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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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APPEAL FROM THE S.C. ADMINISTRATIVE LAW COURT

Honorable Deborah B. Durden, Administrative Law Judge

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

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

v.

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

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# RESPONDENT SOUTH CAROLINA DEPARTMENT OF REVENUE'S INITIAL BRIEF

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## INTRODUCTION

South Carolina imposes a tax on paid admissions to places of amusement (i.e. admissions tax). The Department published guidance at least as early as 2005 advising the public that parasailing rides as places of amusement are subject to admissions tax.[1] The parties do not dispute that Appellant, absent an applicable exemption, is subject to admissions tax for its parasailing rides. Also, without dispute, Appellant did not collect or remit admissions tax, hold an admissions tax license, or file an admissions tax return for its parasailing rides from September 1, 2018 to December 31, 2021 ("Periods at Issue"). Based on an audit of Appellant's records for the Periods at Issue, the Department assessed Appellant for admissions tax, interest, and penalties. In response, Appellant claimed that its parasailing rides fell under an exemption for boats charging for pleasure fishing, excursion, sight-seeing, and private charter. When the Department affirmed that parasailing rides did not fall within the exemption, Appellant sought judicial review by filing a request for a contested case hearing at the South Carolina Administrative Law Court (ALC). On stipulated facts and cross-motions for the summary judgment, the ALC held that Appellant's parasailing rides did not fall under the claimed exemption and were subject to admissions tax.

Appellant proceeded to appeal the ALC's decision in a manner that deprives this Court of appellate jurisdiction. Specifically, Appellant deposited an amount less than the tax owed (not including interest and penalties) into its counsel's IOLTA account. After the deadline to perfect an appeal, Appellant deposited an amount roughly equal to the tax including interest accruing from the Periods at Issue. Appellant's actions raise questions related to this Court's appellate jurisdiction: (1) does a deposit into an IOLTA account constitute an appropriate bond, (2) what amount must be deposited and when does interest start, and (3) must a bond for the correct amount be posted before

[1] *See* S.C. Revenue Ruling #05-14.

filing the Notice of Appeal? The ALC correctly answered Question 2, but Questions 1 and 3 remain for this court to decide.

Therefore, this Court has two issues before it: the threshold question of whether this Court has appellate jurisdiction, and if so, whether parasailing rides are subject to admissions tax.

## STATEMENT OF THE ISSUES ON APPEAL

**I. DOES THIS COURT LACK APPELLATE JURISDICTION IF APPELLATE DID NOT POST BOND OR PAY THE DEPARTMENT THE PROPER AMOUNT OF DISPUTED TAX AND INTEREST, BUT INSTEAD DEPOSITED A LESSER AMOUNT IN ITS ATTORNEY'S IOLTA ACCOUNT?**

**II. DID THE ALC CORRECTLY FIND THAT APPELLANT OWED ADMISSIONS TAX ON THE FEES IT CHARGED FOR ITS PARASAILING RIDES?**

## STATEMENT OF THE CASE

The Department mailed Appellant a Department Determination on August 18, 2023 concluding: (1) the price paid to Appellant for parasailing rides is subject to admissions tax and (2) Appellant is liable for penalties. *See* Department Determination (**R. pp.**). The amount of the tax was $33,998.40 with penalties and interest of $14,356.74 and $4,808.41 respectively computed through September 18, 2023. *Id.* On September 5, 2023, Appellant filed its request for a contested case hearing with the ALC asserting, "The statute under review, Section 12-21-2420 (Exemption No. 13) and the Department of Revenue Ruling No. 95-2 (October 18, 1995) exempts boat charters from accommodations tax."[2] *See* Req. for Contested Case Hr'g (**R. pp.**).

