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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case Nos.: 2021-001528 & 2021-001547

CDT, Inc., Petitioner,

v.

South Carolina Department of Revenue Respondent.

AND

Vimlesh V. Patel and Punita Patel Petitioners,

v.

South Carolina Department of Revenue Respondent.

**CONSOLIDATED PETITION FOR WRIT OF CERTIORARI
OF PETITIONERS CDT, INC. & VIMLESH V. and PUNITA PATEL**

Steven Edward Buckingham (S.C. Bar No. 0075089)
The Law Office of Steven Edward Buckingham
16 Wellington Avenue
Greenville, South Carolina 29609
(o) 864.735.0832
(e) seb@buckingham.legal

Scott F. Talley (S.C. Bar No. 0070364)
Talley Law Firm, P.A.
291 South Pine Street
Spartanburg, South Carolina 29302
(o) 864.595.2966
(e) scott@talleylawfirm.com

Attorneys for Petitioners

Other Counsel of Record:

Sean G. Ryan (S.C. Bar No. 0076585)
Jason P. Luther (S.C. Bar No. 0078021)
South Carolina Department of Revenue
Office of General Counsel
300A Outlet Pointe Boulevard
Columbia, SC 29210
(o) 803.898.5375
(e) sean.ryan@dor.sc.gov
jason.luther@dor.sc.gov

Attorneys for Respondent

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CERTIFICATION OF PETITIONERS' COUNSEL

The undersigned counsel for Petitioners hereby certify and affirm that a petition for rehearing from the decision of the Court of Appeals for which this writ of certiorari is sought was made in a timely fashion, and that it was finally ruled upon by the Court of Appeals on May 19, 2022. Thirty (30) days after such date occurs on June 18, 2022.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals' decision to dismiss Petitioners' underlying appellate proceedings for lack of jurisdiction constitutes reversible error because the decision overlooks, misapprehends, or disregards Petitioners' rights to appeal from an adverse decision of the Administrative Law Court, as supplied by South Carolina Code § 1-23-610(A)(1).
2. Whether the Court of Appeals' decision to dismiss Petitioners' underlying appellate proceedings for lack of jurisdiction constitutes reversible error because the decision overlooks, misapprehends, or disregards the fact that Petitioners could not reasonably comply with the provisions of South Carolina Code § 12-60-3370, specifically because the amount of tax liability asserted by SCDOR following the Administrative Law Court's decision differs from the amount of tax liability actually adjudicated by the Administrative Law Court.

STATEMENT OF THE CASE & PERTINENT FACTS

This matter arises from a contested tax case which was adjudicated in the Administrative Law Court. Petitioners are South Carolina citizens, residents, and taxpayers. Petitioner CDT, Inc. is a South Carolina corporation whose primary business activity is tobacco wholesales; the sole shareholder of CDT, Inc. is Petitioner Vimlesh V. Patel; Mr. Patel's spouse is Petitioner Punita Patel. CDT, Inc. is, for purposes of taxation, considered a pass-through entity, such that the income attributable to CDT, Inc. is reported on the individual tax returns for the Patels.

During or about 2016, Respondent—the South Carolina Department of Revenue—commenced a tobacco & cigarette tax audit with respect to CDT, Inc. During the course of that audit, SCDOR discovered that CDT had not filed South Carolina Corporate Income Tax returns since 2012. This led SCDOR to commence a corporate income tax audit with respect to CDT, Inc. This audit was concluded in 2019, with SCDOR ultimately asserting that CDT, Inc. had earned millions in revenue for which it had not paid taxes. Because SCDOR's conclusions were based on assumptions that were divorced from the reality reflected in CDT's bank records, during the later months of 2019, Petitioners commenced this contested tax case before the Administrative Law Court.

The matter came to trial on May 25, 2021. As a result of the trial, an order was entered on October 28, 2021 holding that CDT, Inc. had earned a certain amount of revenue in tax years 2012-2016 that had not been reported to SCDOR, and directed Respondent to prepare a statement of tax liability owed by Petitioners as a result of the amounts of earned-but-not-reported revenue adjudicated by the court. (R. 1.) Both Petitioners and Respondent filed motions pursuant to Rule 59(e), SCRCP. (R. 32 & 36.) The lower court

denied Petitioners' Rule 59 motion and granted Respondent's, resulting in a modified order entered on November 23, 2021. (R. 15.) It is from these orders that Petitioners took a timely appeal. (R. 45 & 47.)

