

**MONARCH TAX CREDITS v. NORTH CAROLINA DEP'T OF REVENUE &  
RONALD G. PENNY**

19-CVS-012647

NORTH CAROLINA SUPERIOR COURT, WAKE COUNTY

September 26, 2019

**Reporter**

2019 NCBC Motions LEXIS 607 \*

MONARCH TAX CREDITS, LLC, formerly known as STATE TAX CREDIT EXCHANGE, LLC, Plaintiff-Petitioner, v. NORTH CAROLINA DEPARTMENT OF REVENUE and RONALD G. PENNY, SECRETARY, in his official capacity, Defendants-Respondents.

**Type:** Motion

**Counsel**

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KILPATRICK TOWNSEND & STOCKTON LLP,  
Joseph S. Dowdy, N.C. State Bar No. 31941, Phillip A.  
Harris, N.C. State Bar No. 39740, Raleigh, NC, NELSON  
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Counsel for Plaintiff -Petitioner Monarch Tax Credits,  
LLC, formerly known as State Tax Credit Exchange, LLC.

**Title**

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**NOTICE OF DESIGNATION AS A COMPLEX  
BUSINESS CASE OR, IN THE ALTERNATIVE,  
MOTION FOR DESIGNATION AS AN  
EXCEPTIONAL/COMPLEX BUSINESS CASE**

**Text**

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Pursuant to [N.C. Gen. Stat. § 7A-45.4](#) [\*1], Plaintiff Monarch Tax Credits, LLC, formerly known as State Tax Credit Exchange, LLC ("Plaintiff") hereby designates the above-captioned action as a mandatory complex business case, or in the alternative, moves that the Court recommend to the Chief Justice of the North Carolina Supreme Court that she designate this matter an "exceptional" or "complex business" case pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure ("Rule 2.1").

**DESIGNATION AS COMPLEX BUSINESS  
CASE UNDER [N.C. GEN. STAT. § 7A-45.4](#)**

1. In good faith and based on information reasonably available, Plaintiff, through counsel, hereby certifies that this action meets the criteria for:

☒ Designation as a Mandatory Complex Business Case pursuant [N.C. Gen. Stat. § 7A-45.4\(a\)](#), in that it involves a material issue related to:

☒ (1) Disputes involving the law governing corporations, except charitable and religious organizations qualified under [G.S.55A-1-40\(4\)](#) on the grounds of religious purpose, partnerships, and limited liability companies, including disputes arising under Chapters 55, 55A, [\*2] 55B, 57D, and 59 of the General Statutes.

— (2) Disputes involving securities, including disputes arising under Chapter 78A of the General Statutes.

— (3) Disputes involving antitrust law, including disputes arising under Chapter 75 of the General Statutes that do not arise solely under [G.S. 75-1.1](#) or Article 2 of Chapter 75 of the General Statutes.

— (4) Disputes involving trademark law, including disputes arising under Chapter 80 of the General Statutes.

— (5) Disputes involving the ownership, use, licensing, lease, installation, or performance of intellectual property, including computer software, software applications, information technology and systems, data and data security, pharmaceuticals, biotechnology products, and bioscience technologies.

— (8) Disputes involving trade secrets, including

disputes arising under Article 24 of Chapter 66 of the General Statutes.

— (9) Contract disputes in which all of the following conditions are met:

(a) At least one Plaintiff and at least one Defendant is a corporation, partnership, or limited liability company, including any entity authorized to transact business in North Carolina under Chapter 55, 55A, [\*3] 55B, 57D, or 59 of the General Statutes.

(b) The complaint asserts a claim for breach of contract or seeks a declaration of rights, status, or other legal relations under a contract.

(c) The amount in controversy computed in accordance with [G.S. 7A-243](#) is at least one million dollars (\$ 1,000,000).

(d) All parties consent to the designation.

X Designation as a Mandatory Complex Business Case pursuant to N.C.

[Gen. Stat. § 7A-45.4\(b\)](#), in that it involves a material issue related to:

X (1) tax law that has been the subject of a contested tax case for which judicial review is requested under [G.S. 105-241.16](#), or a civil action under [G.S. 105-241.17](#) containing a constitutional challenge to a tax statute, shall be designated as a mandatory complex business case by the petitioner or plaintiff.

X (2) An action described in subdivision (1), (2), (3), (4), (5), or (8) of subsection (a) of this section in which the amount in controversy computed in accordance with [G.S. 7A-243](#) is at least five million dollars (\$ 5,000,000) shall be designated as a mandatory complex business case by the party whose pleading caused the amount in controversy to equal or exceed five million dollars [\*4] (\$ 5,000,000).

2. This Notice of Designation is filed at the time of filing of the Complaint to satisfy the timing requirements for such designation.

