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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE S.C. ADMINISTRATIVE LAW COURT

Honorable Deborah B. Durden, Administrative Law Judge

Appellate Case No. 2024-000962
Administrative Law Court Case No. 23-ALJ-17-0362-CC

Watertoys, L.L.C., d/b/a Tidalwave Watersports,.....Appellant,

v.

South Carolina Department of Revenue,.....Respondent.

REPLY TO RETURN TO THE DEPARTMENT'S MOTION TO DISMISS

Pursuant to Rule 240, SCACR, Respondent South Carolina Department of Revenue (the Department) files this Reply to Appellant's Return to the Department's Motion to Dismiss.

I. The document captioned "Appeal Bond & Personal Surety" does not constitute a bond under section 12-60-3370.

Undisputedly, Appellant did not pay the Department any of the tax or interest determined to be due by the South Carolina Administrative Law Court (ALC) in this matter. Instead, Appellant claims compliance with section 12-60-3370 by posting a bond for the tax (excluding interest). However, the document captioned "Appeal Bond & Personal Surety" simply states that the principals of Appellant owe the tax (excluding interest) if Appellant loses or the Court dismisses the appeal. This is merely a contingent "IOU." Nothing prevents Appellant from withdrawing the money deposited in their attorney's I.O.L.T.A account. For example, if Appellant changes attorneys during the pendency of the appeal, it has the right to withdraw the deposited funds.

Instead, what Appellant should have done – as every other appellant does in appeals involving the Department– was pay the tax and interest to the Department. If Appellant prevailed and was found to not owe the tax, the Department would refund the amount paid plus interest pursuant to S.C. Code Ann. § 12-60-490 (2014).

Here, the State has no guarantee that the funds will be available if Appellant's appeal is unsuccessful. This thwarts the purpose of section 12-60-3370, which presumably acts as a safeguard of taxes that the ALC determined owed to the State—i.e. State funds. Otherwise, taxpayers could spend or even hide the funds during the pendency of an appeal. This risks the taxpayer ultimately not paying the tax and interest and thereby prejudicing the citizens of this State. This is not "ontological speculation" as Appellant claims, but instead real money determined to be due by the ALC. Moneys that should have been paid—i.e. were due—to the State over the Periods at Issue (September 1, 2018 to December 31, 2021).[1] Further, section 12-60-3370 discourages taxpayers from filing frivolous appeals to delay paying the tax and interest due. Therefore, Appellant has neither satisfied the spirit nor the letter of section 12-60-3370 by posting this so-called "bond."

II. "Tax" includes interest under section 12-60-3370.

If this Court finds that Appellant's actions suffice as posting a bond under section 12-60-3370, this Court should still dismiss because the amount of the bond is insufficient. Rather than a $702 deficiency as Appellant claims, the "bond" amount is short $7,853.77. *See* Affidavit of Denise Blackwell attached to the Department's Motion to Dismiss ($33,998.40 tax + $7,151.37

[1] Under S.C. Code Ann. § 12-21-2550 (2014), the admissions tax is due monthly.

interest - $33,296 "bond" amount = $7,853.77 deficiency).[2] S.C. Code Ann. § 12-60-30 (2014), the definition section of the Revenue Procedures Act (RPA), provides:

> **As used in this chapter** and in Chapter 54 of this title except when the context clearly indicates a different meaning:
>
> ***
>
> (27) "Tax" or "taxes" means taxes, licenses, permits, fees, or other amounts, **including interest**, regulatory and other penalties, and civil fines, imposed by this title, or subject to assessment or collection by the department.

(emphasis added).

Interest is the compensation allowed by law for the use or forbearance or detention of money. *Rosen v. U.S.*, 288 F.2d 658, 660 (3rd Cir. 1961); s*ee also* INTEREST, Black's Law Dictionary (12th ed. 2024) (interest is "compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss of money by one who is entitled to its use."). In section 12-60-3370, the Legislature explicitly excluded penalties and civil fines, which are included in the definition of tax.[3] However, the Legislature made no such exclusion for interest. If penalties were inclusive of interest, the Legislature would not have listed both in the definition of tax. *See CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("we must read the statute so 'that no word, clause, sentence, provision or part shall be rendered

[2] While interest accrues from the time the tax was due until paid, Appellant has known the amount of the tax since the Department issued the Proposed Assessment on February 17, 2022. *See* Department Determination attached to the Department's Motion to Dismiss.

