N.C. Farm Bureau Mut. Ins. Co. v. N.C. Dep't of Revenue, 2023 NCBC 29.

STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 10244

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF REVENUE,

Respondent.

ORDER AND OPINION ON PETITION FOR JUDICIAL REVIEW

1. This is an appeal in a contested tax case. Petitioner North Carolina Farm Bureau Mutual Insurance Company, Inc. ("Farm Bureau") seeks judicial review of a decision of the Office of Administrative Hearings that resulted in the disallowance of tax credits that it claimed in 2014, 2015, and 2016. Respondent North Carolina Department of Revenue ("Department"), which seeks to affirm the judgment, has filed exceptions of its own to certain evidentiary rulings made during the administrative proceeding.

2. For the following reasons, the Court **REVERSES** the decision of the Office of Administrative Hearings and **REMANDS** with instructions to grant summary judgment in favor of Farm Bureau. The Court also **OVERRULES** the Department's exceptions.

3. The Court notes that it is issuing this opinion in tandem with its decision in *McCabe v. N.C. Dep't of Revenue*, No. 21 CVS 5724 (Wake Cnty.) (Order and Opinion located at ECF No. 72), which involves similar circumstances and presents similar legal issues.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Christopher G. Smith, William W. Nelson, Robert W. Shaw, and John H. Jo, and by Phillip Jacob Parker, Jr., General Counsel, for Petitioner North Carolina Farm Bureau Mutual Insurance Company, Inc.

Joshua H. Stein, Attorney General of the State of North Carolina, by Perry J. Pelaez, Special Deputy Attorney General, North Carolina Department of Justice, for Respondent North Carolina Department of Revenue.[1]

McDermott Will & Emery LLP, by Jennifer B. Routh, for American Council of Life Insurers, American Property Casualty Insurance Association, Genworth Financial, Inc., Great American Insurance Company, Guardian Insurance Company, Liberty Mutual Group Inc., Nationwide Mutual Insurance Company, Pruco Life Insurance Company, The Northwestern Mutual Life Insurance Company, The Prudential Insurance Company of America, Transamerica Life Insurance Company, and United Services Automobile Association, Amici Curiae.

Kilpatrick Townsend & Stockton LLP, by Joseph S. Dowdy, for Cabretta Capital Corporation, Amicus Curiae.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James C. Adams, II, for John M. McCabe, Amicus Curiae.

Richard D. Pomp, and North Carolina Chamber Legal Institute, by Raymond M. Starling, for North Carolina Chamber Legal Institute, Amicus Curiae.

North Carolina Sustainable Energy Association, by Peter H. Ledford and Benjamin W. Smith, for North Carolina Sustainable Energy Association, Amicus Curiae.

Parker Poe Adams & Bernstein LLP, by Kay Miller Hobart, for The Hartford Group, Amicus Curiae.

Conrad, Judge.

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[1] Perry J. Pelaez has since withdrawn as counsel for the Department. Taking his place are Ericka R. McDaniel, Assistant Attorney General, and M.A. Kelly Chambers, Senior Deputy Attorney General, both of the North Carolina Department of Justice.

I.
BACKGROUND

4. When reviewing a final decision in a contested tax case, the Court does not make findings of fact. The following background is intended only to provide context for the Court's analysis and ruling.

A. Statutory Background

5. North Carolina has long used tax credits to spur the advancement of renewable energy resources. By the end of the twentieth century, there were at least a dozen statutes governing tax credits for wind, solar, hydroelectric, and peat energy facilities. In 1999, the General Assembly repealed and replaced these laws with a simplified (though far from simple) statutory scheme for renewable energy tax credits. *See* 1999 N.C. Sess. Laws 342, secs. 1, 2.

6. Here's how the credit works. "A taxpayer that has constructed, purchased, or leased renewable energy property" is eligible to receive a credit "if the property is placed in service in this State during the taxable year." N.C.G.S. § 105-129.16A(a). The amount of the credit is "equal to thirty-five percent (35%) of the cost of the property" up to a cost of $2.5 million per installation. *Id.* § 105-129.16A(a), (c)(1). But when the property serves a "business purpose," the taxpayer may not take the credit all at one time. It is instead split into five annual "installments beginning with the taxable year in which the property is placed in service." *Id.* § 105-129.16A(a); *see also id.* § 105-129.16A(c)(1) (defining "business purpose"). Each successive installment is contingent. If the property is taken out of service during the five-year period, "the

credit expires," and the taxpayer loses any installments that haven't accrued. *Id.* § 105-129.16A(b).

7. In practice, few taxpayers that qualify for this credit can directly take advantage of it. This is because builders and lessors of renewable energy installations are often limited liability companies or other entities treated as partnerships for tax purposes. *See, e.g.*, *id.* § 105-153.3(9), (13). A partnership does not pay tax and has no tax liability to offset with a credit. It is considered a pass-through entity: its income, losses, and other tax items are allocated among its partners who then report their shares of each on their tax returns.[2]

8. Thus, when a partnership earns a renewable energy tax credit, the partners are the ones who claim it. A hybrid of state and federal law governs what the partners are allowed to claim. The starting point is N.C.G.S. § 105-269.15. Subsection (a) states that a partnership that qualifies for a credit "passes through to each of its partners the partner's distributive share of the credit." *Id.* § 105-269.15(a). Subsection (c) goes on to say that a "distributive share of an income tax credit shall be determined in accordance with sections 702 and 704 of the" Internal Revenue

[2] North Carolina allows partnerships to borrow from federal forms for use in the state partnership tax return, Form D-403. *See* 17 N.C. Admin. Code 6B.3501, 6B.3503(a). To fill out Form D-403, a partnership can import some information directly from the federal IRS Form 1065. Just as the federal Schedule K-1 sets out each partner's allocated share of tax items, the Schedule NC K-1 serves the same purpose on the state level. *See* 17 N.C. Admin. Code 6B.3503(b).

Code. *Id.* § 105-269.15(c). The scope of this reference to Code[3] sections 702 and 704 is central to the parties' dispute here.

9. Those taxpayers that are allowed to claim a renewable energy tax credit, or some share of a credit, must elect which of their tax liabilities to offset. At first, taxpayers were allowed to use the credit against the income tax or the franchise tax, but not both, and not any other type of tax. *See* 1999 N.C. Sess. Laws 342, sec. 2 (codified in part at N.C.G.S. § 105-129.17(a)). In 2009, the General Assembly amended the law to allow taxpayers to elect to apply the credit against the gross premiums tax as well. *See* 2009 N.C. Sess. Law 548, sec. 3 (codified at N.C.G.S. § 105-129.17(a)). This amendment gave insurance companies, health maintenance organizations, and similar entities—all of which pay gross premiums tax and are exempt from income tax—the same incentive to invest in renewable energy property as other companies and individuals. *See* N.C.G.S. §§ 105-130.11(a)(10), 105-228.5(a).

