

South Carolina Bar Association

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State and Local Tax Update

Case Law Update

by

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I. CORPORATE INCOME TAXES

1. State of South Carolina, Administrative Law Court, *Media General Communications, Inc. v. South Carolina Department of Revenue*; Opinion No. 26828 – Filed June 14, 2010

Note: Forced Combination Under Section 12-6-2320 (UDIPTA §18 Relief Provision) by Taxpayer

The Appellant, the South Carolina Department of Revenue (“Department”) contended the Administrative Law Court (“ALC”) erred in construing S.C. Code Ann. §12-6-2320(A)(4) as allowing the three multistate corporations to use the combined entity method in apportioning their income and determining their South Carolina corporate income tax liability.

The case involved three corporations that were challenging the accounting procedure applied by the Department in calculating their corporate income taxes due in South Carolina. The taxes were based on income earned from intangible assets used in this state –royalty receipts from the use of trademarks, trade names, and licenses. Media General and its affiliates comprised a “unitary group.”

In determining these assessments, the Department utilized the separate entity apportionment method, which is the standard apportionment method used in South Carolina for apportioning income among multistate, related business entities.

This is in contrast to the combined entity apportionment method, which the parties have stipulated is defined for this matter as an accounting method whereby each member of group carrying on a unitary business computes its individual taxable income attributable to activities in South Carolina by taking a portion of the combined net income of the group through the utilization of combined apportionment factors.

The corporations timely filed protests to the assessments and asked the Department to use the combined entity apportionment methodology as an alternative method to the separate entity apportionment method to fairly represent their business activities in South Carolina pursuant to S.C. Code Ann. §12-6-2320(A)(4). This statute provides that if the allocation and apportionment provisions do not fairly represent the taxpayer’s business activities in South Carolina, the taxpayer may petition for, or the Department may require, if reasonable, the employment of any other method to effectuate the equitable allocation and apportionment of the taxpayer’s income.

The Department stipulated that the standard statutory method it used did not fairly represent Taxpayer’s income, and that the combined entity apportionment method did fairly measure Taxpayers’ business activity in South Carolina, but it denied the petition based on its determination that it was not authorized under South Carolina law to apply the combined entity apportionment method.

The Supreme Court agreed with the ALC that the legislature enacted Section 12-6-2320 as a relief mechanism, and held that the plain language of Subsection (A)(4) clearly authorized

the Department to use “any other method” to effectuate an equitable apportionment of the taxpayer’s income, including the combined entity apportionment method.

The Court emphasized that, as a general rule, the Department need not automatically use the method requested by a taxpayer, as it has the discretion to select an alternative method that fairly measures the taxpayer’s income in South Carolina.

2. **State of South Carolina, Administrative Law Court, *Carmax Auto Superstores West Coast, Inc. v. South Carolina Department of Revenue*; Docket No.: 09-ALJ-17-0160CC – Filed April 22, 2010**

Note: Forced Combination by SCDOR; Commerce Clause

Petitioner appealed the South Carolina Department of Revenue’s (Department’s) determination that its corporate income tax returns for tax years 2002 through 2007 did not reflect accurately the extent of its business in South Carolina.

Issues presented:

1. Did the Standard statutory apportionment formulas contained in the South Carolina Code fairly represent of the taxpayer’s business in South Carolina?
2. Was the Department’s alternative apportionment formula reasonable?
3. Was the taxpayer’s financing income appropriately sourced to South Carolina?
4. Were the Department’s penalties properly applied to the taxpayer in this case?
5. Did the Department’s actions in this matter violate the taxpayer’s constitutional rights pursuant to the Commerce Clause of the United States Constitution?

Carmax Auto Superstores West Coast, Inc. (taxpayer) was a subsidiary of Carmax, Inc. The taxpayer, a retailer of used light trucks and automobiles, operated Carmax retail locations in several western states. Carmax Auto Superstores Superstores, Inc. (East) was a related subsidiary of Carmax, Inc., which operated Carmax retailers in several eastern states, including South Carolina.

A. Apportionment Formula

The Department contended that the taxpayer’s filed returns failed to reflect fairly the extent of the taxpayer’s business in South Carolina, even using the gross receipts formula in the amended returns. The auditor’s proposed alternative apportionment formula relied on the statutory authority of §12-6-2320(A). The proposed alternative apportionment formula divided the taxpayer’s income from royalties and financing from within South Carolina by the taxpayer’s royalty and financing receipts from all locations in which it does business to determine the ratio of the taxpayer’s apportionable income which is taxable in South Carolina.

The taxpayer, in both its original and amended returns for the years at issue, utilized standard apportionment formulas delineated by statutes -- §§ 12-6-2250 and 12-6-2290, respectively. The Department's findings determined that neither method fairly reflected the extent of the taxpayer's business in South Carolina. The auditor proposed an alternative apportionment method pursuant to § 12-6-2320(A). The statute provides broad authority for the Department to deviate from the standard formulas laid out by other apportionment statutes under limited conditions. Under the statute there are two significant checks on the Department's ability to deviate from statutory formulas. First, the statutory authority of the Department to require an alternative method is triggered only if the standard formulas of Title 12, Chapter 6 fail to fairly represent the extent of the taxpayer's business activity in South Carolina. Second, whatever method the Department proposes, it must be reasonable. The ALC held that the DOR's proposed method met both tests.

B. Penalties

SCDOR assessed penalties against Carmax West based on both negligence and substantial understatement, which totaled \$205,832. SCDOR produced no evidence of any written policies or procedures for auditors to use for guidance in determining whether to assess penalties in a given case nor evidence of any training provided to the auditors regarding the circumstances that would justify assessing penalties. Moreover, SCDOR did not appear to have correctly applied the relevant penalty statutes or made an independent and fair determination of whether penalties were justified under the statutes.

In this case, the Taxpayer filed in accordance with the statutory method as well as the tax return forms and instructions. As the SCDOR witness testified, the tax returns and the instructions to those returns represent substantial authority. It was clear that CarMax West acted in good faith in following this authority and submitting its filing. Furthermore, it made adequate disclosure on its income tax returns, as conclusively evidenced by the fact that the audit report itself used only that information that was reported on the return. Thus, because the Taxpayer had substantial authority and made complete disclosure on its returns, the ALC concluded that CarMax West had established by a preponderance of the evidence that the substantial understatement penalty should not apply and must be dismissed.

C. Constitutional Issues

Since *Complete Auto* was decided, the U.S. Supreme Court has increasingly employed the "internal consistency test" to determine whether a taxing scheme creates unconstitutional discrimination. Simply put, this test asks whether the taxing scheme - if applied by every taxing jurisdiction - would subject more than 100% of a taxpayer's income to taxation. The taxpayer specifically alleged in its brief that the Department's formula would subject more than 100% of its income to taxation. The ALC found that no testimony or other evidence to that effect was offered at the hearing in this matter. The ALC found that a ratio dividing receipts from a particular state by receipts from everywhere, when applied by every taxing jurisdiction in which the taxpayer conducts its business could necessarily tax no more than 100% of the taxpayer's income.

In summary, the ALC found:

1. The Department demonstrated that the Petitioner's apportionment formula failed to fairly represent its business in this State;
2. The Department's proposed alternative apportionment method was reasonable in light of the extent of the Petitioner's business activities in this State;
3. The penalties applied to the Petitioner by the Department for negligence and understatement were not reasonable under the facts of this case; and
4. The imposition of an alternative method in this case was not an unconstitutional violation of the Commerce Clause.

II. Sales Taxes

1. **State of South Carolina, Administrative Law Court, *Home Medical Systems, Inc., v. South Carolina Department of Revenue*, Supreme Court Opinion No. 26638 - Filed April 20, 2009**

Note: Sales Tax exemption for Prescription Drugs as applied to Durable Medical Products; Practice and Procedure

A. Background

Taxpayer was a retailer of durable medical equipment, medical supplies, and other medical products. At issue in the instant case is whether the following categories of products were exempt from sales tax: (1) CPAP and BiPap devices; (2) Ventilator devices; (3) Nasal Intermittent Positive Pressure Ventilation (NIPPV) devices; (4) Nebulizer devices; and (5) Enteral Nutritional formulas.

