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.

BRIEF OF RESPONDENT IN RESPONSE TO THE *AMICUS CURIAE* BRIEF OF THE SOUTH CAROLINA CHAMBER OF COMMERCE IN SUPPORT OF APPELLANT, DUKE ENERGY CORPORATION

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SUMMARY OF ARGUMENT

The Chamber files its *Amicus Curiae* Brief ("Chamber's Brief") and argues that the decision of the Administrative Law Court (ALC) is unsupported by the facts in this case, contains numerous errors of law, and, if left unchecked, will render South Carolina an inhospitable place for business. Yet the Chamber's Brief does not provide any additional material or analysis which will serve this Court in its decision, and instead the Chamber largely parrots the same arguments asserted by the Appellant, Duke Energy Corporation (Duke).

The issue in this case is the meaning of the limitation ("credit limitation") placed on the tax credit found in S.C. Code Ann. § 12-14-60 (2014) ("credit " or "tax credit"), and more specifically, the limitation imposed by subsection (G). As with any tax credit, § 12-14-60 reduces the tax which would otherwise be owed by a taxpayer and the credit is allowed by legislative grace. The Chamber ignores the unambiguous language of § 12-14-60 and subsection (G), as well as the application of the rules of statutory construction in the ALC's analysis of the statute. Instead, the Chamber focuses on the revision to the Department's Form SC SCH. TC-11 ("credit form") (all iterations of which conspicuously state that the credit is limited to "no more than five million dollars" for an entity like Duke); a deference oriented argument (although the Department made no deference argument in the case); a denial of due process (although Duke has been afforded all rights to be heard in the matter and this appeal is now before this Court); and the "unfriendly business climate" created by the ALC decision. Yet the question in this case is whether the Department's official interpretation of the credit limitation (and the ALC's affirmation of that interpretation through the application of long-standing principles of statutory construction) is the correct one.

Consistent with its charge to administer and enforce the revenue laws of this State (*See* S.C. Code Ann. § 12-4-10 (2014)), the Department's focus in this case has been, and remains, to ascertain

the meaning of the credit limitation imposed by § 12-14-60 through the application of sound principles of statutory construction, and that is the issue before this Court.

ARGUMENTS

I. THE ALC'S ORDER DOES NOT ERRONEOUSLY INTERPRET OR MISAPPLY THE DOCTRINE OF LEGISLATIVE ACQUIESCENCE.

The Chamber reasserts the argument of Duke that the Legislature was aware of the Department's credit form prior to 2014 and acquiesced in its interpretation of the credit limitation. Similar to the deference doctrine being advocated by an agency, legislative acquiescence in an agency's interpretation of law may be considered but is not binding on the Court and is not dispositive of any issue before it. *See Brown v. Bi-Lo*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003).

The Chamber misstates facts in its argument, first by pronouncing the Department "[a]lso audited **taxpayers** and advised **them** that **they** could claim up to $5 million in annual Credits" (Chamber's Brief, p. 5, emphasis added), which suggests the Department has routinely applied its credit form prior to 2014 in numerous audits. There is no evidence in the record that the Department conducted any prior audit related to the credit limitation except on one occasion, and that was a prior audit of Duke in which the specific issue of the credit limitation was not addressed in the Department Determination, 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.) Second, to the extent the Department's credit form prior to 2014 expressed any position it was not "open and well-known" (Chamber's Brief, p. 5) - the Department has issued no advisory opinion, such as a Revenue Ruling, to signal to the Legislature any interpretation of the credit limitation, nor has there been any prior court decision addressing the use of the Department's credit

form.[1] This is contrary to the cases relied on by the Chamber. (*See Spencer v. South Carolina Tax Commission*, 281 S.C. 492, 495, 316 S.E.2d 386, 387 (1984), in which the Court found the Tax Commission's regulations prior to the lawsuit persuasive, and *Charleston Cnty. Assessor v. University Ventures, LLC*, 427 S.C. 273, 289, 831 S.E.2d 412, 420 (2019) which noted the interpretation of the statute in question had been successfully defended in multiple cases before the ALC and Court of Appeals).

The Department's credit form in use prior to 2014 did not express the official position of the Department. The record is clear that the official position of the Department on the meaning of the credit limitation was expressed in this case in its Determination issued on April 26, 2019. (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.) (*See* also S.C. Code Ann. § 12-60-30(10) (2014 and Supp. 2018)). Common sense would command the Department to revise a form when necessary to comply with the law, and this is consistent with the Department's duty to administer and enforce the revenue laws of this State.[2] *See* § 12-4-10. Moreover, the Department is not estopped from revising its form in the exercise of its statutory authority to effect public revenues. *Heyward v. South Carolina Tax Commission*, 240 S.C. 347, 351, 126 S.E.2d 15, 17 (1962). It is worth noting the ALC's cogent analysis of the nonissue of the credit form prior to 2014:

> 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

[1]The Chamber also misstates the Department's position on the issue of agency deference when it pronounces "Nor do they support the Department's notion that only the most recent pronouncement is entitled to deference." (Chamber's Brief, p. 9). The record in this case is clear that the Department is advancing no deference argument. (R. p. 22; ALC Order, p. 18.)

