Response filed August 31, 2020, pp. 1-20); (R. pp. 117-129; Duke's Reply filed

September 15, 2020, pp. 1-13); (R. pp. 130-137; Department's Reply filed September 15, 2020, pp. 1-8.) The ALC granted the Department's Motion by Order dated October 27, 2020, concluding Duke was limited to claiming no more than five million dollars in tax credit on a lifetime basis under § 12-14-60. (R. pp. 5-26; ALC Order, pp. 1-22.)

Duke filed its Notice of Appeal on November 24, 2020. Duke filed a Motion for extension of time to file its initial brief until February 10, 2021, which was granted by the Court on December 29, 2020. (R. p. 27; Court Order granting Duke an extension, p. 1.) The Department filed a Motion for extension of time file its initial brief until April 12, 2021, which was granted by the Court on March 2, 2021. (R. p. 28; Court Order granting the Department an extension, p. 1.) The Department filed a Motion for a second extension of time to file its initial brief until April 22, 2021, which was granted by the Court on March 18, 2021. (R. p. 29; Court Order granting the Department additional ten (10) day extension, p. 1.)

STATEMENT OF FACTS

A. Legislative History of § 12-14-60.

Section 12-14-60 was originally enacted in 1995 to provide investment tax credits for economic impact zones. *See 1995 S.C. Act No. 25.* The statute was amended in 1997 to provide a ten year carry-forward provision for unused credit. *See 1997 S.C. Act No. 151.* Neither of these versions of the statute imposed any limit on the total amount of the credit which could be claimed. During the 1998 legislative session, the General Assembly passed *1998 S.C. Act No. 419* to limit the credit for utility companies to $1,000,000; later that same session, *1998 S.C. Act No. 442* was passed to increase the credit to $5,000,000. 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." (R. pp. 1331-1337; Dep't MSJ Ex. C, pp. 1-7.) (Emphasis added).

Section 12-14-60 was amended again in 2005 (*see 2005 S.C. Act No. 113*) and 2010 (*see 2010 S.C. Act No. 290*) to extend the carry-forward provision under certain circumstances and to expand the geographical territory in which the credit may apply. The current language of § 12-14-60(G) imposing the limitation has remained constant since its inception in 1998, and at no time has the General Assembly changed the credit limitation imposed on a utility like Duke, although clearly there was an opportunity to do so on at least two occasions since 1998. Moreover, the General Assembly considered language which would have specifically changed the limitation from a lifetime to an annual basis during the 2017 – 2018 Legislative Session (S.0428), but the General Assembly chose not to pass the amendment. (R. pp. 800-802; Duke MSJ Ex. 30, pp. 1-3.)

B. Duke's Protest and The Revenue Procedures Act.

The South Carolina Revenue Procedures Act (RPA) provides procedures and remedies for a taxpayer to determine a dispute with the Department. *See* S.C. Code Ann. § 12-60-10, *et seq*. (2014). In the Department's Adjustment, Duke was advised of its right to file a written protest within ninety (90) days should it disagree with the Department's proposed adjustment. (R. p. 1320; Dep't MSJ Ex. A, p. 1.) Thereafter, Duke filed its protest on October 16, 2018. (R. pp. 1154-1159; Duke's MSJ Ex. 38, pp. 1-6.) The Department Determination (Determination)[1] was issued on April 26, 2019, at which time Duke exhausted its RPA prehearing remedy under S.C. Code Ann. § 12-60-30(15) (2014) and was allowed to seek relief from the Determination by filing a request for a contested case hearing pursuant to S.C. Code Ann. § 12-60-460 (2014), which it did on May 24, 2019. (R. pp. 1176-1185; Duke's MSJ Ex. 39, pp. 1-10.)

[1]The final agency decision of the Department is referred to as the Department Determination and is defined as "the final determination within the department from which a person may request a contested case hearing before the Administrative Law Court." *See* S.C. Code Ann. § 12-60-30(10) (2014 and Supp. 2018).

C. The Department's Form SC SCH. TC-11.

The form used to compute the tax credit under § 12-14-60 is Form SC SCH. TC-11 (credit form). The credit form was revised in 1998 following the amendment to § 12-14-60 imposing the credit limitation expressed in subsection (G). All versions of the credit form in use during the Audit Period conspicuously stated that the credit is limited to "no more than five million dollars" for an entity like Duke. (R. pp. 680-700, 711-713; Duke's MSJ Ex's. 8-18, pp. 1-21; Duke's MSJ Ex. 23, pp. 1-3.) On July 24, 2014, the Department revised the credit form to ensure the language of the form more clearly reflected the lifetime limitation expressed in subsection (G) and to better assist taxpayers in the computation of the credit. (R. pp. 711-713, 1328; Duke's MSJ Ex. 23, pp. 1-3; Dep't MSJ Ex. B, p. 5.)

The Policy Division (Policy) of the Department is responsible for interpreting the tax laws of the State and writing policy documents. (R. pp. 302, 303; VanStory Tr. pp. 6:6-25; 7:1-23.) The credit form as originally drafted in 1998 was not approved by Policy, and Policy reviewed the credit form in 2013 or 2014 after receiving an inquiry regarding the credit limitation in § 12-14-60(G). (R. pp. 304, 314, 315; VanStory Tr. pp. 32:14-22; 83:22-25; 84:1-12.) Policy reviewed the issue of the credit limitation expressed in the credit form, and the group reached a consensus that the credit limitation imposed by § 12-14-60(G) should be applied on a lifetime basis. (R. pp. 311, 312, 313, 314; VanStory Tr. pp. 80:12-25; 81:1-25; 82:1-25; 83:1-18.) As a result, Policy suggested the credit form be revised to confirm the lifetime limitation of the tax credit, and this revision to its credit form was implemented in 2014. (R. pp. 711-713; Duke's MSJ Ex. 23, pp. 1-3.)

D. The Department's Audit.

The Department examined 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

did not audit the underlying basis for credit, and for purposes of the Adjustment, the Department accepted the amount of credit reported by Duke on its South Carolina corporate income tax returns for the Audit Period. The Department issued its Adjustment to Duke dated July 19, 2018, stating that Duke used $4,298,806 of credit through December 31, 2014, leaving it with a carry-forward balance of $701,195 beyond the Audit Period.[2] The Department disallowed $19,850,727 in carry-forward credit claimed by Duke on its returns for the Audit Period.