The DOR's Final Agency Determination ruled there was no tax exemption because: (1) the items listed in categories 1-4 above were not "prosthetic devices" since they do not replace a body part; and (2) the enteral nutritional formulas (category 5) were not actually sold pursuant to a prescription, and do not require a prescription to be sold.

Following a hearing on the motions, the ALC granted summary judgment in favor of Taxpayer. The DOR filed a motion for reconsideration with the ALC, which was denied, and thereafter filed a Notice of Appeal. Taxpayer filed a motion to dismiss the appeal based on failure to timely serve the Notice of Appeal. The issues presented were:

1. Did the DOR timely serve the Notice of Appeal?
2. Did the ALC err by finding that the sales tax exemption applies to all items and granting summary judgment in favor of Taxpayer?

B. Timeliness of Notice of Appeal

Taxpayer argued the Supreme Court should dismiss the appeal because the DOR failed to timely serve the Notice of Appeal. The Supreme Court noted that this raised a novel issue regarding the intersection of the South Carolina Rules of Civil Procedure and the ALC Rules.

The ALC's summary judgment order was dated August 28, 2007, and the DOR received the order on August 30, 2007. On September 10, 2007, the DOR filed a "Motion for Reconsideration and to Alter or Amend Judgment Pursuant to ALC Rule 29(D), ALC Rule 68, and Rule 59(e), SCRCP" (Post-Order Motion). The ALC denied the Post-Order Motion on October 1, 2007. The DOR then served the Notice of Appeal on October 9, 2007.

Taxpayer contended that under the ALC rules, the DOR's Post-Order Motion was improper because ALC Rule 68 does not permit a Rule 59(e), SCRCP, motion. Therefore, according to Taxpayer, the Post-Order Motion did not toll the time period for serving the Notice of Appeal. Stated differently, Taxpayer argued Rule 59(e), SCRCP, did not apply to ALC actions.

The Supreme Court disagreed, holding "Put simply, Rule 59(e) motions serve a vital purpose for proper issue preservation. As in other appellate matters, we require issue preservation in administrative appeals. We therefore hold Rule 59(e), SCRCP, motions are permitted in ALC proceedings. Accordingly, the DOR's Post-Order Motion tolled the time period for filing an appeal, and the Notice of Appeal was timely served. "

C. Application of the Sales Tax Exemption

Despite the DOR's long-standing construction of this exemption, the ALC found that the department's policies had "contorted the plain language of the statute to severely limit the scope of the exemption." The ALC stated that "the definition of prosthetic device has been updated as the field of medicine has progressed" and therefore found all of the devices at issue in the instant case are prosthetic devices. Furthermore, the ALC held that Regulation 117-332's definition of "prosthetic device" was inconsistent with "current medical definitions and as such should be rejected as contrary to the intent of the General Assembly to provide an exemption for prosthetic devices sold by prescription. "

The DOR argued the ALC erred in invalidating the agency's definition of prosthetic device and by improperly broadening the definition. The Supreme Court agreed. Accordingly, it found that Regulation 117 -332 reasonably defines "prosthetic devices."

Finally, it noted that 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.

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

Regarding the enteral nutritional formulas, the ALC found they were "medicine sold by prescription." The DOR argued that because the formulas were "over the counter" (OTC) products which do not require a prescription, the ALC erred. Furthermore, the DOR contended that CMNs are not equivalent to a prescription. The Supreme Court agreed.

The DOR had set forth a definition for "medicine by prescription" - the medicine must be of a type that requires a prescription, the sale must require a prescription, and it must actually be sold by prescription. The Court agreed with the definition.

2. State of South Carolina Administrative Law Court, *Greenery Gallery, Inc. vs. South Carolina Department of Revenue*, Docket No. 09-ALJ-17-0205-CC – Filed July 23, 2010

Note: Sales Tax Treatment of Services (Warranty and Maintenance Contracts)

The South Carolina Department of Revenue (Department) issued a Department Determination that gross proceeds from Petitioner's sale of maintenance contracts, in which the Petitioner agreed to maintain its clients' plants on a regular basis, were subject to Sales Tax.

Greenery Gallery, Inc., was in the business of selling, leasing and servicing tropical plants. The Petitioner offered plant maintenance and service agreements to its customers, agreeing to water, fertilize, prune, dust, replace and re-arrange the plants on a scheduled basis.

A Department audit revealed that Petitioner had not been remitting sales tax on maintenance of plants which were owned by Petitioner's customers, but serviced and maintained by Petitioner.

S.C. Code Ann. § 12-36-910(B)(6) was amended in 2005 to provide that sales tax applies to "gross proceeds accruing or proceeding from the sale or renewal of warranty, maintenance, or similar service contracts for tangible property, whether or not such contracts are purchased in conjunction with the sale of tangible personal property."

The Legislature has not defined the terms "maintenance," "warranty" or "service contracts," either as part of the amendment to this statute, or as part of the original language in the statute. "Maintenance" is defined as "The care and work put into property to keep it operating and productive; general repair and upkeep." Black's Law Dictionary, 965 (7th ed. 1999)

The ALC held that the agreements in this case clearly fell within these definitions of service contracts or maintenance agreements. The Petitioner's own documents referenced an "agreement" to "professionally maintain" the plants owned by the client.

The ALC found that the plants at issue were tangible personal property as defined by South Carolina statute; that is, they are personal property that can be seen, felt, and touched as defined by § 12-36-60 above. Because the sale of the plants themselves would be subject to sales tax, the subsequent sale of a "maintenance or similar service contract" is also taxable, regardless of where the clients purchased the plants, or when the clients contracted with the Petitioner for this maintenance.

The Petitioner attempted to distinguish between the "sale of the maintenance contract" and the "providing" or "performance" of the maintenance contract. The ALC found that these two concepts were "inextricably related and bound together" so that the sale and performance of the maintenance contract go hand-in-hand in this case and were subject to the sales tax.

3. State of South Carolina Administrative Law Court, *Tronco's Catering, Inc. v. South Carolina Department of Revenue*, Docket No. 09-ALJ-17-0089-CC – Filed April 12, 2010

Note: Sales tax treatment of caterers; “Installation” exception

Petitioner challenged Respondent, South Carolina Department of Revenue's (Department), Determination that it was liable for sales taxes for service, labor, and room charges incident to its food sales.

At issue was:

1. Were service, labor, and room charges incident to the sale of tangible personal property, in this case catered meals, properly included in gross proceeds of the sale and therefore subject to sales tax?
2. Are receipts for service and labor incidental to catered events deductible from gross proceeds as "installation" under 27 S.C. Code Ann. Regs. 117-313 (Supp. 2008)? and
3. Did the Petitioner make wholesale sales to customers during the audit period which can be set-off from the gross proceeds?

The taxpayer operated a full service retail catering business in Columbia, South Carolina. The taxpayer's sales tax returns, filed between September 2003 and December 2005, deducted service, labor, and room charges from its gross proceeds of sales, thereby reducing its tax base and the amount of tax paid. A service charge was a 19% catchall line item charge for overhead costs incident to a catered meal, including, for example: kitchen employees, delivery expenses, insurance and equipment. A labor charge was a flat fee line item charge for servers, butlers, and bartenders who provide services incident to catered meals. The room charge was a line item charge for the use of the taxpayer's facility for catered meals.

On February 2, 2009, the Department issued a Department Determination upholding its proposed assessment and finding that service, labor, and room charges incident to the sale of catered meals could not be deducted from gross proceeds for sales tax purposes.

The ALC found that this statute plainly provides that the value proceeding or accruing from the sale is the tax base. In this instance, the value of the sale of catered meals included service, labor, and room charges. Such charges were incidental to and merely enhance the value of the sale of catered meals. The statute further expressly stated that the value of the sale must include costs for materials, labor, service, transportation, or for any other expense.