On March 20, 2024, Appellant filed the parties' Stipulation. *See* Stipulation (**R. pp.**). In Appellant's cover letter to the Stipulation, Appellant represented that the parties agreed to present the

[2] Appellant conflated admissions tax with accommodations tax, which is a tax on gross proceeds from the rental or charges for rooms or spaces in your own home, hotels, condos, campgrounds, boarding houses, mobile home parks, lodgings, or sleeping accommodations of any kind that are rented to guests for less than 90 consecutive days. *See* S.C. Code Ann. § 12-36-920 (2014). The accommodations tax is part of the Sales and Use Tax Act and is not at issue in this case.

case to the ALC based on the stipulated facts. *See* Appellant's Cover Letter to Stipulation (**R. pp.**). Appellant reserved the right to call Appellant's principal Michael Fiem if the ALC had any questions about any factual matter related to the operation of the business. *Id.* Appellant further inquired of the ALC how to proceed. *Id.* The ALC indicated that the parties could file cross motions for summary judgment. *See* Emails between Appellant's counsel and the ALC (dated March 21, 2024) (**R. pp.**). Then, the ALC would review the briefs on the motions and rule, or schedule oral argument if it had questions after reading the briefs. *Id.* Afterward, the ALC would either grant summary judgment to one party, or deny summary judgment in order to take testimony from the designated witness. *Id.*

On March 26, 2024, Appellant filed a motion for summary judgment. *See* Appellant's Motion for Summary Judgment (**R. pp.**).[3] On March 29, 2024, the Department filed a motion for summary judgment and response to Appellant's motion for summary judgment. *See* Department's Motion for Summary Judgment and Response to Appellant's Motion for Summary Judgment (**R. pp.**). On April 8, 2024, Appellant filed a response to the Department's motion for summary judgment. *See* Appellant's Response to the Department's Motion for Summary Judgment (**R. pp.**). On April 15, 2024, the Department filed a reply to Appellant's response to the Department's motion for summary judgment. *See* Department's Reply to Appellant's Response to the Department's Motion for Summary Judgment. (**R. pp.**). On April 18, 2024, the ALC denied Appellant's motion for summary judgment and granted the Department's motion for summary judgment. *See* Order (filed April 18, 2024) (**R. pp.**).

On April 23, 2024, Appellant filed a motion for reconsideration. *See* Appellant's Motion to Reconsider (**R. pp.**). On May 6, 2024, the Department filed a response to Appellant's motion for

[3] Appellant in its Brief states that it moved for summary judgment on March 26, 2024. The check for the filing fee is dated March 21, 2024; the Motion for Summary Judgment is dated March 24, 2024; and the Memorandum in Support of Appellant's Motion for Summary is dated March 25, 2024. On March 25, 2024, Appellant emailed an electronic copy without an original signature to the ALC on March 25, 2024. The ALC indicated that it would need an original signature and $50 filing fee. On March 26, 2024, Appellant emailed a copy of its Motion with an original signature to the Department.

reconsideration. *See* Department's Response to Appellant's Motion for Reconsideration. (**R. pp.**). On May 7, 2024, Appellant filed a reply to the Department's response to Appellant's motion for reconsideration and attached an affidavit by Appellant's principal Michael Fiem. On May 13, 2024, the Department expressed its position to the ALC that the filed reply with affidavit was not authorized under the SCALC Rule 19(A). *See* Department's email to ALC (dated May 13, 2024) (**R. pp.**). Further, the Department requested that—if the ALC intended to entertain the reply—the Department be granted leave to respond to the reply and newly submitted affidavit. *Id.* On May 14, 2024, the ALC denied Appellant's motion to reconsider. *See* Order (filed May 14, 2024) (**R. pp.**). On May 21, 2024, the Department provided Appellant with the amount of tax with interest and penalties updated through June 13, 2024. *See* Department's email (dated June 10, 2024) (**R. pp.**).

On June 10, 2024, Appellant filed a Notice of Appeal of the ALC's orders granting the Department's motion and denying Appellant's motion for summary judgment and denying Appellant's motion to reconsider. With its Notice of Appeal, Appellant filed a document titled Appeal Bond & Personal Surety for $33,296.00. Appellant's counsel further indicated that the disputed tax was deposited in his IOLTA account. *See* Appellant's Email (dated June 10, 2024) (**R. pp.**). Upon receipt of the email from Appellant's counsel, the Department advised Appellant that the filing did not comply with S.C. Code Ann. § 12-60-3370 (2014). *See* Department's email (dated June 10, 2024) (**R. pp.**).