As a general proposition, a substantial portion of Petitioners' position on appeal—at least to the Court of Appeals—was based on the fact that SCDOR could never produce a consistent statement of what amount of tax liability, as derived from earned-but-not-reported revenue, Petitioners are claimed to have actually owed. Petitioners have discussed this at length in prior filings with the Court of Appeals. (R. 95 & 194.) Suffice to say that that SCDOR's analysis of CDT, Inc.'s earned-but-not-reported revenue for tax years 2012-2016 has been as high as \$40 million above what CDT, Inc.'s bank records evidence.

The crux of this Petition, however, is focused on the Court of Appeals' determination that it does not have jurisdiction to hear the appeal. On January 12, 2022, Respondent filed motions to dismiss Petitioners' appeals as a consequence of the fact that Petitioners did not pay the principal amounts of tax in dispute, or post a bond therefor, prior to commencing appellate proceedings. S.C. Code § 12-60-3370. (R. 49 & 72.) By orders dated February 15, 2022, the Court of Appeals granted Respondent's motions. (R. 29 & 30.) Petitioners timely filed a petition for rehearing with the Court of Appeals, (R. 194), but this, too, was denied, (R. 31). This Petition follows.

ARGUMENT

A. Petitioners are entitled to pursue appellate proceedings as a matter of right.

Respondent's motions to dismiss were predicated on the assertion that, unless Petitioners paid in full or posted a bond for "all taxes, not including penalties or civil fines, determined to be due by the administrative law judge before appealing the decision to the

court of appeals,” then the Court lacked subject matter jurisdiction to entertain appellate proceedings. See S.C. Code § 12-60-3370. (R. 49 & 72.) On this basis, the Court of Appeals explicitly declined to exercise jurisdiction over Petitioners’ appellate proceedings and dismissed the appeals. (R. 29 & 30.)

However, Petitioners would direct this Court’s attention to the first full phrase of Section 3370, which is as follows: “Except as otherwise provided, a taxpayer shall pay, or post a bond for, all taxes, not including penalties or civil fines, determined to be due by the administrative law judge before appealing the decision to the court of appeals. . . .” S.C. Code § 12-60-3370 (emphasis added). The emphasized portion of the foregoing provision leads to an obvious question: *Is there an “otherwise provided” that would create an exception to the ostensible requirements of Section 3370?* The answer is in the affirmative, and is supplied by a completely different title and chapter of the South Carolina Code.

South Carolina Code § 1-23-610(A)(1) is quoted below in full:

For judicial review of a final decision of an administrative law judge, a notice of appeal by an aggrieved party must be served and filed with the court of appeals as provided in the South Carolina Appellate Court Rules in civil cases and served on the opposing party and the Administrative Law Court not more than thirty days after the party receives the final decision and order of the administrative law judge. Appeal in these matters is by right.

S.C. Code § 1-23-610(A)(1) (emphasis added).

There is no dispute that the decision of the administrative law judge from which these appellate proceedings were taken is final, or that the pertinent notices of appeal were properly filed and served. The only issue is whether South Carolina Code § 1-23-610(A)(1) and § 12-60-3370 can be reconciled.

If it is the case, as it appears to be based on the plain language of South Carolina Code § 1-23-610(A)(1), that a party may take an appeal from a final decision of an administrative law judge “by right,” then that necessarily means there are no preconditions to the exercise of that procedural opportunity, nor are any third-party permissions necessary, nor is there any judicial discretion to be exercised in determining whether appellate jurisdiction exists. All that is necessary to invoke a procedural opportunity that is established “by right” is for the party seeking to exercise that opportunity to claim it; once claimed, the right is invoked and must be observed.