The taxpayer claimed its service and labor charges are exempt from § 12-36-90 because the charges constitute "installation" pursuant to Regulation 117-313.3. Regulation 117-313 provides that installation charges are not subject to the sales tax when they are separately stated from the sales price on bills to customers.

The ALC found that the taxpayer's understanding of "installation" was in direct conflict with this Court's prior ruling on the matter. *Hamby Catering, Inc. v. S.C. Dep't of Revenue*, Docket No. 08-ALI-17-0041-CC (June 12, 2009). After contemplating the usual definition of installation, which included defining it as "setup," in *Hamby* the ALC found that "[l]abor to set up, maintain, or break down a catered event, which includes refilling serving dishes with food and setting up folding tables and chairs, does not meet the standard of establishing the food in place."

The ALC also found that the taxpayer provided no proof to substantiate its claim that it made wholesale sales during the audit period. Specifically, the taxpayer did not provide any resale certificates or any other evidence that it made wholesale sales. The only records the taxpayer provided were billing statements. Accordingly, the taxpayer was not entitled to receive a set-off credit for the alleged wholesale sales.

III. ACCOMMODATIONS TAXES

- 1. State of South Carolina Administrative Law Court, *Travelscape, LLC vs. South Carolina Department of Revenue*, Docket No. 08-ALJ-17-0076-CC - Filed February 12, 2009**

Note: Taxation of On-Line Travel Companies; Net vs. Gross in ATAX base; Nexus; Commerce Clause

The following issues were raised in this proceeding:

1. Whether the gross proceeds received by Petitioner from the rental of South Carolina hotel rooms were subject to sales tax under S.C. Code Ann. § 12-36-920 (2000 & Supp. 2007)?
2. Whether imposition of sales tax on the taxpayer violated the Commerce Clause of the United States Constitution?
3. Whether Petitioner was entitled to a waiver of failure to file and failure to pay penalties?

B. Net vs. Gross

Petitioner was an online travel company doing business as Expedia.com through the website, www.expedia.com, and telephone call centers. Petitioner was a single member Nevada Limited Liability Company located in Las Vegas, Nevada. Petitioner's single member, Expedia, Inc., a Washington corporation, is located in Bellevue, Washington. Petitioner contracts with hotels across the country, including hotels located in South Carolina.

Under its merchant business model, the contractual agreements between Petitioner and supplier hotels set room rates that the hotels are willing to accept for reservations booked using Petitioner's website (the Net Room Rate). The Net Room Rates contracted between Petitioner and the hotels are at a discounted price from the rates offered to the general public.

The hotel thereafter invoices Petitioner the agreed upon Net Room Rate. The invoice from the hotel included charges for the room and Accommodations Tax based upon the Net Room Rate. The hotel remitted this sales tax to the South Carolina Department of Revenue (Department). No Accommodations Tax was paid on the difference between the proceeds received by Petitioner from its customer, and the Net Room Rate Petitioner pays to the hotel. At no time had Petitioner filed Accommodations Tax returns with or paid Accommodations Tax to the Department.

The South Carolina Accommodations Tax is imposed on the vendor rather than the customer (i.e., accommodation guest) and is thus referred to as a vendor tax.

The Department contended that since Petitioner charges transients for accommodations, the money it receives as compensation should be considered "gross proceeds" derived from the furnishing of accommodations to transients within the meaning of the statute. Thus, Petitioner should be taxed under Section 12-36-920(A) at a rate of 7% on the entire amount received from its customers instead of the discounted room rate it forwarded to the hotels to be remitted to the Department. Petitioner disputed the Department's position that it "sells" hotel accommodations and instead asserts that it is in the business of "facilitating" hotel reservations. Notably, Petitioner was not a hotel, inn, or a place in which rooms, lodging, or sleeping accommodations are furnished. Accordingly, Petitioner contended that it was not subject to the Accommodations Tax because it did not furnish accommodations within the meaning of the statute. This case thus turned on whether Petitioner was a vendor subject to the Accommodations Tax.

The ALC found that no matter the nomenclature used to describe the fees, these amounts were subject to the tax. The fees are charged to the customer for the value of receiving the right to rent a room from a hotel. The "gross proceeds" generated by the sales transactions between Petitioner and its internet customers are subject to sales tax under Section 12-36-920(A). However, Petitioner had only accounted for sales taxes on the discounted amount (Net Room Rate) paid to the hotel. This was improper as Petitioner's gross proceeds were greater than the Net Room Rate. As the retailer of the hotel room, Petitioner was liable for sales tax on its entire gross proceeds of sale, including not only the Net Room Rate, but also Petitioner's Margin and Service Fees.

C. Commerce Clause

Petitioner further claimed that requiring it to collect the Accommodations Tax would violate the Commerce Clause of the United States Constitution.

The ALC found that Petitioner derived income from booking accommodations that were located within South Carolina - accommodations which enjoyed the benefits of local fire and police protection. Moreover, the services of South Carolinians employed at those accommodations were critical to Petitioner's ability to produce that income. While it is true that those working at the South Carolina accommodations were not employees of Petitioner, that fact was of minor constitutional significance.

D. Penalty

The Department assessed a penalty of \$1,589,176.06 against Petitioner for its failure to remit the Accommodations Tax. However, the ALC found that the imposition of a penalty upon Petitioner was not warranted.

The Department issued SC Rev. Proc. Bulletin #02-5 (the "Revenue Procedure") to provide procedural guidance for the waiver or reduction of penalties pursuant to that statute. The Revenue Procedure provides that "[a] complete penalty waiver is appropriate when lack of performance required by a taxpayer is due to reasonable cause."

Furthermore, the implementation of penalties must be made in light of their purpose. The fundamental purpose of the penalties is not to punish.

Here, the application of the Accommodations Tax to Petitioner was a novel theory. Neither Section 12-36-920 nor any other authority specifically enumerated online travel companies (OTCs) or any other company providing services solely outside the State were subject to the Accommodations Tax. In fact, the Department admitted that difficult and complex issues exist in this case. Furthermore, the Department had never pursued taxation of OTCs before the audit of Petitioner or assessed any OTC, other than Petitioner, for the Accommodations Tax. Finally, the Department, even though requested, has not published any official guidance regarding the application of the Accommodations Tax to OTCs.

IV. UTILITIES

1. **The State of South Carolina, The Court of Appeals, *Alltel Communications, Inc. v. South Carolina Department of Revenue*, Case No.: 2007-ALJ-17-0299 – Filed April 9, 2010**

Note: License Tax on Utilities

Respondents were engaged in the business of providing wireless voice and data communications service via radio within South Carolina.

The basis for the proposed assessment was the Department's determination that Respondents had erroneously used section 12-20-50 of the South Carolina Code (2000) to calculate their license fees. The Department concluded that each Respondent was a "telephone company" and thus was required to pay license fees in accordance with section 12-20-100, rather than section 12-20-50.

Respondents contended that Section 12-20-100 did not apply to them because they were not telephone companies. Alternatively, Respondents argued that, if they were telephone companies, the Department did not properly calculate the license fee owed by Respondents under section 12-20-100. Specifically, Respondents claimed that the Department erred by determining that they derived gross receipts from "services rendered from regulated business".

Here, the ALC concluded that "based on the plain language of the statute," none of the Respondents constituted a telephone company for the purposes of section 12-20-100 because

"the services they provide relate to the provision of wireless communications via radio, not communications via telephone."

On Appeal, the Court of Appeals found that the construction of section 12-20-100 as applied to wireless communications service providers was an important question of novel impression. No appellate court in this State had construed the term "telephone company" for the purposes of section 12-20-100.

Because the Court of Appeals found that further development of the facts was necessary to ascertain whether Respondents constitute telephone companies for the purposes of section 12-20-100, the Court held that the ALC erred by granting summary judgment on that issue.

The Department also contended that the ALC failed to give proper consideration to other issues raised by the parties in their Summary judgment motions.

