STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM S. C. ADMINISTRATIVE LAW COURT

Debra B. Durden, Judge

Appellate Tracking Number: 2024-000962

Administrative Law Court Docket No.: 23-ALJ-17-0362-CC

Watertoys, LLC, d/b/a Tidalwave Watersports, ……Appellant,

v.

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

RECORD ON APPEAL

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March 26, 2025

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ORDERS

PLEADINGS

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, LLC, d/b/a Tidalwave Watersports, Petitioner, v. South Carolina Department of Revenue, Respondent.	Docket No. 23-ALJ-17-0362-CC **ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

This case is before the Administrative Law Court (ALC or Court) pursuant to a Request for Contested Case Hearing filed on September 5, 2023, by Watertoys, LLC, d/b/a Tidalwave Watersports (Petitioner). Petitioner contests a determination by the South Carolina Department of Revenue (Respondent, DOR, or Department) finding it liable for admissions taxes arising out of parasailing rides for which it charged passengers admission fees from September 1, 2018, to December 31, 2021 (the Audit Period). On March 25, 2024, Petitioner filed a Motion for Summary Judgment. On March 29, 2024, DOR filed its own Motion for Summary Judgment. Responses and Replies were filed with respect to each of the motions.

Under SCALC Rule 68, this Court may apply the South Carolina Rules of Civil Procedure in contested case proceedings where no ALC rule applies. Therefore, Rule 56, SCRCP, applies in determining whether summary judgment is proper in this case. Summary judgment is proper when there is no issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 33, 530 S.E.2d 369, 371 (2000); Rule 56(c), SCRCP. Summary judgment should not be granted even when there is no dispute as to evidentiary facts, if there is disagreement concerning the conclusions or inferences to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000). When determining whether any triable issue of fact exists, "the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Quail Hill, LLC v. Cty. of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment can be granted. Trico Surveying, Inc. v. Godley Auction Co., Inc., 314 S.C. 542, 544, 431 S.E.2d 565, 566 (1993).

"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). A party may not rest upon the mere allegations or denials of his pleadings. Rule 56(e), SCRCP. A party opposing summary judgment must come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial. Doe ex rel. Doe v. Batson, 345 S.C. 316, 320, 548 S.E.2d 854, 856 (2001). One may not create a genuine issue of material fact and, thus, avoid summary judgment by asserting that the trier of fact may disbelieve uncontradicted evidence. Hoard ex rel. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 549, 694 S.E.2d 1, 6 (2010).

In this case, the parties agree that there is no genuine issue of material fact relevant to the transactions at issue. Therefore, it is appropriate to resolve the issues related to those transactions by summary judgment.

PETITIONER'S MOTION

Petitioner moves for summary judgment finding Petitioner's parasailing ticket sales income is exempted from the admissions tax. S.C. Code Ann. § 12-21-2420 (2014 & Supp. 2023) imposes an admissions tax on amounts paid to enter places of amusement. For purposes of that section, "admission" is defined in S.C. Code Ann. § 12-21-2410 (2014) as "the right or privilege to enter into or use a place or location." Petitioner argues parasailing falls under an exemption from admissions taxes found at section 12-21-2420(13), which states "[N]o tax may be charged or collected: . . . [o]n admissions to boats which charge a fee for pleasure fishing, excursions, sight-seeing and private charter." Petitioner argues parasailing falls within the language, "excursions, sight-seeing and private charter" in section 12-21-2420(13). Additionally, Petitioner points to S.C. Rev. Rul. #05-14, a policy statement issued by the Department, which states:

> It should be noted that it has been the longstanding position of the Department that . . . fees for boat, carriage, helicopter, plane or bus rides for touring, charter, fishing, or excursion . . . are not subject to the admissions tax.

In its motion, Petitioner states the following:

> ['']Excursion['] means: 'a short journey or trip, especially one engaged in leisure activity.' (Oxford Dictionary) or 'a usually brief pleasure trip' (Webster's Seventh New Collegiate Dictionary)[.] ['']Sight-seeing['] means: 'the activity of visiting

> places of interest in a particular location.' (Oxford Dictionary) or 'the act or pastime of seeing sights.' (Webster's Seventh New Collegiate Dictionary[.] [']Private charter[']means: 'the reservation of an aircraft, boat, or bus for private use.' (Oxford Dictionary) or 'a mercantile lease of a ship or some principal part of it.' (Webster's Seventh New Collegiate Dictionary)[.]

Petitioner argues section 12-21-240(13) is unambiguous and that the definitions Petitioner cites of "excursion," "sight-seeing," and "private charter" plainly encompass parasailing.

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citation omitted). In the alternative, Petitioner argues if section 12-21-240(13) is ambiguous, then the Court is required to construe the ambiguity against the Department, citing Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue, 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012). (Where the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor.)

RESPONDENT'S MOTION

The Department moves for summary judgment finding Petitioner liable for admissions taxes on ticket sales for parasailing rides Petitioner conducted during the Audit Period. Section 12-21-2420 imposes an admissions tax on amounts paid to enter places of amusement. For purposes of that section, "admission" is defined in section 12-21-2410 as "the right or privilege to enter into or use a place or location." A "place of amusement" is "any enclosure or location consisting of an activity that occupies one's spare time, distracts the mind, relaxes, entertains, or gives pleasure." S.C. Rev. Rul. # 05-14. The Department's published policy statement specifically includes "para sail rides" as an example of a place of amusement subject to admissions taxes. Id.

The Department also argues Petitioner does not qualify for a tax exemption. Section 12-21-2420 provides exemptions for admissions taxes. "The language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption." Home Med. Sys., Inc. v. S.C. Dep't of Revenue, 382 S.C. 556, 564, 677 S.E.2d 582, 587 (2009).

Additionally, the Department argues Petitioner is liable for penalties for failing to file its admissions tax returns during the Audit Period. S.C. Code Ann. § 12-54-43(C)(1) (2014) states:

> In the case of failure to file a return on or before the date prescribed by law, determined with regard to any extension of time for filing, there must be added to the amount required to be shown as tax on the return, a penalty of five percent of the amount of the tax if the failure is for not more than one month, with an additional five percent for each additional month or fraction of the month during which the failure continues, not exceeding twenty-five percent in the aggregate.

S.C. Code Ann. § 12-54-43(C)(1) (2014). Section 12-54-43(E) states:

> In case of failure to pay any amount of any tax required to be shown on a return which is not shown, including an assessment within ten days of the date of the notice and demand for payment, there must be added to the amount of tax stated in the notice and demand one-half of one percent of the amount of the tax if the failure is for not more than one month, with an additional one-half of one percent for each additional month or fraction of a month during which the failure continues, not exceeding twenty-five percent in the aggregate.

S.C. Code Ann. § 12-54-43(E) (2014).

ANALYSIS OF THE MOTIONS

The parties do not dispute any of the material facts of this case. Both parties agree parasailing is a form of amusement. Therefore, the parties' respective motions turn on the issue of whether parasailing is exempted from the admissions tax. Section 12-21-2420(13) provides an exemption for "admissions to boats which charge a fee for pleasure fishing, excursion, sight-seeing and private charter." Petitioner points to S.C. Rev. Rul. #05-14 which states the Department does not consider "fees for boat, carriage, helicopter, plane or bus rides for touring, charter, fishing, or excursion" subject to admissions taxes. However, the same Department ruling specifically notes "para sail rides" are subject to admissions taxes. "If the statute or regulation 'is silent or ambiguous with respect to the specific issue,' the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control, 411 S.C. 16, 33, 766 S.E.2d 707, 717 (2014); quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). "[C]ourts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations 'unless there is a compelling reason to differ.'" Kiawah, 411 S.C. at 34, 766 S.E.2d at 718.

Section 12-21-2420(13) is silent with respect to whether parasailing falls under "excursion, sight-seeing and private charter." Therefore, the statute is ambiguous with respect to whether

parasailing falls under the exemption. Petitioner argues South Carolina precedent requires the Court to resolve the ambiguity in favor of Petitioner. However, the Alltel case cited by Petitioner relates to whether a taxpayer is subject to a tax rather than whether the taxpayer is exempt from the tax. Both parties admit the admissions charged for Petitioner's parasailing rides are subject to an admissions tax pursuant to section 12-21-2420 unless an exemption applies to parasailing. Therefore, the Alltel case is inapplicable to this matter because there is no ambiguity about whether section 12-21-2420 applies to Petitioner.

Instead, the statute in question in this matter is a tax exemption. South Carolina law requires tax exemption statutes to be construed strictly against the claimed exemption. Home Med. Sys., 382 S.C. at 564, 677 S.E.2d at 587. The Department's interpretation of this matter in S.C. Rev. Rul. #05-14 states "para sail rides" are subject to the admissions tax. Parasail rides are not specifically exempted under either of the above code sections. Although section 12-21-2420(13) exempts "admissions to boats which charge a fee for . . . excursion, sight-seeing and private charter," the statute does not specifically exempt parasailing. In contrast, there is no ambiguity in the Department's interpretation. The Department explicitly states "para sail rides" are subject to the admissions tax. The later language in S.C. Rev. Rul. #05-14 regarding the Department's longstanding position that "fees for boat . . . rides for touring, charter, fishing, or excursion . . . are not fees to enter or use a place of amusement and are not subject to the admissions tax," merely supplements the preceding statement that "The following list of places of amusements is not all inclusive and is merely provided as guidance." The Department's longstanding interpretation, published in a policy statement, is entitled to deference. Moreover, the language of the exemption does not unambiguously include parasailing. Therefore, a strict construction of the exemption excludes parasail rides from its terms. Since Petitioner's admissions for parasailing rides are subject to the admissions tax as a matter of law, the Court grants the Department's motion for summary judgment and denies Petitioner's motion for summary judgment. Accordingly,

ORDER

IT IS HERREBY ORDERED that the Petitioners' Motion for Summary Judgment is **DENIED**.

IT IS FURTHER ORDERED that the Department's Motion for Summary Judgment is **GRANTED**. Furthermore, Petitioner is liable for penalties pursuant to section 12-54-43.

AND IT IS SO ORDERED.

Deborah Brooks Durden, Judge
S.C. Administrative Law Court

April 18, 2024
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Robin Coleman

Robin E. Coleman
Judicial Aide to Judge Deborah Brooks Durden

April 18, 2024
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, LLC, d/b/a Tidalwave Watersports, Petitioner, v. South Carolina Department of Revenue, Respondent.	Docket No. 23-ALJ-17-0362-CC **ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION**

This case is before the Administrative Law Court (ALC or Court) pursuant to a Request for Contested Case Hearing filed on September 5, 2023, by Watertoys, LLC, d/b/a Tidalwave Watersports (Petitioner). Petitioner contests a determination by the South Carolina Department of Revenue (Respondent, DOR, or Department) finding it liable for admissions taxes arising out of parasailing rides for which it charged passengers admission fees from September 1, 2018, to December 31, 2021 (the Audit Period). The parties entered into stipulations of fact dated March 20, 2024. On March 25, 2024, Petitioner filed a Motion for Summary Judgment. On March 29, 2024, DOR filed its own Motion for Summary Judgment. Responses and Replies were filed with respect to each of the motions. On April 18, 2024, this Court issued an Order Granting Respondent's Motion for Summary Judgment and Denying Petitioner's Motion for Summary Judgment. On April 24, 2024, Petitioner filed a Motion for Reconsideration. On May 7, 2024, DOR filed a response to the motion.

In its Motion to Reconsider, Petitioner raises for the first time an assertion that a genuine issue of material fact exists as to whether parasail rides fall under the exemption to the admissions tax for admission to boats which charge a fee for pleasure fishing, excursions, sight-seeing and private charter. Petitioner failed to raise this issue in its brief in support of its Motion for Summary Judgment or in response to Respondent's Motion for Summary Judgment. A party cannot use a Rule 59(e) motion to raise for the first time an issue that the party could have raised prior to judgment but did not. Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990).

Moreover, if Petitioner intended for the Court to find that a genuine issue of fact exists to foreclose summary judgment, it was incumbent upon Petitioner to file an affidavit or other evidence setting forth the factual dispute. A party may not rest upon the mere allegations or denials

of his pleadings. Rule 56(e) SCRCP. A party opposing summary judgment must come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial. Doe v. Batson, 345 S.C. 316, 321, 548 S.E.2d 854, 856 (2001). One may not create a genuine issue of material fact and, thus, avoid summary judgment by asserting that the trier of fact may disbelieve uncontradicted evidence. Hoard ex rel. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 694 S.E.2d 1 (S.C. 2010).

The remaining arguments in Petitioner's Motion for Reconsideration merely reiterate the arguments made in the Motions for Summary Judgment, which have been carefully considered and ruled upon by this Court. This motion does not seek to correct manifest errors of law or fact or to present newly discovered evidence. Accordingly,

ORDER

IT IS THEREFORE ORDERED that Petitioner's Motion for Reconsideration is **DENIED**.

AND IT IS SO ORDERED.

Deborah Brooks Durden, Judge
S.C. Administrative Law Court

May 14, 2024
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Robin Coleman

Robin E. Coleman
Judicial Aide to Judge Deborah Brooks Durden

May 14, 2024
Columbia, South Carolina

The South Carolina Court of Appeals

Watertoys, LLC, d/b/a Tidalwave Watersports,
Appellant,

v.

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2024-000962

ORDER

The South Carolina Department of Revenue (the Department) has filed a motion to dismiss Watertoys, LLC's appeal due to Watertoys' failure to "pay, or post a bond for, all taxes . . . determined to be due by the administrative law judge before appealing the decision to the court of appeals" pursuant to section 12-60-3370 of the South Carolina Code (2014). S.C. Code Ann. § 12-60-3370 ("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."). After careful consideration, the motion to dismiss is denied; however, nothing in this order prevents the parties from raising the issue of jurisdiction in their briefs.

This matter is hereby remanded to the Administrative Law Court for an order specifying the amount of taxes Watertoys must pay and/or the amount of the bond Watertoys must post pursuant to § 12-60-3370. Counsel for Watertoys shall contact the Administrative Law Court and counsel for the Department within fifteen days of the date of this order to schedule such hearings as the Administrative Law Court deems necessary. Counsel for Watertoys shall provide this court with a status update within thirty days, and every thirty days thereafter until an order is issued.

FOR THE COURT

Columbia, South Carolina

cc:
Thomas R. Goldstein, Esquire
Marcus Dawson Antley, III, Esquire
The Honorable Deborah B. Durden
The Honorable Jana E. Shealy

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, LLC, d/b/a Tidalwave Watersports, Petitioner, v. South Carolina Department of Revenue, Respondent.	Docket No.23-ALJ-17-0362-CC **ORDER AND NOTICE OF HEARING**

This case was remanded to the Administrative Law Court (Court) from The South Carolina Court of Appeals for an order specifying the amount of taxes Petitioner Watertoys, LLC, d/b/a Tidalwave Watersports (Petitioner) must pay and/or the amount of the bond Petitioner must post pursuant to S.C. Code Ann. § 12-60-3370. On July 24, 2024, Counsel for Petitioner sent a letter to this Court requesting a hearing concerning the appeal bond.

IT IS THEREFORE ORDERED that the parties in the above-captioned case shall provide this Court with a brief giving their position on the current amount of tax, interest and penalties due. These briefs shall be submitted by Monday, August 26, 2024.

IT IS ALSO ORDERED that a hearing on the merits of this action is scheduled to begin before the undersigned Judge at **10:00 a.m.** on Wednesday, **August 28, 2024**, at the ALC, located at 1205 Pendleton Street, Edgar A. Brown Building, Second Floor, Suite 224, Columbia, South Carolina. All parties shall be present in the courtroom **thirty (30) minutes prior to the hearing** so the original of each exhibit can be marked by the party intending to introduce it into the record at the hearing. During this time, the parties may also share exhibits.

