THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Judge
Case No. 2012-212844

RECEIVED
SEP 18 2013
SC Court of Appeals

John Ray and Sherry Ray,

Appellants,

v.

S.C. Department of Revenue,

Respondent.

APPELLANTS' PETITION FOR REHEARING, WITH SUGGESTION FOR REHEARING EN BANC, REGARDING THE ORDER DATED SEPTEMBER 11, 2013

Pursuant to Rules 219, 221 and 240, SCACR, the Appellants ("Rays") hereby respectfully Petition for Rehearing regarding the Order of The Honorable Jasper M. Cureton dated September 11, 2013 and received by the undersigned on September 13, 2013. (A Petition regarding the Order of Judge Cureton dated Friday, July 12, 2013 (a virtually identical ruling) and received by the undersigned on Monday, July 15, 2013 remains pending and is not withdrawn by this Petition.)

Pursuant to Rule 219, SCACR, the Rays respectfully suggest that a rehearing en banc is proper to secure uniformity and because the issue, now addressed by both Orders, appears to be one of first impression and is of exceptional importance: 1. the statute upon which the Order(s) relies has been the subject of only a single reported Opinion; 2. which pre-dates the current statute by over five (5) years, 3. in which the statute cited by the Order was held inapplicable; and 4. the neglect of DOR to seek lower tribunal specificity failed to bring its Motion(s) within any version of the statute; 5. DOR's failure to properly or timely serve its "Renewed" Motion (received on the same day the

Order was issued and entered; see ¶¶ 17, 18 and 20 of page 4, hereafter) eliminated an opportunity for the Rays to respond, and 6. DOR's willful tardiness and Rule circumvention are not addressed in the Order of September 11, 2013 nor broached in the sole reported appellate case and have improperly received, instead, the imprimatur of this Court.

This Petition is filed and served well within the fifteen (15) days provided by Rule 221(a). On information and belief, respectfully, as stated in part above, Judge Cureton overlooked or misapprehended the requisites for both such Orders, issued a very similar second Order of September 11, 2013 while the propriety of the first Order remains under rehearing review, and issued a ruling that does not square with the attendant facts. In the absence of rehearing and revision, such Order has the effect of dismissing the appeal.

PARTIAL TIMELINE

The Rays call attention to the Exhibits attached hereto (A-E) and made a part hereof, and the Record on Appeal, and the Rays' Briefs on file. For clarity, a somewhat abbreviated timeline is believed informative.

1. The underlying Administrative Law case was initiated on **May 11, 2012.** (R. p. 18).
2. The order under appeal (granting Summary Judgment to DOR prior to <u>any</u> DOR response to standard discovery) is dated **July 26, 2012** (barely seventy-six (76) days after case filing). (R. p. 1). Its ruling and directive text are devoid of any figure "determined to be due" by the tribunal below. (R. pp. 8-9).
3. DOR filed no motion and took no other steps to alert the tribunal to the omission, nor did it seek any post-Order specificity, and it has filed no cross appeal.
4. However, the Rays immediately sought tribunal reconsideration of pre-mature Summary Judgment, lack of DOR evidence, and the complete refusal of discovery, etc. Despite its lengthy response, DOR still did not call the "determined to be due" omission to the

attention of the tribunal nor seek specificity. The secondary tribunal Order Denying the Rays' Motion to Reconsider is dated **August 21, 2012.**

5. On **August 22, 2012**, the Rays served their Notice of Appeal upon DOR and the tribunal.
6. Both sides filed Motions for Extensions of Time here. Both sides eventually filed initial briefs and Designations of Matter (DOR brief: **January 28, 2013**). DOR did not express nor imply any concerns similar to those of its Motions here.
7. Three (3) months later, on **April 19, 2013**, almost exactly eight (8) months AFTER perfection of the appeal, crediting itself with "due diligence", DOR tardily moved for dismissal. Rule 240(b). Its conclusory Motion was comprised of 3-4 sentences, no attachments, and it cited no supportive documentation. Exhibit A, attached.
8. Nonetheless, by Return of **April 26, 2013**, the Rays responded, pointing out, among other things, DOR's disqualification for the relief demanded, DOR's contradictory concessions, DOR's failure to preserve the issue, and DOR's failure to meet its burden. Exhibit B, attached.
9. On **June 6, 2013**, a bound copy of the Record on Appeal was served along with a Proof of Service.
10. On **June 21, 2013**, bound and unbound copies of the Record on Appeal were filed.
11. On or about **June 26, 2013**, the Appellants' Brief, the Reply Brief, fifteen (15) bound copies of each, and Proofs of Service were served and filed with the Court, thereby concluding the appeals process except for oral argument, if any, and the deliberation and ruling of this Court.
12. ALL documents and copies listed in paragraphs 9, 10 and 11 bore the twenty-years-old accurate street address of the undersigned counsel.
13. An Order was issued on **July 12, 2013** and promptly received by mail directly from the Office of the Clerk utilizing the proper address (see ¶ 13, above).

14. Due to the nature of the Order, on **July 18, 2013**, the Rays mailed to the Court and served a Petition for Rehearing with Suggestion for Rehearing En Banc citing and including most, if not all, of DOR's defects and the notes and arguments provided hereafter. Exhibit C.