The Court of Appeals held that it was questionable whether the ALC actually ruled on the issues. The text of the decision stated that "[i]f the Court were to reach these issues, it *would* find for the Alltel Entities on each of these issues for the reasons set forth above," (emphases added). The Court found that this statement indicated that it was not the ALC's intent to rule on these issues. Nonetheless, to the extent that the ALC did rule on any of these issues, the Court found that the rulings were not sufficiently detailed to enable proper review. Accordingly, the Court reversed the above-referenced portion of the ALC's decision and remand the issues discussed therein to the ALC.

V. INDIVIDUAL INCOME TAXES

1. State of South Carolina Administrative Law Court, *Whitmarsh Smith, III and Anne Smith vs. South Carolina Department of Revenue*, Docket No. 09-ALJ-17-0422-CC Filed – April 01, 2010.

Note: Claim under IRC § 165 for Casualty Loss

This action was brought by the taxpayers to challenge the Department of Revenue's (Department) denial of their claim of an individual income tax refund in the amount of \$21,541, based upon a disallowed casualty loss deduction for the 2005 income tax year. The casualty loss claimed by the taxpayers was based on water and structural damage to their home allegedly resulting from a series of hurricanes in August and September of 2004. The Department denied the claim on January 19, 2007, upon information received from the taxpayers that indicated the damage to the house was the result of progressive deterioration, and therefore, not a casualty.

For South Carolina income tax purposes, gross income, adjusted gross income, and taxable income are to be computed in accordance with the Internal Revenue Code (I.R.C.). The I.R.C. permits individuals to take deductions for certain types of losses sustained during a taxable year, when they have not been compensated for by insurance or otherwise. 26 U.S.C.A. §165(a) (West 2008). These types of losses include "losses of property not connected with a trade or business or a transaction entered into for profit if such losses arise from fire, storm, shipwreck, or other casualty, or from theft." §165(c)(3).

The ALC noted that while the term “casualty” is not specifically defined in the code, IRC § 165 presents examples of types of casualty loss, and extensive case law has interpreted the requirements of the deduction. Implicit in the listed examples of casualties is the requirement that the event arise “suddenly,” and the prevailing current of jurisprudence has long held that a casualty loss requires “suddenness.”

The ALC found that the taxpayers have not met their burden of proof in regards to the element of suddenness. The damage suffered by Petitioners were the result of progressive deterioration and not a casualty loss.

Regardless of whether or not the taxpayers’ damage qualifies as a casualty, §165(c)(3), an insurance claim must be filed for the specific loss if the property is covered by an insurance policy. §165(h)(5)(E) states: “Any loss of an individual described in subsection (c)(3) to the extent covered by insurance shall be taken into account under this section only if the individual files a timely insurance claim with respect to such loss.”

The ALC found there was no formal claim filed with regards to such loss, nor was there any formal adjudication of a claim for the alleged hurricane damage. The Court accordingly found that the taxpayers were not entitled to claim a casualty loss under §165(c)(3), since they failed to file an insurance claim with respect to the specific loss suffered.

VI. PROPERTY TAXES

- 1. State of South Carolina Administrative Law Court, *Glenn A. Olson/Cedar Creek Development Corporation vs. Aiken County Assessor*, Docket No.: 09-AIJ-17-0369-CC - Filed April 30, 2010**

Note: Practice & Procedure: Deadline for Application for Multi-Lot Discount

The Petitioner sought a hearing to contest the Aiken County Board of Assessment Appeals ("Board") decision which denied Petitioner's application for the multiple lot ownership discount for the 2008 tax year due to Petitioner's failure to file the application by the May 1, 2009 deadline.

Petitioner countered that the failure to submit the application by the May 1 deadline was not intentional, and there was no intentional relinquishment or waiver of the multiple lot discount. The application was timely prepared, but because the Petitioner was forced to reduce its personnel due to the economy, the application was inadvertently and unknowingly not mailed. Petitioner had consistently applied for and received the discount in prior years and felt that this fact was indicative of its intent to apply for the discount for the 2008 tax year.

The Petitioner's application was prepared timely, but was not mailed until May 7, 2008 and was received in the Assessor's Office on May 9, 2008.

Although there were extenuating circumstances that contributed to Petitioner's failure to make written application by May 1st, as mandated by the statute, the ALC nevertheless found that the plain language of the statute provides no exception, and Petitioner's failure to apply by the deadline constitutes a waiver of the discount for the 2008 tax year.

2. State of South Carolina Administrative Law Court, *MS Grande Oaks, LLC vs. Charleston County Assessor*, Docket No. 09-ALJ-17-0493-CC - Filed July 23, 2010

Note: Practice & Procedure: Deadline for Filing Application for Multi-Lot Discount

Grande Oaks was a developer who owned several lots within the Grande Oaks subdivision in Charleston County which opened for sale in December 2006. On April 29, 2008, Grande Oaks applied for a multiple lot ownership discount for the 2008 tax year for 90 unsold and unimproved lots out of 295 total lots pursuant to S.C. Code Ann. § 12-43-225. Assessor considered the application as timely filed and granted the discount for the 2008 tax year.

In 2008, Petitioner sold 24 of the 90 lots claimed in 2007. On June 30, 2009, the Assessor mailed Petitioner a property tax assessment notice pursuant to S.C. Code Ann. § 12-60-2510(A)(1) informing Petitioner that "Multiple Lot ownership discount revoked because owner did not reapply for discount." Petitioner received the notice in early July. Upon discovering that the multiple lot discount was not applied on the remaining lots, Petitioner submitted an application for the discount dated July 28, 2009. Petitioner sought application of the discount to the 66 unsold and unimproved Jots for the 2009 tax year. In a letter dated August 4, 2009, the Assessor informed Petitioner that she was without statutory authority to extend the May 1 deadline to apply for the discount.

Grande Oaks argued that it is only required to submit an initial application prior to the May 1st deadline to receive the multiple 101 discount and the duration of the discount is for five years or until a statutorily intervening event occurs, such as the sale of a lot. The ALC found the arguments of the Petitioner to be unpersuasive. The statute's plain language did not support the taxpayer's position.

The ALC found that the plain and ordinary meaning of the statutes required that written application must be made on or before May 1st of the tax year for which the discount is claimed. If the owner makes application for the discount according to the statute, the discounted value applies for five property years unless the lot is sold, improved, or a certificate of occupancy is issued for the improvement. In order to obtain the benefit of the discounted value for the five years, the owner must make its application by May 1st of each year.

3. State of South Carolina Administrative Law Court, *Clarendon County, South Carolina, through the Clarendon County Assessor v. TYKAT, Inc.*, Docket No. 09-ALJ-17-0458-CC - Filed July 23, 2010

Note: Exempt Property

The parties agreed that the material facts were uncontroverted and that one question of law governed the outcome of this matter: whether TYKAT's leasehold interest in real property that is owned in fee simple by the South Carolina Public Service Authority ("Authority"), but was leased to TYKAT, a "S," South Carolina, for-profit corporation, used for commercial purposes was assessable to TYKAT for *ad valorem* taxation.

TYKAT was a for-profit Chapter “S” corporation, organized and existing under South Carolina law, created to pursue a private, commercial purpose.

The ALC noted that land owned by the Authority is not assessable *to the Authority* for *ad valorem* taxation. Neither party had questioned the Authority’s tax-exempt status, nor did either party challenge the tax-exempt nature of the Authority’s interest in the land. Rather the Parties disagreed over whether Clarendon can assess and tax TYKAT’s separate and distinct interest in the land – the Leasehold.

South Carolina Code Annotated Section 12-37-950- states that “[w]hen any leasehold estate is conveyed for a definite term by any grant to whose property is exempt from taxation to a grantee whose property is not exempt, the leasehold estate shall be valued for property tax purposes as real estate.”

The ALC held that the plain, bright-line mandate in Section 12-37-950 compels the Court to hold that the Leasehold is taxable.