On June 19, 2024, the Department filed a motion to dismiss for failure to comply with S.C. Code § 12-60-3370. On June 26, 2024, Appellant filed a return to the Department's motion to dismiss and a document titled Amended Appeal Bond & Personal Surety for $33,998.00. On July 3, 2024, the Department filed a response to Appellant's return to the Department's motion to dismiss. On July 18, 2024, this Court denied the Department's motion without prejudice and remanded this matter to the

ALC for an order specifying the amount of tax Appellant must pay and/or the amount of the bond it must post pursuant to section 12-60-3370.

On July 23, 2024, Appellant requested a hearing at the ALC based on this Court's Order of Remand. On August 1, 2024, the ALC ordered the parties submit briefs by August 26, 2024 and scheduled a hearing for August 28, 2024. *See* Order (filed August 1, 2024) (**R. pp.**). On August 20, 2024, Appellant filed a brief on the remand. *See* Appellant's Brief on Remand (**R. pp.**). On August 26, 2024, the Department filed a brief on the remand. *See* Department's Brief on Remand (**R. pp.**). On August 28, 2024, the ALC held a hearing on remand. On September 4, 2024, the ALC ordered that the amount of tax that must be paid or bond posted under 12-60-3370 was $41,840.92. *See* Order (filed September 4, 2024) (**R. pp.**). On October 22, 2024, Appellant filed a document titled Supplemental Appeal Bond (Interest) for $7,842.52.

## STATEMENT OF FACTS

The only facts properly included in the record are those stipulated to by the parties, which the Department hereby incorporates. *See* Stipulation (**R. pp.**).

## STANDARD OF REVIEW

This Court's review must be confined to the record, and it may reverse the ALC's determination only if that decision was:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610 (2005 & Supp. 2023).

In reviewing a grant of summary judgment, the appellate court applies the same standard that governs the trial court under the Rules of Civil Procedure: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rules Civ.Proc., Rule 56; *Sloan v. Friends of Hunley, Inc.* 369 S.C. 20, 630 S.E.2d 474 (2006).

If Appellant satisfies the threshold requirement of appellate jurisdiction, there is no genuine issue as to any material fact, and the Department is entitled to judgment as a matter of law.

## ARGUMENT

### I. THIS COURT LACKS APPELLATE JURISDICTION IF APPELLATE DID NOT POST BOND OR PAY THE DEPARTMENT THE PROPER AMOUNT OF DISPUTED TAX AND INTEREST, BUT INSTEAD DEPOSITED A LESSER AMOUNT IN ITS ATTORNEY'S IOLTA ACCOUNT.

As a threshold issue, this Court must have appellate jurisdiction. Here, it does not. 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 situation is similar to an appeal whose only defect is that notice of appeal was filed untimely. As with an untimely notice of appeal, 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).

To create appellate jurisdiction, Appellant must comply with S.C. Code Ann. § 12-60-3370, which provides in relevant part: "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." This statute can be broken down into a three-part question: 1) did the taxpayer pay or post a bond 2) for all taxes 3) before appealing? For appellate jurisdiction to exists, the answer to each part of the question must be yes. The parties agree that Appellant never paid the Department any amount associated with this matter. The parties disagree whether Appellant's deposit into its counsel's IOLTA account is a bond. The parties further disagree whether "all taxes" includes interest. Still, the parties agree that the deposit made prior to the deadline to perfect an appeal was deficient. Because the three-part question cannot be answered in the affirmative, the Court lacks appellate jurisdiction.

### A. A deposit into the IOLTA account of Appellant's counsel does not constitute a bond.

Appellant takes the novel approach of depositing funds into its attorney's IOLTA account as posting a bond under section 12-60-3370. Typically, a taxpayer pays the Department the tax including interest ordered by the ALC. When the tax is paid in full, interest stops accruing. In the event the taxpayer prevails on appeal, the Department must refund the amount paid plus interest.[4] *See* section 12-54-25(C)(1) ("Any tax refunded or credited must include interest on the amount of the credit or refund from the latest of the date the tax was paid, the original due date of the return, or the last day prescribed for paying the tax if no return is required, to either the date the refund was sent or delivered to the taxpayer or the date the credit was made."). In rare instances, a taxpayer engages a third party