[3] When section 12-60-3370 was amended effective August 17, 2000 to exclude penalties and civil fines, the Department published guidance clearly stating that tax includes interest. *See* SC Revenue Informational Bulletin #00-1530, 2000 WL 35722072 at 30. The prior version of the statute expressly included interest, penalties, and other amounts determined to be due by the administrative law judge.

surplusage, or superfluous,'"). Accordingly, tax—as used in section 12-60-3370—includes interest.

The interest at issue in this matter is imposed by S.C. Code § 12-54-25 (2014). Under that statute, interest is due on unpaid tax until the tax is paid in its entirety. While the ALC confirmed that the tax was in fact due, the tax liability was incurred during the Periods at Issue. However, Appellant argues incorrectly that the tax was not due until the ALC issued its an order. This interpretation leads to an absurd result. *See Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) (a statute will not be construed to lead to absurd results). Interest exists because the present value of money is greater than the future value of money. Under Appellant's interpretation, no rational taxpayer would pay any tax until ordered to do so by a court. Adopting the Appellant's position would grant it an interest-free loan from the State. The Legislature could not have intended such an absurd result. Further, Appellant conflates prejudgment interest in Title 34 with tax interest in Title 12. These are two entirely different types of interest, and the interpretation of Title 34 interest cited by Appellant is irrelevant to the procedural requirements necessary to perfect a tax appeal from the Administrative Law Court. Whether a taxpayer chooses to pay or post a bond for the tax, the amount must include interest.

III. Failure to comply with section 12-60-3370 divests this Court of appellate jurisdiction.

Appellant cannot cure the deficiency of its appeal after the deadline to appeal. Section 12-60-3370 explicitly mandates that a taxpayer pay the tax or post the bond "before appealing to the court of appeals." Unquestionably, Appellant did not pay or post a bond for the full tax or interest before the deadline to file an appeal (June 13, 2024). *See* Order Denying Appellant's Motion for Reconsideration served on the parties on May 14, 2024 attached to the Department's Motion to Dismiss; *see also* Rule 203(b)(6), SCACR (mandates Notice of Appeal be filed within 30 days

after receipt of the decision). Despite Appellant's contrary assertion, a statutorily mandated prerequisite of appeal is not an immaterial defect and cannot be remedied by a showing of "excusable neglect."[4] Further, Appellant has only attempted to remedy the amount of tax (excluding interest) and has taken no steps to remedy the bond and interest issues.

Appellant misunderstands the distinction between appellate jurisdiction and subject matter jurisdiction made clear by the South Carolina Supreme Court in *State v. Brown*. There is no dispute this Court would have subject matter jurisdiction to hear an appeal from the South Carolina Administrative Law Court related to taxes. However, this Court lacks appellate jurisdiction because Appellant failed to comply with the procedural requirements for perfecting an appeal. *See State v. Brown*, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004) ("this Court has held the failure to comply with procedural requirements for an appeal divests a court of appellate jurisdiction, not the circuit court's subject matter jurisdiction"). This is similar to an appeal whose only defect is that notice of appeal was filed untimely. In that situation and the instant case, this Court cannot entertain the appeal because it lacks appellate jurisdiction even if it has subject matter jurisdiction. *See Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985) (timely service of notice of appeal is a jurisdictional requirement and Court had no authority to extend or expand the time).

Appellant failed to comply with section 12-60-3370 like the appellants in *CDT, Inc. v. S.C. Dep't of Rev.*, 2021-001528 and *Patel v. S.C. Dep't of Rev.*, 2021-001547. Those cases were dismissed by this Court, and the South Carolina Supreme Court denied the petitions for writ of

[4] Appellant cites *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001), which considered whether the ALC erred in denying a motion for relief from judgment under Rule 60, SCRCP. That rule does not apply, and that case lacks any relevance here. At issue here is whether Appellant complied with the statutory requirements for an appeal, which it did not. Further, this is a not a case filed in the wrong appellate court, so Rule 204, SCACR, similarly offers Appellant no relief.

certiorari. *See* SC Supreme Court Appellate Case No. 2022-000844 and 2022-000845, respectively. Importantly, this Court dismissed those cases *with prejudice*, which the Department understands to mean an appellant may not remedy a procedural deficiency of its appeal after the deadline to file an appeal had passed.

IV. The Department has not acted "unethically" in filing this Motion

Appellant's request for sanctions surprised the Department because, shortly after the Department filed its Motion to Dismiss, counsel for the parties had a collegial and cordial phone conversation about the Motion without Appellant's counsel expressing any ethical concerns. In fact, the Department was unaware of these concerns until reading them in Appellant's Return. If Appellant had mentioned its concerns earlier, perhaps the Department could have alleviated Appellant's confusion. As discussed above, the Department properly referred to relevant cases in its Motion to Dismiss.

Contrary to the claims by Appellant counsel, the Department **did** consult with him prior to filing its Motion to Dismiss. The undersigned spoke with Appellant's counsel on May 21, 2024, just a week after the ALC's Order Denying Appellant's Motion to Reconsider. In that conversation, the undersigned informed Appellant's counsel of the requirements of section 12-60-3370 and that taxes, as used in that section, included interest. The Department also told Appellant's counsel the amount of the taxes, updated interest, and penalties owed by Appellant. Appellant's counsel indicated that he was writing down the amounts and was unaware of section 12-60-3370. He also suggested that Appellant may not appeal due to its inability to comply with section 12-60-3370. The Department did not hear again from Appellant's counsel until it received an emailed copy of the Return.

Although, as Appellant correctly recognizes, the Department has no duty to consult with Appellant prior to filing its Motion to Dismiss, counsel for the Department did in fact communicate in writing in a good faith effort to resolve this matter. On the same day Appellant emailed a copy of the Notice of Appeal to the Department, the undersigned identified the deficiency of both the "bond" and the amount. *See* Email Thread attached to the Department's Motion to Dismiss. The undersigned again provided the amount of the tax, updated interest, and penalties. *Id.* The undersigned also indicated that the Department would file a motion to dismiss if these issues were not remedied. *Id.* Prior to expiration of the time to appeal, the Department emailed Appellant's counsel three times and each time offered to discuss these issues over the phone. *Id.* Appellant's counsel responded to the Department's emails but never called to discuss until June 20, 2024—a week after the deadline to file an appeal. *Id.*

Conclusion

At the ALC, the parties stipulated to the material facts. Instead of proceeding to a contested case hearing, Appellant filed a Motion for Summary Judgment. Four days later, the Department filed a cross Motion for Summary Judgment. *See* Order Granting the Department's Motion for Summary Judgment and Denying Appellant's Motion for Summary Judgment attached to the Department's Motion to Dismiss. After losing on summary judgment, Appellant attempted to insert unstipulated, disputed, and immaterial facts in its Motion to Reconsider filings to have a second bite at the apple in a contested case hearing. However, the ALC correctly denied Appellant's Motion to Reconsider. Now, Appellant again attempts to introduce those same unstipulated, disputed, and immaterial facts in its Return and attached Affidavit. Despite moving for summary judgment and agreeing the material facts were not in dispute, Appellant now

complains that the case ended on summary judgment. The ALC correctly decided this case on the merits, and now this Court should dismiss this matter for lack of appellate jurisdiction.

The Department respectfully requests this Court dismiss this appeal.

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July 3, 2024

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v.

South Carolina Department of Revenue,.....Respondent.

PROOF OF SERVICE

I, the undersigned Paralegal with the South Carolina Department of Revenue, attorneys for the Respondent, hereby certify that I have served all counsel listed below with a copy of the Reply to Return to Motion to Dismiss via electronic mail:

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Counsel for Appellant

Jennifer D. Gamble
Senior Paralegal

July 3, 2024

Jennifer Gamble

From: Jennifer Gamble
Sent: Wednesday, July 3, 2024 1:20 PM
To: tgoldstein@cobblaw.net
Cc: Marcus 'Trey' Antley, III; Allen Myrick; Jason Luther
Subject: Watertoys, LLC d/b/a Tidalwave Watersports v. SC Department of Revenue
Attachments: Reply to Return to Motion to Dismiss 7-3-24.pdf

Good Afternoon:

Attached for service upon you please find Reply to Return to the Department's Motion to Dismiss in the referenced matter along with Proof of Service.

Thank you,

Jennifer

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July 3, 2024

VIA ELECTRONIC MAIL
The Honorable Jenny Abbott Kitchings
SC Court of Appeals
Clerk of Court
1220 Senate Street
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Re: Watertoys, L.L.C., d/b/a Tidalwave Watersports v. South Carolina Department of Revenue
Appellate Case No. 2024-000962

Dear Ms. Kitchings:

Enclosed please find Reply to Return to Motion to Dismiss in the above referenced matter. Additionally, I have enclosed a Proof of Service for the same.

By copy of this letter to counsel of record, we are serving them with a copy of the same.

With kind regards, I am

Sincerely,

Marcus D. Antley III, Esquire

MDA/jdg

c: Thomas R. Goldstein, Esquire