The provisions of South Carolina Code § 12-60-3370 are opposed to the plain meaning of § 1-23-610(A)(1). In no uncertain terms, Section 3370 states that an aggrieved taxpayer may appeal from an adverse decision of an administrative law judge only if the taxpayer first pays the disputed principal tax in full or posts a bond. In other words, Section 3370 expressly imposes a condition precedent to the exercise of a party’s appellate rights, even though § 1-23-610(A)(1) states that no such conditions precedent exist.

Fortunately, the inherent conflict between § 1-23-610(A)(1) and § 12-60-3370 does not require this Court to strike one provision down in favor of another; nor does it require the Court to engage in linguistic heroics to reconcile the two provisions. The General Assembly has done this work already.

The opening clause of Section 3370 provides that the conditions precedent to appellate proceedings established therein apply “except as otherwise provided.” Section 610(A)(1) has no such limiting language. Accordingly, the provisions of Section 3370 that ostensibly create conditions precedent to a taxpayer taking an appeal from the final decision

of an administrative law judge must necessarily give way to the provisions of Section 610(A)(1), which state that an appeal may be taken as a matter of right.

Perhaps this analysis may be criticized as acknowledging a construction in which the exception would swallow the rule. Petitioners do not deny that result. However, it represents nothing less than the natural consequence of applying the plain language of each statute as enacted by the General Assembly in a manner that is faithful to the time-honored rules of statutory construction.

Therefore, consistent with the foregoing analysis, Petitioners respectfully request that, as a consequence of this Petition, Petitioners' appeals from the decision of the administrative law judge be allowed to proceed, and that this case be remanded the Court of Appeals to hold proceedings in connection therewith.

B. Respondent's motions to dismiss should have been denied as a consequence of SCDOR's continuing failure to provide Petitioners with the information necessary to observe South Carolina Code § 12-60-3370.

In the event that Petitioners are obliged to follow the conditions precedent to appellate proceedings ostensibly mandated by South Carolina Code § 12-60-3370, which is denied, then Petitioners should nonetheless be entitled to pursue these appellate proceedings due to Respondent's failure to provide Petitioners with the information necessary to honor Section 3370. To demonstrate why this relief is appropriate, it is necessary to track through the multitude of demands made by SCDOR against Petitioners throughout the life of this dispute, both before trial and after.¹

¹ The documentary support for this section of argument is found in Petitioners' Response in Opposition to Respondent's Motions to Dismiss, as well as the attachments submitted in support thereof. (R. 95.)

Respondent's initial analysis of Petitioners' taxable income for the audit period in question was prepared in 2018. Through this analysis, Respondent was ostensibly trying to extrapolate CDT, Inc.'s gross income for each of the years of the audit period by multiplying the costs of CDT, Inc.'s tobacco purchases by a certain ratio, yielded by comparing the operating costs claimed by CDT, Inc. against the operating costs deemed "allowed" by Respondent. This ratio was derived through an analysis of CDT, Inc.'s bank records. The conclusions reached by Respondent through this analysis were, as demonstrated below, utterly bizarre.

For example, for tax year 2016, Respondent determined that CDT, Inc.'s tobacco purchases for that year totaled \$14,255,260. Then, Respondent applied its calculation of operating costs derived—allegedly—from a study of CDT, Inc.'s bank records to extrapolate that CDT, Inc.'s gross revenue for 2016 was \$23,978,570.23. However, as Respondent knew or should have known, based on the very same bank records used to calculate the operational-cost ratio, CDT, Inc.'s gross revenue for 2016 was only \$15,988,720.09. Incredibly, Respondent had overestimated CDT, Inc.'s gross revenue by eight million dollars.

Respondent's initial analysis of the other tax years for the audit period was no better. For 2015, Respondent contended that CDT, Inc.'s gross revenue was \$21,057,862.43, even though CDT, Inc.'s bank records showed revenue of only \$12,183,064; for 2014, Respondent contended that CDT, Inc.'s gross revenue was \$13,150,000, when bank records showed only \$9,633,273. For 2013 and 2012, Respondent simply "carried back" its calculation of gross revenue for 2014, showing that CDT, Inc.'s gross revenue for 2012 and 2013 was the same as 2014—\$13,150,000, despite the fact that

CDT, Inc.'s bank records showed gross revenue for 2012 in the amount of \$3,107,986 and for 2013 in the amount of \$7,284,384.