Additionally, the parties shall take note of the following:

1. This hearing will be conducted in accordance with the Rules of Procedure for the Administrative Law Court (SCALC Rules), a copy of which is available from the Clerk of Court or on the Court's website, www.scalc.net.
2. Unless otherwise determined by the presiding Judge, the hearing will proceed as follows:
    a. Call of the case;
    b. Motions and other preliminary matters;
    c. Stipulations, agreements, or consent orders entered into the record;
    d. Opening statements, with the party requesting the contested hearing proceeding first;

e. Presentation of evidence;

f. Final arguments, with the party requesting the contested hearing opening and closing.

3. Parties shall bring to the hearing all documents, records, and witnesses needed to present the parties' cases. All exhibits moved for introduction at the hearing must be originals. Upon good cause shown at the hearing, copies may be substituted for original exhibits as provided in the South Carolina Rules of Evidence (SCRE). **Note: If special equipment is required for the presentation of evidence, the party presenting the evidence is responsible for obtaining the equipment and its custody.**

4. Subpoenas are available to the parties, pursuant to S.C. Code Ann. § 1-23-320(d) (Supp. 2020) and the SCALC Rule 22, to compel the attendance of witnesses or the production of documents at the hearing. The parties are responsible for the service of subpoenas.

5. **Failure by a party to appear at the hearing may result in:**

   a. A finding that the party who fails to appear does not object to the relief of which notice has been given;

   b. Dismissal of the case of the party who fails to appear;

   c. Exclusion of evidence proffered by the party who fails to appear; or

   d. Such other rulings as are deemed appropriate by the presiding judge.

6. For good cause shown, the parties may request a continuance no later than 24 hours prior to the scheduled hearing date. Failure to timely request a continuance may result in the imposition of court costs and court reporter fees.

7. In the case of settlement or dismissal, failure of the parties to inform the Court before the scheduled hearing that the hearing is not necessary may result in the imposition of court costs and court reporter fees.

8. An attorney representing a party must file a Notice of Appearance within ten (10) days of service of this Notice, unless previously filed with the Court. *See* SCALC Rule 8(B).

AND IT IS SO ORDERED.

Deborah Brooks Durden

August 1, 2024
Columbia, South Carolina

Deborah Brooks Durden, Judge
S.C. Administrative Law Court

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Robin Coleman

Robin E. Coleman
Judicial Aide to Judge Deborah Brooks Durden

August 1, 2024
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, LLC, d/b/a Tidalwave Watersports, Petitioner, v. South Carolina Department of Revenue, Respondent.	Docket No. 23-ALJ-17-0362-CC **ORDER ON REMAND**

This case is before the Administrative Law Court (ALC or Court) pursuant to a contested case filed by Watertoys, LLC, d/b/a Tidalwave Watersports (Petitioner or Appellant). Petitioner contested a determination by the South Carolina Department of Revenue (Respondent or Department) finding it liable for admissions taxes arising out of parasailing rides for which it charged passengers admission fees from September 1, 2018, to December 31, 2021 (the Audit Period). On April 18, 2024, the ALC issued an Order Granting Respondent's Motion for Summary Judgment and Denying Petitioner's Motion for Summary Judgment. On May 14, 2024, the ALC issued an Order Denying Petitioner's Motion for Reconsideration. Petitioner appealed to the South Carolina Court of Appeals. Acting on Respondent's motion to dismiss the appeal due to the failure to pay or post a bond, the Court of Appeals remanded the matter to the ALC to specify the amount of taxes Petitioner/Appellant must pay and/or the amount of the bond which must be posted pursuant to S.C. Code Ann. § 12-60-3370 (Westlaw Edge through 2024 Act No. 225).

ISSUE

What amount of interest, if any, is required to be posted as part of the appeal bond.

DISCUSSION

Petitioner argues that section 12-60-3370 does not require that interest be included in the bond, or, in the alternative, that interest would begin to run only as to the date of the ALC order denying reconsideration. I disagree, finding those arguments to be contrary to the plain language of the statute at issue, as well as the Department's longstanding practice and interpretation of the statutory requirements.

Section 12-60-3370 provides that "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." On June 26, 2024, Petitioner filed an amended

bond by deposits to his attorney's IOLTA account in the amount of $33,998. The parties agree that this is approximately the amount determined to be owed in admissions tax only pursuant to the ALC's orders, excluding both interest and penalties. While interest and penalties increase with time, the amount of the tax excluding interest and penalties is fixed and remains the amount indicated in the Department Determination issued August 18, 2023.

Petitioner challenges whether the language "all taxes" in § 12-60-3370 includes interest and also when interest begins to accrue. As explained below, "all taxes" includes interest, and interest accrues from the date the taxes were due during the Audit Period.

"All taxes" includes interest under section 12-60-3370.

Section 12-60-3370, in relevant part, provides: "[e]xcept 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." (emphasis added). S.C. Code Ann. § 12-60-30 (2014), the definition section of Chapter 60 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). "[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 from the bond amount penalties and civil fines, which are included in the definition of tax.[1] 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 Cty. 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

[1] 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.

part shall be rendered surplusage, or superfluous'") (citation omitted). 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, Petitioner did not file an admission tax return or pay admissions tax for the Audit Period. Regardless, unlike interest, penalties expressly are not included in the amount of the bond Petitioner must post pursuant to section 12-60-3370. Accordingly, tax—as used in section 12-60-3370—includes interest. [2]

Interest accrues from the date tax was due during the Audit Period

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); see 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."). The statute that imposes interest in this matter is S.C. Code § 12-54-25 (A) (2014), which provides: "[i]f any tax is not paid when due, interest is due on the unpaid portion from the time the tax was due until paid in its entirety." Section 12-54-25(D) mandates that "the rate of interest on underpayments and overpayments is established by the department in the same manner and at the same time as the underpayment rate provided in Internal Revenue Code Sections 6621(a)(2) and 6622." SC Information Letter #24-11 publishes the interest rates for the periods from September 1, 1985, to September 30, 2024.

Section 12-54-25(B) explains:

> For purposes of this section, a tax is due on the last day provided for its payment, without regard for any extension of time for payment and without regard for or to any assessment under Section 12-60-910. Stamp taxes and any other tax for which no payment date is provided are due on the day the liability arises.

In this case, the admissions tax returns should have been filed monthly during the Audit Period. Therefore, the liability arose during the Audit Period. Petitioner argues that the tax was not due until this Court issued its order. While this Court confirmed that the tax was in fact due, the tax

[2] Although not precedent, in an unpublished decision Anonymous Taxpayer v. S.C. Dep't of Rev., 2008-UP-124, available at 2008 WL 9837290, the Court of Appeals, citing to State v. Brown, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004) 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.

liability was incurred during the Audit Period. Petitioner's interpretation to the contrary 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 generally is greater than the future value of money. Interest neutralizes the effect of one party having the use of another party's funds. Under Petitioner's interpretation, no rational taxpayer would pay any tax until ordered to do so by a court. Adopting the Petitioner's position would grant it an interest-free loan from the State. The Legislature could not have intended such an absurd result. Further, Petitioner conflated 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 accruing from the Audit Period.

CONCLUSION

"All taxes" under section 12-60-3370 includes interest accrued from when the tax was due. The following amounts were calculated by the Department through the date of the hearing on August 28, 2024[3]:

Tax	$ 33,998.40
Penalty	$ 15,915.60
Interest	$ 7,842.52

ORDER

IT IS THEREFORE ORDERED that the amount that must be paid, or bond posted, to perfect an appeal pursuant to section 12-60-3370 in this matter is $41,840.92.

AND IT IS SO ORDERED.

Deborah Brooks Durden

September 4, 2024
Columbia, South Carolina

Deborah Brooks Durden, Judge
S.C. Administrative Law Court

[3] Interest and penalties will continue to accrue while the remand and appeal are pending.

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Robin Coleman

Robin E. Coleman
Judicial Aide to Judge Deborah Brooks Durden

September 4, 2024
Columbia, South Carolina

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Mailing Address:
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Charleston, SC
zip 29415-1121
Ph: (843) 554-4291
Fax: (843) 554-5566

May 2, 2022

Ms. Jessica Frazier,
Field Audit
S. C. Dept. of Revenue
2070 Northbrook Boulevard
Suite B7
North Charleston, S. C. 29406-9254

RE: Case I.D. 0-001-559-662
Tidalwave Watersports Admissions Tax Appeal

Dear Ms. Frazier,

Thank you for allowing us an opportunity to present our position at an informal. Conference. I understand this will be on Tuesday, May 11, 2022, but I do not know the time. (I am scheduled to be in court that day at 1:00 p.m.)

In order to avoid ambushing you on May 11th, I hope you will allow this letter to serve as our memorandum so that you will know in advance of May 11th our legal position and the reasons for it. That way, you can run it by general counsel if you are so inclined and be prepared in advance of the date and time of the informal conference.

Our legal position is simple and based on the straight-forward, well-established rules of statutory construction. As you are aware, the General Assembly passed § 12-21-2420 in 1929, and the legislature as amended it frequently since that time, the most recent amendments occurring in July 2021. This section authorizes the Department of Revenue to collect taxes on "admissions to places of amusement" in the amount of 5% of the ticket price. The section then lists 16 exemptions, and Exemption No. 13 is our topic of conversation.

Let me add a footnote here. I am reasonably sure I can deduce the origin of Exemption No. 13 because, as your Department noticed, the General Assembly adopted it in 1981 during the extensive Fort Sumter Tours litigation in 1977, 1995, and 2000. These cases made their way from the United States District Court to the Fourth Circuit Court of Appeals to the Supreme Court and back again. See: *Fort Sumter Tours v. Andrus*, 564 F.2d 1119 (4th Cir. 1977); *Fort Sumter Tours v. Babbitt*, 66 F.3d 1324 (4th Cir. 1995); and *Fort Sumter Tours v. Babbitt*, 202 F.3d 349 (D.C. Cir. 2000). Revenue Ruling 95-2 illuminates this timeline in its "S. C. Technical Advice Memorandum #95-2 (Tax)." This memorandum states in applicable part: "Later in 1981, the Legislature amended Section 12-21-2420 to exempt from the admission tax "admissions to boats which charge a fee for pleasure fishing, excursion, sight-seeing, and private charter." In the federal litigation, the court rulings were adverse to Fort Sumter Tours, and these rulings were subsequently overruled by the United States Congress through the efforts of then Congressman Mark Sanford. Mindful of that litigation and its proximity to the 1981 amendment exempting boating from the admissions tax, I attempted to research the legislative history of Exemption No. 13, and I was astonished to

discover that the legislative debate on the amendment is not archived and cannot be retrieved. Therefore my musings on the origin and timing of the amendment remain speculation, but Exemption No. 13 did not arise in a vacuum, and I think it is unfortunate that the legislative debate on the statute's amendments cannot be retrieved as it would shed light on the subject one way or the other. Now, back to what we do know.

The Legislature included exemptions, one of which, number 13, reads as follows:

> However, no tax may be charged or collected:
> (13) On admissions to boats which charge a fee for pleasure fishing, excursion, sightseeing and private charter.

Tidalwave's activities fall under this exemption as it provides "excursion," "sightseeing," and "private charter."

In order to justify imposing an accommodations tax on Tidalwave, the Department would have to amend the Legislature's exemption by carving out a definition of "parasailing" that takes it out of "excursion" or "sightseeing" or "private charter." This is something the Department cannot do. "Parasailing" is an activity that occurs only on board my client's vessel and does not involve "entertainment, dancing, or drinking in a social environment." It is sightseeing and specifically exempt from the accommodations tax. In fact any of the terms, "excursion" or "sightseeing" or "private charter" capture my client's activities. For example, if I hire Tidalwave to take me to view Fort Sumter, it matters not whether I take in the sight from the deck of the boat or from a parasail tethered to the boat. (I think we can agree that being aloft provides a better view.) However you examine the activity, the entire process takes place on the vessel and involves all three of the exempted activities. We turn now to the rules of statutory construction and apply them to these facts.

The most frequently cited Supreme Court opinion on this issue is the 2000 case, *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000). In defining the rules of statutory construction, the Supreme Court said:

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. V. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Id.* at 233, 509 S.E.2d at 262 (citing *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992).

. . .

The canon of construction *"expressio unius est exclusio alterius"* or *"inclusio unius est exclusio alterius"* holds that "to express or include one thing implies the exclusion of another, or of the alternative." Black's Law Dictionary 602 (7th ed. 1999). Section 1-3-240(C) does not specifically exempt the Santee Cooper Board of Directors from its operation, as it does ten other boards. The fact that the Santee Cooper Board of Directors was not included in the list of exclusions implies that the General Assembly intended for section 1-3-240(B) to apply to the Board. "The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed." Norman J. Singer, *Sutherland Statutory Construction* § 47.23 at 227 (5th ed. 1992) (citations omitted).

The Department itself frequently cites the *Hodges* standard in numerous Revenue Rulings, informing taxpayers that words used in statutes must be read in light of their ordinary meaning. By now attempting to carve out "parasailing" as being qualitatively different from "sightseeing" or "excursion," or "private charter" is the same definitional error in play in *Hodges v. Rainey*. The Department is attempting to push Tidalwave out of an exemption by torturing the definitions of "excursion" or "sightseeing" or "private charter" as to somehow exclude "parasailing." This unnatural reading of the exemption not only violates the principle of statutory construction set forth in the well-developed caselaw of South Carolina, but also is at variance with the Department's own stated policies on this subject. In Revenue Ruling 05-14, "Places of Amusement," the Department stated that:

> It should be noted that it has been the longstanding position of the Department that . . . (3) fees for boat, carriage, helicopter, plane or bus rides for touring, charter, fishing, or excursion . . . are not subject to the admissions tax. (See Technical Advice Memorandum #95-2)

The 05-14 Revenue Ruling cites back to the October 18, 1995, Technical Memorandum, which contains, among other things, this footnote: "It should be noted that the admissions tax applies to a carriage, bus, trolley, *etc.* when admission to the vehicle is for entertainment, dancing, or drinking in a social environment, **and not solely for sightseeing**." (emphasis added)

Therefore, because my client's activities take place on the water and involve nothing more than sightseeing (there is no "entertainment, dancing, or drinking"), my client's exemption from the admissions tax is not only consistent with the plain meaning of § 12-21-2450, but also consistent with the Department of Revenue's previously issued rulings on this issue. Please let me know if you have any further questions or concerns, and if not, we look forward to meeting with you on the 11th. Thanking you in advance and with kind regards, I am

Very truly yours,

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein

cc:
Michael Fiem

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September 5, 2023

Hon. Jana E. Shealy,
Clerk of Court
South Carolina Administrative Law Court
Edgar Brown Building
1205 Pendleton Street
Suite 224
Columbia, S. C. 29201

RE: Dept. of Revenue Case I.D. 0-001-559-662
Tidalwave Watersports Admissions Tax Appeal

Dear Ms. Shealy,

In accordance with the *Rules of the Administrative Law Court*, I enclose an original and an extra copy of the appellant's request for contested case hearing along with a copy of the decision being appealed and a properly executed certificate of service. In accordance with Rule 71, I also enclose our firm's check in the amount of $150.00 as the filing fee. By copy of this letter to opposing counsel, I am furnishing a copy of each document to him. Would you be so kind as to file the original and return a clocked copy to me in the envelope provided? Please let me know if I need to send any additional documents to perfect this filing. I thank you in advance for your attention to this request. With kind regards, I am

Very truly yours,

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein

enclosure: Request for Contested Case Hearing, check No. 20462, return envelope

cc:
Mr. Marcus D. Antley, III
Office of General Counsel
S. C. Dept. of Revenue
300A Outlet Pointe Boulevard
Columbia, S. C. 29210

South Carolina Administrative Law Court (SC ALC)

Request for Contested Case Hearing FORM

Mail to: 1205 Pendleton St., Suite 224, Columbia, SC 29201

Last Name:	First:	Middle:	Docket No. (To Be Completed by ALC)
Watertoys, L.L.C. d/b/a Tidalwave Watersports			

Mailing Address:	City:	State and Zip:
1285 Llewellyn Road	Mt. Pleasant	South Carolina 29464-3818

Home Number:	Work Number:	Cell Number:	*E-Mail Address:
	843 886 8456	843 296 9244	michael@tidalwavewatersports.com

*By providing your e-mail address, you consent to receive court orders and notices via electronic transmission

REPRESENTATION

Are you representing yourself? ☐ Yes ☒ No

Are you represented by an Attorney? ☒ Yes ☐ No

Name of Attorney: Thomas R. Goldstein, S. C. Bar No.: 2186

Attorney Mailing Address: P. O. Box 71121 (2344 Cosgrove Ave.)

