

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
20 REV 01001

<p>Integon National Insurance Company Petitioner,</p> <p>v.</p> <p>North Carolina Department of Revenue Respondent.</p>	<p>FINAL DECISION GRANTING SUMMARY JUDGMENT FOR PETITIONER</p>
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THIS MATTER comes before the Honorable Donald R. van der Vaart, Chief Administrative Law Judge presiding, for consideration of Petitioner’s Motion for Partial Summary Judgment on Two Threshold Questions of Law, Petitioner’s Motion for Summary Judgment, with briefs in support thereof filed with the Office of Administrative Hearings (“OAH”) on July 22 and July 30, 2021 respectively, Respondent’s Motion for Summary Judgment and brief in support thereof filed with OAH likewise on July 30, 2021 and Petitioner’s Motion to Withdraw Pleading from the Record filed with OAH on September 17, 2021.

Additionally, Respondent withdrew on September 13, 2021 the Notice of Final Determination and assessment against the Petitioner which formed the basis of Petitioner’s petition. The Respondent offered a draft Order for Refund and Dismissal for this Tribunal in which Respondent stated, *inter alia* that “By withdrawing the Final Determination, Respondent does not dispute Petitioner’s position in this contested case....” Despite the withdrawal, however, this Tribunal retains jurisdiction in this matter.¹

¹ Once the jurisdiction of a court or administrative agency attaches, the general rule is that it will not be ousted by subsequent events. This is true even when the events are of such a nature that they would have prevented jurisdiction from attaching in the first instance. See 20 Am.Jur.2d Courts ss 142, 148 (1965); 21 C.J.S. Courts s 93 (1940). “(O)nce jurisdiction of a court attaches it exists for all time until the cause is fully and completely determined.” *Kinross-Wright v. Kinross-Wright*, 248 N.C. 1, 11, 102 S.E.2d 469,

After careful consideration of the Parties' submissions the Undersigned **GRANTS** summary judgment in favor of the Petitioner and **DENIES** the Respondent's Motion for Summary Judgment. Moreover, the Petitioner's Motion to Withdraw Pleading from the Record is **DENIED**.

APPEARANCES

For Petitioner:	Kay Hobart Miller Scott E. Bayzle Parker Poe Adams & Bernstein LLP PO Box 389 Raleigh, NC 27602
For Respondent:	Terence D. Friedman Matthew H Sommer Assistant Attorney Generals North Carolina Respondent of Justice PO Box 629 Raleigh, NC 27602

DISCUSSION

Unable to develop expensive renewable energy generation under North Carolina's least-cost utility statutory structure, North Carolina's legislature took several legislative actions to encourage the private investment in renewable energy. Laws providing for various tax incentives and renewable energy credits were passed that promoted development of renewable energy beginning in 1999. In 2009 additional legislation was passed including, importantly, a specific provision to encourage insurance companies to invest in renewable energy. By 2015 investments had soared but the legislature extended the tax credit scheme for another year. By all accounts the legislature's efforts were a success [Pet. Brief in Support of Motion for Summary Judgment].

476 (1958). "Jurisdiction is not a light bulb which can be turned off or on during the course of the trial. Once a court acquires jurisdiction over an action it retains jurisdiction over that action throughout the proceeding. . . . If the converse of this were true, it would be within the power of the defendant to preserve or destroy jurisdiction of the court at his own whim." *Silver Surprise, Inc. v. Sunshine Mining Co.*, 74 Wash.2d 519, 523, 445 P.2d 334, 336-37 (1968). *In re Peoples*, 250 S.E.2d 890, 911, 296 N.C. 109, 146 (1978).

In 2014 and in subsequent publications the Respondent, the North Carolina Department of Revenue (DOR), made clear investment structures that would satisfy the legislation and qualify for the tax credits. No mention was made, for example, that DOR would seek to use anti-abuse provisions found only in Federal law that might disqualify investors in renewable energy projects from earning the tax credits.