10. Designed to be temporary, the statutory scheme for renewable energy tax credits carries a built-in sunset provision. As a result, renewable energy properties placed into service after 2017 are no longer eligible to earn the credit. *See id.* § 105-129.16A(e)–(g).

B. Farm Bureau's Investments

11. Farm Bureau is a mutual insurance company. From 2014 to 2016, it invested in various renewable energy projects to obtain a share of the tax credits

[3] In keeping with the North Carolina Revenue Act, the Court refers to the Internal Revenue Code simply as the "Code." *See* N.C.G.S. § 105-228.90(b)(7) (defining "Code" as "[t]he Internal Revenue Code as enacted as of May 1, 2020, including any provisions enacted as of that date that become effective either before or after that date").

generated by them and, thus, reduce its gross premiums tax liability. (*See* R.11658–60.)

12. Farm Bureau made these investments through partnerships organized by Monarch Tax Credits, LLC.[4] Monarch does not own or operate renewable energy projects. Rather, it is a syndicator that works with project operators to market their unused tax credits to investors.

13. In simple terms, Monarch sets up partnerships to route cash from investors to operators of renewable energy projects and then allocate the tax credits generated by the projects back to the investors. How much cash is raised depends on the size of the expected tax credit. For a project expected to generate a $100,000 credit, Monarch might promise to drum up $35,000 from investors. This is meant to cover just part of the project's cost (a project eligible for a $100,000 credit would have a total cost near $300,000), with debt financing covering much of the rest. It's a win-win-win: the project operators receive capital; the investors claim the tax credit; and Monarch takes a cut as middleman. (*See* R.2014, R.2016, R.11220–33, R.11661, R.13800–01, R.44584, R.47604, R.47833, R.47866.)

14. Naturally, the details are more complex. Each project has many layers or tiers of partnerships. At the top are the investors, such as Farm Bureau. They are partners in an entity called the Annual Fund. The Annual Fund is itself a partner in a partnership—called the Master Fund—in the tier below. The Master Fund is a

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[4] Monarch was once known as State Tax Credit Exchange, LLC. For consistency, the Court refers to it as Monarch, although the record and the parties call it by different names.

partner in another partnership just below it. And so on, ending with the project operator, or Sponsor, at the bottom. Because each partnership is a pass-through entity, the tax credits earned by the Sponsor flow up through each tier until they reach the investors. A web of operating agreements, subscription agreements, and other contracts holds the partnerships together.[5] (*See, e.g.*, R.2285, R.3960, R.13718–47, R.13884–99, R.47826.)

15. As the name suggests, each Annual Fund is tied to a single tax year. Recall that renewable energy projects must take a tax credit in installments over five years. Thus, a given project might support five Annual Funds—one for each installment. An Annual Fund for 2014, for example, would receive the installment of tax credit generated for that year and allocate the installment to its partners. By design, the fund would exercise a contractual put option and sell its interest in the Master Fund at the end of the year. A new Annual Fund would then be substituted as a partner in the Master Fund to receive and allocate the 2015 installment. This structure allows investors to participate and claim a share of tax credit on a year-to-year basis with no long-term commitment. (*See* R.2272, R.2288; *see also, e.g.*, R.13741.)

[5] This, too, is a simplified depiction of a more complex corporate structure. The partnerships are not necessarily stacked like rungs on a ladder, with just one partnership in the tier above and one in the tier below. A given Master Fund could hold interests in several lower-tier partnerships, thus dispensing capital to and drawing tax credits from many different renewable energy projects. And, of course, every partnership has a cumbersome official name—for example, STCE 2015 NC Solar Credit Investor Fund A, LLC—making it better to use the sobriquets Annual Fund, Master Fund, and Sponsor for clarity and readability. Less relevant, but worth noting, is that a parallel chain of partnerships exists to serve investors interested in allocations of *federal* tax credits generated by the projects. (*See, e.g.*, R.3960, R.4001.)

16. Indeed, the shorter term helped sway Farm Bureau to invest. Before 2013, all offerings presented to Farm Bureau by tax-credit syndicators had five-year investment horizons. Allen Houck, Farm Bureau's investment czar, deemed those offerings too risky, partly because the principal is a sunk cost. Renewable energy properties typically do not generate a profit in their early years. As a result, tax-credit investors pay cash up front and do not expect to get it back. What they expect to receive is a yearly allocation of tax credits, adding up to a positive total return in the fourth year of the five-year commitment. Houck worried that tying up cash for that long might endanger Farm Bureau's ability to pay insurance claims. He also worried that the tax credits might expire—if tax laws changed or if a natural disaster disabled the renewable energy facility—before Farm Bureau received all five installments. (*See* R.1985, R.1991, R.2036–38, R.2049, R.2267, R.2275–76.)

17. When syndicators, including Monarch, began offering one-year investment structures in 2014, Houck welcomed the change.[6] The investment still required an upfront, nonrecoverable cash payment, but he viewed it as a minor concern because "the investment and the credit would be recognized in the same year." He also considered the risk of natural disasters during a one-year commitment a "non-issue" and concluded that "the risk of non-recovery is far less than the risk we have on our equity portfolio and not significantly greater than the risk on our bonds." Having observed that other insurance companies were investing with tax-credit syndicators,

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[6] Farm Bureau weighed investments offered by several tax-credit syndicators, including not only Monarch but also Holocene, Churchill Securities, and Double Time. (*See* R.2031–42.)

Houck recommended that Farm Bureau do so as well. (*See, e.g.*, R.1985–86, R.1998, R.2032, R.2048–49, R.2052, R.2103, R.2331–34; *see also* R.2271.)

18. On that recommendation, and after obtaining an opinion of counsel and making a site visit, Farm Bureau contributed to two Annual Funds in 2014. It paid for membership units at a rate of seventy-five cents per expected dollar of tax credit. The investment principal totaled $5.1 million, with about a third of that figure due in December 2014 and the remainder due when Farm Bureau received its K-1 schedules several months later. A guaranty agreement also promised Farm Bureau a partial reimbursement if it did not receive the amount of credit that it anticipated. In early 2015, Farm Bureau received its expected return: an allocation of $6.8 million in tax credit on its K-1 schedules. Farm Bureau then used the credit to offset its gross premiums tax, netting a gain of $1.7 million or more than thirty percent. (*See* R.2070, R.2151, R.2166, R.2272, R.2285, R.2293, R.2527–30.)