All told, as a result of Respondent's "analysis," CDT, Inc.'s gross revenue for the audit period was overestimated by approximately \$36 million. This, however, was only Respondent's initial analysis. There were more to follow, and each was plagued by their own brand of fiction.

In March 2019, Respondent issued a "Corporate Working Paper" for each tax year of the audit period with "adjusted" audit calculations. A summary of Respondent's conclusions is set out below, along with a comparison with their prior conclusions:

	Gross Revenue CDT Bank Records	Gross Revenue Initial Analysis	Gross Revenue Mar. 2019 Analysis
2012	\$3,107,986	\$13,150,000	\$5,717,622
2013	\$7,284,384	\$13,150,000	\$9,068,333
2014	\$9,633,273	\$13,150,500	\$11,420,020
2015	\$12,183,064	\$21,057,862	\$16,386,632
2016	\$15,988,720.09	\$23,978,570.23	\$20,710,194

As the foregoing table demonstrates, as of January 2019, Respondent's analyses were trending toward a more factual grounding. However, even this new analysis continued to show that CDT, Inc.'s gross revenues were more—millions more—than what were established through the company's bank records. And the new analysis still overstated CDT, Inc.'s gross revenue for the audit period by approximately \$15.5 million. It was

Respondent’s position that the amounts represented in the March 2019 analysis constituted “the final proposed assessment.”

But this wasn’t true. By correspondence dated July 31, 2019, Respondent sent a “Department Determination” letter, which purportedly set out a true and accurate calculation of taxable revenues attributable to Respondents.

According to this Department Determination:

	Gross Revenue CDT Bank Records	Gross Revenue Initial Analysis	Gross Revenue Mar. 2019 Analysis	Gross Revenue Jul. 2019 Letter
2012	\$3,107,986	\$13,150,000	\$5,717,622	\$7,203,847
2013	\$7,284,384	\$13,150,000	\$9,068,333	\$7,203,847
2014	\$9,633,273	\$13,150,500	\$11,420,020	\$9,549,526
2015	\$12,183,064	\$21,057,862	\$16,386,632	\$12,031,231
2016	\$15,988,720.09	\$23,978,570.23	\$20,710,194	\$15,170,003

Were it not for the inexplicable overestimation of CDT’s gross revenue for 2012, Respondent’s July 31, 2019 Department Determination letter would have fairly closely tracked the amount of CDT, Inc.’s revenue evidenced by its banking records.

However, the Department Determination letter introduced a new issue. For some also-inexplicable reason, Respondent unilaterally decided to discount a substantial portion of the operating expenses (including cost-of-goods-sold) reported by CDT, Inc. and evidenced by its bank records. Following is a table that compares the various positions taken with respect to operating expenses:

	Operating Expenses CDT Bank Records	Operating Expenses Mar. 2019 Analysis	Operating Expenses Jul. 2019 Letter
2012	\$4,452,852	\$4,452,852	\$3,822,607
2013	\$7,005,221	\$7,005,221	\$3,822,606
2014	\$8,859,123	\$8,859,123	\$6,072,554
2015	\$12,646,969	\$12,646,969	\$6,978,222
2016	\$15,913,150	\$15,913,150	\$9,150,810

As evidenced by this table, until Respondent's July 2019 Department Determination letter, the parties were in agreement—to the dollar—on the amount of CDT, Inc.'s operating expenses for each year of the audit period. Then, for reasons which are still not presently known, in the July 2019 Department Determination letter, Respondent undervalued CDT, Inc.'s operating expenses by nearly \$20 million. Accordingly, even though the gap between the parties regarding CDT, Inc.'s gross revenue had been reduced to approximately \$3 million, Respondent's decision to reduce the amount operating expenses creditable to CDT, Inc. created a net-\$17 million gap, for which Respondent was seeking the payment of taxes.