[2]Duke agrees the Department's forms should be revised if necessary to accurately reflect the law. (R. pp. 341-342; Monroe Tr. pp. 56:13-25; 57:1-4.)

> 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.)

In its Motion for Summary Judgement before the ALC, Duke argued that Senate Bill S.0428 (S.0428) is evidence of the Legislature's intent to clarify the credit limitation expressed in S.C. Code Ann. § 12-14-60(G) (2014).[3] This proposed amendment would not have "clarified" the lifetime credit limitation imposed by subsection (G) but instead would have changed the credit limitation to an annual

[3]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).

one. Moreover, in support of its position Duke erroneously relied on *Dale C. Stuckey v. State Budget & Control Board*, 339 S.C. 397, 529 S.E.2d 706 (2000), a case in which the Court addressed a statue with a subsequent amendment that in fact **passed** the Legislature and was law. In its brief before this Court, Duke pivots and argues the legislature chose not to pass S.0428 because it was unnecessary in light of the fact that the Legislature was aware of the Department's application of the credit limitation on an annual basis. The Chamber now joins this illogical refrain.

The Chamber's theory that the Legislature acquiesced in the Department's version of the credit form prior to 2014 fails entirely. If there is a presumption that the Legislature was aware of the credit form prior to 2014, then likewise it was aware of the revised 2014 credit form (in 2017) when it considered S.4028 during the 2017-2018 Legislative Session - the Legislature is either aware of all forms used by the Department at any level or it is aware of no form. If the Legislature was not aware of the credit forms both prior and subsequent to 2014 then the notion of legislative acquiescence is of no consequence. On the other hand, if the Legislature was aware of the credit forms both before and after 2014, then the Legislature has clearly acquiesced in the Department's interpretation of the credit limitation expressed in the 2014 form as evidenced by the Legislature **choosing not to amend** subsection (G) to change the lifetime credit limitation to apply on an annual basis. To the extent legislative acquiescence is relevant in this case, the only logical conclusion is that the Legislature has acquiesced in the Department's interpretation of the credit limitation expressed in its form which was revised in 2014 and applied by the Department consistently since.

II. THE ALC'S ORDER DOES NOT OFFEND DUE PROCESS PRINCIPLES.

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 (2008).

The Chamber contends the draconian actions on the part of the Department denied Duke these basic due process rights, a position which is completely unsupported by the record in this case.

Duke was provided the Department's Notice of Adjustment (Notice) which included an explanation of the Notice and Duke's right to Protest. (R. p. 1320; Dep't MSJ Ex. A, p. 1.) Duke clearly understood the import of the Notice and submitted its protest and exhausted its administrative remedies. (R. pp. 1154-1159; Duke MSJ Ex. 38, pp. 1-6.) Subsequently, Duke filed a request for a contested case hearing with the ALC, as is its right, for a *de novo* hearing in this case. After receiving a decision from the ALC with which it disagreed, Duke has now elected to exercise its additional right to seek appellate review of the matter. Duke has clearly been afforded "notice, the opportunity to be heard in a meaningful way, and judicial review." *Kurschner*, 376 S.C. at 171, 656 S.E.2d at 350.

The Chamber reasserts the argument of Duke that the Department was required to seek a regulation to amend its form, and a failure to do so is offensive to due process principles. The Chamber misinterprets the requirement of a regulation under the South Carolina Administrative Procedures Act (APA).

The Department is authorized to prescribe instructions, including forms, to assist taxpayers. *See* S.C. Code Ann. § 12-60-1720 (2014). The issuance of a form, or the revision of a form, to assist a taxpayer is not a regulation. (*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). Moreover, the Department does not seek agency deference of its position in this case, nor does it argue that its form is dispositive of the credit limitation under § 12-14-60.

South Carolina law does not require agencies to seek a regulation for each and every one of its actions, but only in those instances when its actions create a "binding norm," such that it "so fills out the statutory scheme that upon application one need only determine whether a given case is within

the rule's criterion." *Sloan v. S.C. Board of Physical Therapy Exam'rs*, 370 S.C. 452, 475-476, 636 S.E.2d 598, 610 (2006). The Chamber conflates "filling out a statutory scheme" with the Department's interpretation of the credit limitation through the use of a form. The ALC correctly noted the difference in its Order:

> 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...
>
> 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.) Stated differently, the issue in this case is the Department's interpretation of the credit limitation expressed in § 12-14-60, **not** whether a regulation was required (which it was not) to assert that interpretation.[4]

III. THE ALC'S ORDER IS BASED ON THE APPLICATION OF SOUND PRINCIPLES OF STATUTORY CONSTRUCTION.

The ALC began its legal analysis of the credit limitation expressed in § 12-14-60 by stating two universally recognized principles of statutory construction in South Carolina: 1) the Court should first consider the plain language of the statute to determine its meaning (R. p. 9; ALC Order, p. 5); and 2) that a statute allowing a tax credit must be strictly construed and any ambiguity will be resolved against a taxpayer. (R. p. 9; ALC Order, p. 5.) However, although the ALC recognized the principle of strictly construing a tax credit statute against the taxpayer, the ALC noted that " 'This rule of strict construction simply means that constitutional and statutory language will not be strained or liberally

[4]Both Duke and the Chamber were satisfied with the original version of the Department's form, which under their theory would also be violative of the APA.