4. State of South Carolina Administrative Law Court, *The E.A. House Family Trust vs. Charleston County Assessor*, Docket No. 07-ALJ-17-0265-CC

Note: FMV

The Charleston County Assessor (Assessor) assigned a reassessment value for the property of \$4,200,000. The Trust asserted that the fair market value of 21 East Battery is \$2,000,000.

The ALC noted that an assessment of the value of this very high end property requires consideration not only of the location and condition of the EA House but also of the unique nature of buyers of these types of properties, the cost to repair or restore these properties and the lease encumbering this property.

The ALC ordered that the Assessor value the Petitioner’s property for the 2005 reassessment at \$2,500,000. The ALC rejected the Assessor’s argument that a “sham” related party lease decreased the property value.

5. State of South Carolina Administrative Law Court, *Robert W. Waruszewski vs. Georgetown County Assessor*, Docket No. 09-ALJ-17-0461-CC

Note: FMV

Petitioners each purchased lots in Harbor Club in 2007 in transactions that triggered a reassessment under S.C. Code Ann. §§12-37-3140 and 12-37-3150 of Article 25 (assessable transfer of interest or ATI) for tax year 2008. The controversy arises out of Respondent’s valuation of properties in light of the fact that the Harbor Club development was not completed as planned.

Issues

- (1) What is the proper date to establish the fair market value of property which is subject to an appeal?
- (2) What is the fair market value of the subject properties?

The subject property was developed as a planned unit development consisting of approximately 161 lots. The developer (South Bay Properties, LLC), as a condition of the sale warranted that it would install and build all infrastructure and amenities after the sale. Each of the Petitioners purchased their respective lots in Harbor Club in 2007.

The developer defaulted on its obligations to build the infrastructure and amenities. There was no infrastructure, including roads, water, electricity, or sewer or other amenities on the Lots as of the date of the hearing. The Lots were not capable of being used as residential lots in their present condition.

The Appraiser for Georgetown County repeatedly testified that it was her understanding that she could not accept an appraisal or consider comparable sales in an ATI assessment if it was determined that the sale was an arms-length transaction. She and Georgetown County Assessor, Susan Edwards, each testified that it is their understanding that the 2006 South Carolina Real Property Valuation Reform Act “ties the hands” of the assessor so the purchase price must be used to establish the value and that the only discretion the assessor has is to reduce the purchase price by up to ten percent.

Petitioners contend that the purchase price paid for the Lots did not represent the fair market value of the properties because the purchase price was inflated based upon the developer’s contractual promises. Respondent concedes that the developer defaulted on his obligations to the Lot purchasers at some time after December 31, 2007.

The ALC found that, in general, the values of real property in coastal Georgetown County had fallen in an unpredictable manner during the period from late 2007 through 2009. Therefore, the Court found that evidence of the value of the subject Lots during 2008 and 2009 was not credible evidence of the value on the Lots on December 31, 2007.

Petitioners argued that because they had appealed the Assessor’s determination of the value that it was appropriate for this Court to use a valuation date other than December 31, 2007. Petitioners presented testimony of an appraiser reflecting an opinion as to the value of the Lots as of July 24, 2009 and urged the court to consider that opinion of value and the adjustment to valuation of Harbor Club lots made by the Respondent for the 2009 tax year (assessing the value as of December 31, 2008) as the value for purposes of levying the property taxes for the 2008 tax year. The threshold issue in these cases is the construction of the meaning of 12-37-3140(A)(1)(c) and whether Petitioners were correct in arguing that the ALC may require the Assessor to look to the value of the Lots as of a date other than December 31, 2007 as required under subsection (b)

The Court found, the language of the statute was clear and unambiguous. This was a straightforward case of an assessable transfer of interest. Therefore, the controlling statutory

language establishes the date of valuation as December thirty-first of the year in which the assessable transfer of interest occurred.

The ALC therefore concluded that the relevant inquiry this case required a determination of the fair market value of the lots as of December 31, 2007.

Respondent argued that the developer had not defaulted under the contracts as of December 31, 2007. The ALC found the argument unavailing; the date of legal default under the contract terms does not determine the fair market value of real property. The Court concluded that the purchase price paid for the Lots in this case did not reflect the fair market value of the Lots as raw land without the infrastructure and amenities.

The appraisal evidence offered by Petitioners gave an opinion of the fair market value of the Lots as of July 2009; it did not reflect the fair market value of the Lots as of December 31, 2007. The ALC concluded that neither the Petitioners nor Respondent had produced any evidence whatsoever of the fair market values of the Lot's as of December 31, 2007. as raw land without the infrastructure and amenities. The ALC therefore remanded the cases to the Board with instructions to determine the value of the Lots as raw, unimproved land as of December 31, 2007.

6. State of South Carolina Administrative Law Court, *Richard Harrington, Jr. vs. Georgetown County Assessor*, Docket No. 09-ALJ-17-0356-CC

Note: FMV

Petitioner appeals to the ALC arguing that the value of the Property should be reduced because, as of the date of the contested hearing, the infrastructure and amenities have not been build within the planned unite development as the developer represented during the sales negotiations and subsequent purchases by petitioner.

Petitioner purchased all five lots from South Bay Properties, LLC on December 19, 2007. The Georgetown County Assessor's Office appraised the Property as of December 31, 2007. The Plantation at Winyah Bay planned unit development currently had no infrastructure or amenities located within the development. Infrastructure and amenities were not be constructed within the development prior to December 31, 2007. The Petitioner did not offer any contradictory market sales analysis, appraisal, or testimony regarding the value of the five lots as of December 31, 2007. Therefore, the ALC found that the value originally established by the Assessor pursuant to S.C. Code Ann. §§12-37-3140 and 12-36-3150 should be the valuation for Tax Year 2008.

Petitioner testified that when he purchased the property on December 19, 2007 that he did not believe infrastructure or amenities would be build by December 31, 2007. However, he urged this Court to reduce the value based on the lack of infrastructure and amenities.

The Petitioner failed to demonstrate in the record that this Court may utilize an alternate date other than that found in Section §12-37-3140(A)(1)(b) for purposes of valuation (December 31 of the year in which the assessable transfer of interest occurred).

The Court found that the Petitioner willingly paid each purchase price after reasonable exposure to the market without infrastructure and amenities being constructed at the time of purchase and with the understanding that the same were not to be constructed prior to December 31, 2007. Further, the ALC found no support for Petitioner's position that the value of the property should be reduced for Tax Year 2008 for events such as lack of construction of infrastructure and amenities that occurred after December 31, 2007 and found that the Petitioner presented no market sales evidence that established alternate value as of December 31, 2007.

7. State of South Carolina Administrative Law Court, *RW & KM Ulrich Trust vs. Beaufort County Assessor*, Docket No. 09-ALJ-17-0481-CC

Note: FMV of Vehicle

The Taxpayer challenged the Beaufort County Auditor's ("Auditor's") determination of the value of Taxpayer's 2008 Ford F450 pickup truck in 2009. In 2009, Taxpayer received a tax bill showing the truck with an appraised value of \$65,000.00, which is more than the \$53,565.00 purchase price paid for the vehicle in August 2007.

At the hearing the Taxpayer introduced a Kelly Blue Book valuation that he obtained online. According to the valuation dated May 7, 2010, a 2008 Ford F-450 in good condition is valued at \$32,600.00, and the same truck in excellent condition is valued at \$34,200.00.

The Beaufort County Auditor admitted that the \$65,000.00 valuation is excessive in light of the vehicle's sales price. However, her office valued the vehicle based on the 2009 "Heavy Truck Assessment Guide" that was provided by the South Carolina Department of Revenue.

27 S.C. Code Ann. Regs. 117-1840.2 (Supp. 2009) provides that "[t]he county auditor must use the assessment guides exactly as furnished, except in unusual and extenuating circumstances or where a piece of property is not listed in the guide."