The table below lists the amounts of credit as computed by Duke and Department for the Audit Period:

Tax Credit Per Return		Tax Credit Allowed by DOR	Tax Credit Used by Duke	Tax Credit Disallowed	Tax Credit Carry Forward Per Duke	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	4,955,817	-0-	1,937,887	4,955,817	20,551,921	701,194
	24,850,727	**5,000,000**	**4,298,806**	**19,850,727**		

[2]The Adjustment was not an assessment or demand for additional tax for the Audit Period, but only an adjustment of the amount of credit Duke could claim on a carry-forward basis under § 12-14-60.

Duke claimed a net operating loss for the tax years 2004 through 2013, so the tax credit was not claimed during those years. Duke used $1,937,887 in 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. (R. p. 7; ALC Order, p. 3.)

E. Unrelated Audit.

The Department conducted a separate audit of Duke covering the period from 2008 - 2011 (unrelated audit). (R. p. 714; Duke's MSJ Ex. 26, p. 1.) The specific issue before the Court in this Appeal – the credit limitation imposed by § 12-14-60 – was not addressed in the final agency decision in the unrelated audit, nor was it an issue in the dispute or a consideration in the resolution of the unrelated audit (which dealt with an adjustment to license fees – the credit allowed in § 12-14-60 applies only to corporate income taxes). (R. pp. 272, 273, 276, 284, 285; Sharpe Tr. pp. 96:10-25; 97:1-16; 100:1-13; Donovan Tr. pp. 85:14-25; 86:1-5.) The unrelated audit was conducted prior to Policy undertaking any review of the credit limitation imposed by § 12-14-60, which is before the Court in this case. (R. p. 304; VanStory Tr. p. 32:14-22.)

F. Failed Legislation.

Senate Bill S.0428 was introduced in the spring of 2017 during the 2017 – 2018 Regular Session of the South Carolina General Assembly. The proposed amendment would have placed the word "annually" after the phrase "no more than five million dollars" found in § 12-14-60(G). (R. pp. 800-802; Duke's MSJ Ex. 30, pp. 1-3.)

Meredith Cleland (Deputy Director of Government Services) is a long-time employee of the Department. (R. p. 348; Cleland Tr. p. 9:10-17.) Mr. Cleland's role with the Department is to provide assistance to the General Assembly regarding tax legislation when requested. (R. pp. 349, 350; Cleland

Tr. pp. 10:21-25; 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. (R. pp. 351, 813-814; Cleland Tr. p. 47:3-18; Duke's MSJ Ex. 33, pp. 1-2.) Mr. Cleland provided the draft amendment to the Chairman as requested; he was aware that the Department's position was the credit limitation was applied on a lifetime basis. (R. pp. 351, 352, 356; Cleland Tr. pp. 47:25; 48:1-23; 83:14-18.) The Department will assist in drafting legislation when requested by the General Assembly, even if the draft is in opposition to the Department's view on a particular matter. (R. pp. 351, 352, 356, 357; Cleland Tr. pp. 47:19-25; 48:1-23; 83:14-25; 84:1-7.)

A fiscal impact statement was prepared by the South Carolina Office of Revenue Fiscal Affairs (RFA) in connection with S.0428. (R. pp. 803-809; Duke's MSJ Ex. 31, pp. 1-7.) The RFA had no communication with the Department in the process of preparing its analysis associated with the fiscal impact statement, and most of the information used by RFA in its analysis was provided by Senate staff. (R. pp. 258, 259; Rainwater Tr. pp. 36:20-25; 37:1-13.) After preparing its fiscal impact statement associated with S.0428, RFA learned the Department disagreed with the fiscal impact statement and viewed the credit "as a one time credit." (R. pp. 259, 260; Rainwater Tr. pp. 37:14-21; 40:7-13.) The RFA agreed that its analysis that S.0428 would have no effect on the State general tax revenue for

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[3]Duke argues the Department began "lobbying" the Legislature not to pass S.0428. (Duke brief, p. 4.) The Department does not employ a lobbyist, although Duke does and Mr. Monroe "couldn't list them all." (R. p. 335; Monroe Tr. p. 40:13-17.) Mr. Monroe was advised by Duke's lobbyists as to the status of S.0428 and he spoke with one of Duke's lobbyists "four or five, six, a dozen times" about the bill. (R. pp. 336, 337; Monroe Tr. pp. 42:12-15; 43:1-6.)

[4]Mr. Cleland does not establish policy positions for the Department. (R. p. 355; Cleland Tr. p. 82:2-6.)

2017 – 2018 would be different under the Department's view that the credit under § 12-14-60 is allowed on a lifetime basis. (R. p. 261; Rainwater Tr. p. 42:4-20.)

After having an opportunity to amend § 12-14-60 and change the limitation imposed by subsection (G) from a lifetime limitation to an annual limitation, the General Assembly chose not to do so. (R. p. 260; Rainwater Tr. p. 40:4-6.)

ARGUMENTS

In an appeal from the decision of an administrative agency, the APA provides the appropriate standard of review. *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 500-501 (Ct. App. 2008); *Turner v. S.C. Dep't of Health & Envtl. Control*, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008); *Clark v. Aiken County Gov't*, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005). S.C. Code Ann. § 1-23-610(B) (Supp. 2013) provides the applicable standard, and sets forth the limitations upon which this Court may reverse or modify the ALC's decision:

> (D) The review of the administrative law judge's order must be confined to the record. The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the Appellant has been prejudiced because of the finding, conclusion, or decision is:
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The issue in this case 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).

Because § 12-14-60 provides a tax credit, which is a legislatively-created special circumstance that lessens the overall tax burden of Duke, South Carolina Courts have long held that the statutory tax reduction 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. *SCANA 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).

I. THE ALC CORRECTLY RULED THAT DUKE IS LIMITED TO NO MORE THAN FIVE MILION DOLLARS IN INVESTMENT TAX CREDIT UNDER § 12-14-60.

A. The Administrative Law Court's decision.

The ALC determined the limitation for investment tax credit as described in § 12-14-60 is a lifetime limitation. Stated differently, the aggregate of all tax credit which may be claimed by Duke under § 12-14-60 is limited to five million dollars. The ALC reached its decision after properly applying rules of statutory construction, and concluded the limitation of the tax credit was ambiguous and must be strictly construed against Duke. (R. p. 20; ALC Order, p. 16.) The Department argued before the ALC, and respectfully asserts in this appeal, that the plain language of § 12-14-60 limits Duke to no more than five million dollars in investment tax credit on a lifetime basis. Nevertheless, under either theory of statutory construction, Duke is limited no more than five million dollars on a lifetime basis and the decision of the ALC should be affirmed.