[4] The Legislature reduces the interest rate is reduced by budget proviso and allocates the difference to the operations of the State's Guardian ad Litem Program, Joint Citizens and Legislative Committee on Children, and Department of Juvenile Justice for programs for mentoring or other alternatives to incarceration. *See* S.C. Information Letter #23-11.

and posts a bond. By paying a portion of the owed amount to a surety company, the taxpayer avoids paying the full sum upfront, but if the taxpayer prevails on appeal, it will not receive a refund of the interest accrued.[5]

For at least a couple reasons, the Legislature requires a taxpayer to post a bond or pay the tax including interest before appealing the ALC decisions. First, it discourages the filing of frivolous appeals designed to prolong payment of the disputed amount. Second, it ensures the State receives the tax and interest it is legally owed by mitigating certain risks that might occur during the pendency of the appeal, such as the taxpayer fleeing the jurisdiction of the state to avoid collection or becoming insolvent.

Appellant's counsel is bound by the Rules of Professional conduct to safekeep the disputed funds and distribute the funds when a court order resolves the competing claims. *See* Rule 407, SCACR, Rules of Prof. Conduct, Rule 1.15(e). However, interest continues to accrue with no guarantee that Appellant will pay the additional interest. Neither the Department nor Appellant will receive interest on the funds deposited in the IOLTA account because Appellant's counsel must transmit interest to the SC Bar Foundation. *See* Rule 412 SCACR (h). This is a fatal flaw in Appellant's novel approach to posting a bond under section 12-60-3370. The amount of additional interest would be significant if it takes multiple years before Appellant's appeal is finally decided. The State has no guarantee it will receive this additional interest. Therefore, Appellant's attempt at posting a bond fails to satisfy section 12-60-3370.

**B. All taxes under section 12-60-3370 includes interest.**

S.C. Code Ann. § 12-60-30 (2014), the definition section of Chapter 60 the Revenue Procedures Act (RPA), provides:

[5] Appellant's approach is the worst of both options. Appellant deposited the full amount (albeit untimely) determined by the ALC but will receive no interest if it prevails.

> **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). "[W]hen the legislature defines a term in a statute, that definition governs, and the court must give effect to the definitions contained in the statute and exclude any unstated meanings." 82 C.J.S. *Statutes* § 356. Therefore, unless stated otherwise, taxes include tax, interest, and penalties.

In section 12-60-3370, the Legislature explicitly excluded penalties and civil fines, which are included in the definition of tax.[6] 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 surplusage, or superfluous'"). Penalties and civil fines are explicitly excluded from the taxes required to be paid or posted a bond for under 12-60-3370. In contrast, interest is not included in that exclusive list. *See Hodges v. Rainey*, 341 S.C. 79, 88, 533 S.E.2d 578. 582 (2000) ("enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded").

The penalties at issue here are imposed for failure to file an admissions tax return and failure to pay the tax required to be shown on the admissions tax return. *See* S.C. Code Ann. § 12-54-43(C)(1) and (E) (2014) respectively. These penalties accumulate at a statutory rate while the failure to file and pay continues. Undisputedly, Appellant did not file an admission tax return or pay admissions tax for

[6] 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.

the Periods at Issue. Regardless, unlike interest, penalties expressly are not included in the amount of taxes Appellant must pay or the amount of the bond Appellant must post pursuant to section 12-60-3370.

Appellant asserts "[w]ith credit card debt, interest rates often increase for punishment/penalty for overdue payment." Appellant's Brief at 36. This is how actual penalties work. *See* S.C. Code Ann. §§ 12-54-43(C)(1) and (E) (penalty rate increases with the length of the infraction). In contrast, the interest at issue here follows the Internal Revenue Service's published rates, and the rates do not increase based on the length of the failure to pay. Whether interest is "coercive" as Appellant claims depends on the taxpayer. Absent penalties, a taxpayer may prefer to pay statutory interest because it can earn a return on the unpaid taxes that exceeds the amount of interest. In other words, a taxpayer might enjoy a loan from the state by deferring (perhaps indefinitely) payment of taxes.