3. Plaintiff is a limited liability company organized and existing pursuant to the laws of the State of Georgia, with offices in Charlotte, North Carolina and staff working and

living in Chapel Hill, North Carolina.

4. Defendant North Carolina Department of Revenue ("NCDOR") is an agency of the State of North Carolina. Defendant Ronald Penny is the Secretary of Revenue of the State of North Carolina and he is named as Defendant solely in his official capacity.

5. Plaintiff operates a renewable energy, mill restoration, and historic rehabilitation tax credit investment business. Contrary to North Carolina tax law and the North Carolina Constitution, NCDOR issued a written "Important Notice: Tax Credits Involving Partnerships" in 2018 (the "2018 Notice"), in which it purports to exercise lawmaking functions belonging exclusively to the North Carolina General Assembly, redefines when members of partnerships or other pass-through entities qualify for tax credits, and adopts federal tax law that was not adopted by the General Assembly. [\*5] NCDOR further initiated burdensome and drawn-out audits of Plaintiffs customers and disallowed the use of tax credits by those customers.

6. Plaintiffs first claim for relief seeks judicial review of Defendants' denial of a declaratory ruling by Defendant NCDOR. In its request for declaratory ruling submitted pursuant to [N.C. Gen. Stat. § 150B-4](#), Plaintiff requested that Defendant NCDOR review its 2018 Notice and rescind the erroneous interpretation of the meaning of partnership for the purposes of North Carolina tax law. Defendant NCDOR denied this request.

7. Plaintiffs second, third, and fourth claims relate to the underlying issues raised in Plaintiffs request for declaratory ruling under [N.C. Gen. Stat. § 150B-4](#), which as noted above involve complex issues of tax law and corporate law. The amount in controversy for Plaintiffs claims exceeds \$ 5,000,000.

8. Accordingly, the basis for this designation is that in denying the request for a declaratory ruling, and in undertaking the actions described in the Complaint, NCDOR has improperly, and unconstitutionally, usurped the General Assembly's tax law authority by applying federal tax law, rather than North Carolina tax law, [\*6] to the corporate structure of Plaintiff and its customers and by denying Plaintiff and its customers the ability to receive and apply tax credits.

9. This case involves material issues related to "the law governing corporations" as it involves a question of how

North Carolina tax law should be applied to the corporate structure of Plaintiff and its customers. Moreover, the case involves complex matters of tax law as it is applied to corporations, predicated on NCDOR's unconstitutional interpretation of North Carolina tax law and its misapplication of federal tax law. Then-Chief Special Superior Court Judge for Complex Business Cases, the Honorable Ben Tennille, previously held in a similar case that, in adding tax law cases to [N.C. Gen. Stat. § 7A-45.4\(b\)](#) in 2008, the Legislature "signaled its intention that complex corporate tax matters ... be addressed in [the Business Court]." Order Overruling Opposition to Designation, *Delhaize Am., Inc. v. Secretary of Revenue of N.C.*, No. 07 CVS 020801, at P 1 (Jan. 31, 2008). Judge Tennille further held that the court's decision in *Delhaize America* "could have implications for other companies, and thus the publication of a written opinion by this Court could prove beneficial to the State and those companies." *Id.* at P 2. The same can be said for this case-the Court's decision in this matter will affect other companies seeking to obtain the benefit of the tax credits at issue here.

10. Further, as stated above, this case involves a material issue related to the grounds for mandatory designation set forth in [N.C. Gen. Stat. § 7A-45.4\(b\)\(1\)](#).

11. In accordance with [\*7] [N.C. Gen. Stat. § 7A-45.4\(c\)](#), this Designation is being simultaneously served upon the Honorable Louis A. Bledsoe, III, Chief Business Court Judge, with a copy contemporaneously sent to the Honorable Cheri Beasley, Chief Justice of the North Carolina Supreme Court.

A copy of all significant pleadings filed to date in this action is attached as Appendix A.

#### **MOTION FOR RECOMMENDATION OF RULE 2.1 CASE DESIGNATION**

In the event that the Court does not agree that this case falls within the mandatory designation, Plaintiff hereby moves, in the alternative, for a Rule 2.1 Designation of this action as an "exceptional" or "complex business" case. In support of Plaintiff's alternative Motion to Recommend Rule 2.1 Case Designation, Plaintiff shows unto the Court the following:

1. Plaintiff hereby incorporates by reference the paragraphs in its Notice of Designation.

2. Contemporaneously with the filing of this Motion, Plaintiff filed an action petitioning for judicial review of Defendant NCDOR's denial of a request for declaratory ruling combined with a complaint alleging causes of action for violation of the Constitution of North Carolina.

3. Rule 2.1 of the General Rules [\*8] of Practice provides:

a) The Chief Justice may designate any case or group of cases as

(a) exceptional or (b) "complex business." A senior resident superior court judge, chief district court judge, or presiding superior court judge may ex mero motu, or on motion of any party, recommend to the Chief Justice that a case or cases be designated as exceptional or complex business.