All that changed in 2018 when DOR inexplicably and perhaps whimsically reversed its position for the first time. Now citing Federal anti-abuse tax provisions, DOR denied the Petitioner insurance company tax credits obtained for doing precisely what the legislature meant for insurance companies to do - invest in renewable energy. To DOR, at least in 2018, investing in solar power was abusive and should be disallowed. Petitioner brought this contested case after receiving DOR's "Final Determination" disallowing the use of the tax credits earned by the Petitioner through their investing in multiple renewable energy projects.

The litigation has proceeded with vigor. Less than three months ago DOR moved for summary judgment against the Petitioner, but on September 13, 2021 DOR again reversed itself by withdrawing their Final Determination against the Petitioner. DOR stated that DOR "did not dispute the Petitioner's position in this contested case..." and that the Petitioner was entitled to use of their tax credits. After three years of costly litigation and potential harm to future investments in North Carolina renewable energy projects, DOR is simply asking for this case to go away.

STANDARD OF REVIEW

N.C. Gen. Stat. § 150B 34(e) authorizes this Tribunal to grant summary judgment. The purpose of summary judgment is to bring litigation to an expeditious and efficient decision on the merits "where only a question of law on the indisputable facts is in controversy." *McNair v.*

Boyette, 282 N.C. 230, 234-35, 192 S.E.2d 457, 460 (1972). Summary judgment is appropriate when no genuine issue of material fact exists, and the movant is entitled to judgment as a matter of law. N.C.R. Civ. Proc. 56(c); see also *Dendy v. Watkins*, 288 N.C. App. 447, 219 S.E.2d 214 (1975).

Summary judgment is only proper under Rule 56 of the North Carolina Rules of Civil Procedure if “there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56 The North Carolina Rules of Civil Procedure apply to proceedings in the Office of Administrative Hearings (“OAH”) unless otherwise specified. 26 NCAC 03 .0101(b)

A motion for summary judgment ‘shall be’ granted ‘if the pleadings, depositions, answers to the interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.’ *Estate of Williams v. Pasquotank County Parks & Rec. Dep’t*, 366 N.C. 195, 198, 732 S.E.2d 137, 140 (2012) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)).

Summary judgment is an extreme remedy and should be awarded only where the truth is quite clear. See *Lee v. Shor*, 10 N.C. App. 231, 178 S.E.2d 101 (1970). To entitle one to summary judgment, the movant must conclusively establish a legal bar to the non-movant’s claim or complete defense to that claim. See *Virginia Elec. And Power Co. v. Tillett*, 80 N.C. App. 383, 343 S.E. 2d 188, cert. denied, 317 N.C. 715, 347 S.E. 2d 457 (1986). “[W]hen a moving party has met his burden of showing that he is entitled to an award of summary judgment in his favor, the non-moving party cannot rely on the allegations or denials set forth in [its] pleading, and must, instead, forecast sufficient evidence to show the existence of a genuine issue of material fact in

order to preclude an award of summary judgment.” *Steele v. Bowden*, 238 N.C. App. 566, 768 S.E.2d 47, 57 (2014) (emphasis added).

ISSUES

1. Whether the North Carolina Department of Revenue improperly disallowed the renewable energy tax credit claimed by Petitioner on its 2016 amended North Carolina gross premium tax return?

2. Does the North Carolina Revenue Act contain a “clear and specific reference” to the federal “bona fide partner” and “disguised sale” provisions as required under the North Carolina Constitution and by the North Carolina Supreme Court in *Fidelity Bank v. Department of Revenue*, 370 N.C. 10, 803 S.E.2d 142 (2017)?

3. Did Petitioner purchase Tax Credits in a “sale” which is prohibited under North Carolina law?

Findings of fact are neither necessary nor desirable when ruling on a motion for summary judgment, *Hyde Ins. Agency, Inc. v. Dixie Leading Corp.*, 26 N.C. App. 138, 142, 215 S.E.2d 162, 165 (1975), and decisions issued by the OAH granting such motions need not include such findings. N.C.G.S. 150B-34(e). If the findings of fact are actually the trial court's summation of the undisputed facts which support the judgment, findings of fact and conclusions of law do not render a summary judgment void or voidable. *Noel Williams Masonry, Inc. v. Vision Contractors*, 103 N.C. App. 597, 406 S.E.2d 605 (1991).