Section 12-54-25 mandates when interest applies and how it is calculated. It mandates that tax is due on the last day provided for its payment or on the day the liability arises. Here, those dates are one and the same—during the Periods at Issue. Appellant conflates the statutory interest at issue here with prejudgment and post judgment interest. It is neither. The Legislature imposed interest on unpaid taxes irrespective of a judgment.

Accordingly, tax—as used in section 12-60-3370—includes interest.[7]

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[7] Although not precedent, in an unpublished decision *Anonymous Taxpayer v. S.C. Dep't of Rev.*, Op. No. 2008-UP-124 (S.C.Ct.App. filed Feb. 20, 2008), available at 2008 WL 9837290, the Court of Appeals, citing to *State v. Brown*, found it lacked appellate jurisdiction in the matter because Appellant failed to pay or post a bond for the tax and interest prior to the appeal to the circuit court pursuant to section 12-60-3370. At the time, appeals from the ALC went to the circuit court. *See also CDT, Inc. v. S.C. Dep't of Rev.* (Appellate Case No. 2021-001528) and *Vimlesh V. Patel and Punita Patel v. S.C. Dep't of Rev.* (Appellate Case No. 2021-001547) (filed Feb. 15, 2022) (Court dismissed appeals for failure to comply with section 12-60-3370).

### C. Appellant did not comply with section 12-60-3370 before appealing.

Even if a deposit into the IOLTA account of Appellant's counsel were a bond, it must be done before an appeal according to the explicit language of the statute. As our Supreme Court has held, "a statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous...." *Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995). The requirements of section 12-60-3370 are clear—the taxes must be paid or bond must be posted before appealing, not after appealing to this Court. Appellant neither paid nor posted bond for the tax determined by the ALC before appealing. Appellant concedes that it did not post interest before appealing. *See* Appellant's Brief at 6. It also concedes that it did not post a bond for the correct amount of tax excluding interest before appealing. *See* Appellant Brief at 37. At the hearing on remand, Appellant admitted the parties agreed on the amount of the tax, interest, and penalties if the Court agreed with the Department's position. *See* Hr'g Tr. 27:3-9; 27:20-28:1 (**R. pp.**). Appellant's deadline to appeal was June 13, 2024.[8] Even if tax did not include interest, the deposit was deficient by Appellant's own admission until June 26, 2024. *See* Appellant's Brief at 37.

To permit Appellant to now pay the taxes or post bond would render the "before appealing the decision to the court of appeals" language superfluous. Appellant asks the Court to ignore this critical component of section 12-60-3370. Because no statute shall be interpreted in a manner that renders any term in the statute superfluous, Appellant cannot satisfy section 12-60-3370 by paying the tax or posting bond after the time for perfecting an appeal has passed. Appellant's failure to comply with the requirements of section 12-60-3370 deprives this Court of appellate jurisdiction, and this appeal should be dismissed.

[8] Appellant received written notice of the ALC's Order Denying Appellant's Motion to Reconsider on May 14, 2024. Under SCACR 203(b)(6), it had thirty days from receipt of the ALC's decision. Thirty days from May 14, 2024 is June 13, 2024.

## II. THE ALC CORRECTLY FOUND THAT APPELLANT OWED ADMISSIONS TAX ON THE FEES IT CHARGED FOR ITS PARASAILING RIDES.

### A. Parasailing rides are not exempt from admissions tax as a matter of law.

Even if Appellant satisfied the requirements of appellate jurisdiction, the ALC correctly answered the question of whether admissions to Appellant's parasailing rides were exempt from admissions tax. Because the question before this Court is one of law, the review is *de novo*. First, the Court must determine if the exemption claimed by Appellant, section 12-21-2420(13), is ambiguous. *See Smith v. Tiffany*, 419 S.C. 548, 555–56, 799 S.E.2d 479, 483 (2017) (internal cites omitted) ("It is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question. If a statute is clear and explicit in its language, then there is no need to resort to statutory interpretation or legislative intent to determine its meaning. The text of a statute as drafted by the legislature is considered the best evidence of the legislative intent or will. Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning. [T]here is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning unless a statutory provision is ambiguous."). Section 12-21-2420(13) is not ambiguous, which Appellant concedes. *See* Appellant's Brief at 28. The statute clearly lists the limited activities for which admissions to boats are exempt. Noticeably absent from that list are parasailing rides. Therefore, the analysis should end here.