15. To the date hereof, the Rays have not been "advised that the suggestion [for rehearing en banc] has been rejected" (Rule 219(b), SCACR) or that the Petition has been reviewed, considered and a ruling issued.

16. It now appears that, on or about **August 29, 2013** (date of cover letter), immediately prior to the Labor Day holiday, DOR filed a "Renewed" Motion for dismissal.

17. However, that document and its newly created attachment, purportedly mailed on that date, were misaddressed, delayed by the holiday and postal forwarding, and were not delivered to the Rays until the afternoon of **September 11, 2013**. Exhibit D, attached.

18. Upon his return to the office that evening, the undersigned immediately notified the Clerk, the Deputy Clerk and opposing counsel of the delay, confirmed receipt of the Motion on that date, and expressed the clear intent to respond within the time(s) set by the Rules of this Court (Exhibit E, attached) following proper service; all without notice or knowledge that an Order had already been issued and entered on **September 11, 2013**. No response from any source was forthcoming.

19. Instead, on **September 13, 2013**, the September 11, 2013 Order of The Honorable Jasper M. Cureton dismissing the subject appeal was received in the office of the undersigned.

20. This Motion for Rehearing with Suggestion for Rehearing En Banc timely follows in less than three (3) days following receipt and notice of the September 11, 2013 Order.

ARGUMENT

Preface

Reference is made to the prior filings on this issue (DOR Motion for Dismissal, the Rays' Return to Motion, and the Rays' Petition for Rehearing En Banc addressed to the Order of July 12, 2013), much of which is attached as exhibits. The Rays reiterate by such reference the arguments of their Return and Petition as fully as if restated verbatim. For the reasons stated therein and in the paragraphs of this Petition, the Rays respectfully assert that, like the Order of July 12, 2013, the Order of September 11, 2013 overlooks, misperceives and misapprehends the facts, history and status of this matter. Respectfully, it should be reheard, en banc, and both Orders should be vacated, and the current dismissal disallowed/rescinded/reversed.

Circumvention of the Rules and the Court

DOR has transparently circumvented the rules of this Court and its directives. On July 18, 2013, the Rays filed their Petition for Rehearing en banc regarding Judge Cureton's Order dated July 12, 2013. It remains pending. When such a Petition is filed, it is clear that "[n]o response shall be filed by other parties unless the Court shall so order." Rule 219(b), SCACR. No such Order demanding a DOR response has been issued or served upon the undersigned.

Nonetheless, in a thinly veiled effort, DOR has attempted a respond to the Rays' Petition by filing the euphemistically entitled "Renewed" Motion, which seeks the same exact result as their first Motion. The purposes of DOR's "Renewed" Motion are abundantly clear: attempt to remedy the patent defects of the original Motion and inappropriate Order; and acquire a second Order from the Administrative Judge, thereby rendering the current deliberations, discussion and vote, and potential reversal of the nine (9) sitting Court of Appeals Judges moot and ineffective.

Even if DOR inexplicably asserts that Rule 219(b) does not apply here, it is further barred by the time limits of Rule 240(e), SCACR (a "party opposing a ... petition shall have ten (10) days from the date of service thereof to file ... his return with the clerk and serve on all parties a copy ...".). With both notice and knowledge: a) that the Rays' Petition for Rehearing was pending; b) that it was not to file a Return to the Petition unless directed; and, at best, c) that it was once again tardy in its response; DOR set about to patently evade the express restrictions of Rule 219 and exploit the busy schedule of this Court and its judges.

The research efforts of the undersigned have found no provision in the Rules of this Court for a "Renewed" motion. Rule 240, the only DOR reference to the procedures of this Court, contains no such authorization. Aside from the obviously defective Rule citation in its original Motion, the "Renewed" Motion attempts to justify itself by the same authority, corrected, but still inapplicable in response to the en banc Petition. Moreover, DOR prevailed on its initial Motion, thereby obviating *ab initio* the propriety of any "Renewed" request. Finally, the minimal new text in the DOR "Renewed" Motion failed to notify Judge Cureton, or even offer a hint, that a Petition for Rehearing of his earlier ruling is pending.

Summary

Because the members of this Court have not rushed deliberations or moved at the expedited pace that a consistently tardy DOR requires of it, DOR has sought to revise or evade the Rules of this Court to suit its own interests. It is clear, even more than before, that DOR desperately wishes to avoid appellate Court scrutiny of its conduct below and the Order under appeal, is willing to attempt unilateral modification of the Rules, and willfully withheld the pending rehearing status of this matter from an unsuspecting Judge Cureton.

Inadequate Motion

It is noteworthy that the original DOR Motion for dismissal did not contain a single dollar figure. Exhibit A. The "Renewed" Motion cites a dollar figure only because the original improper Order (as noted in the Rays Petition for Rehearing) ventured outside the four corners of the Motion and, *sua sponte*, listed that amount. Neither Motion refers to a tribunal ruling, because neither can cite, an amount "determined to be due" by the tribunal.