(b) Such recommendation for exceptional cases may include special areas of expertise needed by the judge to be assigned and may include a list of recommended judges. Every complex business case shall be assigned to a special superior court judge for complex business cases, designated by the Chief Justice under Rule 2.2, who shall issue a written opinion upon final disposition of the case.

(c) Such recommendation shall be communicated to the Chief Justice through the Administrative Office of the Courts.

(d) Factors which may be considered in determining whether to make such designations include: the number and diverse interests of the parties; the amount and nature of anticipated pretrial discovery and motions; whether the parties voluntarily agree to waive venue for hearing pretrial motions; the [\*9] complexity of the evidentiary matters and legal issues involved; whether it will promote the efficient administration of justice; and such other matters as the Chief Justice shall deem appropriate.

(e) The Chief Justice may enter such orders as are appropriate for the pretrial, trial, and other disposition of such designated case or cases.

4. Pursuant to Rule 2.1(a), any presiding superior court judge may make a recommendation that this case be designated "exceptional" or "complex business."

5. Pursuant to Rule 2.1(b), it is appropriate for the Court to make recommendations regarding who should serve as

the single Rule 2.1 judge. Plaintiff defers to the Court regarding whether it is inclined to make such a recommendation, but respectfully notes that, a judge of the business court would be appropriate in this case as it involves both complex matters of a business's corporate structure and tax law.

6. The Rule 2.1(d) factors weigh in favor of an exceptional designation in this case.

a. The number and diverse interests of the parties. While this case nominally involves Plaintiff and Defendant NCDOR, the implications extend to every corporate structure that attempts to [\*10] procure and use a variety of North Carolina tax credits. If NCDOR's erroneous denial is sustained, it will impact numerous other entities' ability to use tax credits and their own corporate structures.

b. The amount and nature of anticipated pretrial discovery and motions. This case needs efficient management of the discovery process, including review of any objections to discovery related to confidentiality of tax matters, and the prompt resolution of discovery motions to ensure an efficient resolution of important questions of corporate and tax law. A single assigned judge to oversee the discovery process would be helpful to the parties and would expedite the case.

c. Whether the parties voluntarily agree to waive venue for hearing pretrial motions. Plaintiff agrees to waive venue for hearing pretrial motions.

d. The complexity of the evidentiary matters and legal issues involved. This matter involves complex and novel questions of corporate structure and tax laws. This case will likely be the first time these issues are presented to a court and, accordingly, the legal issues involved are suitable for consideration by a single Rule 2.1 judge.

e. Whether [an exceptional [\*11] designation] will promote the efficient administration of justice. It would be expensive and burdensome for the parties to expend significant resources educating multiple members of the bench concerning the circumstances of this case, and it would burden the judicial system and strain its resources to have multiple different judges consider the case.

f. Such other matters as the Chief Justice shall deem appropriate. Plaintiff respectfully notes that it would be helpful for the parties and the Court for this case to have a

peremptory trial setting definite case management deadlines. Plaintiff further notes that the matter is one in which the media and the public have expressed interest.

7. As no Rule 2.1 factors counsel against this case's designation as an "exceptional" or "complex business" case, and for the foregoing reasons, Plaintiff respectfully requests that this Court recommend that this case be designated "exceptional" or "complex business."

WHEREFORE, Plaintiff, Monarch Tax Credits, LLC, formerly known as State Tax Credit Exchange, LLC, respectfully prays that the presiding judge either accept this case as a mandatory complex business case, or alternatively, recommend [\*12] to the Chief Justice that she designate this case a Rule 2.1 "exceptional" or "complex business" case, make appropriate recommendations regarding who will serve as the Rule 2.1 judge and allow Plaintiff such other and further relief as the Court deems just and proper.

This the 26th day of September, 2019.

KILPATRICK TOWNSEND & STOCKTON LLP

By: /s/ [Signature]

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-AND-

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By: /s/ [Signature]

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*Counsel for Plaintiff-Petitioner Monarch Tax Credits, LLC,  
formerly known as State Tax Credit Exchange, LLC*

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing NOTICE OF DESIGNATION was this day served upon the below-named counsel by certified [\*13] mailing, return receipt requested, at the addresses shown below:

North Carolina Department of Revenue  
c/o Ronald G. Penny, Secretary  
501 North Wilmington Street  
Raleigh, NC 27604

North Carolina Department of Revenue  
c/o Bryan Beatty, Process Agent  
Interim General Counsel  
Post Office Box 871

Raleigh, NC 27602

Ronald G. Penny

Secretary

North Carolina Department of Revenue  
501 North Wilmington Street  
Raleigh, NC 27604

This the 26th day of September, 2019.

/s/ [Signature]

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formerly known as State Tax Credit Exchange, LLC*

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