STIPULATED FACTS

1. Respondent stated on September 13, 2021 in a draft order for this Tribunal’s consideration that Respondent did not dispute Petitioner’s position in this contested case and that Petitioner is entitled the use of the tax credits Petitioner received through investments in renewable energy projects.

2. Petitioner Integon National Insurance Company (“Petitioner”) is a property and casualty insurance company commercially domiciled and doing business in North Carolina.

3. During 2016, Petitioner was owned by National General Insurance Company (“NGIC”).

4. During 2016, NGIC also owned Integon Indemnity Corporation, Integon General Insurance Corporation and Integon Preferred Insurance Company, all of which, like Petitioner, are engaged in the insurance business in North Carolina.

5. Petitioner, as an insurance company, is subject to North Carolina's gross premiums tax. N.C. Gen. Stat. § 105-228.5(a). Petitioner is not subject to the North Carolina corporate income tax. N.C. Gen. Stat. § 105-130.11(a)(10).

6. Petitioner timely filed an amended North Carolina gross premiums tax return for tax year 2016 ("Amended Return") claiming a "Credit for investing in renewable energy property" under N.C. Gen. Stat. § 105-129.16A in the amount of \$1,853,733.

7. The Respondent North Carolina Department of Revenue ("Respondent" or "DOR") is an agency of the State of North Carolina that administers the State's tax laws and collects the taxes due from North Carolina taxpayers.

8. In 2014, the Respondent published a document titled "Guidelines for Determining the Tax Credit for Investing in Renewable Energy Property" ("2014 Guidelines").

9. On September 10, 2018, the Respondent published an "Important Notice: Tax Credits Involving Partnerships" ("Important Notice").

10. The Respondent conducted an audit of Petitioner's Amended Return, in which Petitioner claimed the Energy Credit.

11. On January 3, 2020, the Respondent issued a Notice of Final Determination disallowing the Energy Credit.

12. Petitioner filed a Petition for Contested case hearing within 60 days of the date of the Notice of Final Determination as required by N.C. Gen. Stat. §150B-23(f) ("Petition").

13. Petitioner filed an amended petition pursuant to 26 NCAC § 03 .0101(a) and N.C. Gen. Stat. § 1A-A Rule 15(a) ("Amended Petition").

CONCLUSIONS OF LAW

1. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 of the North Carolina Rules of Civil Procedure and N.C. Gen. Stat. § 150B-33, the undersigned is authorized to grant Summary Judgment. To the extent that the findings of fact contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels.

2. On a motion for summary judgment, the question before the Tribunal is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact, and that a party is

entitled to judgment as a matter of law. *Meadows v. Cigar Supply Co., Inc.*, 91 N.C. App. 404, 371 S.E.2d 765 (1988). Only a fact, resolution of which would prevent the party against whom it is resolved from prevailing, is material. *Bone International, Inc. v. Brooks*, 304 N.C. 371, 374, 283 S.E.2d 518, 520 (1981).

3. The burden of establishing a lack of any triable issue resides with the movant. *Pembee Mfg. Corp. v. Cape Fear Constr. Co., Inc.*, 313 N.C. 488, 329 S.E.2d 350 (1985).

4. In the Motions before this Tribunal, each party has filed a cross-motion for summary judgment, and both parties have agreed and concluded that no material facts are disputed. The Tribunal has conducted its own review of that issue and concurs that there is no genuine issue of material fact to be resolved via a full contested case hearing.

5. By statute, the Respondent “must state the basis for the determination” in the notice of final determination.²

6. The Respondent stated two federal rules for disallowing the tax credit: (1) “because Taxpayer was not a bona fide partner in [Rockwood North Carolina SPE V 2016 LLC (“Rockwood V”)]” under 26 CFR §1.701-2 and (2) “because the exchange of [capital] contributions [with Rockwood V] constituted a disguised sale.”³ [26 USC §707(a)(2)(B)]

7. Both of the stated “bas[e]s for the determination” are erroneous.

8. The Respondent acted erroneously when applying those federal rules to disallow the tax credits.

9. There is no clear and specific reference to either the federal bona fide partner or disguised sale rules in N.C. Gen. Stat. § 105-269.15 and the absence of express incorporation by the General Assembly precludes their application by the Respondent as required by *Fidelity*.

