Case Brief: Ambiguity and Admonition—How the Supreme Court of North Carolina Left Deference Derelict in *Philip Morris USA*[*]

INTRODUCTION

In certain instances of legislative and regulatory ambiguity, courts exercise increased interpretative power over a piece of legislation. For example, when the plain meaning of a statute is unclear, courts may go beyond the text, interpreting the purpose and intent of the legislature when the statute was enacted.[1] Similarly, in a regulatory context, not *every* interpretation by a state agency is deserving of deference.[2] In *Philip Morris USA v. North Carolina Department of Revenue*,[3] the Supreme Court of North Carolina relied on these principles of judicial interpretation to reject the application of the Export Credit Statute ("ECS")[4] by the North Carolina Department of Revenue (the "Department").[5]

In the aforementioned case, Philip Morris, a cigarette manufacturer, sought the right to carry forward unused tax credits from previous years under North Carolina's ECS.[6] Philip Morris generated more than $6 million of tax credits in 2005 and 2006. The company attempted to claim the excess credits in 2012, 2013, and 2014—purporting to carry forward the tax credits that were generated but not claimed in 2005 and 2006.[7] The specific issue in the case is one of statutory interpretation.[8] The ECS limits the "credit allowed" to be claimed under the statute to $6 million per year.[9] If "credit allowed" is defined strictly as the amount of tax credits that can be *claimed* in a year, Philip Morris could still *generate* tax credits over the $6 million threshold in 2005 and 2006, and claim the excess credits in subsequent years.[10] But, if "credit allowed" is defined broadly as the amount of tax credits that can be *generated* in a year, Philip Morris would be capped not only at claiming but at generating $6 million

1. Philip Morris USA v. N.C. Dep't of Revenue, 386 N.C. 748, 755, 909 S.E.2d 197, 203 (2024).
2. *Id.* at 760, 909 S.E.2d at 206 (explaining that deference to an agency's interpretation is only "warranted in cases in which such an interpretation serves to benefit the citizen taxpayer, not the State").
3. 386 N.C. 748, 909 S.E.2d 197 (2024).
4. N.C. GEN. STAT. § 105-130.45(b) (2003) (repealed 2018) (awarding tax credits to manufacturers of cigarettes for exportation).
5. *Philip Morris*, 386 N.C. at 765, 909 S.E.2d at 209.
6. *Id.* at 750–51, 909 S.E.2d at 200–01.
7. *Id.* at 750, 909 S.E.2d at 200.
8. *Id.* at 749, 909 S.E.2d at 200.
9. *Id.* at 750, 909 S.E.2d at 200 (quoting N.C. GEN. STAT. § 105-130.45(b) (2003)).
10. *See id.* at 749, 909 S.E.2d at 200.

in tax credits per year, rendering its "carryforward" claims in 2012, 2013, and 2014 invalid.[11]

The Supreme Court of North Carolina found that the term "credit allowed" was defined differently in two different subsections of the ECS, creating a statutory ambiguity.[12] This ambiguity allowed the court to look beyond the plain language of the statute to consider the intent of the legislature.[13] In doing so, the court concluded that the $6-million-tax-credit cap only restricted the amount of credits that can be *claimed* in a year, leaving the door open for taxpayers to *generate* credits beyond $6 million and claim the excess in subsequent years.[14] Thus, the court sanctioned the generation of excess tax credits in 2005–2006 and the claim of those tax credits in 2012–2014.[15]

FACTS OF THE CASE

After Philip Morris claimed the rollover tax credits in 2012, 2013, and 2014, the Department issued a report disallowing the export credits claimed by the company.[16] The Department explicitly interpreted the ECS to limit the amount of tax credits "generated' not just "allowed," leaving Philip Morris with no credits available to carry forward from the 2005 and 2006 tax years.[17] Philip Morris objected and petitioned the Office of Administrative Hearings for a contested tax case hearing.[18] The administrative law judge ruled in favor of the Department, which prompted Philip Morris to petition the Wake County Superior Court for judicial review of the decision.[19] The trial court found that Philip Morris improperly carried forward the excess export credits, as the ECS "plainly indicates that the General Assembly intended to limit credit generation to six million dollars per year."[20] Philip Morris appealed the trial court's ruling to the Supreme Court of North Carolina.[21]

LEGAL ISSUE AND OUTCOME

The Supreme Court of North Carolina overturned the trial court's ruling and interpreted the ECS to limit the amount of tax credits claimed, not generated.[22] In reaching its conclusion, the court relied on the textual ambiguity

11. *Id.*
12. *Id.* at 764, 909 S.E.2d at 209.
13. *See id.* at 764–65, 909 S.E.2d at 209.
14. *Id.* at 765, 909 S.E.2d at 209.
15. *Id.* at 750, 909 S.E.2d at 200.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 751, 909 S.E.2d at 200–01.
20. *Id.* at 751, 909 S.E.2d at 201.
21. *Id.*, 909 S.E.2d at 201.
22. *See id.* at 764, 909 S.E.2d at 209.

of the ECS along with the Department's own inconsistent interpretation of the statute.