City, State and Zip: N. Charleston, S.C. 29415-1121 (N. Charleston, S.C. 29405)

Attorney Work Number and Cell Number: 843 554 4291 843 729 0928

Attorney E-Mail Address: tgoldstein@cobblaw.net

CASE INFORMATION

Name of Agency that Issued the Decision: (Example – Dept. of Revenue, Dept. of Insurance, DHEC)
S. C. Department of Revenue

In order to have your case processed, **you must attach the agency decision.** Is it attached?: Yes
☒ Yes ☐ No

If no, please explain:

Date the decision was issued: August 18, 2023

Date the decision was received: August 23, 2023

Please provide a brief statement regarding why the hearing is being requested and the relief sought:

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 accomadations tax. See May 2, 2022 correspondence attached here and incorporated by this reference.

Payment (applicable **filing fee pursuant to** ALC Rule 71) is being submitted today to the Administrative Law Court
via ☒ Check ☐ Money Order ☐ Cash
via ☐ U.S. Postal Service ☐ Hand-delivery

X *Your Signature or Signature of Attorney*

Date September 5, 2023

PROOF OF SERVICE (MUST BE COMPLETED)

Your Name: Thomas R. Goldstein Date: Sept. 5, 2023 City: N. Charleston State: S.C.

I hereby certify that on the date and place listed above, I served a copy of the foregoing Request for Contested Case Hearing **on all other parties** to this matter by depositing the same in the United States Mail, postage paid, and addressed as follows (use the reverse side for any additional names):

Name and/or Agency Name	Address	City, State and Zip
Marcus D. Antley, III,	S.C. Dept. of Revenue 300A Outlet Point Road	Columbia, S.C. 29210

Name and/or Agency Name — Address — City, State and Zip

X *Your Signature or Signature of Attorney*

September 5, 2023
Date

Attention: All cases filed in the Administrative Law Court are subject to the Rules of Procedure found at the Court's website www.scalc.net or from the Clerk of Court. Failure to follow these rules may result in dismissal of your case.

DEPARTMENT DETERMINATION

Taxpayer:

Watertoys, LLC
d/b/a Tidalwave Watersports
1285 Llewellyn Road
Mount Pleasant, SC 29464-3818

Periods Involved:

September 1, 2018 – December 31, 2021

Matters in Dispute:

1. Is the price paid to Watertoys, LLC d/b/a Tidalwave Watersports (the Taxpayer) for parasailing rides subject to admissions tax?

2. Is Taxpayer liable for penalties?

Tax	$	33,998.40
Penalty	$	14,356.74
Interest*	$	4,808.41
Amount Due	**$**	**53,163.55**

The interest amount has been updated from the Proposed Notice of Assessment and is computed through September 18, 2023, and will continue to accrue until this matter is resolved.

Determinations:

1. The price paid to the Taxpayer for parasailing rides is subject to admissions tax.

2. The Taxpayer is liable for penalties.

Relevant Facts:

1. During the Periods Involved, the Taxpayer operated a parasailing ride business based out of Isle of Palms, South Carolina.

2. The Taxpayer charges $85.00 for a parasailer and $35.00 for an observer.

3. The South Carolina Department of Revenue (the Department) conducted an audit examination of the Taxpayer to determine the Taxpayer's compliance with admissions tax requirements for the periods of September 1, 2018 – December 31, 2021. During the audit, the Department discovered the Taxpayer did not file admissions tax returns, nor did it collect or remit admissions tax for the amounts received for parasailing rides.

MDC

4. The Department issued the Taxpayer a Proposed Assessment on February 17, 2022, assessing admissions tax and interest, as well as penalties for failure to file returns and failure to pay taxes due.[1]

5. The Taxpayer timely protested the Proposed Assessment by correspondence dated March 17, 2022.

6. The Department conducted an appeals conference with the Taxpayer on June 15, 2022 to discuss the audit. Despite the conference, the Department and the Taxpayer were unable to resolve the issues in dispute and the file was forwarded to the Office of General Counsel for issuance of this Determination.

Analysis:

I. The price paid to the Taxpayer for parasailing rides is subject so admissions tax.

S.C. Code Ann. § 12-21-2420 (2014) imposes an admissions tax on amounts paid to enter places of amusement. For purposes of that section, "admission" is defined in S.C. Code Ann. § 12-21-2410 (2014) as "the right or privilege to enter into or use a place or location." Thus, the admissions tax, a license tax of five percent, is imposed upon the paid right or privilege to enter into or use a place of amusement. A place of amusement is "any enclosure or location consisting of an activity that occupies one's spare time, distracts the mind, relaxes, entertains, or gives pleasure." S.C. Rev. Rul. # 05-14. Further, S.C. Rev. Rul. # 05-14 specifically includes "para sail rides" as a places of amusement subject to admissions tax. Here, the Taxpayer charges for admission to its parasailing rides. Therefore, the price paid to Taxpayer for parasailing rides is subject to admissions tax.[2]

II. The Taxpayer is liable for penalties.

S.C. Code Ann. § 12-54-43(C)(1) (2014) states:

> In the case of failure to file a return on or before the date prescribed by law, determined with regard to any extension of time for filing, there must be added to the amount required to be shown as tax on the return, a penalty of five percent of the amount of the tax if the failure is for not more than one month, with an additional five percent for each additional month or fraction of the month during which the failure continues, not exceeding twenty-five percent in the aggregate.

---

[1] The original assessment included an admissions tax assessment on the $35.00 observer charges, which the Department later removed from the assessment.

[2] The Taxpayer argues that its parasailing rides fall under § 12-21-2420(13), which exempts admissions to boats which charge a fee for pleasure fishing, excursion, sight-seeing and private charter. However, parasailing is not pleasure fishing, excursion, sight-seeing and private charter but rather its own distinct amusement activity. *See Home Med. Sys., Inc. v. S.C. Dep't of Revenue*, 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.").

MSA

Pursuant to the foregoing, a taxpayer is liable for failure to file penalties if it fails to file a return before the due date prescribed by law plus any extension. The Taxpayer did not file admissions tax returns for any of the periods at issue despite being required to file. Because the Taxpayer failed to file admissions tax returns, it is liable for failure to file penalties.

In addition, S.C. Code Ann. § 12-54-43(E) (2014) states:

> In case of failure to pay any amount of any tax required to be shown on a return which is not shown, including an assessment within ten days of the date of the notice and demand for payment, there must be added to the amount of tax stated in the notice and demand one-half of one percent of the amount of the tax if the failure is for not more than one month, with an additional one-half of one percent for each additional month or fraction of a month during which the failure continues, not exceeding twenty-five percent in the aggregate.

Therefore, a taxpayer is liable for failure to pay penalties if it fails to pay a tax on or before the date prescribed by law. The Taxpayer did not pay any admissions tax for the periods at issue despite being required to pay. Because the Taxpayer failed to timely pay its admissions tax liability, it is liable for failure to pay penalties.

Conclusion:

The amounts collected by the Taxpayer from its customers are paid admissions for the privilege of entering a place of amusement and are accordingly subject to admissions tax pursuant to § 12-21-2420. Further, because the Taxpayer failed to file and failed to pay its admissions tax, it is liable for failure to file and failure to pay penalties pursuant to §§ 12-54-43(C)(1) and 12-54-43(E). Therefore, the Taxpayer is liable for admissions tax, interest[3], and penalties.

Department Determination drafted by Department Representative:

Marcus D. Antley, III, Esquire
Associate Counsel
South Carolina Department of Revenue

August 18, 2023

[3] S.C. Code Ann. § 12-54-25(A) (2014) mandates, "[i]f any tax is not paid when due, interest is due on the unpaid portion from the time the tax was due until paid in its entirety."

BELK, COBB, INFINGER AND GOLDSTEIN, P.A.
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May 2, 2022

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North Charleston, S. C. 29406-9254

RE: Case I.D. 0-001-559-662
Tidalwave Watersports Admissions Tax Appeal

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Let me add a footnote here. I am reasonably sure I can deduce the origin of Exemption No. 13 because, as your Department noticed, the General Assembly adopted it in 1981 during the extensive Fort Sumter Tours litigation in 1977, 1995, and 2000. These cases made their way from the United States District Court to the Fourth Circuit Court of Appeals to the Supreme Court and back again. See: *Fort Sumter Tours v. Andrus*, 564 F.2d 1119 (4th Cir. 1977); *Fort Sumter Tours v. Babbitt*, 66 F.3d 1324 (4th Cir. 1995); and *Fort Sumter Tours v. Babbitt*, 202 F.3d 349 (D.C. Cir. 2000). Revenue Ruling 95-2 illuminates this timeline in its "S. C. Technical Advice Memorandum #95-2 (Tax)." This memorandum states in applicable part: "Later in 1981, the Legislature amended Section 12-21-2420 to exempt from the admission tax "admissions to boats which charge a fee for pleasure fishing, excursion, sight-seeing, and private charter." In the federal litigation, the court rulings were adverse to Fort Sumter Tours, and these rulings were subsequently overruled by the United States Congress through the efforts of then Congressman Mark Sanford. Mindful of that litigation and its proximity to the 1981 amendment exempting boating from the admissions tax, I attempted to research the legislative history of Exemption No. 13, and I was astonished to

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In order to justify imposing an accommodations tax on Tidalwave, the Department would have to amend the Legislature's exemption by carving out a definition of "parasailing" that takes it out of "excursion" or "sightseeing" or "private charter." This is something the Department cannot do. "Parasailing" is an activity that occurs only on board my client's vessel and does not involve "entertainment, dancing, or drinking in a social environment." It is sightseeing and specifically exempt from the accommodations tax. In fact any of the terms, "excursion" or "sightseeing" or "private charter" capture my client's activities. For example, if I hire Tidalwave to take me to view Fort Sumter, it matters not whether I take in the sight from the deck of the boat or from a parasail tethered to the boat. (I think we can agree that being aloft provides a better view.) However you examine the activity, the entire process takes place on the vessel and involves all three of the exempted activities. We turn now to the rules of statutory construction and apply them to these facts.

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> It should be noted that it has been the longstanding position of the Department that . . . (3) fees for boat, carriage, helicopter, plane or bus rides for touring, charter, fishing, or excursion . . . are not subject to the admissions tax. (See Technical Advice Memorandum #95-2)

The 05-14 Revenue Ruling cites back to the October 18, 1995, Technical Memorandum, which contains, among other things, this footnote: "It should be noted that the admissions tax applies to a carriage, bus, trolley, *etc.* when admission to the vehicle is for entertainment, dancing, or drinking in a social environment, **and not solely for sightseeing**." (emphasis added)

Therefore, because my client's activities take place on the water and involve nothing more than sightseeing (there is no "entertainment, dancing, or drinking"), my client's exemption from the admissions tax is not only consistent with the plain meaning of § 12-21-2450, but also consistent with the Department of Revenue's previously issued rulings on this issue. Please let me know if you have any further questions or concerns, and if not, we look forward to meeting with you on the 11th. Thanking you in advance and with kind regards, I am

Very truly yours,

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein

cc:
Michael Fiem

20462

BELK, COBB, INFINGER & GOLDSTEIN, P.A.
ATTORNEYS
P.O. BOX 71121
NORTH CHARLESTON, SC 29415-1121

FIRST CITIZENS BANK
67-148/532

9/5/2023

PAY TO THE ORDER OF South Carolina Administrative Law Court

$ **150.00

One Hundred Fifty and 00/100********** DOLLARS

Security features. Details on back.

SC Administrative Law Court
1205 Pendleton Street
Brown Building, Suite 224
Columbia, SC 29201-3755

AUTHORIZED SIGNATURE

MEMO filng fee: Appeal of Tidalwave D.O.R. decision

⑈000 2046 2⑈ ⑆[redacted]⑆ 40 1 1 50 1⑈

BELK, COBB, INFINGER & GOLDSTEIN, P.A. - ATTORNEYS

20462

South Carolina Administrative Law Court		9/5/2023	
8750 · Client Expenses	filing fee		150.00

First Citizens Bank	filng fee: Appeal of Tidalwave D.O.R. decision		150.00

BELK, COBB, INFINGER & GOLDSTEIN, P.A. - ATTORNEYS

20462

South Carolina Administrative Law Court		9/5/2023	
8750 · Client Expenses	filing fee		150.00

First Citizens Bank	filng fee: Appeal of Tidalwave D.O.R. decision		150.00

BELK, COBB, INFINGER AND GOLDSTEIN, P.A.
ATTORNEYS AT LAW
2344 COSGROVE AVENUE
CHARLESTON, SC 29405

Harry C. Belk (1919-2003)
Dale T. Cobb, Jr.

Peggy M. Infinger
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Thomas R. Goldstein
tgoldstein@cobblaw.net

Mailing Address:
P.O. Box 71121
Charleston, SC
zip 29415-1121
Ph: (843) 554-4291
Fax: (843) 554-5566

October 12, 2023

Hon. Jana E. Shealy,
Clerk of Court
South Carolina Administrative Law Court
Edgar Brown Building
1205 Pendleton Street
Suite 224
Columbia, S. C. 29201

RE: Dept. of Revenue Case I.D. 0-001-559-662
Tidalwave Watersports Admissions Tax Appeal

Dear Ms. Shealy,

I enclose an original and an extra copy of the Petitioner's Pre-Hearing Statement. Would you be so kind as to file the original and return a clocked-in copy to me in the enclosed return envelope? By copy of this letter, I am furnishing a copy to opposing counsel. I thank you in advance for your attention to this request. With kind regards, I am

Very truly yours,

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein

enclosure: Pre Hearing Memorandum, return envelope

cc:
Mr. Marcus D. Antley, III
Office of General Counsel
S. C. Dept. of Revenue
300A Outlet Pointe Boulevard
Columbia, S. C. 29210

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, L.L.C., d/b/a Tidalwave Watersports, Petitioner, v. South Carolina Department of Revenue, Respondent.	)	Docket No. 23-ALJ-17-0362-CC **PREHEARING STATEMENT**

The Petitioner, Watertoys, L.L.C., files the following pre-hearing statement:

1. The nature of this proceeding.

This action is brought to apply exemption #13 of § 12-21-240, S. C. Code, ann. to the Department's allegation that Tidalwave must collect and disburse to the State an "amusement" tax for passengers upon its vessels operating in the waters of Charleston County.

