The State of South Carolina

Office of the Attorney General

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The Honorable John G. Richards
Chief Insurance Commissioner
Department of Insurance
P. O. Box 100105
Columbia, South Carolina 29202-3105

Dear Mr. Richards:

In a letter to this Office you questioned the construction of Section 38-7-120 of the Code which relates to the payment of additional tax assessments and the manner of obtaining refunds for overpayments. You particularly questioned whether after the expiration of a one-year period, upon determining that an insurer has made a mistake of overpayment on a tax return, is the Department of Insurance (hereafter the Department) required to make a refund or allow an offset against additional taxes due for the amount of overpayment. You particularly referenced subsections (c) and (d) of Section 38-7-120 which state:

> (c) At any time up to one year after the date upon which any original tax return or other document is required to be filed, an insurer or other person may file an amended return to correct errors of overpayment or other errors made by the insurer or person in the original return or document. No amended return or document may be filed by any insurer or person or accepted by the Commissioner after the expiration of the one-year period. No tax adjustment, deduction, or credit may be made or taken by the insurer or person, or allowed by the Commissioner, on any return or document filed after the expiration

> of the one-year period for errors claimed to have been made by the insurer or other person in the original return or document.
>
> (d) If, upon examination of any original or amended return or document, it appears to the Commissioner that the amount of fees or taxes due is less than the amount theretofore paid, the excess must be ordered refunded by the Commissioner. No refunds may be made with respect to any monies which are distributable to a governmental unit after the distribution has been made.

In your letter you stated:

> In light of the provisions of those subsections, if the Department audits a return after the expiration of the one-year period and after the tax has been paid to the General Fund or other designated account and discovers both additional taxes due as well as errors made by the insurer which would have reduced the amount of the original tax payment, is the Department required to apply a credit against the taxes due? Historically, in construing these subsections, the Department has taken the position that since the one-year period has expired and the taxes already distributed, no credit or offset is allowed against any additional taxes due. The practical result of this construction of the statute is that no mistake of overpayment made by an insurer will be recognized by the Department unless it is discovered by the insurer or the Department within one year of its payment. However, assessments for errors of under payment may be levied by the Department any time within ten years after the initial payment (See Section 38-7-110) and such assessments cannot be diluted by the application of credits for overpayments discovered after the expiration of the one-year period since the funds have been distributed.

It is my understanding that your question was raised as the result of a dispute between Allstate Insurance Company and the Department. You forwarded copies of correspondence which set out the circumstances of the dispute and the positions taken by the parties. This Office has consistently stated that an opinion should not attempt to supersede or intervene in any pending litigation or pending administrative proceeding. Moreover, state law does not authorize factual questions to be resolved by an opinion of this Office. See: Opin. of the Atty. Gen. dated December 12, 1983.

Generally in interpreting a statute, the primary purpose is to ascertain the intent of the legislature. Multi-Cinema Ltd. v. S.C. Tax Commission, 292 S.C. 411, 357 S.E.2d 6 (1987). When interpreting a statute, the legislative intent must prevail if such can be reasonably construed in the language used, which language must be interpreted in light of the intended purpose of the statute. Gambrell v. Travelers Ins. Cos. 280 S.C. 69, 310 S.E.2d 814 (1983). Moreover, in construing a statute, words must be given their plain and ordinary meaning without resorting to subtle or forced construction for the purpose of limiting or expanding the statute's operation. Walton v. Walton, 282 S.C. 165, 318 S.E.2d 14 (1984).

It is generally held that construction of a statute by the agency charged with executing it is entitled to great weight and should not be overruled without compelling and cogent reasons. Dunton v. S.C. Bd. of Examiners in Optometry, 291 S.C. 221, 353 S.E.2d 132 (1987); Faile v. South Carolina Employment Security Commission, 267 S.C. 536, 230 S.E.2d 219 (1976); Emerson Electric Co. v. Wasson, 287 S.C. 394, 339 S.E.2d 118 (1986). A prior opinion of this Office dated September 12, 1985 stated that as to questions regarding the interpretation of an administrative regulation by an agency

> ... a court must necessarily look to the administrative construction of the regulation if the meaning of the words is in doubt. The intention of ... (a legislative body) ... or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of a

> controlling weight unless it is plainly erroneous or inconsistent with the regulation [emphasis added] ... Furthermore, courts must respect an agency's interpretation of its own regulation even if there may be more than one reasonable interpretation ... and even if the construction is not the one that the court would adopt in the first instance. ... Thus, when there exists an administrative interpretation of any agency regulation, this Office is not free to choose a different construction of that regulation even if we believe a different construction to be more reasonable than that chosen by the agency. This Office must defer to any reasonable construction applied by the agency.

It is generally recognized that the refund of taxes is a matter of grace and individuals seeking relief must bring themselves completely within the terms of a statute authorizing a refund. See: Guaranty Bank and Trust Co. v. S.C. Tax Commission, 254 S.C. 82, 173 S.E.2d 367 (1970). As stated by the Court in that case

> ... constitutional and statutory language creating exemption from taxation will not be strained or liberally construed in favor of the taxpayer claiming an exemption, and he must, in order to be entitled to such exemption, clearly bring himself within the exemption on which he relies.

254 S.C. at 89. See also: Colonial Life and Accident Insurance Co. v. S.C. Tax Commission, 228 S.C. 334, 149 S.E.2d 777 (1966); Asmer v. Livingston, 225 S.C. 341, 82 S.E.2d 465 (1954). It has similarly been stated:

> Although the legislature has no power to compel the refund of taxes legally collected, it may prescribe the limitations and conditions on which a refund may be had ... A taxpayer seeking relief under a refund statute must bring himself within its terms ....

84 C.J.S. Taxation, Section 632 p. 1264-1265. Consistent with such, it appears that a court could uphold the construction of Section 38-7-120 as heretofore interpreted by your agency.

With kind regards, I am

Very truly yours,

Charles H. Richardson
Assistant Attorney General

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REVIEWED AND APPROVED BY:

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