A. *Statutory Ambiguity*

When statutory language is "clear and without ambiguity," the court must defer to the plain meaning of the statute.[23] However, when the language of the statute is ambiguous, the court should "determine the purpose of the statute and the intent of the Legislature in its enactment."[24]

A brief examination of North Carolina's ECS is necessary to understand the court's finding and interpretation of the statute's ambiguity. The ECS, codified in 1999, included two subsections that defined the tax credit available to qualifying taxpayers: subsection (b), titled "Credit," and subsection (c), titled "Cap."[25] Under this initial construction, the term "credit allowed" unquestionably placed limitations on the amount of credits *claimed*, not generated—a reading that supports Philip Morris' position.[26] However, in 2003, the North Carolina legislature amended the language of subsection (b) as follows:

> *In the case of a successor in business*, the amount of credit allowed under this section is determined by comparing the exportation volume of the corporation in the year for which the credit is claimed with all of the corporation's predecessor corporations' combined base year exportation volume, rounded to the nearest whole percentage. *The amount of credit allowed may not exceed six million dollars*.[27]

The Department argued that this amendment was intended to limit credit generated, not just credit claimed, to $6 million per year.[28] Thus, after the 2003 amendment, the ECS appeared to use the term "credit allowed" in two different subsections with two different meanings, opening the door to a statutory ambiguity analysis.[29]

In conducting its "legislative intent" analysis, the court sought to resolve the tension in the statute through the doctrine of last antecedent.[30] Because the

23. State v. Fritsche, 385 N.C. 446, 449, 895 S.E.2d 347, 349 (2023) (quoting *In re* R.L.C., 361 N.C. 287, 292, 643 S.E.2d 920, 923 (2007)).

24. *Id.* (quoting *In re* R.L.C., 361 N.C. at 292, 643 S.E.2d at 923).

25. N.C. GEN. STAT. § 105-130.45(b)–(c) (1999) (repealed 2018).

26. *Philip Morris*, 386 N.C. at 756, 909 S.E.2d at 204 ("[T]he Department concedes that the *original statute* did not impose a limit on the amount of credit that could be generated each year.").

27. Act of Dec. 16, 2003, ch. 435, pt. 5, 2003 N.C. Sess. Laws 1421, 1431–33 (codified at N.C. GEN. STAT. § 105-130.45(b)–(c) (2003) (repealed 2018)) (emphasis added).

28. *Philip Morris*, 386 N.C. at 756, 909 S.E.2d at 204.

29. *Id.* at 754, 909 S.E.2d at 203.

30. *Id.* at 757, 909 S.E.2d at 204. The doctrine of last antecedent sets out that "[r]elative and qualifying words, phrases, and clauses ordinarily are to be applied to the word or phrase immediately

amended subsection (b) began with the clause "[i]n the case of a successor business," the court found that the "credit allowed" generation limitation in subsection (b) was only applicable to successor businesses, in an effort to prevent "double dipping" by a surviving corporation and a merged corporation.[31] By writing off the amended language of subsection (b) as only applicable to successor businesses, the court paved the way to an interpretation of the ECS which provided no limitations on export credits generated, permitting the carry forward practice sought by Philip Morris.[32]

B. *The Department's Inconsistent Interpretation*

Next, despite the Department's position that the ECS limits credits generated to $6 million, the court refused to give deference to the state agency because the "Department's representations and actions [did] not support its current position."[33] In this section of the opinion, the court held that the Department's repeated failure to act in accordance with its purported interpretation of the 2003 amendment entitled Philip Morris to rely on the understanding that the ECS permitted unlimited tax credit generation.[34]

To support its position that the Department had failed to give consistent notice of the critical change in the ECS, the court cited several instances of the Department's lack of notice to taxpayers.[35] First, the court noted entries in the Department's 2003 *Supplement to Tax Law Changes* and 2004 *Rules and Bulletins Taxable Years* publications, neither of which indicated a "change of position" or "new limitation" on a taxpayer's ability to generate and carry forward credits under the ECS.[36] In the same publication, the Department mentioned "clarifying" changes to the ECS but never used the word "generate" to clarify the new limitations it allegedly imposed on taxpayers under the statute.[37] Moreover, in the Department's 2005 and 2006 bulletins, there were entire sections devoted to "limitations and carryforward"—yet the "generation" limitation was again left unmentioned.[38]

The court compounded this evidence to conclude that Philip Morris was justified in relying on the proposition that the cap on "credit allowed" referred

preceding rather than extending to or including others more remote." *Id.*, 909 S.E.2d at 204 (quoting Wilkie v. City of Boiling Spring Lakes, 370 N.C. 540, 548–49, 809 S.E.2d 853, 859 (2018)).