2. Statutory authority confirming subject matter jurisdiction to the agency and other applicable statutes and regulations.

Jurisdiction is conveyed by §1-23-310, *et. seq*. S. C. Code of Laws and the South Carolina Constitution Article I, §22. §1-23-500, S. C. Code, ann. creates the administrative Law Court as a part of the Executive Branch of State government, and §1-23-600 S. C. Code specifically sets the jurisdiction of the Court to include:

"judicial review of final agency decisions with the presiding administrative law judge exercising the same authority as the court of appeals, provided that a party aggrieved by a final decision of an administrative judge is entitled to judicial review of the decision by the court of appeals pursuant to the provisions of Section 1-23-610."

3. The issues presented for determination.

There is a single issue presented for determination; to wit, whether the Petitioner is or is not required to collect and remit an "amusement" tax or whether the application of Exception 13 exempts the Petitioner from the statutory requirement for businesses to collect "amusement taxes under § 12-21-2420, S. C. Code. This code section (emphasis added) provides as follows:

SECTION 12-21-2420. Imposition of tax; rate; exemptions; payment, collection, and remittance; disposition of revenues.

There must be levied, assessed, collected, and paid upon paid admissions to places of amusement within this State a license tax of five percent. The license tax may be listed separately from the cost of admission on an admission ticket. **However, no tax may be charged or collected**:

(1) On account of any stage play or any pageant in which wholly local or nonprofessional talent or players are used.

(2) On admissions to athletic contests in which a junior American Legion athletic team is a participant unless the proceeds inure to any individual or player in the form of salary or otherwise.

(3) On admissions to high school or grammar school games or on general gate admissions to the State Fair or any county or community fair.

(4) On admissions charged by any eleemosynary and nonprofit corporation or organization organized exclusively for religious, charitable, scientific, or educational purposes; or the presentation of performing artists by an accredited college or university; provided, that the license tax herein levied and assessed shall be collected and paid upon all paid admissions to all athletic events of any institution of learning above the high school level; provided, however, that carnivals, circuses, and community fairs operated by eleemosynary or nonprofit corporations or organizations organized exclusively for religious, charitable, scientific, or educational purposes shall not be exempt from the assessment and collection of admissions tax on charges for admission for the use of or entrance to rides, places of amusement, shows, exhibits, and other carnival facilities, but not to include charges for general gate admissions except when the proceeds of any such carnival, circus, or community fair are donated to a hospital; provided, further, that no admission tax shall be charged or collected by reason of any charge made to any member of a nonprofit organization or corporation for the use of the facilities of the organization or corporation of which he is a member.

(5) On admissions to nonprofit public bathing places.

(6) On admissions to any hunting or shooting preserve.

(7) On admissions to privately owned fish ponds or lakes.

(8) On admissions to circuses operated by eleemosynary, nonprofit corporations or organizations organized exclusively for religious, charitable, scientific, or educational purposes when the proceeds derived from admissions to the circuses shall be used exclusively for religious, charitable, scientific or educational purposes.

(9) On admissions to properties or attractions which have been named to the National Register of Historical Places.

(10) On admissions charged to classical music performances of a nonprofit or eleemosynary corporation organized and operated exclusively to promote classical music.

(11) On admissions to events other than those events enumerated in item (4) of this section, sponsored and operated exclusively by eleemosynary, nonprofit corporations or organizations organized exclusively for religious, charitable, scientific, civic, fraternal, or educational purposes when the net proceeds derived from admissions to the events shall be immediately donated to an organization operated exclusively for charitable purposes. The term "net proceeds" shall mean the portion of the gross admissions proceeds remaining after necessary expenses of the event have been paid. This item shall not apply to an event in which the above organizations receive a percentage of gross proceeds or a stated fixed sum for the use of its name in promoting the event.

(12) On admissions charged by nonprofit or eleemosynary community theater companies or community symphony orchestras, county and community arts councils and departments and other such companies engaged in promotion of the arts.

(13) On admissions to boats which charge a fee for pleasure fishing, excursion, sight-seeing and private charter.

(14) On admissions to a physical fitness center subject to the provisions of Chapter 79 of Title 44, the Physical Fitness Services Act, that provides only the following activities or facilities:

(a) aerobics or calisthenics;

(b) weightlifting equipment;

(c) exercise equipment;

(d) running tracks;

(e) racquetball;

(f) swimming pools for aerobics and lap swimming; and

(g) other similar items approved by the department.

The entire admission charge of a physical fitness center which provides any other activity or

facilities is subject to the tax imposed by this article. Physical fitness facilities or centers of the State of South Carolina and any of its political subdivisions which are exempt from the Physical Fitness Services Act, pursuant to Section 44-79-110 and, therefore, subject to the admissions tax under this article are nevertheless exempt from the admissions tax if they meet other requirements of this subsection.

(15) For entry into the pit area of NASCAR sanctioned motor speedways or racetracks for drivers, crew members, or car owners where a participation fee is charged these persons by NASCAR, or by the speedway or racetrack, where a charge to these persons is made on a per event basis for entry into the pit area, or where a combination of annual and per event charges to these persons is made for entry into the pit area.

(16) on admissions to the State Museum.

The tax imposed by this section must be paid by the person or persons paying the admission price and must be collected and remitted to the South Carolina Department of Revenue by the person or persons collecting the admission price. The tax imposed by this section does not apply to:

(a) any amount separately stated on the ticket of admission for the repayment of money borrowed for the purpose of constructing an athletic stadium or field by any accredited college or university;

(b) any amount of the charge for admission, whether or not separately stated, that is a fee or tax imposed by a political subdivision of the State. The revenue derived from the provisions of this section from fishing piers along the coast of South Carolina is allocated for use of the Commercial Fisheries Division of the Department of Natural Resources; or

(c) any amount that an accredited college or university requires a season ticket holder to pay to a nonprofit athletic booster organization that is exempt from federal income taxation in order to receive the right to purchase athletic event tickets.

HISTORY: 1962 Code Section 65-802; 1952 Code Sections 65-801, 65-802; 1942 Code Section 2531; 1932 Code Section 2531; 1928 (35) 1089; 1929 (36) 114; 1932 (37) 1493; 1934 (38) 1577; 1935 (39) 282; 1936 (39) 1377, 1591, 1771; 1938 (40) 1799; 1940 (41) 1921; 1956 (49) 1841; 1959 (51) 144; 1960 (51) 1958; 1961 (52) 466; 1965 (54) 589; 1968 (55) 2855; 1969 (56) 444; 1972 (57) 2562; 1974 (58) 2381, 2812; 1978 Act No. 605, Sections 1, 2; 1981 Act No. 88, Section 1; 1985 Act No. 201, Part II, Section 62; 1991 Act No. 168, Section 11; 1991 Act No. 171, Part II, Section 9A(1); 1993 Act No. 181, Section 146; 1996 Act No. 458, Part II, Section 75; 1998 Act No. 334, Section 1; 2001 Act No. 74, Sections 1, 4 eff July 18, 2001; 2014 Act No. 242 (S.474), Section 1, eff July 1, 2014; 2017 Act No.

4. The Action requested of the Court, if any;

The only action requested is that the Court reverse the agency determination that the Petitioner is required to collect and remit an "amusement" tax because Exception 13 clearly exempts it. The Petitioner also requests an award of a reasonable attorney's fee under § 15-77-300, 310, *et. seq.* because there is no substantial justification for demanding an "amusement" tax under the facts presented, and there are no countervailing considerations that would make an award of attorney's fees unjust.

5. A brief summary of the facts to be presented at the hearing:

Tidalwave provides a wide spectrum of water touring. These include:

General Touring
General Sightseeing
Eco Touring (*i.e.* dolphin watching, visiting remote waterways, *etc.*,
Bachelorette parties
Parasailing

All the activities take place on the vessel while it is underway, and if a passenger elects to parasail, he or she is launched from the boat while it is underway and descends to the boat, again, while it is underway. All activities are geared toward touring the waters around Charleston, which can include the harbor, the cityscape, or visits to remote, pristine places that can only be reached by boat.

Section 12-21-2420, S. C. Code, ann. authorizes the Department of Revenue to collect taxes on "admissions to places of amusement" in the amount of 5% of the ticket price. The same statute provides 16 exemptions to the amusement tax, and Exemption No. 13 exempts "admissions to boats that provide pleasure fishing, excursion, sign-seeing, and private charter." (quoted above)

Thus, Tidalwave is not required to collect and remit an "amusement" tax because the straight-forward and unambiguous language of Exception 13 exempts Tidalwave. Not only do the rules of statutory construction compel a straight-forward reading of Tidalwave's exemption,

but also—even if the exemption were ambiguous—the Supreme Court makes clear that Courts called upon to construe an ambiguous tax statute must construe it in the light most favorable to the taxpayer:

> Generally, a court must apply the rules of statutory interpretation to resolve the ambiguity and discover the intent of the legislature. [citation omitted] However, "[i]n the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt." [citations omitted] "[W]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor." [citations omitted] (noting general rule that where substantial doubt exists as to the construction of tax statutes, the doubt must be resolved against the government.) The existence of an ambiguity in section 12-20-100 raises substantial doubt regarding the section's application to Petitioner's. This doubt must be resolved in favor of Petitioners. *Alltel Communications, Inc. v. S. C. Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012)

Here there is no ambiguity in § 12-21-2420. The General Assembly passed § 12-21-2420 in 1929, and frequently amended it. The most recent amendments occurred in July 2021. The statute provides 16 exemptions to collections of "amusement" taxes, and Exemption No. 13 governs the case before the Court.

An interesting historical footnote sheds some light on Exemption 13. The General Assembly adopted it in 1981 during the on-going and extensive Fort Sumter Tours litigation in 1977, 1995, and 2000. These cases made their way from the United States District Court to the Fourth Circuit Court of Appeals to the Supreme Court and back again. See: *Fort Sumter Tours v. Andrus*, 564 F.2d 1119 (4th Cir. 1977); *Fort Sumter Tours v. Babbitt*, 66 F.3d 1324 (4th Cir. 1995); and *Fort Sumter Tours v. Babbitt*, 202 F.3d 349 (D.C. Cir. 2000). The Department of Revenue Ruling 95-2 illuminates this timeline in its "S. C. Technical Advice Memorandum #95-2 (Tax)." This memorandum states in applicable part: "Later in 1981, the Legislature amended Section 12-21-2420 to exempt from the admission tax "admissions to boats which charge a fee for pleasure fishing, excursion, sight-seeing, and private charter." In the *Fort Sumter* federal litigation, the

court rulings were adverse to Fort Sumter Tours, and through the efforts of then Congressman Mark Sanford, Congress overruled these judicial rulings. Mindful of that litigation and its proximity to the 1981 amendment exempting boating from the admissions tax, the undersigned attempted to research the legislative history of Exemption No. 13, which has not been preserved. As a result, the full impact of the run-up to the legislative amendment remains unknown.

However, as set forth above, Exemption number 13, reads as follows:

> However, no tax may be charged or collected:
> (13) On admissions to boats which charge a fee for pleasure fishing, excursion, sightseeing and private charter.

Tidalwave's activities fall under this exemption as it provides "excursion," "sightseeing," and "private charter."

In order to justify imposing an accommodations (amusement) tax on Tidalwave, the Department tortures the Legislative exemption by carving out a subcategory definition of "parasailing." The Department argues this unilaterally imposed carveout takes "parasailing" out of "excursion" or "sightseeing" or "private charter." The Department's reworking of legislation is something the Department cannot do. On April 26, 2023, the Court of Appeals affirmed the Administrative Law Court on this same issue: ". . . while this court typically defers to the agency's interpretation of an applicable statute, we will reject its interpretation where the plain language of the statute is contrary to the agency's interpretation." *Jack's Custom Cycles, Inc. v. S. C. Department of Revenue*, __ S.C. __, __ S.E.2d __ (Ct. App. Op. No. 5970 filed April 26, 2023, citing *Brown v. Bi-Lo Inc.*, 354 S.C. 436, 581 S.E.2d 836 (2003) "Parasailing" is an activity that occurs only on board Tidalwave's vessel and does not involve any of the indicia of conduct that triggers the "amusement" tax: "entertainment, dancing, or drinking in a social environment." Parasailing is waterborne sightseeing and specifically exempt from the "amusement" tax. In fact

three of the Exemption's categories capture Tidalwave's activities: "excursion" or "sightseeing" or "private charter." For example, if I hire Tidalwave to take me to view Fort Sumter, it matters not whether I take in the sight from the deck of the boat or from a parasail tethered to the boat. The activities are identical.

Instead of torturing the listed definitions of Exemption 13, the Department errs in failing to apply the ordinary rules of statutory construction. The most frequently cited Supreme Court opinion on the rules of statutory construction is the 2000 case, *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000). In defining the rules of statutory construction, the Supreme Court said:

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. V. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Id.* at 233, 509 S.E.2d at 262 (citing *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992).
>
> . . .
>
> The canon of construction *"expressio unius est exclusio alterius"* or *"inclusio unius est exclusio alterius"* holds that "to express or include one thing implies the exclusion of another, or of the alternative." *Black's Law Dictionary* 602 (7th ed. 1999). Section 1-3-240(C) does not specifically exempt the Santee Cooper Board of Directors from its operation, as it does ten other boards. The fact that the Santee Cooper Board of Directors was not included in the list of exclusions implies that the General Assembly intended for section 1-3-240(B) to apply to the Board. "The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed." Norman J. Singer, *Sutherland Statutory Construction* § 47.23 at 227 (5th ed. 1992) (citations omitted).

The Department itself frequently cites the *Hodges* standard in numerous Revenue Rulings, informing taxpayers that words used in statutes must be read in light of their ordinary meaning. By now attempting to carve out "parasailing" as being qualitatively different from "sightseeing" or "excursion," or "private charter," the Department is employing the same definitional error rejected by *Hodges v. Rainey* and the same erroneous construction prohibited by *Alltel Communications, Inc. v. S. C. Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012)[1] The Department violates the rules governing statutory interpretation in pushing Tidalwave out of an exemption by legislatively rewriting (or torturing) the definitions of "excursion" or "sightseeing" or "private charter" to exclude "parasailing." This unnatural reading of the exemption not only violates the principle of statutory construction set forth in the well-developed case law of South Carolina, but also is at variance with the Department's own stated policies on this subject. In Revenue Ruling 05-14, "Places of Amusement," the Department stated that:

> It should be noted that it has been the longstanding position of the Department that . . . (3) fees for boat, carriage, helicopter, plane or bus rides for touring, charter, fishing, or excursion . . . are not subject to the admissions tax. (See Technical Advice Memorandum #95-2)

The 05-14 Revenue Ruling cites back to the October 18, 1995, Technical Memorandum, which contains, among other things, this footnote: "It should be noted that the admissions tax applies to a carriage, bus, trolley, *etc.* when admission to the vehicle is for entertainment, dancing, or drinking in a social environment, **and not solely for sightseeing**." (emphasis added) Therefore, because Tidalwave's activities take place on the water and involve sightseeing (there is no "entertainment, dancing, or drinking"), Exemption 13 provides an exemption from the admissions

[1] In addition, Petitioner will use discovery to obtain the Department's records of its 2014 Sales Tax Audit of the Petitioner, which found no error or omission in Tidalwave's collection and disbursement of sales tax. This finding should act as collaterally estopping the Department from changing its legal position now.

tax. This outcome is required by the application of the plain meaning of § 12-21-2450, and the application of Exemption 13 is also consistent with the Department of Revenue's previously issued rulings on this issue.