If the Court determines section 12-21-2420(13) is ambiguous, the Court must strictly construe the exemption against Appellant. Although the ALC mentions agency deference[9], the ALC applied a strict construction to an exemption statute. *See* Order Granting Department's Motion for Summary

[9] The ALC cites the South Carolina Supreme Court decision *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, which quotes the United States Supreme Court decision *Chevron* in the context of federal law. After the ALC's Order denying Appellant's motion for reconsideration, the United States Supreme Court's decision in *Loper-Bright* overturned *Chevron*.

Judgment and Denying Appellant's Motion for Summary Judgment at 5 (**R. p.**) ("a strict construction of the exemption excludes parasail rides from its terms."). However, Appellant argues that a substantial doubt should be resolved in its favor. Appellant confuses the statutory construction rules for a tax exemption statute with those for a tax imposition statute. *Alltel*, cited in Appellant's Brief, deals with a tax imposition statute—which has the opposite construction of a tax exemption statute. Here, the parties do not dispute that Appellant's parasailing rides are subject to admissions tax absent an exemption. In fact, admissions to boats which charged for excursions, sight-seeing, and fishing were subject to admissions tax prior to enactment of the subsection (13) exemption. *See* Op. S.C. Att'y Gen. 115 (June 28, 1979) and Op. S.C. Att'y Gen. 50 (March 31, 1981) ("An excursion boat offering sight-seeing or fishing is a place of amusement and the charges for admission thereto are taxable under the provisions of § 12–21–2420."); *see also* Op. S.C. Att'y Gen. 247 (November 24, 1975) ("All admissions are generally subject to the tax unless specifically exempted."). Because the statute at issue is an exemption, the Court must strictly construe it.

Exemptions are the exception, not the rule. Taxpayers bear the burden of bringing themselves squarely within the parameters of the statute which grants the exemption. *See Owen Indus. Prods., Inc. v. Sharpe*, 274 S.C. 193, 262 S.E.2d 33 (1980); *S. Soya Corp. of Cameron v. Wasson*, 252 S.C. 484, 167 S.E.2d 311 (1969); and *S. Weaving Co. v. Query*, 206 S.C. 307, 34 S.E.2d 51 (1945). Exemption statutes are construed strictly against the taxpayer. *Home Medical Systems, Inc. v. S.C. Dep't of Rev.*, 382 S.C. 556, 564, 677 S.E.2d 582, 587 (2009) ("The language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption."). South Carolina's case law mandates that ambiguity be resolved against granting the exemption.

Contrast this to Appellant's assertion that the Legislature exempted all waterborne activities from admissions tax. *See* Appellant's Brief at 23. Appellant seeks to rewrite the exemption and insert "parasailing" into the list to expand the exemption. Appellant looks to the dictionary definition of

"charter" to expand the admission tax exemption to any paid activity on a boat. Appellant suggests it is leasing the vessel to parasailers. If that were the case, Appellant would owe sales tax instead of admissions tax. *See* S.C. Code Ann. § 12-36-100 (2014) (sale of tangible personal property includes rental or lease). Considering the flat 5% admissions tax and 6% state sales tax plus any additional local and special taxes, this could roughly double its tax liabilities. Illogically, Appellant claims that reading sightseeing, excursion, and private charter as not being broad enough to include parasailing is an expansion of their definitions—i.e. a narrow reading of the exemption is somehow an expansion. To the extent Appellant argues the language of an exemption statute should not be expanded, the Department agrees.

Throughout this matter, Appellant also confuses the application of *Hodges v. Rainey*. In that case, the Santee Cooper Board of Directors was not included in the list of exclusions—i.e. specifically exempted—from the Governor's discretionary power to remove. For that reason, the Supreme Court held the Governor had discretionary power to remove officers on the Santee Cooper Board of Directors. Here, parasailing rides were not included in the list of exclusions—i.e. specifically exempted—from admissions tax. Therefore, the Legislature intended for it to be subject to admissions tax.