31. *See id.* at 757, 909 S.E.2d at 204 (alteration in original).
32. *See id.* at 757, 759, 909 S.E.2d at 204, 205.
33. *Id.* at 765, 909 S.E.2d at 209.
34. *Id.*
35. *See id.* at 760–62, 909 S.E.2d at 206–07.
36. *Id.* at 761–62, 909 S.E.2d at 207.
37. *Id.* at 762, 909 S.E.2d at 207.
38. *Id.* at 762–63, 909 S.E.2d at 207–08.

to credits claimed, not generated, even after the 2003 amendment to the ECS.[39] Because the Department's actions "lacked transparency," the Export Credit generation limitation ushered in by the 2003 amendment amounted to an "abrupt reversal of policy without notice to the public or taxpayers."[40] Accordingly, there was no official interpretation of the ECS by the Department to which the court was required to defer.[41] Between its resolution of the statutory ambiguity and its refusal to defer to the position of the Department, the court concluded that Philip Morris appropriately carried forward the excess export credits in line with the ECS, steamrolling the express position of the Department at the time the case was decided.[42]

LEGAL IMPLICATIONS

The *Philip Morris* opinion is consequential for several reasons, ranging from statutory interpretation methods to the changing relationship between the courts and state agencies. Specifically, two aspects of *Philip Morris* raise new legal issues: (1) that a statute with two identical, differently defined terms necessarily constitutes a statutory ambiguity, which might lead to judicial encroachment on the state legislature; and (2) that the court's discarding of the Department's updated position signifies a movement away from state agency deference, mirroring the same development in federal law since *Loper Bright*.[43]

First, the court's decision to call the ECS "ambiguous" because it uses two different definitions of "credit allowed" could create a blanket of "per se . . . ambiguity" in subsequent cases that deal with similar statutes.[44] While the "credit allowed" definitions in subsections (b) and (c) of the statute did not provide for easy interpretation, there is a valid argument that the legislature *intended* to use the terms with "different shades of meaning."[45] Statutory interpretation should be conducted not just by "reference to the language itself" but by an analysis of the "specific context" in which the language arises.[46] By

39. *Id.* at 763, 909 S.E.2d at 208. "Simply put, the Department's actions amount to an abrupt reversal of policy without notice to the public or taxpayers." *Id.* at 764, 909 S.E.2d at 208.

40. *Id.* at 764, 909 S.E.2d at 208.

41. *Id.* at 760, 909 S.E.2d at 206.

42. *See id.* at 764–65, 909 S.E.2d at 209.

43. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2271–73 (2024).

44. *Philip Morris*, 386 N.C. at 768, 909 S.E.2d at 211 (Riggs, J., dissenting).

> Generally, there is a "natural presumption that identical words used in different parts of the same act are intended to have the same meaning." But that presumption does not always hold, and the fact that a legislative body may choose to give identical words different meanings in different sections of a statute does not, by definition, mean that the statute is ambiguous.

Id. at 768–69, 909 S.E.2d at 211 (citations omitted) (quoting Atl. Cleaners & Dyers, 286 U.S. 427, 433 (1932)).

45. *See id.* at 386 N.C. at 769, 909 S.E.2d at 211.

46. Yates v. United States, 574 U.S. 528, 537 (2015).

assuming de facto ambiguity when two identical words are used with different meanings, courts could "jump the gun," departing from the plain language of the statute without giving sufficient weight to the express position of the agency.

Next, the majority's insistence that the Department's interpretative inconsistencies render the agency's current position obsolete strikes a meaningful blow to state agency interpretation. The court is correct in pointing out that the Department could have been clearer in its communication about the generation limitation in the 2003 amendment.[47] Even still, if an agency's current position is supported by the statute itself and can be subverted because of an imperfect notice to implicated constituents, courts could reject coherent agency positions so long as they have an inconsistent agency bulletin to point to. This usurpation of regulatory power mirrors the federal trend since *Loper Bright*[48] and could usher in the downsizing of agency authority in North Carolina.[49]

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47. *See supra* notes 35–39 and accompanying text.

48. *Loper Bright*, 144 S. Ct. at 2271–73.

49. North Carolina common law provides that the Supreme Court of North Carolina "gives 'great weight to an agency's interpretation of a statute it is charged with administering.'" N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Exam'rs, 371 N.C. 697, 700, 821 S.E.2d 376, 379 (2018) (quoting High Rock Lake Partners v. N.C. Dep't of Transp., 366 N.C. 315, 319, 735 S.E.2d 300, 303 (2012)). The majority opinion in *Philip Morris* might indicate a departure from this precedent, following the federal trend in *Loper Bright*. *See Philip Morris*, 386 N.C. at 774, 909 S.E.2d at 215 (Riggs, J., dissenting). State courts have tended to deem *Loper Bright* relevant when the cases they hear involve federal law. Robin Kundis Craig, *The Impact of* Loper Bright v. Raimondo*: An Empirical Review of the First Six Months*, 109 MINN. L. REV. 2671, 2687 (2025). Even still, at least three state courts have suggested that *Loper Bright* is also relevant when state agencies interpret federal law. *Id.* at 2688. State courts have also cited to *Loper Bright* to represent the principle of court interpretive primacy when there is no competing agency interpretation at issue. *Id.*

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