For these reasons, Tidalwave is asking the Court to deny the Department's request for a declaratory judgment and to maintain the status quo in order to conform to the plain and ordinary meaning of § 12-21-2450.

5. A brief summary of the facts to be presented at the hearing.

The facts will show that Tidalwave operates a small fleet of motor vessels which it uses to transport passengers for sightseeing, eco-tours, and parasailing. Parasailing is always an optional activity for which Tidalwave charges a surcharge over the base price of the sightseeing ticket. For passengers who do elect to go aloft, they both launch from and return to the boat so that all activities take place as part of the water borne sightseeing trip. Michael Fiem and Michael Malley are the principals of the company and can testify as to operations. Ginger Campbell is an employee who can testify to the manner in which reservations are made and tickets sold and the pricing. (Her testimony is cumulative to Mr. Fiem and Mr. Malley, but Petitioner lists her in the event one of them might be unavailable for the hearing.) Andie Hershberger is the C.P.A. for the company and is available to answer any technical questions about financial reports and filings. The Department of Revenue 2014 employee's name is unknown, but she conducted a sales tax audit of Tidalwave in 2014 and found no deficiencies in sales tax reporting or collections. The Department of Revenue's records should contain this information.

6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion.

The Petitioner will move at the appropriate time for a summary judgment/directed verdict for the same reasons set forth above; to wit, that the application of the rules of statutory construction determine that Tidalwave is not subject to the "amusement" tax.

7. A list of proposed witnesses and exhibits:

WITNESSES

Mr. Michael Fiem
Tidalwave Watersports
1285 Llewellyn Road
Mt. Pleasant, S. C. 29464

Mr. Michael Malley
Tidalwave Watersports
1285 Llewellyn Road
Mt. Pleasant, S. C. 29464

Ms. Ginger Campbell
Tidalwave Watersports
1285 Llewellyn Road
Mt. Pleasant, S. C. 29464

Ms. Andie Hershberger, C.P.A.
McGuier & Co., L.L.C.
1100 Queensboro Boulevard
Mt. Pleasant, S. C. 29464

Representative of S. C. Dept. of Revenue (from 2014)
2070 Northbrook Boulevard
Suite B 7
Charleston, S. C. 20406

EXHIBITS

Revenue Ruling 5-14

Revenue Ruling 91-2

8. A statement regarding the necessity for discovery, if any.

The Petitioner anticipates basic interrogatories, one set of Requests for Production (especially related to the Department of Revenue's 2014 Sales Tax audit of the taxpayer), and perhaps a single deposition if the Department furnishes additional Revenue Rulings.

9. The estimated length of the hearing.

Four hours

10. Any dates within the next six months when you will not be available for a hearing.

October 6, 2023

October 10, 2023

November 8, 2023

November 9, 2023

11. An email address where you can be reached.

tgoldstein@cobblaw.net

Respectfully submitted,

October 12, 2023

/s/Thomas R. Goldstein
Thomas R. Goldstein, S. C. Bar No. 2186
Belk, Cobb, Infinger & Goldstein, P.A.
P. O. Box 71121
N. Charleston, S. C. 29415-1121
(843) 554 4291
(843) 554 5566 (fax)
tgoldstein@cobblaw.net

CERTIFICATE OF SERVICE

This is to certify that I have served counsel for all parties in the foregoing matter with a copy of this pleading by:

- ☐ depositing in the U.S. Mail a copy of same in a properly addressed envelope with adequate postage thereon
- ☐ handing counsel a copy thereof
- ☐ by facsimile and depositing in the U.S. Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This 12th day of October 2023

BY _____

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
OFFICE OF GENERAL COUNSEL

300A Outlet Pointe Blvd.
Columbia, SC 29210

Main Line: 803.898.5130
Facsimile: 803.896.0171

September 20, 2023

VIA US MAIL
The Honorable Deborah Brooks Durden
Administrative Law Judge
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: Watertoys, LLC, d/b/a Tidalwave Watersports vs. South Carolina Department of Revenue
Docket No.: 23-ALJ-17-0362-CC
DOR File No.: 230028

Dear Judge Durden:

Enclosed please find the South Carolina Department of Revenue's Agency Information Sheet and Notice of Appearance for the above-captioned matter. Also enclosed is a Proof of Service.

If you have any questions or need any further information from me, please do not hesitate to contact me at 803.898.5623 or Marcus.Antley@dor.sc.gov. If I am not available, you can reach my paralegal, Chris Harrington, at 803.898.5363 or Herman.Harrington@dor.sc.gov.

Sincerely,

Marcus D. Antley, III, Esquire
Associate Counsel

MDA/hch
Enclosure

cc: Thomas R. Goldstein, Esquire

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, LLC, d/b/a Tidalwave Watersports, Petitioner(s), vs. South Carolina Department of Revenue, Respondent(s).	**AGENCY INFORMATION SHEET and NOTICE OF APPEARANCE** DOCKET NO. 23-ALJ-17-0362-CC

1. Identifying information on the matter in controversy (Name and/or title of agency proceeding, statutory provisions giving rise to the controversy, file number or any other identifying information):

   Watertoys, LLC
   d/b/a Tidalwave Watersports
   Admissions Tax
   Period(s) Involved: September 1, 2018 through December 31, 2021

   Is the price paid to Watertoys, LLC d/b/a Tidalwave Watersports (the Taxpayer) for parasailing rides subject to admissions tax?

   Is Taxpayer liable for penalties?

   S.C. Code Ann. § 12-21-2420 (2014); S.C. Code Ann. § 12-21-2410 (2014); S.C. Code Ann. § 12-54-43(C)(1) (2014); S.C. Code Ann. § 12-54-43(E) (2014); and S.C. Code Ann. § 12-54-25(A) (2014)

2. Has the agency staff issued a final written decision regarding its action or inaction in this matter? _X_ yes no _____ (if yes, please attach a copy).
   See Department Determination dated April 18, 2023.

3. Name, address and telephone number of all known parties and their attorneys, if represented:

Respondent:
South Carolina Department of Revenue
Marcus D. Antley, III, Esquire, Associate Counsel
W. Allen Myrick, Jr., Esquire, Associate General Counsel
Jason P. Luther, Esquire, Chief Legal Officer
300A Outlet Pointe Boulevard
Columbia, SC 29210
Phone: (803) 898.5623
Marcus.Antley@dor.sc.gov

Petitioner
Watertoys, LLC
d/b/a Tidalwave Watersports
1285 Llewellyn Road
Mt. Pleasant, SC 29464-3818
Work Phone: (843) 886.8456
Cell Phone: (843) 296. 9244
michael@tidalwavewatersports.com

Attorney for Petitioner
Thomas R. Goldstein, Esquire
P.O. Box 71121
North Charleston, SC 29415-1121
Work Phone: (843) 554.4291
Cell Phone: (843) 729.0928
tgoldstein@cobblaw.net

4. Name, address and telephone number of all known persons who have exercised their legal right to object to the issuance of the permit, and who have indicated they will appear at a hearing:

N/A

{Signature on following page}

Pursuant to ALC Rule 8(B), notice is hereby given that the undersigned is authorized to and will be representing the above-named agency in this matter. Further, by my signature below, I certify that a copy of this information sheet has been served on all parties, and/or protestants (without enclosures) by first class mail on the date shown below.

Marcus D. Antley, III

Marcus D. Antley, III, Esquire (Bar No. 102176)
Associate Counsel
W. Allen Myrick, Jr., Esquire (Bar No. 14718)
Associate General Counsel
Jason P. Luther, Esquire (Bar No. 78021)
Chief Legal Officer
300A Outlet Pointe Boulevard
Columbia, SC 29210
(803) 898.5623 (Telephone)
(803) 896.0171 (Fax)
Marcus.Antley@dor.sc.gov
Court.orders@dor.sc.gov
Attorneys for S.C. Department of Revenue

Columbia, South Carolina
September 20, 2023

DEPARTMENT DETERMINATION

Taxpayer:

Watertoys, LLC
d/b/a Tidalwave Watersports
1285 Llewellyn Road
Mount Pleasant, SC 29464-3818

Periods Involved:

September 1, 2018 – December 31, 2021

Matters in Dispute:

1. Is the price paid to Watertoys, LLC d/b/a Tidalwave Watersports (the Taxpayer) for parasailing rides subject to admissions tax?

2. Is Taxpayer liable for penalties?

Tax	$	33,998.40
Penalty	$	14,356.74
Interest*	$	4,808.41
Amount Due	$	**53,163.55**

**The interest amount has been updated from the Proposed Notice of Assessment and is computed through September 18, 2023, and will continue to accrue until this matter is resolved.*

Determinations:

1. The price paid to the Taxpayer for parasailing rides is subject to admissions tax.

2. The Taxpayer is liable for penalties.

Relevant Facts:

1. During the Periods Involved, the Taxpayer operated a parasailing ride business based out of Isle of Palms, South Carolina.

2. The Taxpayer charges $85.00 for a parasailer and $35.00 for an observer.

3. The South Carolina Department of Revenue (the Department) conducted an audit examination of the Taxpayer to determine the Taxpayer's compliance with admissions tax requirements for the periods of September 1, 2018 – December 31, 2021. During the audit, the Department discovered the Taxpayer did not file admissions tax returns, nor did it collect or remit admissions tax for the amounts received for parasailing rides.

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4. The Department issued the Taxpayer a Proposed Assessment on February 17, 2022, assessing admissions tax and interest, as well as penalties for failure to file returns and failure to pay taxes due.[1]

5. The Taxpayer timely protested the Proposed Assessment by correspondence dated March 17, 2022.

6. The Department conducted an appeals conference with the Taxpayer on June 15, 2022 to discuss the audit. Despite the conference, the Department and the Taxpayer were unable to resolve the issues in dispute and the file was forwarded to the Office of General Counsel for issuance of this Determination.

Analysis:

I. **The price paid to the Taxpayer for parasailing rides is subject so admissions tax.**

S.C. Code Ann. § 12-21-2420 (2014) imposes an admissions tax on amounts paid to enter places of amusement. For purposes of that section, "admission" is defined in S.C. Code Ann. § 12-21-2410 (2014) as "the right or privilege to enter into or use a place or location." Thus, the admissions tax, a license tax of five percent, is imposed upon the paid right or privilege to enter into or use a place of amusement. A place of amusement is "any enclosure or location consisting of an activity that occupies one's spare time, distracts the mind, relaxes, entertains, or gives pleasure." S.C. Rev. Rul. # 05-14. Further, S.C. Rev. Rul. # 05-14 specifically includes "para sail rides" as a places of amusement subject to admissions tax. Here, the Taxpayer charges for admission to its parasailing rides. Therefore, the price paid to Taxpayer for parasailing rides is subject to admissions tax.[2]

II. **The Taxpayer is liable for penalties.**

S.C. Code Ann. § 12-54-43(C)(1) (2014) states:

> In the case of failure to file a return on or before the date prescribed by law, determined with regard to any extension of time for filing, there must be added to the amount required to be shown as tax on the return, a penalty of five percent of the amount of the tax if the failure is for not more than one month, with an additional five percent for each additional month or fraction of the month during which the failure continues, not exceeding twenty-five percent in the aggregate.

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[1] The original assessment included an admissions tax assessment on the $35.00 observer charges, which the Department later removed from the assessment.

[2] The Taxpayer argues that its parasailing rides fall under § 12-21-2420(13), which exempts admissions to boats which charge a fee for pleasure fishing, excursion, sight-seeing and private charter. However, parasailing is not pleasure fishing, excursion, sight-seeing and private charter but rather its own distinct amusement activity. *See Home Med. Sys., Inc. v. S.C. Dep't of Revenue*, 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.").

MSA

Pursuant to the foregoing, a taxpayer is liable for failure to file penalties if it fails to file a return before the due date prescribed by law plus any extension. The Taxpayer did not file admissions tax returns for any of the periods at issue despite being required to file. Because the Taxpayer failed to file admissions tax returns, it is liable for failure to file penalties.

In addition, S.C. Code Ann. § 12-54-43(E) (2014) states:

> In case of failure to pay any amount of any tax required to be shown on a return which is not shown, including an assessment within ten days of the date of the notice and demand for payment, there must be added to the amount of tax stated in the notice and demand one-half of one percent of the amount of the tax if the failure is for not more than one month, with an additional one-half of one percent for each additional month or fraction of a month during which the failure continues, not exceeding twenty-five percent in the aggregate.

Therefore, a taxpayer is liable for failure to pay penalties if it fails to pay a tax on or before the date prescribed by law. The Taxpayer did not pay any admissions tax for the periods at issue despite being required to pay. Because the Taxpayer failed to timely pay its admissions tax liability, it is liable for failure to pay penalties.

Conclusion:

The amounts collected by the Taxpayer from its customers are paid admissions for the privilege of entering a place of amusement and are accordingly subject to admissions tax pursuant to § 12-21-2420. Further, because the Taxpayer failed to file and failed to pay its admissions tax, it is liable for failure to file and failure to pay penalties pursuant to §§ 12-54-43(C)(1) and 12-54-43(E). Therefore, the Taxpayer is liable for admissions tax, interest[3], and penalties.

Department Determination drafted by Department Representative:

Marcus D. Antley, III, Esquire
Associate Counsel
South Carolina Department of Revenue

August 18, 2023

[3] S.C. Code Ann. § 12-54-25(A) (2014) mandates, "[i]f any tax is not paid when due, interest is due on the unpaid portion from the time the tax was due until paid in its entirety."

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, LLC, d/b/a Tidalwave Watersports, Petitioner(s), vs. South Carolina Department of Revenue, Respondent(s).	Docket No.: 23-ALJ-17-0362-CC **PROOF OF SERVICE**

I, the undersigned employee of the South Carolina Department of Revenue, do hereby certify that I have served a copy of the foregoing, **Agency Information Sheet and Notice of Appearance**, for the above-captioned matter by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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North Charleston, SC 29415-1121
Attorney for Petitioner

Herman C. Harrington
Herman C. Harrington, Paralegal
South Carolina Department of Revenue

Columbia, South Carolina
September 20, 2023

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March 20, 2024

Hon. Deborah Brooks Durden
Administrative Law Judge
Edgar A. Brown Building
1205 Pendleton Street
Suite 224
Columbia, S. C. 29201

RE: Dept. of Revenue Case I.D. 0-001-559-662
Tidalwave Watersports Admissions Tax Appeal, Docket No. 23-ALJ-17-0362-CC
D.O.R. File No.: 230028

Dear Judge Durden,

Opposing counsel and I have engaged in substantial efforts to resolve this case, and while we did not succeed in resolving the case in its entirety, we have agreed to present the case to your Honor on a Stipulation of Facts without calling factual witnesses. (We also agreed that I would have the right to call the taxpayer's principal, Michael Fiem, if your Honor has question(s) about any factual matter related to the operation of the business.) I am attaching to this letter our agreed upon Stipulation of Facts.

In light of our decision not to call fact witnesses (unless you have a question about the operation of the business), may I inquire as to your preference in how we present the case? I am informed that as a contested (as opposed to appellate) case, your Honor addresses it *de novo*. Would you, therefore, prefer to set a briefing schedule ahead of the hearing date, or rather take the matter on argument of counsel only, or allow us to present the case and then direct a briefing schedule on specific questions, if any? I do not have enough experience in Administrative Law Court to have a body of experience from which to draw to anticipate what your preference might be. (Mr. Antley has been generous with his expertise in trying to keep me on the right path, which I assume is just one of the benefits of advanced age.) Would you mind letting us know what your preference is as to how we tailor our presentation? I thank you in advance for your attention to this request. By copy of this letter, I am providing a copy of my communication with your Honor to opposing counsel. With kind regards, I am

Very truly yours,

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein

enclosure: Stipulation of Facts
cc:
Mr. Marcus D. Antley, III (with enclosure)

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, LLC d/b/a Tidalwave Watersports, Petitioner, vs. South Carolina Department of Revenue, Respondent.	)	DOCKET NO. 23-ALJ-17-0362-CC **STIPULATION**

Pursuant to S.C. Code Ann. § 12-6-3320 (2014), the parties stipulate to the following:

1. During the September 1, 2018 – December 31, 2021 (Periods at Issue), Petitioner operated a water sports business based out of Isle of Palms, South Carolina.