Therefore, like the original Order, the Order of September 11, 2013 grants relief for which DOR does not qualify under the very statute (S. C. Code § 12-60-3370) upon which both solely rely. The more recent Order relies solely upon the text of the original Order, which ventured beyond the four corners of the DOR motion before the Court (Exhibit A) and which engaged in *sua sponte* findings. Exhibit C, pp. 3-4.

DOR did not seek lower tribunal clarification or specificity nor did it request a post-Summary Judgment determination below. In its brief, DOR did not raise the issue. Therefore, the issue raised in the DOR "Renewed" Motion is unpreserved and DOR cannot raise, or "renew" it for the first time here. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004); *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). Moreover, "[DOR's] short, conclusory statements [are] made without supporting authority are deemed abandoned …". *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). The absence of an "amount determined to be due" by the tribunal is now the "law of the case", DOR's tardy protestations notwithstanding.

Summary

Having reviewed the Rays' original Petition for Rehearing, DOR has recognized the defects of its original Motion and the original Order granting its request. By its poorly camouflaged "Renewed" Motion and the ensuing Order, simply, DOR demands Court indulgence and approval of its multiple failures here and below.

Sua sponte ruling beyond the relief requested

Again, the "CONCLUSION" AND "ORDER" sections of the Order under appeal contain no figures. Yet, despite the absence of a specific sum in the tribunal ruling and with no reference in the original DOR Motion (Exhibit A), the July 12, 2013 Order, *sua sponte*, required an $850 payment or bond. The Rays sought rehearing for that and other reasons. Exhibit C.

In its "Renewed" Motion, DOR cites the same *sua sponte* figure of that Order in an attempt to cure the absence of any "sum determined to be due" below. Similarly, the Order of September 11, 2013 relies exclusively on that *sua sponte* figure which is no where else adduced.

Such post-Judgment factual additions are beyond the purview of appellate courts. *Amisub of South Carolina, Inc. v. South Carolina Department of Health and Environmental Control*, Op. 27257, footnote 16 (S.Ct. May 29, 2013). In addition, this Court has ruled that a trial court is prohibited from going beyond the scope of the motion before it. *Wells Fargo Bank, NA v. Smith*, 398 S.C. 487, 499, 730 S.E.2d 328, 335 (Ct.App. 2012). On information and belief, the same proscription applies here.

Summary

DOR has not pointed to any sum that was "determined to be due by the administrative law judge", thereby rendering its Motions inadequate and improper for award. In its recent "Renewed" Motion and in the Order of September 11, 2013, both DOR and Judge Cureton can only cite to a figure that was published *sua sponte* by Judge Cureton in his original Order. Since neither the original Motion nor the original Order can point to a figure that was determined to be due by the "administrative law judge", the Order of September 11, 2013, should not be allowed to "piggy back" on a voluntary, non-prompted appellate court finding. In context, the Order of September 11, 2013 does not approach and, instead, contradicts the two-pronged plain language requirement of S. C. Code § 12-60-3370 and, respectfully, it cannot properly be sustained. A figure gratuitously listed by an appellate court does not approach the threshold of that statute.

Synopsis of other oversights and misapprehensions

The DOR "Renewed" Motion, like its predecessor, was grossly tardy, defied any definition of due diligence, no consultation with opposing counsel was made, was submitted to the Court while Rehearing deliberations were pending, was defectively served, denied the Rays an opportunity to respond, and the "Renewed" Motion was not properly before the Court nor awardable. It did not comply with the requirements of Rule 240, SCACR, evaded the requirements and restrictions of this Court and the Rules of Appellate Procedure promulgated by the Supreme Court as to support. Further, DOR's right to so move (if any it ever possessed, which remains denied based on the plaint language of the statute) was abandoned, released, waived and voluntarily relinquished by DOR's failure to seek tribunal clarification, multiple submissions here, willful delay until the 11th hour here, and defective service.

In addition, had there actually been a tribunal determination, DOR's "due diligence" required a proper Motion before perfection and within days (Rule 240(b), SCACR; S. C. Code § 12-60-3370) of appeal, not twelve (12) months after perfection and thirteen (13) months after the issuance of the Order under appeal. Instead, the timing plainly suggests that counsel for DOR had completed his research, reviewed the Rays' briefs, recognized the propriety of reversal and remand, willfully used an out-of-date address, and sought only to avoid the scrutiny of this Court, all to the Rays' egregious and improper prejudice. The Order of September 11, 2013 gives this Court's imprimatur and express approval to DOR's "sandbagging" for a full year, if any right to dismissal it truly had (which remains denied).

Only as this Appeal approaches Court of Appeals review and ruling, did DOR note some claim to an August 20<u>12</u> right. By its text, the Order of September, 2013 overlooks DOR's prejudicial delay and, by its award, fully approves DOR's conduct.

Summary

DOR's assertion of right to payment or bond, and the Order of September 11, 2013, is barred by a failure to seek compliance with the statute it cites. S. C. Code § 12-60-3370. Neither DOR (Exhibit A) nor the Orders of July 12, 2013 and September 11, 2013 specify a finding other than that volunteered Judge Cureton. DOR sought no relief below, or here, during any reasonable time frame. Rule 240(b), SCACR. DOR failed to preserve and has consequently abandoned its conclusory claim. *State v. Howard*, 384 S.C. 212, 218, 682 S.E.2d 42, 45 (Ct.App. 2009).