Under a correct application of the rules of statutory construction, Appellant's parasailing rides do not fall under the section 12-21-2420(13) exemption and are subject to admissions tax as a matter of law.

**B. There is no genuine issue as to any material fact.**

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Young v. S.C. Dep't of Disabilities & Special Needs*, 374 S.C. 360, 649 S.E.2d 488 (2007); *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007); *Pittman v. Grand Strand Entm't, Inc.*, 363 S.C. 531, 611 S.E.2d 922 (2005); *Eagle Container Co., LLC v.*

*County of Newberry*, 366 S.C. 611, 622 S.E.2d 733 (Ct. App. 2005); *B & B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 603 S.E.2d 629 (Ct. App. 2004). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

The parties fully developed the record through stipulations encompassing the material facts.[10] Appellant agreed that no material facts were in dispute up until the point it lost. The stipulated material facts do not leave room for inference.[11] No further inquiry into the facts is desirable. Therefore, the services of the fact finder are unnecessary, and summary judgment is proper.

Appellant claims that the ALC ignored that its parasailing operation only occurs on boats and lists other activities it claims to provide like bachelorette parties. *See* Appellant's Brief at 22. However, , parasailing was the only activity at issue in this matter. The ALC properly considered the facts before it, and nothing in the record indicates otherwise. Rejecting Appellant's argument does not mean the ALC did not consider it. Appellant seems to suggest that only unopposed motions for summary

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[10] The ALC's order on summary judgment was based on the stipulated facts. On appeal, as it did in its Motion to Reconsider filings, Appellant attempts to introduce new evidence through an affidavit that was never presented to the ALC during the summary judgment briefings. Those late filings with the ALC were improper under SCALC Rule 29(D)(1), and the alleged facts in the affidavit are not properly before this Court on appeal because they were never considered by the ALC below. Even if the Court were to consider these after-the-fact allegations, they are immaterial to the dispute in this case because they deal either with (1) sales tax matters—not the admissions tax at issue here, or (2) tax years outside of the Periods at Issue.

[11] In determining whether any genuine issue as to any material fact exists, the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the non-moving party. *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 642 S.E.2d 751 (2007); *Med. Univ. of S.C. v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004); *Moore v. Weinberg*, 373 S.C. 209, 216, 644 S.E.2d 740, 743 (Ct. App. 2007); *Rife v. Hitachi Constr. Mach. Co., Ltd.*, 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005).

judgment should be granted. If that were true, summary judgment would be rendered null by the mere filing of a simple motion in opposition. However, our case law contradicts such a suggestion.

To overcome a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial. *See NationsBank v. Scott Farm* 320 S.C. 299, 465 S.E.2d 98 (Ct.App. 1995). Factual statements by Appellant's attorney made in written motions or responses ordinarily may not be considered by the court in determining whether genuine issue of material fact exists which will preclude summary judgment. *See Higgins v. Medical University of South Carolina* 326 S.C. 592, 486 S.E.2d 269 (Ct.App.1997). Inadmissible evidence does not create a genuine issue of material fact. *See Hall v. Fedor* 349 S.C. 169, 561 S.E.2d 654 (Ct.App.2002). Appellant cannot rely on its unsupported allegations to withstand a summary judgment motion. *See Strickland v. Madden* 323 S.C. 63, 448 S.E.2d 581 (Ct.App. 1994), rehearing denied; *see also Baughman v American Tel. & Tel. Co.* 306 S.C. 101, 410 SE2d 537 (1991). Even if Appellant's allegations purportedly conflicted with the stipulated facts, that does not demonstrate a genuine issue of material fact. *See Klippel v Mid-Carolina Oil, Inc.* 303 SC 127, 399 SE2d 163 (Ct.App.1990) (conflicting statement in an affidavit and deposition were insufficient to demonstrate a genuine issue of material fact). With no material fact in dispute, the question for the ALC and now this Court is legal—not factual.

Appellant cites *Azar* throughout its Brief to argue summary judgment is not proper. However, in *Azar*, a genuine issue of material fact existed because the trial court construed the statute wrong. As discussed in section II.A. above, there is no incorrect construction of the exemption statute here.

Therefore, there is no genuine issue as to any material fact.

**C. Appellant did not preserve the issue that it should have been granted a hearing.**

Appellant makes the remarkable assertion that this case was decided without its full participation. *See* Appellant's Brief at 38. Appellant addressed the ALC through its filings and was afforded full participation. The parties stipulated to the facts and made arguments in their motions

and responses. Despite this, Appellant argues the ALC erred by not having the parties appear in person to present their arguments orally. Appellant cites the *Fuentes* case as support, but that case is irrelevant here. *See* Appellant Brief at 10. In *Fuentes*, the court conducted a hearing after chattels were already taken. The parties in that case did not have an opportunity to address the court until after the property was seized. Here, Appellant has never paid the Department the amount in dispute. Most importantly, Appellant had an opportunity to address the court and did address the ALC through its filings. If Appellant failed to make arguments (or sufficiently persuasive arguments) in its filings, that is not an error by the ALC but an error in the filings.[12]

Appellant cannot stay silent throughout the ALC proceedings and then claim for the first time in its appeal that the ALC must hear an oral argument. In Appellant's motion for summary judgment and response to the Department's motion for summary judgment, Appellant never asked for an opportunity to present an oral argument to the ALC. Even in its motion to reconsider, Appellant did not ask for or complain that it was denied a hearing to orally argue in defense of the Department's motion for summary judgment or in support of Appellant's motion for summary judgment. *See* Appellant's Motion to Reconsider (**R. pp.**). If Appellant had asked, the ALC might have accommodated a request for oral argument. It is too late for Appellant to complain now when it never asked. *See Lukacs v. Walker*, 301 S.C. 80, 390 S.E.2d 365 (Ct.App. 1990) (Defendant failed to preserve for appeal issue of whether it was entitled to ten days' notice of hearing on summary judgment motion where defendant never argued before trial judge that it was entitled to notice, and failed to object to rescheduling of hearing for the following morning.). Therefore, Appellant did not preserve the issue that Appellant must have a hearing to present an oral argument.

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[12] Notably, the ALC granting summary judgment without hearing an oral argument is not unusual. *See e.g. Clarence Hinnant v. S.C. Dep't. of Rev.*, Docket No.: 18-ALJ-17-0167-CC (S.C. Admin. Law Ct. July 17, 2018) and *Alfonso and Evon Whitt v. S.C. Dep't. of Rev.*, Docket No.:19-ALJ-17-0008-CC (S.C. Admin. Law Ct. May 16, 2019).

## CONCLUSION

As explained more fully above, this Court should dismiss this matter for lack of appellate jurisdiction for Appellant's failure to comply with section 12-60-3370. If the Court finds it has appellate jurisdiction, it should affirm the ALC's order that Appellant's parasailing rides are subject to admissions tax and do not fall under an exemption. The parties stipulated to the material facts and filed cross-motions for summary judgment. The ALC considered the parties' stipulations, motions, responses, and other filings. Appellant could have argued from the beginning that material facts were in dispute, but instead it only raised the issue after losing at summary judgment. Appellant can only blame itself for foreclosing its chance for a contested case hearing. Appellant wants more bites at the apple and requests another remand for the ALC to address Appellant's motion for summary judgment.[13] *See* Appellant's Brief at 39. However, the ALC has adequately addressed the parties' motions for summary judgment. Further, there is no need to remand because the Court of Appeals applies the same standard to summary judgment as the trial court. If this Court agrees with the Department (and Appellant prior to losing its motion for summary judgment) that no material facts are in dispute, this Court can decide this case as a matter of law. Therefore, the Department asks this Court to dismiss this matter for lack of appellate jurisdiction or affirm the ALC's decision.

{Signature on following page}

[13] Appellant also requests the case be assigned to a new judge upon remand. *See* Appellant's Brief at 13. This forum shopping is inappropriate. Since the ALC conducts a bench trial, there is no risk of unfair prejudice.

Respectfully Submitted,

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