19. Farm Bureau also contributed to Annual Funds in 2015 and 2016. Each year, it invested $10.85 million. In lieu of a guaranty, Farm Bureau took a discount on membership units, paying just seventy cents per expected dollar of credit. The investments earned Farm Bureau $15.5 million in tax credit—and, thus, a net gain of more than $4.5 million—in each of those years. (*See* R.11325, R.11327, R.11666; *see also* R.2272.)

20. All told, Farm Bureau invested almost $27 million in Annual Funds created by Monarch and received tax-credit allocations of $37.8 million that it used to offset its gross premiums tax liability.

C. Procedural History

21. In 2018, following an audit, the Department disallowed the renewable energy tax credits claimed by Farm Bureau in 2014, 2015, and 2016 and issued a proposed assessment of roughly $24 million in additional taxes, penalties, and interest. Farm Bureau objected and requested further review. (*See* R.3073–75, R.11664.)

22. While that review was ongoing, the Department issued public guidance titled "Important Notice: Tax Credits Involving Partnerships." The stated purpose of the Important Notice was "to assist in evaluating the validity and potential amount of" a partner's distributive share of a tax credit earned by a pass-through entity. To that end, the Department referred taxpayers to federal law, citing the link "to sections 702 and 704 of the Code" in N.C.G.S. § 105-269.15. In the Department's words, a "person not qualifying as a partner under federal income tax [law] would not qualify for allocation of a credit" under state law. Similarly, the Department cautioned that some transfers of tax credits may be viewed as disguised sales under Code section 707, which would prevent the "credits from being allocated to a taxpayer under section 704." (R.996–98.)[7]

[7] In the years before the Important Notice, the Department issued many Private Letter Rulings ("PLRs") concerning section 105-269.15. Farm Bureau argues that the Department blessed Monarch's partnership structure in these PLRs and reversed course in the Important Notice. The Department, on the other hand, argues that its interpretation has remained consistent throughout and notes that Farm Bureau never requested a PLR. After reviewing the PLRs, the Court concludes that they have little relevance to the questions presented. *See* N.C.G.S. § 105-264.2(a) ("A written determination is applicable only to the individual taxpayer addressed and as such has no precedential value except to the taxpayer to whom the determination is issued.").

23. Not long after, the Department upheld its proposed assessment against Farm Bureau in a Notice of Final Determination. Echoing the guidance given in the Important Notice, the Department concluded that Farm Bureau was not a bona fide partner under federal law. It reasoned that Farm Bureau expected to receive no material benefit from the Annual Funds other than allocations of tax credits, that the short duration of the investment and contractual guaranties negated any entrepreneurial risk, and that the Annual Funds engaged in no business activity apart from allocating their single-year credit installments. This, in the Department's view, meant that Farm Bureau lacked the "meaningful upside potential" and "meaningful downside risk" that federal courts look for when deciding whether a taxpayer is a bona fide partner. (R.183–84 (citing, *e.g.*, *Historic Boardwalk Hall, LLC v. Comm'r*, 694 F.3d 425 (3d Cir. 2012)).)

24. The Department also concluded that Farm Bureau's investments were disguised sales under Code section 707. Farm Bureau had argued that section 707 does not apply because there is no reference to it in the applicable state statutes. It had also argued that, even if section 707 applies, state tax credits are not property that can be the subject of a disguised sale. The Department rejected both positions and treated the investments as disguised sales for essentially the same reasons that it deemed Farm Bureau not to be a bona fide partner. (*See* R.184–86 (citing *Va. Historic Tax Credit Fund 2001 LP v. Comm'r*, 639 F.3d 129 (4th Cir. 2011)).)

25. Farm Bureau filed a petition for a contested case hearing in the Office of Administrative Hearings. Voluminous discovery, including reports and depositions of half a dozen experts, culminated in cross-motions for summary judgment.

26. In a Final Decision, the Administrative Law Judge ("ALJ") granted summary judgment for the Department. The ALJ saw "no evidence that Farm Bureau intentionally sought to defraud the State" or the Department. Even so, the ALJ concluded that Farm Bureau did not "meet the criteria" for claiming a credit under section 105-129.16A(a) because it "did not construct, purchase, or lease renewable energy property." The decision says little about the bona fide partnership and disguised sale issues, listing both as "[a]dditional issues for review" but providing no analysis. (R.24624–31.)

27. Following the Final Decision, Farm Bureau paid the assessment and then petitioned for judicial review in this Court. The Department, in turn, has filed exceptions relating to the admissibility of expert testimony offered by Farm Bureau. (*See* Pet., ECF No. 3; Resp. to Pet., ECF No. 12.)

28. These matters are ripe for determination.

II.
LEGAL STANDARD

29. In reviewing an agency's final decision, this Court "acts in the capacity of an appellate court," and "the substantive nature of each assignment of error dictates the standard of review." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 658, 662 (2004). The Court reviews de novo an order granting summary judgment. *Midrex Techs. v. N.C. Dep't of Revenue*, 369 N.C. 250, 257 (2016); *see also* N.C.G.S.

§ 150B-51(b)(4), (c). This means that the Court "considers the matter anew and freely substitutes its own judgment for" the agency's. *Midrex*, 369 N.C. at 257 (cleaned up) (quoting *Carroll*, 358 N.C. at 660). But the scope of review is limited to "the final decision and the official record." N.C.G.S. § 150B-51(c).

30. "In reviewing a final decision allowing . . . summary judgment, the court may enter any order allowed by . . . Rule 56" of the North Carolina Rules of Civil Procedure. *Id.* § 150B-51(d). Thus, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). The Court views the evidence in the light most favorable to the nonmoving party and draws all inferences in its favor. *See, e.g.*, *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 682 (2002); *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182 (2011).

31. The moving party has the initial, procedural "burden of establishing that there is no triable issue of material fact," which may be accomplished "by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim." *DeWitt*, 355 N.C. at 681 (citations and quotation marks omitted). If the moving party carries this burden, then "the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating that the nonmoving party will be able to make out at least a prima facie case at trial." *Id.* at 681–82 (cleaned up).

32. The taxpayer retains the substantive "burden of proving eligibility for a credit and the amount of the credit." N.C.G.S. § 105-129.18. And the "proposed assessment of the Secretary [of Revenue] is presumed to be correct." *Id.* § 105-241.9(a).

III.
ANALYSIS

33. Farm Bureau seeks to reverse the judgment below and restore the tax credits that it claimed in 2014, 2015, and 2016. In its view, the General Assembly offered tax credits as an incentive to encourage insurance companies and others to invest in renewable energy. Farm Bureau contends that it did its part by putting millions of dollars in real money toward real renewable energy properties. It further contends that it has earned a share of the tax credits generated by those properties and that the Department unjustly used federal tax-abuse doctrines to disallow them.