Moreover, the lack of tribunal specificity and the nebulous conclusory text of the DOR Motion(s) should have been fatal to its demands and exposes the impropriety of both Orders. It is well settled that, regarding the enforcement of tax statutes, like the sole DOR cite here, "... the taxpayer should receive the benefit in cases of doubt." *S.C. Nat'l Bank v. S.C. Tax Comm'n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989).

CONCLUSION

Here, it is not rhetorical to ask: How many "bites at the apple" does DOR get to seek and cure its defective demands? How often must the Rays respond to the same Motion seeking the same relief? Is it proper for DOR to circumvent the Rules and the pending consideration of this Court and, thereby, create unnecessary duplication and require still further efforts and expenditures by a consumer/taxpayer?

It is clear from the Record that the Order under appeal granted Summary Judgment against and denied even minimal discovery to the Rays. It is similarly clear that it was not conclusive as to the determination required for the application of S. C. Code § 12-60-3370 and both DOR's original Motion and "Renewed" Motion confirm that fatal defect. Respectfully, Judge Cureton's Order of July 12, 2013 overlooked both absences, misapprehended the effect, and ventured beyond the four corners of the Motion to reach a *sua sponte* determination that was not made below nor even alleged in the DOR Motion. His Order of September 11, 2013, in full reliance on the earlier Order, compounds and exacerbates the errors.

DOR's right to demand payment or bond, even improperly, as here, fully vested no later than the Rays' August 22, 20<u>12</u> Notice of Appeal. By its defectively served, "Renewed" Motion dated August 28, 20<u>13</u>, well after the filing of final briefs and the Record on Appeal, DOR failed to preserve any such claim: it sought no Rule 59, SCRCP, clarification below; it sought no remand for such a determination; it alleged no sum in its Motions; and it points to no evidence.

Consequently and respectfully, the Order of September 11, 2013 misperceives that DOR was awarded anything beyond Summary Judgment, on liability alone, and an ill-conceived approval for its discovery abuses. The "Renewed" Motion for Dismissal should have been refused as not recognized by the Rules of this Court and, if countenanced, its demand denied due to a lack of evidence and non-compliance with the statute upon which it is solely grounded.

WHEREFORE, because the Order of September 11, 2013 overlooked and misapprehended the lack of evidence and the prerequisites of the statute it applied; due to the "first impression" nature of this issue and the absence of reported cases; due to the reliance on unpled and unsupported *sua sponte* findings; due to DOR's dilatory failure to request/demand/move/petition for payment or bond (if any right it truly felt it had) until this appeal was finalized; due to DOR's neglectful and egregiously prejudicial twelve (12) month delay; and due to DOR's attempt to seek enforcement of an invalid ruling while a request for rehearing of that ruling is pending before the Court, the Rays respectfully request a rehearing of the Order of September 11, 2013 and submit that it is proper for withdrawal/vacation/rescission/reversal. Moreover, due to the absence of precedent as to the current statute and attendant facts, the Rays also suggest that such rehearing should be En Banc.

Respectfully submitted,

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September 16, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson, III
Administrative Law Judge

Case No. 12-ALJ-17-0221-CC
Appellate Case No. 2012-212844

John Ray and Sherry Ray, ... Appellants,

v.

South Carolina Department of Revenue, ... Respondent.

RESPONDENT'S MOTION FOR ORDER OF DISMISSAL

In accordance with Rule 240(e), SCACR, the Department moves for an order of the Court dismissing this appeal. S.C. Code Ann. § 12-60-3370 (Supp. 2011) required the Rays to post a bond for the taxes determined to be due by the ALC before filing this appeal. After due diligence, the Department understands that the Rays have not posted a bond with this Court or the ALC. Accordingly, the Department requests that the Court dismiss this appeal.

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EXHIBIT
A

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Judge
Case No. 2012-212844

John Ray and Sherry Ray,

Appellants,

v.

S.C. Department of Revenue,

Respondent.

THE APPELLANTS' RETURN TO DOR'S MOTION

The Appellants hereby Return to the Respondent's Motion to Dismiss, dated April 18, 2013 and received by the undersigned on April 19, 2013. Pursuant to Rule 240(e), SCACR, the Appellants respond as follows.

Currently Pertinent Timeline

The primary order under appeal is dated **July 26, 2012**

The secondary Order Denying Petitioner's Motion to Reconsider is dated **August 21, 2012.**

On **August 22, 2012**, the Rays' <u>served</u> their Notice of Appeal upon DOR.

Both sides filed initial briefs and Designations of Matter (Rays: **November 26, 2012**; DOR: **January 28, 2013**) and both sides have filed Motions for Extensions of Time.

Only now, eight (8) months after appeal perfection, on **April 18, 2013**, transparently asserting "due diligence" and disrespectfully misciting a section of the Rules, DOR moves for dismissal.