B. The plain language of § 12-14-60 is clear and unambiguous and limits Duke to no more than five million dollars in tax credit on a lifetime basis.

1. The Department's interpretation is consistent with the plain language of § 12-14-60.

S.C. Code Ann. § 12-14-60(A)(1) (2014) provides:

> **SECTION 12-14-60.** Investment tax credit.
>
> (A)(1) There 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). S.C. Code Ann. § 12-20-100 (2014) imposes a license tax on utilities, the type of business in which Duke is engaged. (R. p. 6; ALC Order, p. 2.) Therefore, the limitation imposed by § 12-14-60(G) applies to the amount of credit which may be claimed by Duke.

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. *SCANA Corp.*, 384 S.C. 388, 391, 683 S.E.2d 468, 469 (2009) (construing S.C. Code Ann. § 12-14-60(D) (2014)).

Section 12-14-60(G) limits the amount of the credit. The total amount of the credit for which Duke is eligible is "no more than five million dollars." No other subsection of the statute explains or

contradicts the limitation imposed. This is a concise and definite phrase which clearly conveys the intent of the General Assembly. Moreover, when imposing the credit limitation in subsection (G), the General Assembly established a clear marker that an "entity" (such as Duke) is limited to "no more than five million dollars" for "investments made after June 30, 1998." The plain language in subsection (G) clearly reflects the General Assembly's intention to limit the credit, on a global basis, for all **"investments"** (not just a single investment). Therefore, the plain and unambiguous language of § 12-14-60(G) limits Duke to a maximum of five million dollars in tax credit, and no other meaning is evident from the General Assembly.

When the subsections are read together as a whole, the clear meaning of the language is that the statute provides a lifetime limit of five million dollars 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.

2. The title to *1998 S.C. Act No. 419 and 1998 S.C. Act No. 442* reaffirms the lifetime credit limitation expressed in § 12-14-60(G).

The title to the Act amending the statute further bolsters the plain language in § 12-14-60(G) which limits the use of the credit on a lifetime basis. Unlike Duke's reliance on unenacted legislation and an e-mail from a member of Senate staff, our Courts have held that the title is part of an Act and 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). Outside of the language of § 12-14-60 itself, the title to the act imposing the credit limitation 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 *S.C. Act No. 419* to limit the credit for utility companies to one million dollars; later that same session, *S.C. Act No. 442* was passed to increase the credit to five million dollars. 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).

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 (April 13, 2021, 10:40 a.m.), https://merriam-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).

If there is any resort to matters outside the plain text of the statute, the title to the Act amending § 12-14-60 is a clear indication of the legislative intent of subsection (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 Duke) may claim after June 30, 1998 to five million dollars on a lifetime basis.**

3. Duke misinterprets the credit limitation imposed by § 12-14-60(G).

Throughout its argument before the ALC and this Court, Duke has focused on the phrase "any taxable year" (§ 12-14-60(A)(1)) in its construction of the meaning of the credit limitation. In furtherance of its argument, Duke asserts that the phrase "any taxable year" reflects the intention of the General Assembly to impose an annual limitation on the amount of credit which it may claim because the credit is a deduction on its annual corporate tax return. Duke 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. Duke conflates subtractions from income tax on a tax return with the plain meaning of the tax credit limitation imposed in § 12-14-60(G). In considering this argument, the ALC noted:

> 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). (Emphasis added).

(R. p. 14; ALC Order, p. 10.)

Duke argues that the phrase "any taxable year" in subsection (A)(1) and the carry forward provision in (D)(1) are consistent with the annual requirement to file a corporate income tax return and, therefore, the limitation in subsection (G) should be interpreted as annual. Similarly, according to Duke the limitation imposed in subsection (G) is annual because subsection (A)(2) addresses the formula used to calculate the amount of credit to be allowed in a tax year. Nevertheless, the ALC correctly determined that although components of § 12-14-60 allow the credit to be taken annually, or calculated and carried forward annually, nothing changes the clear lifetime limitation imposed by

subsection (G). Moreover, although from a timing standpoint the statute allows the credit for any taxable year, this does not make the limitation expressed in subsection (G) annual. Duke's analysis of the credit limitation ignores the clear marker in subsection (G) which establishes that Duke is allowed "no more than five million dollars" for all "investments" made after June 30, 1998. Duke does not and cannot refute 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 five million dollars under any circumstance.

The Department has allowed Duke to claim the tax credit "for any taxable year" as part of its annual corporate income tax return, and likewise, it has allowed Duke to carry forward unused credit under § 12-14-60(D)(1), subject to the lifetime limitation imposed by subsection (G). (R. pp. 6-7; ALC Order, pp. 2-3.) That a tax credit may be claimed on an annual return would never result in a credit being allowed ad infinitum as Duke argues. While income tax returns must 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 language of 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.

Duke's contention that the credit limitation is applied annually is not supported by the plain language of the statute: 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. *SCANA Corp.*, 384 S.C. 388, 391, 683 S.E.2d 468, 469 (2009). It is a harmonious interpretation of the clear language of § 12-14-60

to allow Duke a credit for any taxable year in which it qualifies under (A)(1), and determine the amount through the formula expressed in subsection (A)(2), while imposing a lifetime limitation of five million dollars pursuant to subsection (G).

C. Any ambiguity in the meaning of the credit limitation imposed for the amount of tax credit allowed under § 12-14-60 must be strictly construed against Duke.

As the moving party in this matter, Duke bears the burden of proving the tax credit should be applied on an annual basis. "[T]he burden of proof rests upon him who has the affirmative of the issue and does not shift to the defendant even when aided, in the first instance, by a rebuttable presumption." *Ford v. Atl. Coast Line R. Co.*, 169 S.C. 41, 168 S.E. 143, 167 (1932); *see also Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 132, 530 S.E. 2d 643, 651 (Ct. App. 2000). (R. pp. 9-10; ALC Order, pp. 5-6.) Importantly, § 12-14-60 provides a tax credit, and long-standing principles of statutory construction require that any ambiguity in the credit limitation expressed in § 12-14-60(G) must be strictly construed against Duke. *See TNS Mills, Inc*, 331 S.C. 611, 620, at 620, 503 S.E.2d 471, 476 (1998); *Southeastern-Kusan, Inc.*, 276 S.C. 487, 489, 280 S.E.2d 57, 58 (1981); *Thayer*, 307 S.C. 6, 413 S.E.2d 810 (1992); *Home Medical Systems, Inc*, 382 S.C. 556, 677 S.E.2d 582 (2009).