34. The Department, by contrast, contends that a partner's right to receive an allocation of state tax credits depends on federal law relating to partnership tax, including the law defining who is and isn't a bona fide partner and which transactions between a partner and a partnership are disguised sales. The evidence, according to the Department, shows that Farm Bureau's interest was in acquiring tax credits, not carrying on a business with entrepreneurial risks and rewards. Thus, the Department argues, Farm Bureau was not a bona fide partner in the Annual Funds, and even if it were, its deals were disguised, cash-for-credit sales.

35. It is notable that the Department does not seek to affirm the judgment based on the ALJ's reasoning, namely that Farm Bureau could not claim tax credits because

it "did not construct, purchase, or lease renewable energy property." (R.24627.) This is because the ALJ appears to have mistaken the criteria for earning a tax credit with those for allocating one.

36. The key state statutes—sections 105-129.16A(a) and 105-269.15(a)—are straightforward on this point. A partnership qualifies for a tax credit "as an entity," and the way it qualifies is by "engag[ing] in an activity that is eligible for" the credit. N.C.G.S. § 105-269.15(a). Here, that means that the partnership must have "constructed, purchased, or leased renewable energy property." *Id.* § 105-129.16A(a). If the partnership has done one of those things, then it has earned a tax credit and "passes through to each of its partners the partner's distributive share of the credit." *Id.* § 105-269.15(a). Nothing requires the partners themselves to engage in activity eligible for a credit as a condition of claiming a distributive share.

37. It follows that Farm Bureau wasn't required to construct, purchase, or lease renewable energy property, as the ALJ held. Farm Bureau is not a partnership claiming to have qualified for a tax credit. Rather, it claims to be a partner entitled to an allocation of tax credits that were earned by Sponsors of renewable energy projects and passed through tiers of intermediate partnerships. And there is no dispute that those Sponsor-level partnerships legitimately earned renewable energy tax credits by performing one or more activities listed in section 105-129.16A(a).

38. What is disputed is whether Farm Bureau is truly a partner entitled to claim a share of the earned credits—a dispute rooted in a disagreement about which aspects of federal law the General Assembly adopted in section 105-269.15 and which it did

not. Although the Final Decision did not resolve those issues, the task on appeal is to determine whether the judgment itself—not the reason given for the judgment—is correct. "If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the [lower tribunal] may not have assigned the correct reason for the judgment entered." *Shore v. Brown*, 324 N.C. 427, 428 (1989).

39. Accordingly, the Court turns to the parties' arguments regarding Farm Bureau's partnership status and whether it may claim a distributive share of the tax credits held by the Annual Funds. The Court begins with the bona fide partnership and disguised sale issues before turning to the remaining issues, including the Department's exceptions.

A. Bona Fide Partnership

40. Under federal law, some entities legally organized as partnerships are not bona fide partnerships for tax purposes. The doctrine goes back at least to the 1940s when the United States Supreme Court defined the criteria that make a partnership "real for income-tax purposes." *Comm'r v. Culbertson*, 337 U.S. 733, 741 (1949); *see also Comm'r v. Tower*, 327 U.S. 280 (1946). The basic test is "whether the partners really and truly intended to join together for the purpose of carrying on business and sharing in the profits or losses or both." *Culbertson*, 337 U.S. at 741 (quoting *Tower*, 327 U.S. at 287). Taxpayers flunk that test when they adopt the partnership form as "mere camouflage," *id.* at 747, or to cover up "a mere paper reallocation" of gains or losses, *id.* at 746 (quoting *Tower*, 327 U.S. at 292). But if "the partners joined together in good faith to conduct a business, having agreed that the services or capital to be

contributed presently by each is of such value to the partnership that the contributor should participate in the distribution of profits, that is sufficient" to pass the test. *Id.* at 745.

41. The parties emphatically dispute whether Farm Bureau is a bona fide partner as defined by *Culbertson*. They also dispute an antecedent issue: whether N.C.G.S. § 105-269.15 adopts *Culbertson*'s definition of partnership. The Department contends that, because a "distributive share of an income tax credit shall be determined in accordance with sections 702 and 704 of the" Code, *see* N.C.G.S. § 105-269.15(c), the partner claiming the share must also be a partner as defined by federal law. Farm Bureau disagrees, arguing that the General Assembly defined partner and partnership broadly in the North Carolina Revenue Act and that section 105-269.15(c) lacks a clear and specific reference to federal definitions of those terms.[8]

42. "As a general proposition, when the General Assembly intends to adopt provisions or definitions from other sources of law into a statute, it does so 'by clear and specific reference.' " *Fidelity Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 19 (2017) (quoting *Lutz Indus. v. Dixie Home Stores*, 242 N.C. 332, 340 (1955)). This is just as true for tax law as any other area of law. Thus, "the General Assembly has

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[8] Farm Bureau also argues that section 105-269.15(c) and its reference to federal law are red herrings. According to Farm Bureau, the statute says that a distributive share of an "income tax credit" must be determined under Code sections 702 and 704 but says nothing about how to determine a tax credit used to offset a partner's gross premiums tax. This is incorrect. An "income tax credit" is simply a tax credit that a taxpayer may use to offset its income tax liability. That is so even if the taxpayer has the option to use—and in fact uses—the credit to offset one or more other types of tax liability. The renewable energy tax credit is undoubtedly an income tax credit because it can be applied against the income tax. How Farm Bureau elected to use the credit is beside the point.

selectively incorporated certain of the definitions contained in the Internal Revenue Code into the North Carolina Revenue Act" but has not adopted them "on any sort of wholesale basis." *Id.* at 21.

43. *Fidelity Bank* illustrates this principle. There, the taxpayer bought United States government bonds at a discount and earned a sizeable gain when they matured. Federal law treats this gain "as interest" for the purpose of determining federal taxable income, 26 U.S.C. § 1276(a)(4), and North Carolina law allows taxpayers to deduct from state taxable income any "[i]nterest upon the obligations of the United States . . . to the extent included in federal taxable income," N.C.G.S. § 105-130.5(b). The taxpayer took the deduction on the theory that section 105-130.5(b) incorporated the federal definition of the word interest. Our Supreme Court rejected that interpretation and reasoned that, "had the General Assembly intended" to adopt the federal definition, "it would have incorporated that definition into N.C.G.S. § 105-130.5(b)(1) by clear and specific reference." *Fidelity Bank*, 370 N.C. at 20 (citation and quotation marks omitted). Because the statute lacked a clear and specific reference, the Supreme Court construed interest according to its ordinary meaning and rejected the taxpayer's claim. *See id.* at 21–22.

44. For much the same reason, the Court agrees with Farm Bureau's reading of section 105-269.15 and disagrees with the Department's.