2. Petitioner offered various water activities including ecotours, jet ski rentals, and parasailing rides.

3. When a passenger engages in parasailing, the Petitioner launches the passenger from the motor vessel while it is underway, and the passenger returns to the vessel at the completion of the parasailing ride.

4. For parasailing rides, Petitioner charged $85.00 for a passenger to parasail and $35.00 for a passenger to observe.

5. The Department conducted an audit examination to determine Petitioner's compliance with admissions tax[1] requirements for the Periods at Issue (September 1, 2018—December 31, 2021).

6. During the Periods at Issue, Petitioner did not collect and did not file admissions ("amusement") tax returns or hold an admissions tax license.

7. During the Periods at Issue, Petitioner did not collect or remit admissions ("amusement") tax for the amounts received for parasailing rides.

8. The Department issued Petitioner a Proposed Assessment on February 17, 2022, assessing admissions tax and interest, as well as penalties for failure to file returns and failure to pay taxes due. The original assessment included an admissions ("amusement") tax assessment on the $35.00 observer charges, which the Department later removed from the assessment.

[1] Admissions or amusement tax refers to the license tax imposed under Article 17 of Chapter 21 of Title 12.

9. Petitioner timely protested the Proposed Assessment by correspondence dated March 17, 2022.

10. The Tax Code (Title 12) does not contain a definition of "parasailing."

THE PARTIES SO STIPULATE.

WATERTOYS, LLC D/B/A TIDALWAVE WATERSPORTS

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Attorney for Watertoys, LLC d/b/a Tidalwave Watersports

SOUTH CAROLINA DEPARTMENT OF REVENUE

By: /s/Marcus D. Antley, III
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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, L.L.C., d/b/a Tidalwave Watersports, Petitioner, v. South Carolina Department of Revenue, Respondent.	)	Docket No. 23-ALJ-17-0362-CC **MOTION FOR SUMMARY JUDGMENT**

As allowed by Rule 19 of the *Administrative Law Court Rules*, the Petitioner, Watertoys, L.L.C., moves for an Order of the Court disposing of the matter by summary judgment or judgment on the pleadings. This motion is based on the jointly filed stipulation of fact, and upon the ground that there are no genuine issues of material fact and the Petitioner is entitled to judgment as a matter of law under the holding of *Alltel Communications, Inc. v. South Carolina Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012) and the general rules of statutory interpretation.

Respectfully submitted.

March 24, 2024

/s/Thomas R. Goldstein
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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, L.L.C., d/b/a Tidalwave Watersports,	)	Docket No. 23-ALJ-17-0362-CC
	)	
Petitioner,	)	
	)	**MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
v.	)	
	)	
South Carolina Department of Revenue,	)	
	)	
Respondent.	)	

The legal issues in this case are thoroughly briefed in the Petitioner's October 15, 2023, Pre-hearing statement and Petitioner incorporates those statements here as if set forth verbatim. As the parties' joint stipulation of facts demonstrates, there are no material factual issues in dispute, and it is undisputed that the Petitioner operates a water touring service that provides a number of water-borne excursion activities, including "parasailing." It is also undisputed that neither the South Carolina Code nor the Department of Revenue Regulations provide a definition of "parasailing" that distinguishes it from the terms used by the General Assembly in setting up the "accommodations" or "amusement" tax set forth in the South Carolina Code:

> **SECTION 12-21-2420.** Imposition of tax; rate; exemptions; payment, collection, and remittance; disposition of revenues.
> There must be levied, assessed, collected, and paid upon paid admissions to places of amusement within this State a license tax of five percent. § 12-21-240, S. C. Code, ann

The South Carolina Code contains a specific exemption, Exemption 13, from the amusement tax. Exemption #13 in § 12-21-240, S. C. Code, ann., exempts certain activities from collecting an "admissions" or "amusement" tax, an exemption which is clear:

> However, no tax may be charged or collected: . . . (13) On admissions to boats which charge a fee for pleasure fishing, excursions, sight-seeing and private charter. § 12-21-240, S. C. Code, ann

The "admissions" or "amusement" tax is defined in revenue rulings as a tax collection imposed on admission to places that provide "dancing or drinking in a social environment." In Revenue Ruling 05-14, "Places of Amusement," the Department states that:

> It should be noted that it has been the longstanding position of the Department that . . . (3) fees for boat, carriage, helicopter, plane or bus rides for touring, charter, fishing, or excursion . . . are not subject to the admissions tax. (See Technical Advice Memorandum #95-2)

These issues are fully briefed in Petitioner's Pre-hearing brief, which is incorporated here as if set forth in full *verbatim*, but the parties' submission of the case on stipulated facts make the case now ripe for disposition by way of summary judgment, and the Petitioner calls special attention to the Supreme Court's 2012 tax case holding in *Alltell Communications*, a case which controls the outcome here. *Alltel Communications, Inc. v. S. C. Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012)

The Department of Revenue seeks to push Tidalwave out of the statutory exemption on its unsupported construction that "parasailing" is qualitatively different from "excursion, sight-seeing, and private charter." § 12-21-2420, S. C. Code, ann., Exemption #13.

Excursion means: "a short journey or trip, especially one engaged in leisure activity." (Oxford Dictionary) or "a usually brief pleasure trip" (Webster's Seventh New Collegiate Dictionary) Sight-seeing means: "the activity of visiting places of interest in a particular location." (Oxford Dictionary) or "the act or pastime of seeing sights." (Webster's Seventh New Collegiate Dictionary) Private charter means: "the reservation of an aircraft, boat, or bus for private use." (Oxford Dictionary) or "a mercantile lease of a ship or some principal part of it." (Webster's

Seventh New Collegiate Dictionary) The fact that a parasailing participant takes in sights from aloft obviously does not disqualify Tidalwave from Exemption 13 because the Department itself notes that the tax is not imposed on "boat, carriage, helicopter, plane, or bus rides for touring, charter, fishing, or excursion." Revenue Ruling 05-14

The rules of statutory construction require that words be afforded their "plain and ordinary" meaning. As the Supreme Court said in *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000):

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. V. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Id.* at 233, 509 S.E.2d at 262 (citing *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992).

The plain meaning of "excursion" and "sight-seeing" and "charter" are unmistakable and only in the Department's unsupported assertion is "parasailing" excluded from these plain and ordinary terms. Therefore, in light of the controlling rules of logic, language, and statutory construction, there are two, and only two, possible constructions of Exemption 13: either it is ambiguous or it is not, but either construction requires application of the Exemption to Tidalwave's activities.

If it is not ambiguous, then the inquiry ends, and the plain and ordinary meaning of the words prevent the Department of Revenue from collecting an amusement tax on Tidalwave's passengers because nowhere in the South Carolina Code or in the numerous Revenue Rulings is a definition of "parasailing" that carves it out of the ordinary meanings of Exemption 13's use of the terms: "excursion," or "sight-seeing" or "private charter." Clearly, parasailing is encompassed by

all three, and the burden is with the Department of Revenue to show otherwise, which it cannot do using ordinary English language.

On the other hand, if Exemption 13 is ambiguous, then the Court is required to construe the ambiguity against the Department of Revenue:

> Generally, a court must apply the rules of statutory interpretation to resolve the ambiguity and discover the intent of the legislature. [citation omitted] However, **"[i]n the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt."** [citations omitted] "[W]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor." [citations omitted] (noting general rule that where substantial doubt exists as to the construction of tax statutes, the doubt must be resolved against the government.) The existence of an ambiguity in section 12-20-100 raises substantial doubt regarding the section's application to Petitioner's. This doubt must be resolved in favor of Petitioners. *Alltel Communications, Inc. v. S. C. Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012) (emphasis added)

Exemption 13 could not be clearer, and it is an impermissible expansion of common terms to construe the exemption so narrowly as to exclude a single charter company from the clear application of the statute. Whether a Tidalwave passenger takes in the sights sitting down, standing up, or aloft does not induce a contradictory meiotic division of the statute. Analyzed logically, the Department improperly distributes the middle term of a syllogism to arrive at an invalid conclusion:

> Sight-seeing, excursion, and charters are exempt.
>
> Parasailing is not sight-seeing, excursion, or charter.
>
> Therefore, parasailing is subject to the tax.

The syllogism is invalid because the middle term is a negation and cannot carry the original premise to an affirmative conclusion. Leaving aside the obvious—that an assertion parasailing is not sight-seeing, *etc.* is wholly unsupported, the negation of the middle premise prevents the formation of a valid syllogism thus:

Invalid syllogism	Valid syllogism
All men are mortal.	All men are mortal.
Socrates is not a man.	Socrates is a man.
Socrates is mortal.	Socrates is mortal.

If the Department of Revenue wishes to carve out an exception to Exemption 13, it must do more than simply creating a negation out of whole cloth. Rather, its remedy is to petition the Legislature to amend § 12-21-2420, but until then, it is required to feed all South Carolina citizens from the same spoon, and there is nothing that supports its unsupported assertion that "parasailing" is not included in "excursions, sight-seeing, or private charter." It must, therefore, tax Tidalwave in conformity with the power granted to it by the Legislature in § 12-21-2420, which requires the Department to treat Tidalwave like every other business that provides "excursion, sight-seeing [or] private charter."

Because there are no facts in dispute, and because the outcome is the same whether Exemption #13 is clear or ambiguous, the Petitioner respectfully submits that this issue can be decided as a matter of law that Exemption 13 does not require Tidalwave to collect and remit an admissions or amusement tax.

Respectfully submitted,

March 25, 2024

/s/Thomas R. Goldstein
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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, L.L.C., d/b/a Tidalwave Watersports, Petitioner, v. South Carolina Department of Revenue, Respondent.	)	Docket No. 23-ALJ-17-0362-CC **CERTIFICATE OF SERVICE**

I certify that I filed the within Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment upon opposing counsel by mailing a copy properly addressed with sufficient postage affixed thereto to Marcus D. Antley, III, at 300A Outlet Pointe Boulevard, Columbia, S. C. 29210 and via electronic mail to marcus.antley@dor.sc.gov this 25th day of March, 2024.

BY: /s/Thomas R. Goldstein

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STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
OFFICE OF GENERAL COUNSEL

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March 29, 2024

VIA ELECTRONIC MAIL AND US MAIL
The Honorable Deborah Brooks Durden
Administrative Law Judge
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: Watertoys, LLC, d/b/a Tidalwave Watersports vs. South Carolina Department of Revenue
Docket No.: 23-ALJ-17-0362-CC
DOR File No.: 230028

Dear Judge Durden:

Enclosed please find the Department's Motion for Summary Judgment in the above-captioned matter. Additionally, I have enclosed Department's Response to Petitioner's Motion for Summary Judgment. Lastly, I have enclosed a Proof of Service for the same.

If you have any questions or need any further information from me, please do not hesitate to contact me at 803.898.5623 or Marcus.Antley@dor.sc.gov. If I am not available, you can reach my paralegal, Jennifer Gamble, at 803.898.5031or Jennifer.Gamble@dor.sc.gov.

Sincerely,

Marcus D. Antley, III, Esquire
Senior Counsel, Tax

Enclosures
MDA/jdg

cc: Thomas R. Goldstein, Esquire

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, LLC, d/b/a Tidalwave Watersports, Petitioner, vs. South Carolina Department of Revenue, Respondent.	DOCKET NO. 23-ALJ-17-0362-CC **THE DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT**

TO: THOMAS R. GOLDSTEIN, ATTORNEY FOR PETITIONER

Pursuant to Rule 56(c), SCRCP and SCALC Rules 19 and 68, Respondent, South Carolina Department of Revenue (Department), moves for an order of summary judgment in favor of the Department and against Watertoys, LLC, d/b/a Tidalwave Watersports (Petitioner). Rule 56(c), SCRCP, provides that a trial court shall grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). The undisputed, material facts demonstrate that: 1) the price paid to Petitioner for parasailing rides is subject to admissions tax and 2) Petitioner is liable for penalties. Therefore, the Department is entitled to judgment as a matter of law.

FACTS AND PROCEDURAL HISTORY

The parties filed a joint Stipulation of Facts that are not in dispute, which the Department incorporates by reference. *See* Stipulation of Facts, attached as Exhibit 1. Importantly, Petitioner charged passengers for parasailing rides and did not collect or remit admissions tax during the Periods at Issue.

STANDARD OF REVIEW

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). 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). "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 material facts are not in dispute, and those facts viewed in the light most favorable to the Petitioner establish that: 1) the price paid to Petitioner for parasailing rides is subject to admissions tax and 2) Petitioner is liable for penalties. Accordingly, the Court should grant the Department's Motion for Summary Judgment.

ARGUMENT

I. The price paid to Petitioner for parasailing rides is subject to admissions tax.

S.C. Code Ann. § 12-21-2420 (2014) imposes an admissions tax on amounts paid to enter places of amusement. For purposes of that section, "admission" is defined in S.C. Code Ann. § 12-21-2410 (2014) as "the right or privilege to enter into or use a place or location." Thus, the admissions tax, a license tax of five percent, is imposed upon the paid right or privilege to enter into or use a place of amusement. A place of amusement is "any enclosure or location consisting of an activity that occupies one's spare time, distracts the mind, relaxes, entertains, or gives pleasure." S.C. Rev. Rul. # 05-14 attached as Exhibit 2. Further, S.C. Rev. Rul. # 05-14 specifically includes "para sail rides" as a places of amusement subject to admissions tax.[1] Here, Petitioner charges for admission to a place of amusement—parasailing rides. Therefore, the price paid to Petitioner for parasailing rides is subject to admissions tax.

II. Petitioner does not qualify for an admissions tax exemption.

Section 12-21-2420 provides certain limited exemptions from admission taxes. However, 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

[1] "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (quoting *Dunton v. S.C. Bd. of Examin'rs in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)); *see also Nucor Steel v. S.C. Pub. Serv. Comm'n*, 310 S.C. 539, 543, 426 S.E.2d 319, 321 (1992) (recognizing that where an agency is charged with the execution of a statute, the agency's interpretation should not be overruled without cogent reason).

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.").

Petitioner argues that its parasailing rides fall under § 12-21-2420(13), which exempts admissions to boats which charge a fee for pleasure fishing, excursion, sight-seeing and private charter. However, parasailing is not pleasure fishing, excursion, sight-seeing or private charter but rather its own distinct amusement activity. Petitioner cannot bring itself squarely within the plain language of the claimed exemption, so Petitioner's parasailing rides are subject to admissions tax.

III. Petitioner is liable for penalties.

S.C. Code Ann. § 12-54-43(C)(1) (2014) states:

> In the case of failure to file a return on or before the date prescribed by law, determined with regard to any extension of time for filing, there must be added to the amount required to be shown as tax on the return, a penalty of five percent of the amount of the tax if the failure is for not more than one month, with an additional five percent for each additional month or fraction of the month during which the failure continues, not exceeding twenty-five percent in the aggregate.

Pursuant to the foregoing, a taxpayer is liable for failure to file penalties if it fails to file a return before the due date prescribed by law plus any extension. Petitioner did not file admissions tax returns for any of the Periods at Issue, so it is liable for failure to file penalties.