The logic of our Supreme 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 reduces the tax revenue of the State. Therefore, when interpreting a statute which, only 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 Duke.

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 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, 267 S.C. 548, 557, 230 S.E.2d 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,* 406 S.C. 132, 140, 750 S.E.2d 65, 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 Systems* 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 ALC found the equipment was entitled to the tax exemption. In reversing the decision of the ALC, the Supreme Court criticized the ALC for applying an expansive construction 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. S.C. 556, 565, 677 S.E.2d 582, 587 (2009).

As the party seeking the tax credit, Duke bears the burden of proving its interpretation of § 12-14-60 is correct and that it should be allowed to claim the full credit annually. Duke fails its burden because its interpretation seeks a forced construction of § 12-14-60 which unreasonably broadens the language of the statute and fails to bring itself squarely within the annual limitation for which it argues. *TNS Mills*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (citing *Walton v. Walton*, 282 S.C. 285, 318 S.E.2d 14 (1984)); *Avco Corp.*, 267 S.C. 581, 588, 230 S.E.2d 614, 617 (1976). 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 Duke.

II. THE ALC CORRECTLY REJECTED DUKE'S ARGUMENTS THAT 1) THE DEPARTMENT ESTABLISHED A BINDING INTERPRETATION OF THE CREDIT LIMITATION THROUGH THE USE OF ITS FORM, AND 2) THE LEGISLATURE ACQUIESCED IN THE DEPARTMENT'S CREDIT FORM IN USE PRIOR TO 2014.

A. The ALC correctly concluded the Department's form did not irrevocably establish its position.

The deference doctrine in South Carolina provides that a certain level of deference may be afforded the interpretation of a statute or regulation by an agency charged with its administration. *A.O. Smith Corporation v. South Carolina Department of Health and Environmental Control*, 428 S.C. 189, 833 S.E.2d 451 (2019); *Kiawah Development Partners, II v. South Carolina Dept. of Health and Environmental Control*, 411 S.C. 16, 766 S.E.2d 707 (2014). Duke attempts to assert a deference argument on behalf of the Department by insisting it has established "a long standing practice" through the use of its credit form.

In finding there was no authority for Duke's assertion of an inverse deference doctrine, and that the Department was not bound by a prior version of its credit form, the ALC aptly noted:

> 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.

(R. pp. 18-19; ALC Order, pp. 14-15.)

Duke contends the Department's position regarding the credit limitation was irrevocably stated through the use of its credit form prior to 2014. 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).

Forms are not, however, law, nor do they carry the same force and authority as law. S.C. Code Ann. § 1-23-10(4) (2005). (R. p. 18; ALC Order, p. 14.) Regardless of the manner in which the form suggested the tax credit be computed from 1998 through 2013, the form in each of these years conspicuously stated that the credit is limited to "no more than five million dollars" for an entity such as Duke. 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). (R. pp. 285, 286, 287, 288, 289; Donovan Tr. pp. 86:8-25; 87:1-25; 88:1-25; 89:1-25; 90:1-15.)

There are different levels of guidance provided by the Department. The testimony of the Department was consistent: the official position of the Department is expressed through Policy, which drafts Revenue Rulings, Revenue Procedures or other Advisory Opinions, or through the Office of General Counsel (OGC), which writes Department Determinations. (R. pp. 272, 297, 255, 315, 316, 317, 355; Sharpe Tr. p. 96:6-9; Thomas Tr. p. 58:18-22; Taylor Tr. p. 41:5-12; VanStory Tr. pp. 84:19-22; 86:19-25; 87:1-10; Cleland Tr. p. 82:7-15.) The form as originally drafted in 1998 and used through 2013 was not approved by Policy, and Policy reviewed the form for the first time in conjunction with § 12-14-60 in 2013 after receiving an inquiry regarding the credit limitation. (R. p. 304; VanStory Tr. p. 32:14-22.) Policy is responsible for interpreting the tax laws of the State and writing policy documents. (R. pp. 302, 303; VanStory Tr. pp. 6:6-25; 7:2-23.)

As is its function within the Department, Policy carefully researched the issue and determined the form did not clearly reflect the credit limitation expressed in § 12-14-60 and as a result, recommended a revision to the form which was implemented in 2014.[5] Subsequently, OGC reviewed

[5]Duke contends Mrs. VanStory "single-handedly formed the Department's position" in this case. (Duke brief, p. 12.) Mrs. VanStory is a Tax Policy Manager and twenty-six (26) year employee of the Department. (R. pp. 300, 301; VanStory Tr. pp. 4:18-25; 5:2-20.) She 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 five million dollars on a lifetime basis. (R. pp. 1331-1337; VanStory Tr. pp.

Duke's protest and issued its Department Determination confirming the view of Policy, thus establishing the Department's 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. (R. p. 18; ALC Order, p. 14.)

Duke also argues that the calculation of the credit in the unrelated audit of Duke 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 unrelated audit covering the period from 2008 – 2011. (R. p. 265; 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 the unrelated 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). (R. pp. 272, 273, 276, 284, 285; Sharpe Tr. pp. 96:10-25; 97:1-16; 100:1-13; Donovan Tr. pp. 85:14-25; 86:1-5.) The findings related to the tax credit in the unrelated audit represented Mr. Sharpe's beliefs, not those of the Department. (R. p. 274; Sharpe Tr. p. 98:13-19.) Moreover, the unrelated audit from 2008 – 2011 was conducted prior to the expression of any official Department position. Duke mischaracterizes the evidence in this case by asserting "senior employees" continue to believe that the credit limitation should be applied annually. (R. p. 41; Duke'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 OGC, and that the employee's opinion

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80:12-25; 81:1-25; 82:1-25; 83:1-18; Dep't MSJ Ex. C, pp. 1-7.) Contrary to Duke's assertion, Policy operated as it should and provided guidance to the Department when the question regarding the form arose.

did not express the official Department position.[6] (R. p. 275; Sharpe Tr. p. 99:7-25.) Mr. Sharpe testified that he agreed with the official position expressed by Policy. (R. p. 275; Sharpe Tr. p. 99:4-6.)

The evidence shows the Department acted responsibly when the question of the form arose. Even Duke agrees that the Department's forms should accurately reflect the law and be revised if necessary. (R. pp. 341, 342; Monroe Tr. pp. 56:13-25; 57:1-4.) Clearly, if the Department issues a form which does not clearly reflect the law it has a duty to revise the form in order to comply with its charge to administer and enforce the tax laws of the State. S.C. Code Ann. § 12-4-10 (2014). 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 an agency deference argument, which it is not. (R. p. 230; Hr'g Tr., p. 63:6-7.) The ALC appropriately noted:

> 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.