45. As Farm Bureau observes, the General Assembly defined various terms, including partner and partnership, in N.C.G.S. § 105-153.3. "Partnership" means "[a] domestic partnership, a foreign partnership, or a limited liability company," and "the

term 'partner' means a member of the limited liability company." N.C.G.S. § 105-153.3(9), (13). These definitions expressly apply to the part of the Revenue Act that governs the determination of individual income tax. *See id.* § 105-153.3 ("The following definitions apply in this Part[.]"). Although section 105-269.15 is in a different part of the Revenue Act, it governs the allocation of "income tax credits" and is therefore closely related. By using the same words in the same (or at least a highly similar) context, the General Assembly presumably intended the same meaning. At the least, the statutory structure and context do not indicate that the General Assembly intended to define partner and partnership one way for determining individual income tax and another way for allocating income tax credits. *See Home Depot U.S.A., Inc. v. N.C. Dep't of Revenue*, 2015 NCBC LEXIS 103, at *16 (N.C. Super. Ct. Nov. 6, 2015) (recognizing the "natural presumption that identical words used in different parts of the same act are intended to have the same meaning" (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932))).

46. The Department's position is that section 105-269.15 incorporates federal definitions of partner and partnership, thus departing from the definitions used in analogous parts of the Revenue Act. As the Supreme Court held in *Fidelity Bank*, had the General Assembly intended to adopt federal statutory or judicial definitions of the words partner and partnership, it would have incorporated those definitions into section 105-269.15 by clear and specific reference. There is no such reference in the statute.

47. The only candidate is subsection (c)'s reference to Code sections 702 and 704. *See* N.C.G.S. § 105-269.15(c). But neither section defines the term partnership. And neither refers to bona fide partnerships. These Code sections are "silent on the question of when a putative partnership is in fact valid." *Southgate Master Fund, L.L.C. v. United States*, 659 F.3d 466, 483 n.53 (5th Cir. 2011). All they address is how to calculate a partner's distributive share of tax items, such as income, loss, and credit. *See* 26 U.S.C. §§ 702, 704. It is for that purpose—determining a distributive share, not determining partnership status—that section 105-269.15(c) points to Code sections 702 and 704.

48. No other language in section 105-269.15 refers to federal law, much less to federal definitions of specific terms. Section 105-269.15 does not use the phrase bona fide partnership. It does not cite, quote, or allude to Code section 7701, which defines partnership but "does not supply a comprehensive definition." *Cross Refined Coal, LLC v. Comm'r*, 45 F.4th 150, 156 (D.C. Cir. 2022). Nor does it refer to the case law and "anti-abuse regulations" that fashion the criteria that make a partnership bona fide for federal income tax purposes. *Id.*; *see also Southgate Master Fund*, 659 F.3d at 483 n.53 ("Here the judicial doctrines step into the breach.").

49. It is true, as the Department contends, that "[a] statute providing exemption from taxation is strictly construed against the taxpayer and in favor of the State." *Aronov v. Sec'y of Revenue*, 323 N.C. 132, 140 (1988). But this rule applies only when "the meaning of a tax statute is doubtful . . . . [I]f the intent of the Legislature is discernible from the statute it will prevail regardless of the rule of strict construction

against exemptions." *Institutional Food House, Inc. v. Coble*, 289 N.C. 123, 135 (1976). Here, the intent of the General Assembly is discernible. The text and structure of section 105-269.15 show an intent to use the words partner and partnership in the same sense that they are used in analogous parts of the Revenue Act. Had it wished to use a different meaning, the General Assembly could have incorporated federal definitions of the disputed terms by a clear, specific reference. It did not. There is no work for the canon of strict construction to do.[9]

50. As a result, Farm Bureau need not show that it is a bona fide partner under federal law to claim a distributive share of a tax credit under section 105-269.15. Farm Bureau qualifies as a partner if it is a "member" of a "limited liability company"—which it indisputably is. N.C.G.S. § 105-153.3 (9), (13).

51. The Department worries that this interpretation elevates form over substance and invites abuse. Its concern is exaggerated. North Carolina courts are far from powerless when faced with abuse of the corporate form. In rare cases, it is surely necessary to "look beyond the corporate facade and to substance rather than form," so as to ensure that the tax laws will not " 'be evaded through technicalities.' " *Good Will Distribs. (N.), Inc. v. Currie*, 251 N.C. 120, 126 (1959) (quoting *Indus. Cotton Mills Co. v. Comm'r*, 61 F.2d 291, 293 (4th Cir. 1932)).

[9] It is also true that "the construction placed upon the statute by the Secretary . . . although not binding, will be given due consideration by a reviewing court." *Aronov*, 323 N.C. at 140. But "our courts are not restricted with respect to the interpretation of the provisions of the Revenue Act by reason of any decision made or regulation promulgated by the" Secretary. *Campbell v. Currie*, 251 N.C. 329, 333 (1959). The Court has given due consideration to the Department's construction—taken as a litigating position, not by formal regulation—and found it inconsistent with the statute's text and structure.

52. This isn't that kind of case. The transactions at issue were real, not fictitious, and they involved exactly the kind of economic activity that the General Assembly deemed socially desirable and sought to encourage with tax credits. Farm Bureau contributed millions of dollars to support renewable energy properties—properties that were, in fact, placed in service and that did, in fact, qualify to receive tax credits. As the ALJ rightly observed, there is "no evidence that Farm Bureau intentionally sought to defraud the State." (R.24628.)

53. Moreover, Farm Bureau was not a member of the Annual Funds in name only. It had meaningful membership rights—including rights to share in profits and losses—established through operating agreements, subscription agreements, and related organizational documents. (*See, e.g.*, R.24937–52, R.24906–35.) Yes, its goal in joining the Annual Funds was undoubtedly to obtain tax benefits, which would be suspect if the activity that generated the tax benefits lacked substance or was otherwise a sham. Again, though, the renewable energy properties in this case were real and qualified for tax credits. Pursuing real economic ends for tax-related reasons is legitimate and, as the Court of Appeals has observed, tends to support the existence of a legal partnership. *See Best Cartage, Inc. v. Stonewall Packaging, LLC*, 219 N.C. App. 429, 438 (2012) ("[W]e believe plaintiff's allegations are sufficient to meet any requirement of profit sharing [to form a partnership] in that they shared employees with no accounting and jointly sought tax incentives to share in the vertical integration of their businesses.").

54. The undisputed evidence shows that Farm Bureau was a member of the Annual Funds, having contributed real capital to further real renewable energy projects. Accordingly, the Court concludes that Farm Bureau is a partner in the sense meant by section 105-269.15. The Department's contrary interpretation of that statute is flawed, and its contention that Farm Bureau is not a bona fide partner under federal law is misplaced.