In addition, S.C. Code Ann. § 12-54-43(E) (2014) states:

> In case of failure to pay any amount of any tax required to be shown on a return which is not shown, including an assessment within ten days of the date of the notice and demand for payment, there must be added to the amount of tax stated in the notice and demand one-half of one percent of the amount of the tax if the failure is for not more than one month, with an additional one-half of one percent for each additional month or fraction of a month during which the failure continues, not exceeding twenty-five percent in the aggregate.

Therefore, a taxpayer is liable for failure to pay penalties if it fails to pay a tax on or before the date prescribed by law. Petitioner did not pay any admissions tax for the Periods at Issue, so it is liable for failure to pay penalties.[2]

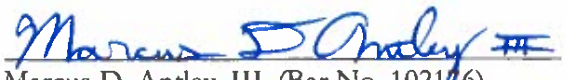
CONCLUSION

Petitioner's parasailing rides are subject to admissions tax and no exemption applies. Despite the Department's published guidance that para sail rides are subject to admissions tax, Petitioner did not collect or remit admissions tax on the price paid to Petitioner for parasailing rides. Therefore, the Department asks that this Court enter an order granting the Department's Motion for Summary Judgment and finding that: 1) the price paid to Petitioner for parasailing rides is subject to admissions tax and 2) Petitioner is liable for penalties.

{Signature on following page}

[2] Under S.C. Code Ann. § 12-54-160 (20014), the Department may waive, dismiss, or reduce the penalties. However, penalties are appropriate in this case because the Department has published guidance since at least 2005 that explicitly lists "para sail rides" as subject to admissions tax. *See* Revenue Ruling #05-14.

Respectfully submitted,



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March 29, 2024

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, LLC, d/b/a Tidalwave Watersports, Petitioner, vs. South Carolina Department of Revenue, Respondent.	DOCKET NO. 23-ALJ-17-0362-CC **THE DEPARTMENT'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to SCALC Rules 19(A), Respondent, South Carolina Department of Revenue (Department), submits this response to Watertoys, LLC, d/b/a Tidalwave Watersports' (Petitioner's) Motion for Summary Judgment. As discussed below, the Department requests that the Court deny Petitioner's Motion for Summary Judgment.

ARGUMENT

I. Under the plain language of the statute, Petitioner does qualify for the exemption.

"All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct. App. 2005). "The legislature's intent should be ascertained primarily from the plain language of the statute." *Id.*

To borrow from Petitioner's discussion of syllogisms:

- Section 12-21-2420(13) only exempts admissions to boats which charge a fee for pleasure fishing, excursion, sight-seeing and private charter.
- Parasailing rides are not pleasure fishing, excursion, sight-seeing or private charter.
- Section 12-21-2420(13) does not exempt admissions to boats which charge a fee for parasailing rides.

Petitioner's strained interpretation equates parasailing rides to excursion, sight-seeing, and private charter. Under this logic, Ferris wheels and rollercoasters similarly would constitute excursion, sight-seeing, and private charter. However, that would be an absurd result far divorced from the legislative intent.[1] Petitioner provides dictionary definitions of excursion, sight-seeing, and private charter. None of those definitions include any mention of parasailing.

Notably, Petitioner does not define parasailing. Parasailing means: "the recreational sport of soaring in a parachute while being towed usually by a motorboat." *Merriam-Webster* (March 29, 2024, 9:14 AM), www.merriam-webster.com/dictionary/parasailing. This definition does not mention excursion, sight-seeing, or private charter or have any overlap with those terms' respective definitions. With no better indication of legislative intent than the plain language of the statute, the General Assembly did not intend to exempt parasailing rides from admissions tax. Therefore, the Court should deny Petitioner's Motion for Summary Judgment.

II. Tax exemptions are strictly construed against the taxpayer.

Petitioner mistakenly relies on the South Carolina Supreme Court's decision in *Alltel Communications, Inc. v. S. C. Department of Revenue,* 399 S.C. 313, 731 S.E.2d 869 (2012). The principle described in that decision relates to the imposition of a tax (i.e. whether a taxpayer is subject to a tax) as opposed to an exemption from tax. Here, Petitioner does not dispute that it is subject to the admissions tax for the amounts charged for parasailing without the exemption provided in S.C. Code

[1] For nearly two decades, the Department has had published guidance—S.C. Rev. Rul. # 05-14—indicating that para sail rides are subject to admissions tax. *Stone Mfg. Co. v. S.C. Emp. Sec. Comm'n*, 219 S.C. 239, 249, 64 S.E.2d 644, 648 (1951) ("the construction of a statute by the officials charged with its administration, which has been acquiesced in by the Legislature for a long period of time, should be given great weight").

Ann. § 12-21-2420(13) (2014).[2] Instead, the parties disagree whether Petitioner qualifies for an exemption. As elaborated in the Department's Motion for Summary Judgment, 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."). In sum, South Carolina's case law mandates that ambiguity be resolved against granting the exemption. If the Court finds the statute is ambiguous, it must be narrowly construed. Therefore, the Court should reject Petitioner's broad interpretation of excursion, sight-seeing, and private charter as including parasailing and deny Petitioner's Motion for Summary Judgment.

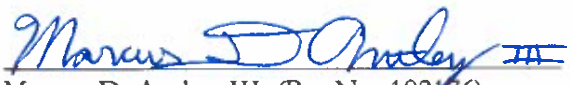
CONCLUSION

Ultimately, Petitioner's parasailing rides are not exempt from admissions tax. Therefore, the Department asks that this Court deny Petitioner's Motion for Summary Judgment.

{Signature on following page}

[2] "It is also undisputed that neither the South Carolina Code nor the Department of Revenue Regulations provide a definition of 'parasailing' that distinguishes it from the terms used by the General Assembly in setting up the…'amusement' tax set forth in the South Carolina Code." Petitioner's Motion for Summary Judgment at p. 2.

Respectfully submitted,



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March 29, 2024

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, LLC, d/b/a Tidalwave Watersports, Petitioner, vs. South Carolina Department of Revenue, Respondent.	)	Docket No.: 23-ALJ-17-0362-CC **PROOF OF SERVICE**

I, the undersigned paralegal of the South Carolina Department of Revenue, do hereby certify that I have served a copy of the foregoing, the Department's Motion for Summary Judgment and the Department's Response to Petitioner's Motion for Summary Judgment, for the above-captioned matter by electronic mail and by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

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Attorney for Petitioner

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March 29, 2024

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April 8, 2024

Hon. Deborah Brooks Durden
Administrative Law Judge
Edgar A. Brown Building
1205 Pendleton Street
Suite 224
Columbia, S. C. 29201

RE: Dept. of Revenue Case I.D. 0-001-559-662
Tidalwave Watersports Admissions Tax Appeal, Docket No. 23-ALJ-17-0362-CC
D.O.R. File No.: 230028

Dear Judge Durden,

I enclose the Petitioner's Return (and an extra copy to return a filed copy) to the Department of Revenue's Motion for Summary Judgment, which I am also sending electronically and by regular mail. By copy of this letter, I am providing a copy to opposing counsel both electronically and by regular mail. Please let me know if anything further is required to perfect this filing. With kind regards, I am

Very truly yours,

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein

enclosure: Return to Department's Motion for Summary Judgment, return envelope

cc:
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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, L.L.C., d/b/a Tidalwave Watersports, Petitioner, v. South Carolina Department of Revenue, Respondent.	)	Docket No. 23-ALJ-17-0362-CC **REPLY TO D.O.R.'S MOTION FOR SUMMARY JUDGMENT**

In its March 29, 2024 Motion for Summary Judgment, the Department crystalizes the issue before the Court (and perhaps demonstrates that an additional fact is necessary for the Court to make an informed decision). On page 4 of its motion, the Department sustitutes its argument for a fact when it writes:

> "However, parasailing is not pleasure-fishing, excursion, sight-seeing or private charter, but rather is its own distinct amusement activity."

This is not a statement of fact; rather, it is the Respondent's argument. We can agree that parasailing is not "pleasure-fishing," but it takes a degree of language chutzpah to declare that parasailing is neither excursion, nor sight-seeing, nor charter, and in issuing its verdict on the meaning of "parasailing," the Respondent overlooks that Exemption 13 is specifically tailored to activities on water: "on admissions to boats"! To be fair to the Department—and to assist the Court—perhaps the Stipulation of Facts, in light of the Respondent's language decree, is insufficient for the matter to be decided as a matter of law because of the joint stipulation of facts does not adequately cover the undisputed fact that parasailing takes place entirely on a boat that is underway. It is possible this is a fact about which the Department of Revenue is unaware. When

a passenger aboard Tidalwave's sight-seeing boat launches, she launches from the boat and returns to the boat. The entire event occurs on the water from a boat. This is an undisputed fact.

Moreover, the partial parasailing activity does not confine the entirety of sight-seeing activity on board any more than buying a hotdog at Williams Brice stadium does not circumscribe the experience of attending a football game. A passenger engages in sight-seeing, excursion, and private charter before, during, and after being launched, and frankly it is an imperious stretch of English language to assert that sight-seeing 7 feet above sea level is fundamentally different from sight-seeing at 40 feet above sea level. That kind of language flexibility would make someone on a ladder an astronaut. The excursion neither begins nor ends with parasailing; rather, parasailing is a small part of the whole trip just like buying a hotdog at a football game does not delineate the experience. The Department's torturing the sight-seeing, excursion, and private charter language is based on nothing more than its semantic fiat. When there is a sales tax exemption on medicine, the Department would not exclude aspirin because the exemption does not use the word, "aspirin." While parasailing is **part** of the excursion, **part** of the sight-seeing, or **part** of the private charter, like "aspirin" is included in the broader term, "medicine," it is not the whole and the trip remains an excursion, sight-seeing, and private charter whether a passenger is seated, standing, or aloft. The only reason Tidalwave charges a different fee for a passenger who elects parasailing is because it involves additional crew members to operate and monitor the process, but it does not change the fact that it is just as much excursion or sight-seeing as standing or seated on deck.

Moreover, the cases relied upon by the Department are unavailing. In chronological order, *Southern Weaving Co. v. Query, et. al.*, 206 S.C. 307, 34 S.E.2d 51 (1945) is a profound case on a personal level. First, it involved a question of whether excess profits earned through government war contracts but later disgorged under the statutory "renegotiation" process should or should not

be included as taxable **income** under the South Carolina Tax Commission's theory of a "claim of right." The S. C. Tax Commission attempted to collect an income tax on returned income to the War Department as "excessive." Not only did the Court determine the case in favor of the taxpayer, but also held that a taxpayer receiving income under a War Department contract is aware that moneys received are subject to being disgorged as "excessive" during the statutory renegotiation process: "In many instances to determine the contract prices definitely in advance would result in a delay which might be seriously determinantal to the prosecution of the war." The South Carolina Tax Commission contended the taxpayer was not entitled to an adjustment, and the circuit court decided the issue against the Tax Commission, which the Supreme Court affirmed.[1]

The second case, *Southern Soya Corporation of Cameron v. Wasson*, 252 S.C. 484, 167 S.E.2d 311 (1969) is another income tax deduction case in which the taxpayer claimed a deduction after the time for claiming it passed. Once again, the Supreme Court makes clear that universal policy that ambiguity in tax statutes must be resolved in favor of the taxpayer:

> The rule generally applicable in the construction of income tax statutes that ambiguities are to be resolved in favor of the taxpayer . . . does not apply in the construction of a statute authorizing deductions; rather, the ambiguity will be resolved against the taxpayer.

The issue before the Court is not whether Tidalwave missed a deadline to claim a deduction; rather, the issue before the Court is how to construe the words, excursion, sight-seeing, and charter, in their ordinary and plain meaning, which is the issue in the next case cited by the Department.

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[1] This case leaves a **profound** personal effect because it addresses the identical W.W.II military contracts for khaki that lifted the Goldstein's of Brest Litovsk out of poverty at the same time the einsatzgruppen were murdering the other half of the family, the Gelbgiser's. trapped there.

The final case, *Owen Industrial Products, Inc. v. Sharpe*, 274 S.C. 193, 274 S.E.2d 33 (1980) involved an application for a refund of property taxes on the ground that the taxes collected by the County on behalf of the Hospital Board of Trustees were County taxes for which the taxpayer was entitled to an exemption as a "new industrial enterprise." (The Court also found that a "Fire District Tax" was not a County tax.) The Court agreed with the taxpayer and expressed the universal rule that ". . . **the language of a tax exemption statute** must be given its plain, ordinary meaning and must be construed strictly against the claimed exemption." (emphasis added) The Department seeks to avoid the "plain, ordinary, meaning" of Exemption 13 by suggesting that a Ferris wheel or a roller coaster qualify as "excursions": ". . . Ferris wheels and roller coasters similarly would constitute excursion, sight-seeing, and private charter" (Department of Revenue's Response to Summary Judgment, page 2) The Department also quotes a definition of "parasailing" as involving "soaring" while towed by a "**motorboat**," which brings Tidalwave squarely in the exemption because the Respondent stubbornly refuses to acknowledge the exemption is for waterborne activities. There is no definition of "parasailing" in counsel's *Webster's Seventh New Collegiate Dictionary*, but reference to the *Liddle and Scott Greek-English Lexicon* (Oxford Univ. Press, 1974) explains the origin of the term. In Greek, "*para*" is the preposition for "from beside, from alongside of," thus literally, "from sailing." Thus, a Ferris wheel or a roller coaster absolutely would qualify under Exemption 13 if, and only if, they were on a waterborne vessel, a distinction the Department struggles to ignore:

> However, no tax may be charged or collected: . . . (13) **On admissions to boats** which charge a fee for pleasure fishing, excursions, sight-seeing and private charter. § 12-21-240, S. C. Code, ann (emphasis added)

The Department inadvertently makes Petitioner's argument for it. When a patron to Disney World pays for admission to Disney World, she does not pay a separate fee to ride Space Mountain because Space Mountain is part of the park for which she paid an admission fee. Likewise, when a patron boards a Tidalwave **boat**, she pays for admission to travel on the boat to take in the sights whether it is an eco-tour, a harbor cruise, a bachelorette cruise, and whether a passenger is sitting, standing, or aloft. Passengers are not obligated to use a parasail. Whether she chooses to go aloft on a parasail or not, she still participates in the entire sight-seeing/excursion experience, and there is no argument that paying to go aboard the vessel is a private charter. In the same way that Space Mountain is a small part of the whole of Disney World that a patron may or may not elect to ride, deciding to go aloft is a small part of a harbor excursion, eco-tour, or sight-seeing[2] and until the General Assembly amends § 12-21-2420, Tidalwave is not required to collect or remit an "admissions" tax for sight-seeing passengers on its vessels. Even the Department's reliance on Revenue Ruling 05-15 (September 15, 2005) undercuts its own argument. There, the Department defines a "place of amusement" as: "any **enclosure or location** consisting of an activity that occupies one's spare time, distracts the mind, relaxes, entertains, or gives pleasure," once again ignoring the exemption's limitation to boats. (emphasis added)

Finally, Tidalwave has been in operation since 2005 in the same business, and even underwent a Department of Revenue audit in 2014, which found no deficiencies related to the amusement tax. Only the Department of Revenue can explain what changed in its interpretation of what is a clear and unambiguous statute, but in light of the long history of agreement about the

[2] There have been other parasailing companies that took passengers aloft from a beach and deposited them back on the beach. The Department might have a decent shot at pushing such a business out of Exemption 13 because the patrons are not paying to board a boat, but here all the activities take place on the "boat" while it is underway and while it is engaged in sight-seeing, excursion, or private charter.

interpretation and application of the statute, it is inappropriate to suggest that Tidalwave be exposed to penalties for adhering to a procedure in which the Department itself acquiesced.