Here, the Auditor determined that the assessed value of the personal property was listed in the Department's 2009 Heavy Truck Assessment Guide and valued the vehicle accordingly. While the ALC found it was appropriate for the Auditor to use the Department assessment guide to assess the Taxpayer's vehicle, in view of the Auditor's testimony, there are unusual and extenuating circumstances in this case to support deviation from the guide. As the Auditor noted, normally vehicles don't appreciate in value unless the vehicle is modified after purchase, and to apply the value reflected in the Department's assessment guide would result in a substantial and unrealistic increase in the value of Taxpayer's vehicle. The ALC reduced the vehicle's value.

8. State of South Carolina Administrative Law Court, *FPA, Inc. vs. Aiken County Assessor*, Docket No. 09-AU-17-0376-CC

Note: P&P Deadline for Appeal

Upon request from the Petitioner, former Aiken County Tax Assessor, Michael E. Reed, wrote a letter to the Aiken County Administration on September 13, 2008 in which he stated that gross errors in the appraisal process were committed when the subject property was entered into

the tax record for tax year 2006. According to Reed, the subject property, which was valued at \$17,000 +/- per acre, should have been valued at \$2,000 +/- per acre.

The Aiken County Tax Assessor mailed the assessment notice to Petitioner on May 22, 2006, and Petitioner objected to it well beyond the ninety-day statutory deadline on April 17, 2007. Petitioner did not disagree that the appeal was untimely under S.C. Code §12-60-2510(A)(3). Petitioner contended the board was still authorized to hear its claim under S.C. Code §12-602530(A), which provides:

“The board may rule on any timely appeal relating to the correctness of any of the elements of the property tax assessment, *and also* other relevant claims of a legal or factual nature . . . “ (emphasis added).

Respondent counters that the legislature’s use of the conjunction “and” in the statute instead of “or” means that the board may only hear matters that are both “timely appeals” and “relevant claims of a legal or factual nature.” The ALC disagreed and ruled the appeal was not timely.

9. State of South Carolina Administrative Law Court, *Carl M. Allen vs. Dorchester County Assessor*, Docket No. 09-ALJ-17-0234-CC

Note: P&P Deadline to Appeal

The Dorchester County Assessor mailed a reassessment notice to Appellant on July 14, 2009 for petitioner’s vacant lot. The deadline for Petitioner to file an appeal was October 12, 2009. However, the first correspondence received in the Assessor’s office was Appellant’s fax dated November 12, 2009. While this fax contained a letter appealing the assessment, the letter was dated October 20, 2009.

The ALC found that compliance with statutory time periods for filing appeals is a prerequisite for an appellate entity to have jurisdiction to hear an appeal.

The Court held that the Petitioner’s failure to timely appeal the Assessor’s decision within the ninety days divested the Dorchester County Assessor and the Board of assessment Appeals of jurisdiction. Therefore, the ALC did not have jurisdiction to review the matter and the decision of the Dorchester County Assessor was affirmed.

10. State of South Carolina Administrative Law Court, *Nancy Rochester vs. Oconee County Assessor*, Docket No. 09-ALJ-17-0099-CC

Note: Fit for Intended Use

Petitioner Nancy Rochester (“Rochester”) challenged Respondent Oconee County Assessor’s (“Assessor”) decision to place her residence on the 2008 Oconee County tax rolls. Rochester asserted that her residence was not complete and fit for the use for which it was intended by December 31, 2007.

Michael Murphy was a residential inspector for the Oconee County Department of Building and Codes. He inspected the Rochester Residence on December 13, 2007 and found five relatively minor items which needed to be corrected before a final inspection could occur.

Murphy returned to the Rochester residence on December 18, 2007 and made his final inspection. The items listed on the December 13, 2007 Inspection List which needed correction had been performed. Murphy stated that there were not life and safety issues present when he performed his final inspection on December 18, 2007 and as of that date, the Rochester residence was ready for occupancy. He gave verbal permission to Rochester to move in and occupy her residence.

Mrs. Rochester testified that a coat of primer paint had been applied to the kitchen walls but a final coat of paint was needed. She stated that the bottom cabinets in the kitchen were in place but the drawers were not installed. No upper cabinets had been installed. The doors for the cabinets above the washer and dryer had not been installed and there were no doors on the pantry. The refrigerator and microwave were not in place. Murphy explained that the Oconee County Building Codes do not require a final inspection to include cosmetic items. He testified that cosmetic items include a final coat of paint, cabinetry and microwave ovens.

The Court concluded that Rochester failed to establish that her new structure was not fit for its intended use as of December 18, 2007 and was, therefore, subject to taxes for Tax Year 2008.

11. State of South Carolina Administrative Law Court, *Richland County Assessor vs. South Development Corporation*, Docket No. 09-ALJ-17-0142-CC

Note: P&P Deadline for Appeals

The Richland County Assessor valued the parcel at \$1,266,600.00 for the 2006 tax year. From that Assessment, Respondent submitted its first informal appeal on May 7, 2007 and request an adjustment in the assessed value for the year 2006.

The Assessor conducted an office review of the property on June 5, 2007. Since that conference did not resolve the dispute over the property value, Petitioner provided respondent with a form, "Application for Review of Appraisal/Assessment."

Respondent did not file a written protest with Petitioner within thirty days after the date of the conference as required by S.C. Code Ann. 12-60-2520(B)(2000).

On February 3, 2008, Respondent requested that his case be heard by the Richland County Board of Assessment appeals.

By letter dated March 20, 2009, the Board of Assessment Appeals determined a value of \$295,000 for the Respondent's property. In determining that valuation, the Board addressed the merits of the case. However, it did not address the issue of late filing of the application for review pursuant to S.C. Code Ann. §12-60-2520(2000).

Petitioner argues that the requirement of timely filing the application of review is a non waivable jurisdictional prerequisite for Board Review.

The ALC agreed and found that the Board of Assessment Appeals lacked jurisdiction to review the valuation established by the answer.

Compliance with statutory time periods for filing appeals is a prerequisite for an appellate entity to have jurisdiction to hear an appeal. Respondent's failure to timely appeal the Assessor's decision to the Richland County Board of Assessment Appeals within the thirty days divested the Board of Assessment Appeals of Jurisdiction. Therefore, the ALC did not have jurisdiction to review the matter and the decision of the Richland County Assessor was affirmed.

12. State of South Carolina Administrative Law Court, Oconee County Assessor vs. Douglas Chirillo, Charlotte Chirillo, and George Power Company, Docket No. 09-ALJ-17-0079-CC

Note: Spot Reassessment

Several decades ago, Georgia Power Company created Lake Yonah when it erected a hydroelectric power facility on the Tugaloo River, which runs between South Carolina and Georgia. Georgia Power owns the land surrounding Lake Yonah, but leases individual lots to resident's who have erected cabins, docks, and other structures there. Some of these lots are located in Oconee County, but generally only accessible by boat coming from the Georgia side of the lake.

The remoteness and inaccessibility of the Lake Yonah properties in Oconee County presented a unique situation, making it difficult if not impossible to provide regular County and government services, including police and fire protection. Former County Assessor Roger Williams was aware of these property and the challenges they posed while he was assessor. During his tenure. Williams consulted with other County officials concerning the tax treatment of these properties, and out of concern over liability in the event an emergency situation did occur, Oconee County decided it would not require residents of the lots to pay ad valorem property taxes.

In 2008, a new Oconee County Assessor, Leslie Smith, decided to start assessing ad valorem taxes for the properties. The Assessor performed assessments for 2008, and, claiming the properties had "escaped taxation" pursuant to S.C. Code Ann. §12-39-220 (2000), also sought back taxes for 2005, 2006, and 2007.

The issues were did the Assessor perform an improper "spot" reassessment outside of a countywide reassessment year? Can the Assessor seek back taxes for 2005, 2006, and 2007?

The last countywide legal reassessment year in Oconee County was 2005. This year, 2010, was a countywide legal reassessment year in Oconee County, but the County's decisions at issue in this case all occurred prior to 2010.

In 2008, which was not a legal reassessment year, the Assessor revisited the County's prior decision not to tax the properties.

The Chirillos argued that the Assessor conducted an improper “spot” reassessment outside of a legal reassessment year. The ALC agreed. South Carolina law only permits county tax assessors to reassess property values every five year. See also *Long Cove Homeowner’s Assoc. v. Beaufort County Tax Equalization Board*, 488 S.E.2d 857 (S.C. 1997).

It should be noted here that this case differs from *Long Cove*, id., in that in the latter, there had actually been an assessment of \$0.00 on the property in question, whereas in the instant case, there was not an assessment but instead a refusal to tax.

The ALC found that the Assessor can change this decision in the future, but not by conducting a “spot” reassessment outside legal reassessment year under the guise of seeking so-called “back” taxes. Rather, the Assessor must wait until the next legal reassessment year to revisit it’s prior decision not to assess these properties.

The ALC found that the Assessor cannot collect back taxes for 2005, 2006 or 2007. The Assessor contended that S.C. Code Ann. §12-39-220 permits the collection of back taxes in this case. According to that section:

If the county auditor shall at any time discover that any real estate or new structure, duly returned and appraised for taxation, has been omitted from the duplicate, he shall immediately charge it on the duplicate with the taxes of the current year and the sample taxes of each proceeding year it may have escaped taxation.

The Court found that Section 12-39-220 only permits the collection of back taxes for property that has “escaped taxation.” The evidence discussed above demonstrated that the County, including the Assessor’s Office, was well aware of and on notice of the existence the residential cabins on Lake Yonah for years but consciously decided not to assess ad valorem taxes.

13. State of South Carolina Administrative Law Court, *CFRE, LLC vs. Greenville County Assessor*, Docket No. 09-ALJ-17-0432-CC

Note: Single Member LLCs and 4%

Petitioner contends that a single-member limited liability company qualifies for the four (4%) percent legal residence assessment ration for property tax purposes.

The ALC found that only a natural person is entitled to the four percent (4%) special assessment ratio for legal residences. The Legislature’s failure to enact either Senate Bill 1414 or Senate Bill 230 suggest that the legislature does not intend single-member limited liability companies to qualify for the four percent special assessment ratio for legal residences.

The Attorney General has also issued two opinions that a single member limited liability company does not qualify for the four percent special assessment ratio for legal residences.

14. State of South Carolina Administrative Law Court, *Gregory Ford and Leslie Ford vs. Beaufort County Assessor*, Docket No. 09-AU-17-0493-CC

Note: 4% and Rented primary Residences

Petitioners own a home at 21 Sand Dollar Road on Hilton Head Island in Beaufort County. 21 Sand Dollar Road is the Petitioner's legal residence and domicile. For the tax year 2008, Petitioners occupied the home for approximately none (9) months. The other three months they leased an apartment in Sea Pines and rented their primary residence as a means of generating income. 21 Sand Dollar was available for rental for 13 weeks during the summer of 2008. Of that it was actually rented for a total of ninety-one (91) days.

Section 12-43-220(c)(7) provides that the owner-occupant of a legal residence is not disqualified from receiving the four percent assessment if the taxpayer's residence meets the requirements of the Internal Revenue Cod §280A(g), and the taxpayer otherwise is eligible to receive the residential assessment. To meet Internal Revenue Code §280A(g) "a dwelling unit may only be [must be] is used during the taxable year by the taxpayer as a residence' and the dwelling unit may only be "actually rented for less than fifteen(15) days during the tax year." As clearly established, the property at issue In the instant proceedings was available for rental throughout the Summer of 2008, and was actually rented for a period of no fewer than ninety on (91) days during that period.

I find that the exception under Section 12-43-220(c)(7) is limited to those owner occupied legal residences which are rented for fewer that fifteen (15) days during the relevant tax year. Since Petitioners Rental Period is clearly outside the limited exception authorized by that Section, their property is ineligible for the preferential assessment sought.

15. State of South Carolina, Administrative Law Court, *Linda Lusk vs. Spartanburg County Assessor*; Docket No. 09-ALJ-17-0474-CC

Note: Ag Use

Petitioner appealed the decision of the Spartanburg County Board of Assessment Appeals (Board) denying the agricultural classification of her parcel of property for the tax year 2008.

The property at issue in this matter was a 4.72 acre tract of land located at 1185 Christopher Road in Spartanburg, South Carolina, and identified as Tax Map number 1-16-00-031.06. Petitioner purchased the property in 1987 as a portion of the larger 1,200 acre tract of land known as Belue Farms. The subject property, which was used for sawgrass (hay), was assessed as agricultural property when it was purchased in 1987.

The Taxpayer contended that if the property did not meet the acreage requirement, it should be grandfathered in as agricultural pursuant to the exception contained within the statute. S.C. Code Ann. 12-43-22(3)(e).

The ALC found that the language of this statute is clear in the fact that if property was owned by the current owner and classified as agricultural for the ten (10) years prior to January 1, 1994, the property would be eligible for the agricultural classification regardless of the size of

the tract of land. In this case the property was classified as agricultural for the ten years prior to January 1, 1994; however, the taxpayer acquired the subject property by deed recorded May 18, 1987. Therefore, the taxpayer failed to satisfy the ten (10) year ownership requirement.

16. State of South Carolina, Administrative Law Court, *Foxcroft of Sumter, LLC vs. Sumter County Assessor*, Docket No. 10-ALJ-17-0276-CC

Note: Ag Use

This case was before the Court pursuant to Foxcroft of Sumter, LLC's ("Petitioner") challenge of the Sumter County Assessor's ("Assessor") determination that Petitioner's property would not be classified as agricultural for tax year 2008.

The subject parcel of real estate consisted of 11.99 acres. It was configured as five unique tax parcels and an old farm road for tax year 2005. The Petitioner requested that the 5 parcels and the farm road be combined into one tax parcel as part of the Petitioner's plan to develop the adjoining property to the north into 254 single-family residential lots.

The Petitioner argued the property should receive the Agricultural Use designation because: 1) it was part of a "farm" as that term is defined by the United States Department of Agriculture; 2) the property could be used for agricultural purposes, if that could be done economically; 3) grass grew on the property; 4) the property was taxed as agricultural property in 1994; and 5) it was entitled to have its application approved due to procedural errors in the appeals process.

The Petitioner introduced photographs of six to eight round hay bales on the subject property in its appeal to the Sumter County Tax Board of Appeals and at the contested hearing, but the Petitioner's Manager admitted during his testimony at the hearing that he obtained the hay from another farmer and moved the bales onto the subject property in 2009.

The property could be used for agricultural purposes but for economic reasons Petitioner decided not to bale or to utilize otherwise the grass that grew on the property.

The ALC found that although grass on the property appeared to qualify the property for United States Department of Agriculture programs as "cropland" and allows the particular parcel to be included as a part of a larger "farm," as the federal regulations define those terms 7 C.F.R. §718.2, that determination was not binding on the Sumter County Assessor or this Court on the question of whether the property qualifies for the Agricultural Assessment. The ALC found it did not.

Although the ALC recognized that certain deadlines and procedures were not strictly adhered to in this case due to inadvertence, there is no indication there was any intent by either the Sumter County Assessor or the Sumter County Tax Board of Appeals to deny the Petitioner due process in this case. There is no South Carolina case law or statute that supports the proposition that the Petitioner is entitled to an Agricultural Assessment as a consequence of a procedural defect by either the Assessor or the Appeals Board.

17. State of South Carolina, Administrative Law Court, *Robert M. Richardson v. Richland County Assessor*; Docket no. 07-ALJ-17-0129-CC

Note: Ag Use

This matter came before the Court for review of the Richland County Assessor and Richland County Board of Assessment Appeals' decisions to revoke Agricultural use classification in 2006 and apply roll-back taxes to 17.92 acres of property located along two Notch Road in Columbia SC for the tax years 2001-2005.

Petitioner contended that since receiving the agricultural use classification, for many years he has executed and performed his management plan by excavating 2-4 acre sections and selling the dirt, followed by regular reseeding, replanting, and other legitimate forestry practices.