55. For the sake of completeness, even if the Department's interpretation were correct, it would not be entitled to summary judgment. Federal courts "do not lightly set aside *de jure* partnerships as shams." *Cross Refined Coal*, 45 F.4th at 156. Whether a partnership is bona fide depends on whether "the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise." *Culbertson*, 337 U.S. at 742. This is "a question of fact," *id.* at 741, that federal courts typically decide after trial, not on summary judgment. *See, e.g.*, *Cross Refined Coal*, 45 F.4th at 155; *Historic Boardwalk*, 649 F.3d at 445–46; *ASA Investerings P'ship v. Comm'r*, 201 F.3d 505, 511 (D.C. Cir. 2000); *see also Feibus & Co. v. Godley Constr. Co.*, 301 N.C. 294, 306 (1980) (noting that North Carolina courts rarely resolve questions of intent on summary judgment).[10]

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[10] Courts must "consider[] all the facts," including (a) "the agreement," (b) "the conduct of the parties in execution of its provisions," (c) "their statements," (d) "the testimony of disinterested persons," (e) "the relationship of the parties," (f) "their respective abilities and capital contributions," (g) "the actual control of income and the purpose for which it is used," and (h) "any other facts throwing light on their true intent." *Culbertson*, 337 U.S. at 742. In addition to these factors, federal courts have employed an "analytically distinct" test distilled by the Tax Court from *Culbertson*. *See BCP Trading & Invs., LLC v. Comm'r*, 991 F.3d 1253, 1269–70 (D.C. Cir. 2021); *see also DJB Holding Corp. v. Comm'r*, 803 F.3d 1014, 1022–23 (9th Cir. 2015) (stating eight factors "[t]he Tax Court distilled from *Culbertson*").

56. Viewing the evidence in the light most favorable to Farm Bureau, a factfinder could conclude that it had a business purpose and that it intended to join together with others in the present conduct of the enterprise. The evidence shows that Farm Bureau supplied capital, which is one of the essential "ingredients" of a bona fide partnership. *Culbertson*, 337 U.S. at 740. This capital contribution had a nontax business purpose, namely to support the creation and operation of properties that produce renewable energy. And the use of the partnership form furthered that business purpose by enabling the renewable energy properties "to raise more capital" through tax-credit financing. *Cross Refined Coal*, 45 F.4th at 159. Indeed, "[l]ow-tax entities . . . often use the prospect of tax credits to attract high-tax entities . . . into a partnership, and in return, the high-tax partners provide the financing needed to make the tax-incentivized project possible." *Id.* at 157.

57. Evidence tying the use of the partnership form to a nontax business purpose was absent in *Historic Boardwalk*, the Department's preferred case. The alleged partner there gave the appearance of contributing toward the rehabilitation of a historic building, but its "contributions were not at all necessary for the . . . project to be completed" because the rehabilitation was already "fully funded." *Historic Boardwalk*, 694 F.3d at 456–57. The use of the partnership form was mere camouflage. It was not needed to secure capital, had no connection to the project's nontax business purpose, and was simply a conduit to obtain tax benefits. *See id.* at 461.

58. The Department insists that Farm Bureau had no upside potential, faced no downside risk, and expected no profit from its year-to-year investments other than through tax credits. As the D.C. Circuit recently observed, though, "a partnership's pursuit of after-tax profit can be legitimate business activity for partners to carry on together. This is especially true in the context of tax incentives, which exist precisely to encourage activity that would not otherwise be profitable." *Cross Refined Coal*, 45 F.4th at 158.

59. The General Assembly determined that renewable energy sources are socially desirable and used tax incentives to encourage investment in them. Farm Bureau answered that call and made meaningful contributions to renewable energy projects that (as far as the record shows) continue to generate energy within the State's power grid. Farm Bureau's contributions are no less real because it aimed to earn a positive, post-tax return from this otherwise unprofitable business. "Taxpayers that structure their dealings to receive tax benefits afforded by statute are entitled to those benefits, no matter their subjective motivations." *Id.* at 156; *see also id.* at 158–59 ("The Commissioner's view would thus hamstring Congress's ability to use tax credits to encourage all kinds of activity that is socially desirable but unprofitable to those undertaking it."); *see also Sacks v. Comm'r*, 69 F.3d 982, 992 (9th Cir. 1995) ("If the government treats tax-advantaged transactions as shams unless they make economic sense on a pre-tax basis, then it takes away with the executive hand what it gives with the legislative.").

60. At a minimum, Farm Bureau has shown that there is a genuine issue of material fact concerning whether it is a bona fide partner under federal law. Thus, even if section 105-269.15 incorporates federal law on bona fide partnerships, the Department would not be entitled to summary judgment on that basis.

61. But, as discussed, section 105-269.15 does not incorporate that aspect of federal law. There is no "clear and specific" reference to any federal statute, regulation, or case law involving the bona fide partner doctrine. As a result, the Court concludes that Farm Bureau need not show that it is a bona fide partner under federal law. North Carolina law alone governs partnership status in this context, and as a member of a limited liability company, Farm Bureau is indisputably a partner for purposes of section 105-269.15.

B. Disguised Sale

62. The Department argues that, even if Farm Bureau qualifies as a partner, the judgment must be affirmed because its cash-for-credit deals were disguised sales. The Court turns to this argument next.

63. Under federal law, partnerships usually recognize no gain from their partners' contributions of capital and no loss from distributions to their partners. *See* 26 U.S.C. §§ 721, 731(b). In that sense, transfers between partnerships and their partners "are tax-free." *Virginia Historic*, 639 F.3d at 138. The disguised sale rule is an exception. This rule, codified at Code section 707, aims to keep taxpayers from using "the partnership provisions" of the Code to avoid paying tax on "what would in substance have been a taxable exchange if it had not been run through the partnership." *Id.* (citation and quotation marks omitted). Section 707 is lengthy and

multifaceted. The relevant part addresses transactions between a partnership and a partner that "are properly characterized as a sale or exchange of property." 26 U.S.C. § 707(a)(2)(B)(iii). These transactions are treated as "between the partnership and one who is not a partner"—in other words, as taxable events as opposed to tax-free events. *Id.* § 707(a)(1).

64. Once again, the parties dispute whether the General Assembly adopted this federal statute into section 105-269.15. Their arguments mirror those relating to the bona fide partnership doctrine. The Department points to section 105-269.15(c)'s reference to Code sections 702 and 704 and argues that it necessarily sweeps in section 707 as well; by contrast, Farm Bureau argues that there is no clear and specific reference to federal law governing disguised sales.

65. The Court agrees with Farm Bureau. Had the General Assembly intended to adopt Code section 707 and its implementing regulations, it would have done so "by clear and specific reference." *Fidelity Bank*, 370 N.C. at 19 (citation and quotation marks omitted). Yet the text of section 105-269.15(c) makes no mention of section 707. Nor does it address when, if ever, to treat a partnership's allocation of a distributive share of a tax credit to a partner as a taxable event.