These circumstances were the backdrop of the trial of this matter, through which the court found as follows:

With Respect to CDT's Gross Revenue for the Audit Period

	Gross Revenue CDT Bank Records	Gross Revenue Mar. 2019 Analysis	Gross Revenue Jul. 2019 Letter	Gross Revenue ALC Order
2012	\$3,107,986	\$5,717,622	\$7,203,847	\$5,184,625
2013	\$7,284,384	\$9,068,333	\$7,203,847	\$8,222,588
2014	\$9,633,273	\$11,420,020	\$9,549,526	\$10,350,459
2015	\$12,183,064	\$16,386,632	\$12,031,231	\$14,853,172
2016	\$15,988,720.09	\$20,710,194	\$15,170,003	\$18,760,572

With Respect to CDT's Operating Expenses for the Audit Period

	Operating Exp. CDT Bank Records	Operating Exp. Mar. 2019 Analysis	Operating Exp. Jul. 2019 Letter	Operating Exp. ALC Order
2012	\$4,452,852	\$4,452,852	\$3,822,607	\$4,454,271
2013	\$7,005,221	\$7,005,221	\$3,822,606	\$7,006,640
2014	\$8,859,123	\$8,859,123	\$6,072,554	\$8,862,028
2015	\$12,183,064	\$16,386,632	\$12,031,231	\$12,647,823
2016	\$15,988,720.09	\$20,710,194	\$15,170,003	\$15,917,710

With Respect to CDT's Taxable Income

	Taxable Income ALC Order
2012	\$730,354
2013	\$1,215,948
2014	\$1,488,431
2015	\$2,205,349
2016	\$2,842,862

Petitioners are sincerely hopeful that the foregoing tables demonstrate the incontrovertible fact that Respondent's calculations of gross revenue, and tax liability based thereon, have been wildly unpredictable throughout the entirety of these proceedings. However, there is one final calculation that Petitioners would like to raise to this Court's attention.

In the orders from which the appeals were taken, the lower court directed Respondent to prepare a statement of taxes owed by Petitioners based on the taxable income attributed to CDT, Inc. as a result of trial. Respondent did so via email to Petitioners' counsel on December 2, 2021. A summary of the pertinent assertions is set out in the following table:

	Taxable Income ALC Order	Taxable Income Respondent's Email
2012	\$730,354	\$778,715
2013	\$1,215,948	\$1,212,249
2014	\$1,488,431	\$1,492,156
2015	\$2,205,349	\$2,238,122
2016	\$2,842,862	\$2,860,861

At an absolute minimum, before raising any objections to jurisdiction based on a taxpayer's failure to pay the principal amount of taxes owed as a result of the Administrative Law Court's adjudication under S.C. Code § 12-60-3370, SCDOR must actually advise the taxpayer of the amount of its principal tax liability as adjudicated. See, e.g., Beltram v. SCDOR, Unpublished Op. No. 2019-UP-349 (S.C. Ct. App. Oct. 23, 2019) (unpublished decision). It is required by the statute. And, at least with regard to Petitioners, it seems that has yet to happen. It would be fundamentally unfair to deprive Petitioners of their appellate rights on jurisdictional grounds when SCDOR has apparently not even placed Petitioners in the position of being able to comply with the statute. Yet that is the circumstance in which Petitioners find themselves, and which have necessitated the filing of this Petition.

CONCLUDING STATEMENT

For the reasons set out in this Petition, and for any other reason as may appear in the record, Petitioners would respectfully request a decision from this Court that reverses the Court of Appeals on Respondent's motions to dismiss for lack of jurisdiction, remands the matter to the Court of Appeals to allow Petitioners to pursue their appellate rights, and provides such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/ Steven Edward Buckingham

Steven Edward Buckingham (S.C. Bar No. 0075089)
The Law Office of Steven Edward Buckingham
16 Wellington Avenue
Greenville, South Carolina 29609
(o) 864.735.0832
(e) seb@buckingham.legal

Scott F. Talley (S.C. Bar No. 0070364)
Talley Law Firm, P.A.
291 South Pine Street
Spartanburg, South Carolina 29302
(o) 864.595.2966
(e) scott@talleylawfirm.com

Attorneys for Petitioners

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