The Assessor maintained that although taxpayer's property historically qualified for agricultural use, the 2006 sale of a 2.06 acre portion of the original tract to Goodwill Industries required revocation of the remaining 17.92 acre tract. The Assessor contended the evidence demonstrated that rollback taxes were based on the fact that less than 50 percent of the 17.92 acre tract was devoted to legitimate forestry.

Respondent further argued that the site was not amenable to forestry, and was located in an area which is a commercial corridor.

The ALC found that 50% or more of the entire remaining 17.92 acres qualifies as agricultural property. The fact that the tract may have been purchased for investment purposes does not disqualify it if actually used for agricultural purposes. The ALC further concluded that the sale of dirt from the site at a net loss did not constitute a commercial business disqualifying the agricultural use of the property.

18. State of South Carolina, Administrative Law Court, *Charleston County Assessor vs. Goldbug Properties, LLC*, Docket no. 09-ALJ-17-0469-CC

Note: ATI

Respondent Goldbug Properties, LLC (Respondent) protested the Charleston County Assessor's (Petitioner) decision to reassess the value of the property located at 2602 Raven Street, Sullivans Island, South Carolina, for tax year 2008.

Issue: did the transfer of interest in the limited liability company holding title to the Property constitute an assessable transfer of interest pursuant to S.C. Code Ann. §12-37-3150?

The Assessor asserted that the transactions in which Michael C. Robinson transferred 53% of his interest in Goldbug to his wife and daughters triggered an assessable transfer of interest because it did not come within the exception found in S.C. Code Ann. §12-37-3150(B)(1)(b) which excludes from the definition of an assessable transfer of interest (ATI) any transfers not subject to federal income tax pursuant to Section 1041 (Transfers of Property Between Spouses or Incident to Divorce.) Assessor based its position on the assertion that the December 2007 transfers of the interest in Goldbug were made by Robinson in his capacity as

member-manager of the company, and thus the transfer to Robinson's wife, Carolyn M. Epperly, was a transfer from Goldbug to Epperly and not a transfer between spouses.

Taxpayer asserted that the Charleston County Board of Assessment Appeals did not err in its decision that the transfer of ownership interest in Goldbug was not an assessable transfer of interest because the transfer to Epperly falls within the exception for transfers between spouses and the amount of ownership interest transferred to non-spouse transferees was below the level necessary to trigger an ATI.

The ALC held that any transfer of title to real property or ownership interest in an LLC holding title to the real property is excluded from the definition of an ATI if the transfer of interest is between spouses. If the transfer was between the LLC and an individual it would fall outside the exception and constitute an ATI. The stipulation of facts provided that Robinson transferred title to the property to Goldbug and then transferred 50% of his membership interest in Goldbug to Epperly.

The ALC held that in this case, the Assessor misapprehended the nature of the transfer of interest at issue. While it was true that a transfer of interest in the real property from Goldbug to Epperly would constitute an ATI because that transaction would not be between spouses, in this case the transfer was in the interest in shares of Goldbug. The transfer of those shares in the LLC between spouses Robinson and Epperly clearly falls within the exception provide for in S. C. Code Ann. 12-37-3150(B)(1)(b).

19. State of South Carolina, Administrative Law Court, *Charleston County Assessor, v. 4 Cousins, LLC*; Docket no. 09-ALJ-17-0359-CC

Note: ATI

The Assessor and Respondent stipulated that the property's appraised value should be Eight hundred One Thousand Dollars (\$901,000) for purposes of the 2008 tax bill if the Court determined that no assessable transfer of interest has occurred.

The Assessor and Respondent stipulated that the property's appraised value should be One Million One Hundred Sixty-Five Thousand Dollars (\$1,165,000) for purposes of the 2008 tax bill if the Court determined that an assessable transfer of interest has occurred.

In 2006 the South Carolina Legislature adopted the South Carolina Real Property Valuation Reform Act (the "Act") which provides in relevant part:

(A) For purposes of determining when a parcel of real property must be appraised, an assessable transfer of interest in real property includes, but is not limited to, the following: (1) a conveyance by deed; . . . (4) a conveyance by distribution from a trust, except if the distribute is the *sole* present beneficiary or the spouse of the sole present beneficiary, or both (emphasis added) S.C. Code Ann §12-37-3150(A).

In the instant case, taxpayer contended the 2007 conveyance of property to the four individuals did not constitute an ATI under S.C. Code Ann. § 12-37-3150 because of the exception provided for in subsection (A)(4). Respondent argues that “sole” can mean one unit or group, and the conveyance from the group or unit of trust beneficiaries to the same group of individuals did not constitute an assessable transfer of interest. The Petitioner argued that the 2007 conveyance was a conveyance by deed – not a distribution from a trust. Petitioner further argued that even if the conveyance is determined to be a distribution by trust, the distributees were not the “sole present beneficiary,” and as such, did not qualify for the exception provided for in S.C. Code Ann. §12-37-3150(A).

Respondent attempted to characterize the 2007 property conveyance as “a mere re-titling of property” where the parties retained the same percentage of ownership interest.

It was stipulated by the parties that the trustees failed to create the four trusts as directed by the will, and it was further stipulated that the trustees failed to convey the property to the four trust beneficiaries when each became 25 years of age. Rather, the property was conveyed, via deed, in 2007 when all the named trust beneficiaries were over the age of 25. Therefore, the ALC found that the transfer is an ATI in real property and must be appraised by the Assessor.

The ALC also found that even if the conveyance was a distribution from a trust, the transfer in this matter would not qualify as an exception under §12-37-3150(A)(1). This section specifically provides that the distributee must be the “sole” present beneficiary, for purposes of §12-37-3150.

20. State of South Carolina, Administrative Law Court, *Selby Blair and Michele Blair vs. Horry County Assessor*; Docket no. 09-ALJ-17-0277-CC

Note: ATI

The property which was the subject of this hearing was a boat slip located at Mariner’s Pointe Horizontal Property Regime. The taxpayers argued in the appeal that their purchase of the subject property did not constitute an ATI because assessable transfers of interest do not include transfers among members of an “affiliated group.” According to the taxpayer’s argument, they were members of an affiliated group by virtue of their membership in the Mariner’s Pointe Homeowners Association. In addition, the Petitioners argued that other boat slips at Mariner’s Pointe were valued much lower for tax purposes than the subject property.

S.C. Code Ann. §12-37-3150(A)(Supp. 2009) sets forth certain instances when real property must be appraised following an assessable transfer of interest in that property. Under the statute, an assessable transfer of interest does not include a transfer of real property or other ownership interests among members of an affiliated group. §12-37-3150(B)(7). The statute further provides that “affiliated group” is as defined in Section 1504 of the Internal Revenue Code, “one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation. . .” The ALC found that here, no corporation or affiliated members of a corporation purchased and sold the subject property. Thus, the transfer was not exempt from inclusion as an assessable transfer of interest under §12-37-3150(B)(7) as the Taxpayers assert.

21. State of South Carolina, Administrative Law Court, *David Berkes and Gail Austin vs. Horry County Assessor*; Docket no. 09-ALJ-17-0514-CC

Note: POS

Petitioners believed that the value of their property should be lowered because the Point of Sale Law violates the Constitution of South Carolina. They argued that new purchasers of real estate since January 1, 2007 are penalized because their property is immediately reassessed upon transfer at Fair Market Value without any cap on the percentage increase. Moreover, they contended that the Point of Sale re-evaluation without revaluation of similar properties which did not sell is discriminatory.

Petitioner's main argument was that the 2006 Point of Sale law is unconstitutional because the taxation of transferred properties after 2007 is not uniform with respect to the taxation of other properties which haven't been sold. The ALC found that the Constitutionality issue must not be reached by this Court. SC Courts have repeatedly held that "ALJs are an agency of the executive branch of the government and must follow the law as written until its constitutionality is judicially determined: ALJs have no authority to pass upon the constitutionality of a statute or regulation.

The ALC noted that the assessor's office admitted that this law results in inequities among taxpayers. However, the 2006 Point of Sale Law is the law of this state and the Assessor's office is bound to follow the law in making their determination.