66. The Department contends that section 707 applies even if not stated in so many words. Its reasoning goes like this. A distributive share "shall be determined in accordance with sections 702 and 704." N.C.G.S. § 105-269.15(c). Section 704, in turn, states that a distributive share "shall, *except as otherwise provided in this chapter*, be determined by the partnership agreement." 26 U.S.C. § 704(a) (emphasis

added). Thus, the Department says, determining a distributive share in accordance with section 704 necessitates compliance with section 707, which is in the same chapter.

67. This argument overreaches. The chapter at issue—"Normal Taxes and Surtaxes"—is home to *hundreds* of statutes. Section 704(a) does not purport to bring them all into play. Instead, it establishes a default rule for determining a partner's distributive share and makes that default rule subject to exceptions in a handful of statutes scattered throughout the chapter. *See, e.g.*, *id.* § 48D(d)(2)(A)(i)(II) ("paragraph (3) shall be applied with respect to such credit before determining any partner's distributive share . . . of such credit"); *id.* § 163(j)(4)(A) ("For purposes of clause (ii)(II), a partner's distributive share of partnership excess taxable income shall be determined in the same manner as the partner's distributive share of nonseparately stated taxable income or loss of the partnership.").

68. The Department seems to believe that section 707(a) is one of these exceptions yet offers no persuasive reason to read it that way. The purpose of that statute, which neither refers to distributive shares nor says how to determine one, is to regulate the tax treatment of sale-like transactions between partnerships and their partners. How to *determine* a distributive share is one thing; whether to *tax* a distribution "as a sale or exchange" is another. *Id.* § 707(a)(2)(B)(iii). Whatever else section 105-269.15's directive to determine a distributive share "in accordance with sections 702 and 704" may require, it is not a veiled reference to section 707(a) and does not require application of the disguised sale rule.

69. Implicit in the Department's position is a view that sections 704 and 707 are intended to work together, each being a part of the fabric of federal partnership tax law. Doubtless, that's true. Even so, the General Assembly is free to pick and choose which parts of federal partnership tax law to incorporate into state law and which to leave out. It would turn *Fidelity Bank* on its head to construe a reference to one part of the federal statutory scheme of partnership tax as a reference to the whole.

70. To be sure, *Fidelity Bank* does not say that the General Assembly must call out Code sections by title and number to incorporate them into state law. Any clear and specific reference will do. Certainly, the General Assembly is aware that the Code is a complex, interrelated body of law and knows how to use plain language to incorporate isolated definitions, all or part of a section, or more comprehensive doctrines. But section 105-269.15 evinces no direct or indirect reference to section 707. The General Assembly chose to incorporate sections 702 and 704 and only those sections. Honoring that choice does not cast doubt on the scope of broader references to the Code in other parts of the Revenue Act, as the Department contends.

71. Consider, too, that section 105-269.15 serves to reduce the tax liability of partners (by allocating shares of tax credits earned by partnerships) while the disguised sale rule does the opposite (by stripping away the tax exemption that usually applies to partnership-related contributions and distributions). There is an obvious tension between the two. True, the tension is not insoluble. The General Assembly could have adopted a rule, much like Code section 707, that treats certain credit allocations as akin to sales and declares the income from claiming a share of

credit to be subject to taxation. But if that is what the General Assembly intended, it would have used the language of taxation, not exemption. And if the General Assembly had intended to adopt a law as complex and well-defined as the disguised sale rule, it would have used clear, specific language to do so. It did neither. The language of section 105-269.15(c) ("distributive share . . . shall be determined") mimics that of Code section 704 ("distributive share . . . shall . . . be determined"), not that of Code section 707 ("such transfers shall be treated" as taxable events).

72. Ordinary canons of statutory construction point in the same direction. The judiciary presumes that the General Assembly chooses its words "carefully." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201 (2009). When dealing with "a series of two or more terms or things that should be understood to go hand in hand," the inclusion of a subset supports "a sensible inference that the term left out must have been meant to be excluded." *Cooper v. Berger*, 371 N.C. 799, 810 (2018) (citation and quotation marks omitted). So too here. The targeted enumeration of sections 702 and 704—which go hand in hand to determine a partner's distributive share of tax items—conveys an intent to omit and exclude section 707. *See, e.g.*, *C Invs. 2, LLC v. Auger*, 383 N.C. 1, 12 (2022) ("Moreover, this narrow scope . . . conveys the General Assembly's intent that the exception go no further than to exempt those specific types of covenants.").

73. Likewise, "a statute should not be interpreted in a manner which would render any of its words superfluous." *State v. Coffey*, 336 N.C. 412, 417–18 (1994). The Department's interpretation threatens to do just that. If the mention of Code

section 704 alone sweeps the bulk of federal partnership tax law into section 105-269.15(c), then the additional mention of Code section 702 serves no purpose. The better approach is to "give every word of the statute effect." *N.C. Med. Bd.*, 363 N.C. at 201; *see also Lunsford v. Mills*, 367 N.C. 618, 623 (2014) ("Thus, in effectuating legislative intent, it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used.").

74. If there were some reasonable doubt about the meaning of section 105-269.15, the Department could call on the canon of strict construction to tip the scales in its favor. *See Institutional Food House*, 289 N.C. at 135; *Aronov*, 323 N.C. at 140. There isn't, and so it can't.

75. Of course, if state law excludes the disguised sale rule, then state and federal law may treat certain partnership transactions differently. There is no reason to be uneasy about that result. *See Fidelity Bank*, 370 N.C. at 21–22 (finding "nothing illogical" about treating a taxable event differently under state and federal law). North Carolina's policy-making branches are not beholden to the federal government's fiscal priorities. In this context, the General Assembly may have reasonably decided that taxing allocations of tax credits as disguised sales would deter the very investments in renewable energy that it wished to encourage. (As an aside, the Department has not argued or shown that the federal government has treated transactions between Monarch and its investors involving North Carolina tax credits as disguised sales.)

76. In sum, section 105-269.15 does not incorporate the disguised sale rule. Thus, application of that rule cannot support the judgment below.

77. To bring things to a close, it bears mention that the disguised sale rule—assuming the rule applies and assuming the transactions at issue were disguised sales—would not be a reason to *disallow* the credit allocations to Farm Bureau. The appropriate result would instead be "to revoke the nonrecognition treatment for transactions between a partner and a partnership and to treat the transaction as a taxable sale of property between unrelated parties." *Tribune Media Co. v. Comm'r*, T.C. Memo 2021-122, 122 T.C.M. (CCH) 258 (2021). That is, income from the exchange is subject to taxation. *See, e.g.*, *BC Ranch II, L.P. v. Comm'r*, 867 F.3d 547, 557 (5th Cir. 2017) ("such a contribution is considered a disguised sale and treated as income"); *Route 231, LLC v. Comm'r*, 810 F.3d 247, 262 (4th Cir. 2016) (adjusting partnership's "federal tax form to reflect, in relevant part, income of $3,816,000" from partner's contribution).