10. The “sale” of tax credits is prohibited in North Carolina.

11. Plain reading of the General Assembly’s statutory scheme to promote investments in renewable energy sources shows in pertinent part:

- A taxpayer that constructs, purchase or leases renewable energy property is “allowed” a credit if the property is placed in service in North Carolina during the taxable year. N.C. Gen. Stat. § 105-129.16A
- Although the credit is “allowed” in the year the renewable energy property is placed in service, the credit is “taken” in five equal installments. *Id.*

² N.C. Gen. Stat. § 105-241.14(a).

³ Final Determination at 20.

- The amount of the credit is based upon the “cost” of constructing or purchasing the renewable energy property. *Id*
- A partnership that engages in an activity that is eligible for the credit – the construction, purchase, or lease of renewable energy property – qualifies for the credit as an entity. N.C. Gen. Stat. § 105-269.15(a).
- Qualification for the credit occurs at the *partnership* level – not the partner level. *Id*.
- The partnership that qualifies for the credit “passes through” each partner’s “distributive share” of the credit for which the partnership entity qualifies. *Id*.
- The amount of the partner’s “distributive share” (portion of the total credit) for which the partnership entity qualifies is determined under sections 702 and 704 of the Internal Revenue Code. N.C. Gen. Stat. § 105-269(c).
- The credit allowed in N.C. Gen. Stat. § 105-129.16A is allowed against the gross premium tax levied in Article 8B of Chapter 105. N.C. Gen. Stat. § 105-129.17.
- To attract additional investment in renewable energy property in North Carolina, the “sunset” or expiration of the credit was delayed multiple times. *See, e.g.*, N.C. Gen. Stat. § 105-129.16A (f), (g) and (h).

12. Through Respondent’s admission that Petitioner is entitled to tax credits Petitioner earned through investing in renewable energy projects, Petitioner did not purchase the credits through a “sale.”

FINAL DECISION

The Undersigned concludes there is no genuine issue of material fact and Petitioner is entitled to summary judgment as a matter of law and, therefore, **GRANTS** Petitioner’s Motion for Partial Summary Judgment on Two Threshold Questions of Law and Petitioner’s Motion for Summary Judgment, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1. The Undersigned hereby **DENIES** Respondent’s Motion for Summary Judgment, and the Petitioner’s Motion to Withdraw Pleading from the Record.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the Administrative Procedure Act of North Carolina, N.C. Gen. Stat. § 150B-1 *et. seq.*, N.C. Gen Stat. § 150B-45(a)(1), and N.C. Gen Stat. § 105-241.16, any party aggrieved by the Final Decision may seek judicial review by filing a Petition for Judicial Review in the Superior Court of Wake County and in accordance with the procedures for a mandatory business case set forth in N.C. Gen. Stat. § 7A-45.4(b) through (f). **Before filing a petition for judicial review, a taxpayer must pay the amount stated in the Notice of Final Determination, plus applicable interest, which continues to accrue until the tax is paid.** N.C. Gen. Stat. § 105-241.21.

The party seeking review must file the petition within 30 days after being served with a written copy of the Final Decision. In conformity with 26 N.C. Admin. Code 3.0102, which incorporates the provisions of electronic service as defined in 26 N.C. Admin. Code 3.0501, **the Certificate of Service attached to this Final Decision shows the date of service on the parties.**

N.C. Gen. Stat. § 150B-46 describes the contents of the Petition for Judicial Review and requires service of the petition on all parties. Because the Office of Administrative Hearings is required to file the official record in the contested case under review, **the party seeking judicial review must send a copy of the Petition for Judicial Review to the Office of Administrative Hearings when the judicial review is initiated**

IT IS SO ORDERED.

This the 23rd day of September, 2021.



Donald R van der Vaart
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

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This the 23rd day of September, 2021.



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