ARGUMENT

Preface

For any, and certainly all, of the following reasons, the Motion is improper and should be denied. The DOR Motion is not timely submitted and it is not properly before the Court at this late date. It does not comply with the requirements of Rule 240, SCACR, and DOR attempts to evade the requirements and restrictions of this Court and the Rules of Appellate Procedure promulgated by the Supreme Court as to support. Further, DOR's right to so move (if any it ever possessed, which is denied) has been abandoned, released, waived and voluntarily relinquished by DOR's delay, failures to seek clarification, multiple submissions here, and prior filings with this Court. Moreover, DOR now summarily demands relief for which it does not qualify in hopes that this overburdened Court will not detect its flaws and inequities.

DOR is disqualified from the relief demanded

DOR, at this 11th hour, lists a cite, with nothing more, in its conclusory demand for dismissal. It is noteworthy, and revealing, that DOR doesn't list, never sought, and did not acquire the "determination" that it proposes this Court create out of whole cloth and impose.

As noted, the primary order was issued **July 26, 2012**. Both its "CONCLUSION" AND "ORDER" sections are bereft of any dollar figure. The tribunal's "determination" was limited to a non-specific, and wholly improper, award of Summary Judgment (cf. Appellants' initial Brief; the DOR Motion, with no prompting, admitted/confirmed a failure to respond to discovery for 45 days and, upon denial of its Summary Judgment, it would be forced to finally disclose).

The subsequent Order Denying Petitioner's Motion to Reconsider, provides only that "the Rays' Motion to Reconsider, Grant Relief and Set Aside Order is **DENIED**". In short, the only rulings issued by the tribunal lack any figure "determined to be due". The DOR Motion fails under the very terms of the statute it cites.

DOR concessions

The April 18, 2013 DOR Motion confirms its own insufficiency. Again, it cites no figure, clearly because none was "determined". Further, had there actually been such a determination, DOR's "due diligence" required a Motion within days (Rule 240(b), SCACR) of appeal, not eight (8) months after perfection. Also, DOR alleges no post-Judgment motion or petition for payment or bond before the Administrative Law Court to "determine" the amount of any undertaking which it only now asserts. In short, DOR requested no "fixing" of any bond or amount, nor approval of the tribunal, or this Court, or any court.

DOR has failed to meet its burden

The service of a Notice of Appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. S.C. Code § 18-19-220. In the months since perfection of the August 22, 2012 Notice of Appeal, DOR has claimed no exception to the automatic stay. Now, with the appeal within some eleven (11) days of finalization and within some thirty (30) days of filing the bound Record and final Briefs, DOR has completed its research, recognizes the likely reversal of its award, and transparently seeks to avoid the scrutiny of this Court by grasping at long expired and inapplicable procedural straws.

The true impetus for the DOR motion is that it simply wants to modify the rules to its sole benefit. A state agency engages in unsustainable conduct "by substituting its own [desires] for that of the General Assembly". *Hampton v. Haley,* Op. 27244, p.2 (April 24, 2013); *Bryson v. State Budget and Control Board*, Op. 27245, p. 2 (April 24, 2013).

Inadequacy of Motion

Aside from mis-citing the Rules of this Court, DOR has failed to adhere to Rule 240, SCACR, in that it offers no memorandum nor citation of applicable authority. Moreover, in the only reported case construing the inapplicable statute advanced by DOR, DOR's position was rejected by the Supreme Court. The DOR Motion offers no exception to the general standard of S.C. Code § 18-19-220.

Instead, the only ground for dismissal advanced by DOR is its admitted and established failure to seek clarity and the determination required by the very statute it cites. DOR should not be rewarded or allowed to avoid the review of this Court ensuing from sitting on its own rights for eight (8) months, if any rights it truly had.

Delay

If DOR is minimally genuine in its belief of a right to the relief demanded, which is denied, it has delayed its claim to the point of egregious prejudice to the Appellants. As noted elsewhere, this appeal is now eight (8) months old and only now does DOR bring its unsubstantiated Motion to Dismiss.

The Rules of this Court clearly anticipate that any such demand will be promptly brought early in the process. A motion to dismiss an appeal ... shall ... automatically **stay the time limits for perfecting** the appeal until the motion is decided". Rule 240(b), SCACR (emphasis added). Perfecting the appeal (filing, service and payment of filing fees) is required to be done within thirty (30) days of written notice of the order under appeal.

Therefore, in the absence of an assertion of post-perfection misconduct by the Appellants, DOR was obligated to immediately provide notice of any claim for a right to dismissal. By not doing so, and by engaging in its duties under the established briefing schedule of the Rules, DOR abandoned its right to seek dismissal (if any it had).

Failure to preserve

DOR has failed to preserve its claim for a right to payment or bond. It sought no clarification below. There was no cross-appeal. It sought no remand for determination.

More importantly, DOR drafted, presumably researched, and finalized its own Brief. As no time did DOR raise, by motion or argument in its brief, the issue of payment or bond. At no time did it petition any Court for stay relief. Only now, as this Appeal reaches its final days and final stages, does DOR note some claim to an August 2012 right.

DOR's right to payment or bond, if any it had, was totally dependent upon the tribunal below. DOR sought no relief there, or here, during any reasonable time frame. Rule 240(b), SCACR. From the file in this Court and by DOR's own admissions, it has failed to preserve and has consequently abandoned its conclusory claim. *State v. Howard*, 384 S.C. 212, 218, 682 S.E.2d 42, 45 (Ct.App. 2009).

CONCLUSION

As outlined in the Appellant's Brief and in the tribunal record, DOR demands that it be allowed to both summarily prosecute and self-servingly adjudicate to its own benefit, in abject contravention of the Appellants' rights. DOR's motivation is readily apparent, if not overtly admitted. Like its conduct before the tribunal, DOR seeks to avoid any scrutiny of its conduct or an impartial merits review of the Administrative Law Court's inconsistent, misapplication of Rule 56, SCRCP (the order under appeal confirms DOR's refusal of discovery and confirms the absence of statements other than those of DOR counsel in its Motion memorandum). All such conduct is inappropriate. *Constitution of the State of South Carolina*, Article I, §§ 8, 22 & 23; S.C. Code § 1-23-650(B).

Assuming for argument only that DOR was ever entitled to any undertaking (which remains denied), DOR never sought the required clarity and never noted the claim for bond it now asserts as support for its motion. Therefore, it is egregiously inequitable for DOR to demand approval and reward from this Court for its admitted neglect and abject failures.

Finally, both the text of the present Motion and the directives (Conclusions and/or Order sections) of the orders under appeal are, at best for DOR, inconclusive and serve to create doubt that the statute even applies. Such doubt is fatal to DOR's Motion. It is well established that, regarding the enforcement of tax statutes, like the sole DOR cite, "... the taxpayer should receive the benefit in cases of doubt." *S.C. Nat'l Bank v. S.C. Tax Comm'n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989).

WHEREFORE, due to DOR's confirmation of its failures to seek order specificity; its failure to request/demand/move/petition for payment or bond (if any right thereto it truly felt it had); and by its neglectful and prejudicial eight month delay, the Appellants respectfully suggest that the DOR Motion to Dismiss is tardy, insufficient, improper for consideration and should be denied.

Respectfully submitted,

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April 26, 2013

THE STATE OF SOUTH CAROLINA
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APPEAL FROM THE ADMINISTRATIVE LAW COURT
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EXHIBIT
C

APPELLANTS' PETITION FOR HEARING AND SUGGESTION OF REHEARING EN BANC

Pursuant to Rules 221 and 240, SCACR, the Appellants hereby respectfully petition for rehearing regarding the Order of The Honorable Jasper M. Cureton dated Friday, July 12, 2013 and received by the undersigned via standard mail on Monday, July 15, 2013. This Petition is filed and served well within the fifteen (15) days provided by Rule 221(a) and less than the shortened ten (10) days required in the text of the Order. On information and belief, the Court overlooked or misapprehended the requisites for such Order, the Appellants' argument, and the attendant facts. In the absence of rehearing and revision, such Order has the effect of dismissing the appeal.

Moreover, pursuant to Rule 219, SCACR, the Appellants respectfully suggest that a rehearing en banc is proper to secure uniformity and because the issue addressed by the Order is of exceptional importance: 1. the statute upon which the Order relies has been the subject of only a single reported Opinion, 2. which pre-dates the current statute by over five (5) years, 3. in which the statute cited here was held inapplicable; and 4. the failure of DOR to seek tribunal specificity required to bring its Motion under any version of the statute and its willful tardiness here are not addressed in the Order of July 12, 2013 nor in the sole reported appellate case.

APPELLATE TIMELINE

1. The underlying case was initiated on **May 11, 2012** (R. p. 18) and the order under appeal (granting Summary Judgment to DOR prior to <u>any</u> DOR response to discovery) is dated **July 26, 2012** (barely seventy-six (76) days after case filing) (R. p. 1). The Order's ruling and directive are bereft of any figure "determined to be due" by the tribunal. (R. pp. 8-9).
2. DOR filed no motion and took no other steps to call tribunal attention to the omission nor did it seek any post-Order specificity regarding any issue and has filed no cross appeal.
3. However, the Rays sought tribunal reconsideration of pre-mature Summary Judgment, lack of DOR evidence, refusal of discovery, etc. DOR did not call the "determined to be due" omission to the attention of the tribunal. The secondary Order Denying the Rays' Motion to Reconsider is dated **August 21, 2012.**
4. On **August 22, 2012**, the Rays <u>served</u> their Notice of Appeal upon DOR and the tribunal. Neither DOR nor the tribunal timely raised the current issue below or in this Court.
5. Both sides filed Motions for Extensions of Time. Both sides eventually filed initial briefs and Designations of Matter (DOR: **January 28, 2013**).
6. On **April 18, 2013**, some nine (9) months following issuance of the Order under appeal and eight (8) months following perfection of the appeal, with no consultation and crediting itself with "due diligence", DOR moved for dismissal. Its Motion was comprised of 3-4 sentences, no attachments, and cited no documentation. Exhibit.
7. On or about **June 26, 2013**, the Appellants' Brief, Respondent's Brief, Reply Brief, the Record on Appeal, and fifteen bound copies of each were filed with the Court.
8. The subject Order was issued, filed, served, and received nearly three (3) weeks later.