78. The Department's contrary approach is misguided. It contends that North Carolina law prohibits sales of tax credits, including disguised sales under Code section 707. But if the Department is correct that section 105-269.15(c) incorporates section 707, then section 707 *is* North Carolina law. The Department cannot take the part of section 707 that it likes and leave out the part that it doesn't. Section 707 taxes sale-like partnership transactions; it does not nullify them.[11]

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[11] The Department also argues that the Annual Funds *actually* sold tax credits to Farm Bureau, contrary to North Carolina law. It is undisputed, though, that Farm Bureau purchased a membership interest in each Annual Fund and received tax credits only in the

79. In any event, section 105-269.15(c) contains no "clear and specific reference" to Code section 707 or the disguised sale doctrine. Accordingly, the Court concludes that the disguised sale rule does not support the judgment.[12]

C. The Amount of Farm Bureau's Distributive Shares

80. The next issue is whether Farm Bureau has carried its burden to show that the credit allocations that it claimed in 2014, 2015, and 2016 are correct. Farm Bureau argues that its allocations are commensurate with its ownership interests in the Annual Funds and therefore comply with Code sections 702 and 704, as incorporated into section 105-269.15(c). In support, Farm Bureau cites organizational documents for the various partnerships, transaction documents regarding its contributions and the resulting allocations, and cost certifications for the underlying renewable energy projects. Farm Bureau also contends that it independently validated the accuracy of documents received from the partnerships. (*See, e.g.*, R.11666–69.)

81. In response, the Department fails to rebut this evidence. It argues, for example, that Farm Bureau's K-1 schedules are full of "errors and inconsistencies" but never says what the errors and inconsistencies are. (DOR Op. Br. 53, ECF No. 61.)

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form of partnership allocations. What the Department means by an "actual" sale is that the transactions were sales in substance, though not in form. That argument simply repeats the Department's disguised sale argument.

[12] The Court need not and does not address Farm Bureau's alternative argument that tax credits are not property and therefore cannot be subject to the disguised sale rule.

82. Likewise, the Department argues that the allocations made to Farm Bureau were not in accordance with its partnership interests, as required by Code section 704(b), due to "the apparent use of recourse debt to finance the projects." (DOR Op. Br. 53.) But the Department cites no evidence, offers no law related to the treatment of debt financing under section 704(b), and does not say how the projects' debt financing affects Farm Bureau's interests in the partnerships.

83. Also missing are the Department's own calculations. What shares of credit would Farm Bureau be entitled to claim after correcting the supposed K-1 errors and factoring in the projects' debt financing? The response brief is silent.

84. In lieu of spelling out its arguments and citing evidence to support them, the Department points to its "briefing below." (DOR Op. Br. 53.) This is not only an impermissible end run around the word limits imposed by the Business Court Rules (which the Court enlarged in this case) but also a violation of the requirement to cite evidence with specificity. "It is not the Court's job to sift through the record and make" the Department's case for it. *Brewster v. Powell Bail Bonding, Inc.*, 2020 NCBC LEXIS 27, at *9 (N.C. Super. Ct. Mar. 11, 2020) (cleaned up).

85. Accordingly, the Court concludes that Farm Bureau has offered unrebutted evidence to show that its claimed allocations were determined in accordance with its interests in the partnerships. The allocations comply with Code sections 702 and 704 and N.C.G.S. § 105-269.15(c).

D. The Department's Exceptions

86. The Department has submitted exceptions to the ALJ's denial of its motions to exclude the reports and testimony of Farm Bureau's expert witnesses. Specifically,

the Department contends that the experts impermissibly opined on questions of law and on matters outside the scope of their expertise.

87. An ALJ's ruling on the admissibility of expert testimony is reviewed for an abuse of discretion. *See, e.g.*, *Stark v. N.C. Dep't of Env't & Nat. Res.*, 224 N.C. App. 491, 500–01 (2012). "The burden is on the party who asserts that evidence was improperly admitted to show both error and that he was prejudiced by its admission." *State v. Gappins*, 320 N.C. 64, 68 (1987); *see also Hasty v. Turner*, 53 N.C. App. 746, 750 (1981) ("The burden is on the appellant not only to show error, but also to enable the Court to see that he was prejudiced and that a different result would have likely ensued had the error not occurred.").

88. The Department has not come close to carrying its burden. To start, the Department all but abandoned these issues by making only skeletal arguments in its primary brief. As an example, in violation of the Business Court Rules, the Department refers to its "brief below" for arguments that the experts impermissibly opined on matters outside the scope of their expertise. (DOR Op. Br. 56.) This is wholly insufficient to preserve an issue for appeal. Although the Department advanced more comprehensive arguments in its reply brief, those arguments are untimely. *See, e.g.*, *State v. Fowler*, 353 N.C. 599, 607–08, 616, 620–22, 625 (2001) (deeming issues abandoned when party assigned error but advanced no arguments in supporting brief); *McKinnon v. CV Indus., Inc.*, 228 N.C. App. 190, 196 (2013) (deeming issue abandoned when party made only a "passing reference" rather than any "specific argument"); *State v. Triplett*, 258 N.C. App. 144, 147 (2018) ("[A] reply

brief is not an avenue to correct the deficiencies contained in the original brief." (citations and quotation marks omitted)); *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 78–79 (2015) (same).

89. Moreover, at no point in either brief does the Department address the issue of prejudice or show that it was prejudiced by the ALJ's decision. No potential prejudice is apparent. In rendering the Final Decision, the ALJ did not rely on or refer to any of Farm Bureau's expert reports or testimony. Moreover, even if the ALJ had considered that testimony, no prejudice resulted because the Department prevailed. Likewise, this Court has not relied on the experts' reports and testimony as a basis for its decisions; rather, the Court has based its conclusions on the application of North Carolina law to the undisputed facts. Even if the ALJ erred in denying the Department's motions to exclude, the Department has failed to meet its burden to show that it was prejudiced by the error.

90. Accordingly, the Department has not met its burden to show an abuse of discretion. Its exceptions are overruled.

IV.
CONCLUSION

91. For all these reasons, the Court **GRANTS** Farm Bureau's Petition, **VACATES** the Final Decision, and **REMANDS** with direction to **GRANT** summary judgment in favor of Farm Bureau. The Court further **OVERRULES** the Department's exceptions to the ALJ's denial of its motions to exclude.

SO ORDERED, this the 3rd day of April, 2023.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases