



ALAN WILSON
ATTORNEY GENERAL

October 19, 2015

The Honorable Katrina Shealy
Senator, District 23
P.O. Box 142
Columbia, SC 29202

Dear Senator Shealy:

Attorney General Alan Wilson has referred your letter dated September 22, 2015 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue (as quoted from your letter):

"I have been contacted by an accounting firm of behalf of Angel Investors Credits who went into business in 2014. However, the company was not aware that they were required to file an application with the South Carolina Department of Revenue to obtain the [Angel Investor] tax credit [pursuant to South Carolina Code Sections 11-44-40, 11-44-70, et seq.]. In good faith the company invested with the understanding that they would receive a tax credit from the state. As a result, I am sure other qualifying investors may have missed the July 15, 2015 deadline as well. I would like to know whether or not it would be legal to have this deadline[] extended through October 15, 2015 or until the credit cap of \$5 million is reached, whichever comes first."

Law/Analysis:

By way of background, it is this Office's custom to defer administrative decisions to administrative agencies. Op. S.C. Att'y Gen., 2013 WL 1803941 (April 23, 2013) (citing Goodman v. City of Columbia, 318 S.C. 489, 458 S.E.2d 531 (1995)). Therefore, this Office will proceed in attempting to answer your question with the understanding that in this situation we will defer to the administrative agency charged with the acceptance and approval if the applications for an angel investor tax credit pursuant to the High Growth Small Business Job Creation Act of 2013.

The High Growth Small Business Job Creation Act of 2013 appears to be a "creature of statute." S.C. Code § 11-44-10 et seq. As you may know, a creature of statute only has those powers expressly conferred or necessarily implied to effectively and successfully accomplish the duties with which it is charged. S.C. Coastal Conservation League v. S.C. DHEC, 363 S.C. 67, 610 S.E.2d 482 (2005); Op. S.C. Att'y Gen., 2014 WL 2619140 (May 30, 2014) (citing Captain's Quarters Motor Inn v. S.C. Coastal Council, 306 S.C. 488, 413 S.E.2d 13 (1991)). Thus, as a creature of statute, the Act and any tax credits therein must conform to whatever limitations or requirements are given to it by the statute creating it.

As a background regarding statutory interpretation, the cardinal rule of statutory construction is to ascertain the intent of the legislature and to accomplish that intent. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). The true aim and intention of the legislature controls the literal meaning of a statute. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). The historical background and circumstances at the time a statute was passed can be used to assist in

interpreting a statute. *Id.* An entire statute's interpretation must be "practical, reasonable, and fair" and consistent with the purpose, plan and reasoning behind its making. *Id.* at 816. Statutes are to be interpreted with a "sensible construction," and a "literal application of language which leads to absurd consequences should be avoided whenever a reasonable application can be given consistent with the legislative purpose." *U.S. v. Rippetoe*, 178 F.2d 735, 737 (4th Cir. 1950). Like a court, this Office looks at the plain meaning of the words, rather than analyzing statutes within the same subject matter when the meaning of the statute appears to be clear and unambiguous. *Sloan v. SC Board of Physical Therapy Exam.*, 370 S.C. 452, 636 S.E.2d 598 (2006). The dominant factor concerning statutory construction is the intent of the legislature, not the language used. *Spartanburg Sanitary Sewer Dist. v. City of Spartanburg*, 283 S.C. 67, 321 S.E.2d 258 (1984) (citing *Abell v. Bell*, 229 S.C. 1, 91 S.E.2d 548 (1956)).

By way of background, the South Carolina Department of Revenue has statutory authority to "provide for the manner in which the [angel investor's] application [for a tax credit pursuant to Chapter 44] is to be submitted." S.C. Code § 11-44-70(A). Moreover, the Department of Revenue also is given the authority to "tentatively" approve an application if it determines that the application meets the requirements of Chapter 44. *Id.* In order to receive the angel investors tax credit provided by the High Growth Small Business Job Creation Act of 2013, an applicant must submit an application pursuant to Department of Revenue's manner of submission for "tentative approval" followed by the Department of Revenue bestowing approval or denying the application. S.C. Code § 11-44-70. The statute also references "angel investors who filed a timely application." S.C. Code § 11-44-70(C). By referencing "angel investors who filed a timely application," the statute denotes the existence of untimely applications. Thus, we will apply the principle that the Legislature did not intend to do a futile thing by including the language referencing a "timely" application in the distribution of tax credits where the limit was reached, thus eliminating those who filed an untimely application from being considered in the pro rata distribution where the "maximum aggregate limit of tax credits" was reached for that year. S.C. Code §§ 11-44-70; 11-44-50; see *Op. S.C. Att'y Gen.*, 1984 WL 159859 (May 9, 1984) (citing *St. ex rel. Mcl.eod v. Montgomery*, 244 S.C. 308, 136 S.E.2d 778(1964)). It appears from a plain reading of the statute that the negative recourse for a late application (if the Department of Revenue were to allow submission thereof) would be that Department of Revenue would have until January thirty-first of the following year to give tentative approval and that the tax credits are issued pro rata, so the credits could already be allocated. S.C. Code §§ 11-44-70; 11-44-50. Thus, while we see nothing in the statute addressing a late or untimely application, since the statute mentions a timely application, we believe a court would determine that how to handle an untimely application is within the discretion of the Department of Revenue and will support such a determination to allow an untimely application, noting the pro rata distribution of the tax credits.¹ We also believe this interpretation is consistent with the legislative intent, which is to "to encourage angel investors to invest," increasing the State's "base of wealth-creating businesses" and supporting those businesses that are attempting to "commercialize technology invented in this State's institutions of higher education." S.C. Code § 11-44-20.

Conclusion: For all of the above reasons, this Office determines that the South Carolina Department of Revenue has the fiscal authority to accept an untimely application for an angel investor's tax credit filed with them pursuant to the High Growth Small Business Job Creation Act of 2013. However, this Office is only issuing a legal opinion based on the current law at this time. Until a court or the Legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office

¹ Please note the applicant still must comply with all other requirements of the Act, including registration with the South Carolina Secretary of State. S.C. Code § 11-44-60.

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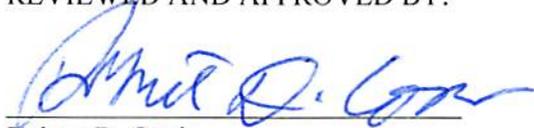
believes a court would interpret the law in the matter. Additionally, you may also petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. S.C. Code § 15-53-20. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,



Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General