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 County Assessor*, 395 S.C. 67, 74-75, 716 S.E.2d 877, 881 (2011). (R. p. 9; ALC Order, p. 5.) Furthermore, in determining the credit limitation in § 12-14-60(G) did not plainly state whether the five million ($5 million) limitation is annual or lifetime, 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.)[5]

In its analysis to determine the credit limitation, the ALC did not view the credit limitation imposed by § 12-14-60(G) in a vacuum but stated it must consider the statutory scheme and § 12-14-60 as a whole. (R. p. 12; ALC Order, p. 8, citing *CFRE*, 395 S.C. at 74, 716 S.E.2d at 881.) The ALC carefully considered each of Duke's arguments addressing different subsections of § 12-14-60 and gave cogent reasons as to why those arguments do not definitively answer the question of the credit limitation. (R. pp. 13-15; ALC Order, pp. 9-12.) Moreover, when considering the statute as a whole, the ALC concluded the determination by the Department was reasonable. (R. p. 20; ALC Order, p. 16.)

To assert, as the Chamber has in its brief, that the ALC "automatically construed" the credit limitation against Duke, or that it did not consider the statute as a whole in its analysis, is to ignore the well-reasoned text of the decision.

IV. THE DECISION OF THE ALC DOES NOT RESULT IN UNSOUND TAX POLICY, NOR DOES IT MAKE TAX PLANNING IMPOSSIBLE.

[5]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.

That the Chamber would advocate policies which favor lower taxes for its members is not surprising, but the Chamber conflates tax policy and tax planning with the statutory construction of the credit limitation in this case. In support of its tax policy and tax planning argument, the Chamber exclaims that "the sky is falling" and tells this Court that the ALC's decision poses "[a] direct threat to the State's business-friendly reputation and its continued economic growth" (Chamber's Brief, p. 13); that the Department's approach "[p]uts all of South Carolina's taxpayers – including the Chamber's members – in a quandary" (Chamber's Brief, p. 14); and "The Department's actions may be a harbinger of things to come, and how it will treat the State's business community" (Chamber's Brief, p. 14).

The Chamber argues that the tax policy resulting from the ALC's decision in this case does not adequately incentivize Duke to invest in the State. However, 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.[6] Moreover, there is nothing in the record which supports the notion that Duke's tax planning was adversely affected by the ALC's decision. To the contrary, the record in this case is clear that Duke must spend hundreds of millions of dollars each year to upgrade and maintain its equipment and facilities to service customers, and has done so for 100 years, regardless of any tax credit. (R. pp. 322-323; Monroe Tr. pp. 10:19-25; 11:1-17; R. pp. 323-324; Monroe Tr. pp. 11:18-25; 12:1-9; R. pp. 326-327; Monroe Tr. pp. 15:17-25; 16:1-14.) The question is not whether Duke has enjoyed the tax credit granted through legislative grace – it has

[6]Duke claimed a net operating loss for tax years 2004 – 2013, so the tax credit was not used 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.)

already been significantly incentivized and enjoyed significant deductions on its tax returns – but the extent to which the credit limitation allows that credit to be taken.

Considerations for the amount of tax credits – given as a matter of legislative grace – are for the province of the Legislature. "[The] wisdom of tax policy is exclusively within the purview of the legislature and may not be supplanted by the Court." *Centex v. South Carolina Department of Revenue*, 406 S.C. 132, 151, 750 S.E.2d 65, 75 (2013). The construction of statutory language limiting the tax credit is for the Court to decide. The issue in this case is not whether the ALC's decision comports with the Chamber's view of a tax policy which fits the definition of a "business friendly climate," or the efficacy of Duke's tax planning, but the meaning of the credit limitation imposed by § 12-14-60(G). To that end, the decision of the ALC gives a cogent analysis of its statutory construction of § 12-14-60 and correctly ruled that Duke is limited to claiming no more than five million dollars in credit on a lifetime basis.

CONCLUSION

For the reasons set forth above, the Department would respectfully submit that this Court should reject the arguments by the Chamber as irrelevant and unpersuasive for purposes of this appeal.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Respondent in Response to the *Amicus Curiae* Brief of the South Carolina Chamber of Commerce in Support of Appellant, Duke Energy Corporation, complies with Rule 211(b), SCACR, to the extent applicable under Rule 213, SCACR.

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