ARGUMENT

Preface

Reference is made to the prior filings on this issue (DOR Motion for Dismissal, the Rays' Return to Motion, and the Order of July 12, 2013). The Rays reiterate by such reference the arguments of their Return as fully as if restated verbatim. For the reasons stated therein and in the paragraphs of this Petition, the Appellants respectfully assert that the Order of July 12, 2013 overlooks, misperceives and misapprehends the facts, history and proper status of this matter. It should be reheard, en banc, the July 12, 2013 Order should be vacated, and dismissal disallowed.

Inadequate Motion

It is noteworthy that the DOR Motion for an Order of Dismissal did not contain a single dollar figure. It did not recite, because it could not recite, an amount "determined to be due" by the tribunal. Therefore, the Order grants relief for which DOR does not qualify under the very statute (S. C. Code § 12-60-3370) upon which both solely rely.

DOR did not seek tribunal clarification or specificity, it did not seek a determination below, nor did it cross-appeal the absence of such determination. Therefore, the issue raised in the DOR Motion is unpreserved and DOR cannot raise it for the first time here. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004); *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). Moreover, "[DOR's] short, conclusory statements [are] made without supporting authority are deemed abandoned ...". *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). The absence of an "amount determined to be due" is now the "law of the case".

Sua sponte ruling beyond the relief requested

Again, the "CONCLUSION" AND "ORDER" sections of the Order under appeal contain no figures. Yet, despite the absence of a specific sum in the tribunal ruling and the DOR Motion, the July 12, 2013 Order, *sua sponte*, requires an $850 payment or bond. It appears that such additions are beyond the purview of appellate courts. *Amisub of South Carolina, Inc. v. South Carolina Department of Health and Environmental Control*, Op. 27257, footnote 16 (S.Ct. May 29, 2013). In addition, this Court has ruled that a trial court is prohibited from going beyond the scope of the motion before it (*Wells Fargo Bank, NA v. Smith*, 398 S.C. 487, 499, 730 S.E.2d 328, 335 (Ct.App. 2012)) and, on information and belief, the same proscription applies here.

Synopsis of other oversights and misapprehensions

The DOR Motion was grossly tardy, defied any definition of due diligence, no consultation with opposing counsel was made, and the Motion was not properly before the Court. It did not comply with the requirements of Rule 240, SCACR, evaded the requirements and restrictions of this Court and the Rules of Appellate Procedure promulgated by the Supreme Court as to support. Further, DOR's right to so move (if any it ever possessed, which remains denied) was abandoned, released, waived and voluntarily relinquished by DOR's failure to seek tribunal clarification, multiple submissions here, and willful delay until the 11th hour here.

In addition, had there actually been a July 26, 2012 tribunal determination, DOR's "due diligence" required a Motion within days (Rule 240(b), SCACR) of appeal, not eight (8) months after perfection and nine (9) months after the issuance of the Order under appeal. Instead, the timing of its motion suggests that prior counsel for DOR had completed his research, reviewed the Rays' briefs, recognized the propriety of reversal and remand, and sought only to avoid the scrutiny of this Court to the Appellants' currently egregious and improper prejudice. The Order of July 12, 2013 gives this Court's imprimatur and express approval to DOR's "sandbagging" for eight (8) months, if any right to dismissal it truly had (which remains denied).

More importantly, DOR drafted, presumably researched, and finalized its own Brief. At no time did DOR raise, by motion or argument in its brief, the issues of determination, payment or bond. At no time did it petition any Court for stay relief. Only as this Appeal approached Court of Appeals review and ruling, did DOR note some claim to an August 2012 right. By its text, the Order of July 12, 2013 overlooks DOR's prejudicial delay and, by its award, approves.

DOR's right to payment or bond, if any it had, was totally dependent upon the tribunal below. DOR sought no relief there, or here, during any reasonable time frame. Rule 240(b), SCACR. DOR failed to preserve and has consequently abandoned its conclusory claim. *State v. Howard*, 384 S.C. 212, 218, 682 S.E.2d 42, 45 (Ct.App. 2009).

Finally, the lack of tribunal specificity and the nebulous conclusory text of the DOR Motion should have been fatal to its demand. It is well settled that, regarding the enforcement of tax statutes, like the sole DOR cite here, "... the taxpayer should receive the benefit in cases of doubt." *S.C. Nat'l Bank v. S.C. Tax Comm'n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989).

CONCLUSION

It is proper to acknowledge that the current attorney of record for DOR inherited this matter some twenty (20) days ago. On information and belief, none of the improprieties of the last twelve (12) months described in the Record, the Appellants' briefs, and the foregoing pages and paragraphs are attributable to him.

Nonetheless, while the Order under appeal granted Summary Judgment against the Appellants and denied even minimal discovery to them, it was not conclusive as to the determination required for the application of S. C. Code § 12-60-3370. The DOR Motion confirmed that defect. Respectfully, Judge Cureton's Order of July 12, 2013 overlooked both absences, misapprehended the effect, and ventured beyond the four corners of the Motion to reach a *sua sponte* determination that was not made below nor even alleged in the DOR Motion.

Accepting for argument only, DOR's right to demand payment or bond vested no later than the August 22, 2012 Notice of Appeal. Consequently, DOR failed to preserve any claim for a right to payment or bond: it sought no Rule 59, SCRCP, clarification below; it sought no remand for a determination; and it alleged no sum in its Motion. Respectfully, the Order of July 12, 2013 misperceives that DOR was awarded anything beyond Summary Judgment on liability alone and approval for its discovery refusals.

For the foregoing reasons and all those of the Appellants' Return, the Motion for Dismissal should have been refused and its demand denied. It is respectfully submitted that the Order of July 12, 2013 should be revisited and fully withdrawn/vacated. Due to the novel nature of this issue and the absence of reported cases, at least under the attendant facts and the current statute, it is further submitted that the Order should be revisited/reheard en banc.

WHEREFORE, because the Order of July 12, 2013 overlooks and misapprehends: the absence of a sum "determined to be due", DOR's failure to seek such specificity, DOR's dilatory failure to request/demand/move/petition for payment or bond (if any right it truly felt it had) until this appeal was finalized, and by DOR's neglectful and egregiously prejudicial eight (8) month delay, the Appellants respectfully Petition for a rehearing of the Order of July 12, 2013 and submit that it is proper for vacation/rescission. Moreover, due to the absence of precedent as to the current statute and attendant facts, the Appellants also suggest that such rehearing should be En Banc.

Respectfully submitted,

J. William Ray
700 East North Street
Greenville SC 29601-3013
(864) 313-5332
PRO SE/ATTORNEY FOR APPELLANTS

July 18, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson, III
Administrative Law Judge

Case No. 12-ALJ-17-0221-CC
Appellate Case No. 2012-212844

John Ray and Sherry Ray, ... Appellants,

v.

South Carolina Department of Revenue, ... Respondent.

RESPONDENT'S MOTION FOR ORDER OF DISMISSAL

In accordance with Rule 240(e), SCACR, the Department moves for an order of the Court dismissing this appeal. S.C. Code Ann. § 12-60-3370 (Supp. 2011) required the Rays to post a bond for the taxes determined to be due by the ALC before filing this appeal. After due diligence, the Department understands that the Rays have not posted a bond with this Court or the ALC. Accordingly, the Department requests that the Court dismiss this appeal.

Benjamin John Tripp (Bar No. 79788)
Counsel for Litigation
Sean G. Ryan (Bar No. 76585)
Managing Counsel for Litigation
Milton G. Kimpson (Bar No. 7917)
General Counsel for Litigation
Harry T. Cooper, Jr. (Bar No. 1383)
Executive Deputy Director

EXHIBIT

RECEIVED
APR 19 2013

State of South Carolina
Department of Revenue
301 Gervais Street
P.O. Box 125
Columbia South Carolina 29214

CE-6

EXHIBIT
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Forwarded To

J. WILLIAM RAY ATTORNEY
AT LAW
700 EAST NORTH ST #4
GREENVILLE, S.C. 29601

RECEIVED
SEP 11 2013

Subject:	Rays v. DOR; 2012-212844
From:	JR (jr@att.net)
To:	jkitchings@sccourts.org; callen@sccourts.org;
Cc:	aaronscheuer@gmail.com;
Bcc:	j.williamray@gmail.com;
Date:	Wednesday, September 11, 2013 7:15 PM

Ladies,

I am/represent the Appellant(s). I returned to the office moments ago from out-of-county court appearances to find that a "Renewed" Motion for Order of Dismissal arrived in **today's** mail. It had been mailed to an inaccurate address, over the Labor Day weekend, and further delayed by the necessity of postal forwarding. (See pages 1-3 of the attached Exhibit).

In June, our P.O. Box lease expired and we returned to our 20-years-old street address. So, in late-May, our address was changed on both the Bar website and the Bar Desk Book (pages 4-5). Three months ago, our address was revised on our letterhead and all correspondence (pages 6, 8, 13) and has been in use by the Court for at least the last two months (page 16). The Record on Appeal, Appellants Brief, Reply Brief, our pending Motion, and Proofs of service (most nearly three months old) have all borne the proper address (pages 7, 9, 10, 11, 12, 14, 15).

While I am confident that it was mere clerical oversight, it is clear that the Respondent's document was sent to an address no longer in use and, in the absence of our Forwarding Order, would have never arrived here. Nonetheless, although I question the propriety of a "Renewed" motion here, I hereby acknowledge and confirm **receipt** of DOR's document **today**, September 11, 2013, and I will timely respond within the periods set in the Rules of this Court as if it were properly mailed yesterday, September 10, 2013.

I apologize for the necessity of this imposition upon your time.

Bill Ray

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EXHIBIT
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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Judge

69809

Case No. 2012-212844

John Ray and Sherry Ray,

Appellants,

v.

S.C. Department of Revenue,

Respondent.

PROOF OF SERVICE

I do hereby certify that a copy of the Appellants' Petition for Rehearing En Banc in the above captioned case has been duly served on the Respondent by placing the same in an envelope, with adequate prepaid postage affixed thereto, addressed as shown below, and properly depositing such copy of it in the United States Mail on the date below.

Aaron M. Scheuer, Esquire
Attorney for the Respondent S.C. Department of Revenue
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September 16, 2013