(R. p. 23; ALC Order, p. 19.) If the form is not enforceable as a matter of law (*see* § 1-23-10(4)), then neither version of the Department's form - either prior to or after 2014 - is dispositive of the issue. Stated differently, each party has a view of the credit limitation and that dispute was decided by the ALC and is now on appeal to this Court. To suggest the Department's credit form prior to 2014 is dispositive of the meaning of the credit limitation imposed by § 12-14-60 is to usurp the authority of the General Assembly and this Court.

B. The General Assembly has not acquiesced in any version of the Department's form in use prior to 2014.

[6]It would not be unusual for Department employees to have different opinions on a tax related matter, given the fact that the Department is a large agency with several hundred employees. This is all the more reason that the Department's official position on a matter is developed through Policy and/or OGC.

Duke centers its argument that the Legislature acquiesced in the Department's credit form prior to 2014 on failed legislation (S.0428), and in advancing this argument, Duke has misstated the facts.

Duke refers to S.0428 as a "clarifying" amendment to § 12-14-60. The proposed amendment would have placed the word "annually" after the phrase "no more than five million dollars" found in § 12-14-60(G). Therefore, even if the proposed legislation had been enacted, the inclusion of the word annually would not have been a simple clarification, but instead it would have changed the current credit limitation completely.

Duke contends that a fiscal impact statement associated with S.0428 prepared by the RFA, as well as a draft of legislation prepared by the Department, establish the Department's position on the credit limitation at the time S.0428 was considered by the General Assembly.[7] To the contrary, the record is clear that the RFA had no communication with the Department when preparing its fiscal impact statement (R. p. 259; Rainwater Tr. p. 37:1-13), and when the RFA did communicate on the subject in the fall of 2019 with Meredith Cleland, the Department's Deputy Director of Government Services, Mr. Cleland indicated the Department disagreed with the fiscal compact statement, and that the Department viewed the tax credit "as a one time credit." (R. pp. 259, 260; Rainwater Tr. pp. 37:14-

[7]Duke also relies on an e-mail from a Senate staff member to the RFA as evidence of the Department's position on S.0428. As pointed out by the Department in its Response before the ALC (R. p. 102; Dep't Response, p. 7), this e-mail is hearsay and not reliable evidence, was not considered by the ALC in it Order, and the Department would respectfully assert it should not be considered for any reason. "It is settled principle in the interpretation of statutes that even where there is some ambiguity or some uncertainty in the language used, resort cannot be had to the opinions of legislators or of others concerned in the enactment of the law, for the purpose of ascertaining the intent of the legislature." *Kennedy v. South Carolina Retirement System*, 345 S.C. 339, 353-354, 549 S.E.2d 243, 250 (2001); "Moreover, even if the statute was ambiguous, affidavits of drafters of the statute and legislators are not admissible as evidence of legislative intent." *Bowaters Carolina Corp. v. Smith*, 257 S.C. 563, 572, 186 S.E.2d 761, 764 (1972).

21; 40:7-13.) The record is also clear 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. As is his practice when requested by the General Assembly to assist in legislation, Mr. Cleland prepared the draft and forwarded it to the Chairman on September 6, 2017. (R. p. 351, Cleland Tr. p. 47:3-18.) Mr. Cleland provided the draft amendment to the Chairman as requested, although he was aware at the time the Department's position was the credit limitation was computed on a lifetime basis. (R. p. 356; Cleland Tr. p. 83:14-18.) The Department will assist in drafting legislation when requested by the General Assembly, even if the draft changes the law on a particular matter. (R. pp. 351, 352, 356, 357; Cleland Tr. pp. 47:19-25; 48:1-23; 83:14-25; 84:1-7.)

Despite the record in this case, Duke asserts in its brief that "The undisputed evidence in this case proves that even after the credit form was amended in 2014, the Department was still advising the Legislature that the Credit Limitation was an annual limitation." (Duke brief, p. 29.) This statement is contrary to the undisputed facts regarding the Department's interaction with the Legislature and its position on the credit limitation since the form was revised in 2014. All evidence shows the contrary: 1) the testimony of Mr. Rainwater and Mr. Cleland; 2) the only relevant portion of the Department's Memo dated August 15, 2017, to the House Ways and Means Chair stating "With this background in mind, it is the Department's position that if the Legislature chooses to amend Section 12-14-60(G) to make the $5 million investment credit an annual-**rather than lifetime**-credit, this change should only apply <u>prospectively</u>." (R. p. 812; Duke MSJ Ex. 32, p. 3, ¶6) (emphasis added); 3) the credit form has not changed and has been applied consistently by the Department since 2014 (R. p. 18; ALC Order, p. 14); 4) the Department issued its Determination on April 26, 2019, expressing its official position on the credit limitation, and this litigation ensued. None of those facts are

consistent with Duke's contention that the Department took an official position that the credit limitation is annual before or after the credit form was revised in 2014.

Duke's reasoning that the failed legislation is evidence of legislative acquiescence is puzzling on another level.[8] In its Motion, Duke argued a subsequent amendment may be construed to clarify legislative intent, and in support thereof, cited *Dale C. Stuckey v. State Budget & Control Board*, 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000). However, the Court in *Stuckey* addressed a statute with a subsequent amendment which had in fact passed the Legislature and was law. In this instance, S.0428 did not pass. Duke now pivots and argues the Legislature chose not to pass S.0428 because it was unnecessary in view of the fact that the Legislature was aware of the Department's application of the credit limitation on an annual basis. (Duke brief, p. 28.) This argument is contrary in all respects to the evidence in the record.

If there is anything to be gleaned from failed S.0428, it is that the Legislature, when given an opportunity to change the credit limitation from a lifetime to an annual basis, chose not to do so.

The ALC correctly rejected Duke's reliance on S.0428 as relevant to anything probative of the credit limitation expressed in § 12-14-60(G):

> 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

[8]Duke contends the Department has not issued any public guidance on its interpretation of the credit limitation since the credit form was clarified in 2014, and that the only action on the part of the Department has been to issue its Determination to Duke in this case. (Duke brief, pp. 29-30.) Although the Determination is specific to Duke in this case, it could only be issued to Duke in the context of this dispute. Moreover, once Duke filed its request for a contested case hearing, the proceedings before the ALC and now this Court are a matter of public record, and the Department's official position regarding the credit limitation is likewise expressed publicly. Furthermore, there is nothing in the record that even remotely suggests the Department has applied the credit limitation differently to other taxpayers.

> 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.*

(R. pp. 19-20; ALC Order, pp. 15-16.)

Legislative acquiesce in the construction of a statute or regulation is akin to the deference doctrine, and relies on a long standing and consistent interpretation of law of which the Legislature is aware. *Charleston Cnty. Assessor v. University Ventures, LLC*, 427 S.C. 273, 289, 831 S.E.2d 412, 420 (2019). Like the deference doctrine, legislative acquiesce in an agency's interpretation of law is not binding on the Court and is not dispositive of any issue before it. *Brown v. Bi-Lo*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003).

The cases cited by Duke for the proposition of legislative acquiescence are distinguishable because those cases address a long and consistent interpretation by an agency charged with administering the law and that proposition is advocated by the agency (similar to the deference doctrine). *See Etiwan Fertilizer Co. v. S.C. Tax Comm.*, 217 S.C. 354, 60 S.E.2d 682 (1950); *Ryder Truck*

Lines v. S.C. Tax Comm'n, 248 S.C. 148, 149 S.E.2d 435 (1966). Moreover, some of these cases involve the issuance of public policy documents by the agency or prior decisions by the Court interpreting the law at issue. *See CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 77, 78, 716 S.E.2d 877, 883 (2011); *Charleston Cnty. Assessor,* 427 S.C. 273, 289, 831 S.E.2d 412, 420 (2019).

There is no evidence in this case that the Legislature was aware of or acquiesced in the Department's use of its credit form prior to 2014. The credit limitation imposed by subsection (G) has been unchanged since its enactment in 1998. The Department has issued no public document, such as a Revenue Ruling, to signal to the Legislature its interpretation of the credit limitation, nor has there been any prior court decision addressing the use of the Department's credit form. Duke argues the Legislature would have been aware of the Department's form prior to 2014, but there is no supporting evidence. Assuming arguendo that is true, then the Legislature would have also been aware of the revised form issued in 2014 which confirmed that the credit limitation was to be applied on a lifetime basis, and knowing this when S.0428 was before it during the 2017 – 2018 Legislative Session, the Legislature then approved the Department's interpretation by choosing not to amend subsection (G) to change the lifetime credit limitation to apply on an annual basis.

Duke's arguments of legislative acquiescence and the Department's practice in the use and revision of its credit form are designed to deflect this Court's attention from the central matter before it: the statutory construction of the tax credit limitation for an entity like Duke, as expressed by the text of § 12-14-60(G).

III. THE ALC CORRECTLY APPLIED THE PRINCIPLES OF STATUTORY CONSTRUCTION IN DETERMINING THE CREDIT LIMITATION IMPOSED BY § 12-14-60.

A. The ALC did not automatically conclude that any ambiguity in § 12-14-60 should be construed against Duke's interpretation.

A tax credit is allowed through the grace of the Legislature. It is a deduction in the tax which would otherwise be paid by a taxpayer, and one of the principles most widely recognized by our Courts in the statutory construction of a tax credit is that it must be strictly construed and any ambiguity will be resolved against the taxpayer. *Thayer*, 307 S.C. 6, 413 S.E.2d 810 (1992); *Home Medical Systems*, 382 S.C. 556, 677 S.E.2d 582 (2009).

Duke asserts the ALC misapplied recognized principles of statutory construction and "automatically" concluded that the credit limitation should be applied on a lifetime basis. This does not represent a fair reading of the ALC's Order. While the ALC began its analysis by recognizing ambiguities in tax credit statutes are to be resolved against a taxpayer, it also acknowledged the legal principle that "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 doesnot 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*, 395 S.C. 67, 74-75, 716 S.E.2d 877, 881 (2011). (R. p. 9; ALC Order, p. 5.)

Consistent with the rules of statutory construction, the ALC first considered the plain language of § 12-14-60 and determined § 12-14-60(A)(1) "plainly allows a taxpayer to earn and apply the tax credit every year the taxpayer places qualifying property into service." *State v. Sweatt*, 379 S.C. 367, 665 S.E.2d 645, 649 (Ct. App. 2008), aff'd as 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."). (R. pp. 10-11; ALC Order, pp. 6-7.) In determining subsection (G) limits the credit to "no more than five million dollars" and that "§ 12-14-60(G) does not plainly set forth whether the $5 million limitation is an annual limitation or a lifetime limitation," the ALC concluded "this...does not necessarily mean the limitation is ambiguous and will be construed against the taxpayer at this juncture." *Crescent*

Manufacturing Co. v. Tax Commission, 129 S.C. 480, ___, 124 S.E. 761, 765 (1924). (R. pp. 11-12; ALC Order pp. 7-8.) "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). (R. p. 12; ALC Order, p. 8.)

The ALC carefully considered the statutory scheme and § 12-14-60 as a whole in its analysis of the credit limitation imposed by subsection (G). (R. pp. 13-16; ALC Order, pp. 9-12.) The ALC considered Duke's argument that subsection (A)(1) provides a credit which may be claimed annually, and by extension, the credit limitation should be applied on an annual basis. The ALC correctly concluded "This argument is unpersuasive considering practically all taxes are computed on an annual basis." (R. p. 13; ALC Order, p. 9.) The ALC also considered Duke's argument that the credit limitation is imposed on an annual basis because subsection (D)(1) provides credits may be carried forward annually, and in certain circumstances, the carry forward period may be extended under subsection (D)(2), and the ALC did not wander outside the words of the statute in its analysis. The ALC correctly noted "Subsection (D), overall, thus reinforces 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 five million limitation is either limited to yearly earnings or is a total limitation for an entity." (R. p. 14; ALC Order, p. 10.) Consistent with this sound logic, the ALC found that subsection (G) establishes not how or when the credit may be taken, but **the extent to which the credit can be utilized overall**, similar to the overall limitation generally placed on the ten year carry forward provision under subsection (D). (R. p. 14; ALC Order, p.10.)

The ALC determined the credit limitation expressed in subsection (G) is ambiguous[9] and resolved that ambiguity against Duke and in favor of the Department. *S. Soya Corp. v. Wasson*, 252 S.C. 484, 167 S.E.2d 311 (1969). "It is both reasonable, and plausible, for the five million limitation to be either an annual limitation or a lifetime limitation." (R. p. 20; ALC Order, p. 16.) Moreover, as to the reasonableness of the Department's position, the ALC concluded:

> 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.

(R. pp. 20-21; ALC Order, pp. 16-17.)

The ALC did not "automatically" construe any ambiguity in § 12-14-60 against Duke, but instead its decision is well reasoned and applies long-standing principles of statutory construction in considering the plain language of § 12-14-60 and the statute as a whole.

B. The ALC's ruling does not frustrate the legislative purpose of § 12-14-60.

Any deduction from a tax which would otherwise be due – allowed by legislative grace – is designed to influence the activity of a taxpayer, often to invest or otherwise create economic activity or growth. Duke argues that because § 12-14-60 is designed to encourage capital investment is South Carolina (S.C. Code Ann. § 12-14-20 (2014)), the credit limitation imposed by subsection (G) should

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[9]Ambiguous is defined by Merriam – Webster as "capable of being understood in two or more ways". *See* Merriam-Webster (April 13, 2021, 10:49 a.m.), https://meriam-webster.com/dictionary/ambiguous.

be broadened beyond its plain language ("no more than five million dollars"), contrary to well established case law. "Subtle or forced construction of statutory words for the purpose of expanding a statute's operation is prohibited." *TNS Mill*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (citing *Walton vs. Walton*, 282 S.C. 285, 318 S.E.2d 14 (1984)). The language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption. *John A. Hollingsworth on Wheels, Inc. v. Greenville Cty. Treasurer*, 276 S.C. 314, 278 S.E.2d 340 (1981).

While the legislative intent of a statute designed to promote investment and economic development may be a consideration by the Court in construing a tax credit statute, it in no way relieves the Court from the long-standing principle that the tax credit must be strictly construed and any ambiguity resolved against the taxpayer. *See Matthews*, 267 S.C. 548, 230 S.E.2d 223 (1976); *Centex*, 406 S.C. 132, 750 S.E.2d 65 (2013). Moreover, the ALC's ruling to limit the tax credit on a lifetime basis does not frustrate the legislative intent to promote investment by Duke and other like entities, it simply limits the **amount** of investment, which was clearly the Legislature's intent when enacting subsection (G) (which has remained unchanged since its enactment in 1998). Duke's argument is that it should be incentivized more, not less, is contrary to the principle of strictly construing a tax credit statute against the taxpayer.[10]

Duke's argument that the Legislature intended to allow it to claim more in tax credit than five million dollars is an exercise in conjecture and presupposes Duke's knowledge of legislative intent. The intent of the Legislature is best expressed by the text of the statute (*see Hodges*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)), which was carefully considered by the ALC in its Order. Duke must bring itself squarely within the expanded credit limitation which it seeks. *Avco Corp.*, 267 S.C. 581,

[10]Duke's argument ignores the fact that it has already been significantly incentivized and enjoyed significant deductions on its tax returns. (R. pp. 1320-1322; Dep't MSJ Ex. A, pp. 1-3.)

588, 230 S.E.2d 614, 617 (1976). The General Assembly chose to write the statute as it did and, therefore, the tax credit afforded Duke under § 12-14-60 is limited to five million dollars on a lifetime basis. "[The] wisdom of tax policy is exclusively within the preview of the legislature and may not be supplanted by the Court." *Centex*, 406 S.C. 132, 151, 750 S.E.2d 65, 75 (2013).

C. The ALC's ruling does not lead to an absurd result.

Duke contends the ALC's Order limiting the tax credit to five million on a lifetime basis produces an absurd result and in support cites *Kiriakides v. United Artist 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. The decision in *Kiriakides* in no way suggests the ALC's ruling leads to an absurd result.

In its Motion for Summary Judgment (R. pp. 50-51; Duke's Motion, pp. 19-20), Duke argued it would be absurd to construe the tax credit limitation on a lifetime basis when the Legislature amended § 12-14-60 in 2010 to expand the credit use to the entire state, not just "economic compact zones". *See 2010 S.C. Act No. 290.* In refuting this argument, the ALC noted:

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

> And, as the Department notes, subsection 12-14-60(G) remained the same before and after the geographic expansion of the tax credit in 2010, suggesting the interpretation of the limitation would not change either.

(R. p. 15; ALC Order, p. 11.)

Duke now contends that the use of the phrase "an entity" in subsection (G) is inconsistent with limiting the tax credit on a lifetime basis because a business enterprise will simply form multiple entities so that each may claim the five million in lifetime credit. Whether the General Assembly used the phrase "an entity" or the word "entities" the lifetime credit limitation remains the same under subsection (G): "no more than five million dollars." Moreover, under Duke's theory that the credit limitation is annual, a business enterprise could create multiple entities in order that each entity could claim five million annually in tax credit. Subsection (G) simply provides the lifetime credit limitation of five million dollars for an entity subject to the license tax under § 12-20-100. As long as the "entity" qualifies, it may claim the credit on that basis. Duke's argument in this regard is of no consequence to the statutory construction of § 12-14-60 and the lifetime credit limitation imposed in subsection (G).

Duke argues the ALC's Order produces an absurd result because some statutes enacted by the General Assembly which impose a lifetime limitation address specific projects or an affiliated group of taxpayers. Similarly, the General Assembly provides an annual limitation specifically for taxpayers in the construction industry and taxpayers producing energy from biomass resources.[11]

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[11] *See* S.C. Code Ann. § 12-6-3420(B)(2) (2014) providing that a credit of ten thousand dollars annually may be claimed for the construction or improvements of an infrastructure project, and *see* S.C. Code Ann. § 12-6-3620(B) (2014) allowing a taxpayer to claim up to six hundred fifty thousand dollars of credit for a single taxable year for the purchase and installation of equipment to produce energy home biomass resources.

Clearly, the amount of credit allowed is not dependent on the activity of the taxpayer, but by the **language imposing the credit limitation.**[12]

III. THE ALC CORRECTLY REJECTED DUKE'S ARGUMENTS RELATED TO DUE PROCESS, ESTOPPEL, UNJUST ENRICHMENT, SOUTH CAROLINA'S RULE-MAKING PROCESS AND THE TAXPAYERS' BILL OF RIGHTS.

A. There is no basis for Duke's claims that the Department should be estopped from its interpretation of the credit limitation or that the State has been unjustly enriched.

1. Estoppel.

Duke argues the Department should be equitably estopped from requiring the tax credit to the taken on a lifetime basis. In support of this position, Duke 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, Duke has merely recited the elements of equitable estoppel, while failing to show the application of this doctrine to the

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[12]Duke asserts "the General Assembly chose its words carefully when it enacted the credit statute." (Duke brief, p. 36.) The Department would agree, and the General Assembly was particularly careful when using words to describe the credit limitation in subsection (G) to impose an absolute limit of "no more than five million dollars."

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 Carolina 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, 240 S.C 347, 351, 126 S.E.2d 15, 17 (1962) (emphasis added).

2. Unjust enrichment.

Duke 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 S.C. 262, 264, 321 S.E.2d 198, 199. The decision also held "Where a plaintiff has an adequate remedy at law, equitable relief is not normally in order." *Barrett*, 283 S.C. 262, 264, 321 S.E.2d 198, 199 (Citing Am. Jur. 2d Equity § 87). Like the doctrine of equitable estoppel, unjust enrichment is an equitable argument. Here, Duke has the rights and remedies afforded it under the RPA, including the right to file a requested case hearing

and have a *de novo* trial before the ALC, which it has done. *See* § 12-60-10, et al. Duke's argument has no legal basis, and it advances no credible argument for unjust enrichment in this case.

Conversely to Duke's position, Duke gave testimony that it has maintained a presence in South Carolina for approximately one hundred (100) years (R. p. 326; Monroe Tr. p. 15:5-15); Duke's business requires constant upgrades and maintenance to its equipment (R. pp. 322, 323; Monroe Tr. pp. 10:19-25; 11:1-17); that for one year alone, Duke spent approximately $750 million dollars in qualifying equipment (R. pp. 323, 324; Monroe Tr. pp. 11:18-25; 12:1-9); Duke has made capital investments continuously during its 100 years in South Carolina. (R. pp. 326, 327; Monroe Tr. pp. 15:17-25; 16:1-14.) Duke's business requires significant investment to maintain its equipment and facilities to service customers. Duke has maintained a presence in South Carolina for 100 years and has invested heavily because if must, not because of a tax credit.[13]

B. The Department's revision to its form did not violate any South Carolina rule-making process.

Duke argues the Department's revision to its form is tantamount to the passage of an unauthorized regulation and violates the APA and in support cites *Joseph v. S.C. Dep't of Labor, Licensing & Reg.*, 417 S.C. 436, 790 S.E.2d 763 (2016).[14] Under § 1-23-10(4) of the APA, a regulation is defined as "each agency statement of general public applicability that implements or prescribes law or policy

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[13]Duke argues the ALC's ruling financially impacts its earnings, financial statements, shareholders and customers (the latter apparently being a reference to rate hikes). There is nothing in the record to support this argument – no expert testimony, no corporate records or written analysis – except the self-serving testimony of Mr. Cooper. Moreover, the "financial impact" to Duke has no bearing on the meaning of the credit limitation expressed in § 12-14-60(G).

[14]The issue in *Joseph* is dissimilar to the case at hand. In *Joseph*, the issue was whether the Board of South Carolina Labor, Licensing and Regulation was required to give public notice of a position statement prior to adoption at a regularly scheduled board meeting. The Department is not required to hold a board meeting or take other formal action to prescribe forms under § 12-60-1720.

or practice requirements of any agency." The issuance of a form, or revision of a form, to assist a taxpayer is not a regulation.[15] Furthermore, § 1-23-10(4) also provides "policy or guidance issued by an agency other that in a regulation does not have the force or effect of law." Moreover, in this case the Department does not seek deference, nor does it argue that its form is ultimately dispositive of the credit limitation under § 12-14-60.

The Department was created to administer and enforce the revenue laws of this State. *See* 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." To the extent the Department determines a form should be revised to more accurately reflect the law and better assist taxpayers, then it should do so under the charge given it pursuant to §§ 12-4-109 and 12-60-1720. As the ALC correctly noted:

> 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 thestatute 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.

(R. p. 22, ALC Order, p. 18.)

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[15] *See* 1997 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.

C. Duke has been afforded full due process under the Taxpayers' Bill of Rights.

The South Carolina Taxpayers' Bill of Rights (Taxpayers' Bill) provides:

> 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 Adjustment plainly stated the adjustment of the credit made by the Department, the resulting amount of credit carry forward and the time in which Duke had to protest the Notice.[16] (R. p. 1320; Dep't MSJ Ex. A, p. 1.) Duke obviously received the Notice, understood its import, and protested the findings in the Notice.[17] (R. pp. 1154-1159; Duke MSJ Ex. 38, pp. 1-6.)

Duke's contention that the Department's actions were in conflict with the Taxpayers' Rights and that it was denied due process are without merit.[18] Due process requires "notice, an opportunity to be heard in a meaningful way, and judicial review." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350. As noted by the ALC:

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[16]S.C. Code Ann. § 12-58-30 (2014) establishes the positon of the Taxpayer's Rights advocate (Advocate), but Duke testified it was unaware of the name of the Advocate and had made no contact with the Advocate regarding this case. (R. p. 331; Monroe Tr. p. 33:7-22.)

[17]Duke makes repeated references throughout its Brief that the Department's adjustment of the tax credit allowed has been implemented "retroactively," but any assessment of taxes, or adjustment of tax credits, necessarily applies to tax returns prepared prior to any audit by the Department.

[18]Duke relies on *F.C.C. v. Fox Television Station, Inc.*, 567 U.S. 239 (2012) in advancing its due process argument. *F.C.C.* dealt not with the construction of a tax statute, but rather the issuance of forfeiture orders imposing civil penalties on television stations and the potential reputational injury to them at the time their licenses might be subject to renewal.

> I conclude the Department complied with the Taxpayers' Bill of Rights in this case becausethe 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.

(R. p. 23, ALC Order, p. 19.)

Moreover, Duke has been afforded all of its administrative remedies and chose to file a request for contested case hearing with the ALC, as is its right, for a *de novo* hearing in this case.[19]

CONCLUSION

For the reasons stated above, the Department would respectfully request this Court to affirm the decision of the ALC finding that Duke is limited, as a matter of law, to no more than five million dollars in tax credit under § 12-14-60.

Respectfully submitted,

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[19]The ALC hears a contested case as the *de novo* fact finder and may draw its own conclusions. *Young v. S.C. Dep't of Health and Envtl. Control*, 383 S.C. 452, 680 S.E.2d 784 (Ct. App. 2009). Furthermore, the ALC is free to reach its own conclusions of law. *Engaging and Guarding Laurens County's Environment (EAGLE) v. S.C. Dep't of Health and Envtl. Control*, 407 S.C. 334, 344, 755 S.E.2d 444, 449 (2014).

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

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

Duke Energy Corporation, ... Appellant,

v.

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

CERTIFICATE OF COUNSEL

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

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