Respectfully submitted,

April 8, 2024

/s/Thomas R. Goldstein
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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, L.L.C., d/b/a Tidalwave Watersports, Petitioner, v. South Carolina Department of Revenue, Respondent.	)	Docket No. 23-ALJ-17-0362-CC **CERTIFICATE OF SERVICE**

I certify that I served the within Reply to Department of Revenue's Motion for Summary Judgment upon opposing counsel by mailing a copy properly addressed with sufficient postage affixed thereto to Marcus D. Antley, III, at 300A Outlet Pointe Boulevard, Columbia, S. C. 29210 and via electronic mail to marcus.antley@dor.sc.gov this 8th day of April, 2024.

April 8, 2024

/s/ Thomas R. Goldstein
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STATE OF SOUTH CAROLINA
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April 15, 2024

VIA ELECTRONIC MAIL AND US MAIL
The Honorable Deborah Brooks Durden
Administrative Law Judge
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: Watertoys, LLC, d/b/a Tidalwave Watersports vs. South Carolina Department of Revenue
Docket No.: 23-ALJ-17-0362-CC
DOR File No.: 230028

Dear Judge Durden:

Enclosed please find the Department's Reply to Petitioner's Response to the Department's Motion for Summary Judgment in the above-captioned matter. Additionally, I have enclosed a Proof of Service for the same.

If you have any questions or need any further information from me, please do not hesitate to contact me at 803.898.5623 or Marcus.Antley@dor.sc.gov. If I am not available, you can reach my paralegal, Jennifer Gamble, at 803.898.5031or Jennifer.Gamble@dor.sc.gov.

Sincerely,

Marcus D. Antley, III, Esquire
Senior Counsel, Tax

Enclosures
MDA/jdg

cc: Thomas R. Goldstein, Esquire

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, LLC, d/b/a Tidalwave Watersports, Petitioner, vs. South Carolina Department of Revenue, Respondent.	DOCKET NO. 23-ALJ-17-0362-CC **THE DEPARTMENT'S REPLY TO PETITIONER'S RESPONSE TO THE DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to SCALC Rules 19(A), Respondent, South Carolina Department of Revenue (Department), submits this Reply to Watertoys, LLC, d/b/a Tidalwave Watersports' (Petitioner's) Response to the Department's Motion for Summary Judgment.[1] As discussed below, the Department requests that the Court grant the Department's Motion for Summary Judgment.

ARGUMENT

I. Parasailing is not pleasure fishing, excursion, sight-seeing, or private charter.

Stipulation of Fact #4 provides: "When a passenger engages in parasailing, the Petitioner launches the passenger from the motor vessel while it is underway, and the passenger returns to the vessel at the completion of the parasailing ride." Petitioner charges passengers who parasail separately from passengers who only observe. *See* Stipulation of Facts ¶ 4. The Department seeks only to assess Petitioner for the charges to parasail. *See* Stipulation of Facts ¶ 8. This is a taxpayer-friendly approach because charging admission to observe a parasailer is arguably subject to

[1] Petitioner captioned its filing as "Reply to D.O.R.'s Motion for Summary Judgment." Because Petitioner's filing responds to the Department's Motion for Summary, the Department refers to Petitioner's filing as a Response for consistency with the language of SCALC Rule 19(A).

admissions tax. Regardless, classifying the parasailing ride itself as pleasure fishing, excursion, sight-seeing, or private charter is too tenuous a conclusion even when all the facts are viewed in the light most favorable to Petitioner.

The fact that the amusement activity occurs on a boat only matters if it is pleasure fishing, excursion, sight-seeing, or private charter. S.C. Code Ann. § 12-21-2420(13) (2014) exempts from charging admissions tax "on admissions to boats **which charge a fee for pleasure fishing, excursion, sight-seeing, or private charter**" (emphasis added). Simply because an activity occurs on a boat does not exempt it from admissions tax. *See* 1979 S.C. Op. Att'y Gen. 115 (1979) ("An excursion boat offering a dance floor is a place of amusement and the charges for admission thereto are admissions that are taxable under § 12–21–2420 of the 1976 Code of Laws."); *see also* Rev. Rul. #05-14 ("Charges for [boat] cruises with entertainment, such as one in which patrons attempt to solve a murder mystery, do not come within the exemption in Code Section 12-21-2420(13)"). Under Petitioner's argument, a bowling alley on a barge would owe no admissions tax. *Beach v. Livingston*, 248 S.C. 135, 139, 149 S.E.2d 328, 330 (1966) ("A bowling alley is a 'place of amusement'"). This is an absurd result. "If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect." *DIRECTV, Inc. & Subsidiaries v. S.C. Dep't of Revenue*, 421 S.C. 59, 70, 804 S.E.2d 633, 639 (Ct. App. 2017). Therefore, the Court should reject Petitioner's argument.

II. Tax exemptions are strictly construed against the taxpayer.

Our Courts treat exemptions, deductions, and credits similarly. *See Owen Indus. Prods., Inc. v. Sharpe*, 274 S.C. 193, 262 S.E.2d 33 (1980) (an exemption case that cites *Chronicle Publishers, Inc. v. South Carolina Tax Commission*, 244 S.C. 192, 136 S.E.2d 261 (1964) which is a deduction case). Petitioner is correct that the Court found in favor of the taxpayer in *Southern*

Weaving, but only because it deemed the item was not a deduction. However, relevant here, the Court recognized the well-established case law that "[deductions] are a matter of legislative grace, and a taxpayer claiming a deduction must bring himself squarely within the terms of a statute expressly authorizing it." *S. Weaving Co. v. Query*, 206 S.C. 307, 313–14, 34 S.E.2d 51, 54 (1945). Petitioner provides a citation from *Southern Soya* that makes the distinction between an imposition statute and an exemption (or deduction or credit) statute: "The rule generally applicable in the construction of income tax statutes that ambiguities are to be resolved in favor of the taxpayer...does not apply in the construction of a statute authorizing deductions; rather, **the ambiguity will be resolved against the taxpayer**." *S. Soya Corp. of Cameron v. Wasson*, 252 S.C. 484, 489, 167 S.E.2d 311, 313 (1969) (emphasis added). This distinction demonstrates why Petitioner's reliance on the *Alltel* case, which involved an imposition issue, is misplaced because the issue here involves an exemption. Notably, 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* 1981 S.C. Op. Att'y Gen. 50 (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.").

"As a general rule, the language of a tax exemption statute must be given its plain, ordinary meaning and **must be construed strictly against the claimed exemption**." *Owen Indus. Prod., Inc. v. Sharpe*, 274 S.C. 193, 195, 262 S.E.2d 33, 34 (1980) (emphasis added). Only an absurd and broad construction of pleasure fishing, excursion, sight-seeing, or private charter could include parasailing rides. Therefore, the Court should reject Petitioner's proposed construction of the admissions tax exemption.

III. Petitioner alleges unsupported and irrelevant facts in its Response.

The final paragraph of Petitioner's Response includes purported facts that are not included in the Stipulation of Facts or otherwise supported. The Stipulation of Facts do not mention Petitioner's business or Audits outside of the Periods at Issue. Further, such nonmaterial alleged facts are irrelevant to the matter before the Court. Therefore, the Court should strike the final paragraph of Petitioner's Response.

CONCLUSION

Ultimately, Petitioner's parasailing rides are not exempt from admissions tax. Therefore, the Department asks that this Court grant the Department's Motion for Summary Judgment.

Respectfully submitted,

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Columbia, South Carolina
April 15, 2024

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, LLC, d/b/a Tidalwave Watersports, Petitioner, vs. South Carolina Department of Revenue, Respondent.	Docket No.: 23-ALJ-17-0362-CC **PROOF OF SERVICE**

I, the undersigned employee of the South Carolina Department of Revenue, do hereby certify that I have served a copy of the foregoing, the Department's Reply to Petitioner's Response to the Department's Motion for Summary Judgment, for the above-captioned matter by electronic mail and by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

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Attorney for Petitioner

Geneva McIntosh
Legal Assistant

Columbia, South Carolina
April 15, 2024

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, L.L.C., d/b/a Tidalwave Watersports, Petitioner, v. South Carolina Department of Revenue, Respondent.	)	Docket No. 23-ALJ-17-0362-CC **MOTION FOR RECONSIDERATION**

TO: Marcus Antley, counsel for Respondent, South Carolina Department of Revenue:

Please take notice the Petitioner moves for an Order of Reconsideration as allowed by the *Rules of Procedure for the Administrative Law Court*, Rule 29(D). The Respondent respectfully shows that the Court's Order of April 18, 2024 is controlled by errors of law requiring amendment of the Order.

1. Summary Judgment Standard

While the Court's April 18th Order sets out a partial correct statement of law governing summary judgment, the Court overlooks and fails to apply the most critical component of the summary judgment standard; to wit, that facts and their reasonable inferences must be drawn in the favor of the non-moving party: "In determining whether any triable issues of fact exist, a court considering motion for summary judgment must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *Quail Hill, LLC. v. County of Richland*, 387 S.C. 223, 692 S.E.2d 499 (2010) This is so because summary judgment is a "drastic remedy," and should not be imposed to deprive a litigant of a trial on

disputed factual issues: "Since it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues."; *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999). . ." *Gary v. Askew*, 813 S.E.2d 717, 423 S.C. 47 (S.C. 2018). Here, the Court does precisely the opposite and overlooks that not only is the issue before the Court a novel one, but also grounds its decision entirely upon improper "deference" to Respondent's opinion despite the parties drawing diametrically opposed conclusions from the facts. These errors of law are discussed thoroughly by the Court of Appeals in *Schmidt v. Courtney and Kemper Sports*, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003):

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333; *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000); *Mosteller v. County of Lexington*, 336 S.C. 360, 520 S.E.2d 620 (1999); *Redwend Ltd. P'ship*, 354 S.C. at 468, 581 S.E.2d at 501; *Baril*, 352 S.C. at 280, 573 S.E.2d at 835; *Trivelas*, 348 S.C. at 130, 558 S.E.2d at 273; *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002); *Hedgepath v. American Tel. & Tel. Co.*, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001); *Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001); *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999); *Middleborough Horizontal Prop. Regime Council v. Montedison*, 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995). "Summary judgment is inappropriate when further development of the facts is desirable to clarify the application of the law." *Lee v. Kelley*, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct. App. 1989). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Redwend Ltd. P'ship*, 354 S.C. at 468, 581 S.E.2d at 501; *Baril*, 352 S.C. at 280, 573 S.E.2d at 835; *Hall*, 349 S.C. at 173-74, 561 S.E.2d at 656; *Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001); *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000); see also *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003) (noting that summary judgment should not be granted even when there is no dispute as to evidentiary facts, if there is dispute as to conclusions to be drawn therefrom). Although the facts regarding Schmidt's injury are not disputed, application of the law to the facts is disputed, and is a novel issue.

Thus, the Court's summary judgment standard is incomplete and fails to account for the parties' disputed conclusions. For example, on page 5 of the Order under review, the Court states that the Department's interpretation of its own policy statement "is entitled to deference." That may be so, but "deference" is not an algorithm that determines the outcome. Otherwise, courts

and lawyers are just so many potted plants and no citizen need challenge any state agency on any interpretation of any policy. "Deference" is not an oath of fealty, and because the Department of Revenue has an opinion on how the case should be decided does not determine the outcome, especially at the summary judgment stage. By analogy, if a police officer issues a moving violation for "driving too fast for conditions," the motorist receiving the citation might be interested to know what the conditions are, which must be more than deference to the officer's subjective opinion. Here, the Court's analysis starts and stops with the Department of Revenue's fiat that parasailing is necessarily excluded from "excursions, sight-seeing, [or] private charter." While the Department's assertion about its policy might be entitled to "deference," deference is not the same thing as dictating judgment as a matter of law.

2. Legal Standard

In the April 18th Order under review, the Court cites a line of cases that tax exemption statutes may be construed strictly against the taxpayer, citing *Home Med. Systems, Inc. v. S.C. Dept. of Revenue,* 382 S.C. 556, 677 S.E.2d 582 (2009) on the ground that the Exemption No. 13 does not use the word "parasailing" even though using the word in its plain and ordinary meaning would encompass "sight-seeing," "excursion," and "private charter" in the same way that using the word "animal" includes "cat." The Court distinguishes *Alltel Commc'ns, Inc. v. S.C. Dept. of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012) on the ground that "it relates to whether a taxpayer is subject to a tax rather than whether the taxpayer is exempt from the tax," a distinction without a difference. (Order under review at page 5) First the Court's analysis violates the fundamental associative law of logic that allows equalities to be expressed in different forms: $(a + b) + c = a + (b + c)$. It makes neither logical nor semantic sense to conclude two cases are materially different

because one case involves whether a taxpayer is subject to a tax while the case involves whether a taxpayer is exempt from a tax. That is a distinction without a difference as the Supreme Court makes clear in the first paragraph: "This case presents the legal question of whether the Alltel Entities (collectively Petitioners), which are cellular service providers, are included in the definition of 'telephone company' for the purpose of increased license fees in S. C. Code Ann. section 12-20-100 (2000)." Whether a taxpayer is "subject" to a tax is logically identical to the question of whether a taxpayer is "exempt" from a tax. Here, the Court errs by simply adopting the Department's interpretation of its policy, which cannot possibly be the standard unless courts are to be the handmaidens of state agencies.

Moreover, the Supreme Court's analysis in *Home Medical Systems, Inc.*, supports the Petitioner's legal position, not the Department of Revenue's. The issue in *Home Medical Systems, Inc.* was whether the medical devices sold by the taxpayer were or were not exempt from sales tax. Because the exemption applied to medical supplies sold by prescription, a point the Supreme Court emphasized by boldface type ("products which do not **require** a prescription"—emphasis in original, including a footnote explaining that some of the products appeared on grocery store shelves), the Supreme Court found the Administrative Law Court erred in re-writing the statute to include such products. That analysis shines brilliant illumination on the issue now before the Court where the Department of Revenue is simply re-writing the General Assembly's statute to increase its collections, something it cannot do:

> Moreover, '[r]egulations authorized by the Legislature have the force of law.", *Goodman v. City of Columbia*, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995). **Nonetheless, a regulation may not alter or add to a statute**. *Id.*
> *Home Medical Systems, Inc., v. South Carolina Department of Revenue*, 382 S.C. 556, 677 S.E.2d 582 (2009) (emphasis added)

Here, the Department is taking a much bolder step, and the Court errs in allowing a memo composed by the Department of Revenue to veto an exemption provided by statute. The rules of statutory construction do not change depending on the parties before the Court. The statue, § 12-21-2420 is subject to the same rules of statutory construction independent of the parties before the Court, and the fact is indisputable that the statute exempts boats from the admissions/amusement tax provided they are engaged in excursion or sight-seeing or private charter and all three encompass parasailing, which is at least a genuine issue of material fact.

3. Deference vs. Rules of Statutory Construction

On page 4 of the Order under review, the Court cites *Kiawah Dev. Partners, II, v. S. C. Dept't. of Health & Env't Control*, 411 S.C. 16, 766 707 (2014) for the proposition that an agency's interpretation of its regulations is entitled to "deference." As discussed in the next section, there is nothing ambiguous about the General Assembly's exempting activities on boats from admissions/amusement taxes, but more concerning is the Court's elevation of "deference" to legislative veto. The Department of Revenue has no power to adopt legislation; it is required to adhere to the law like the rest of us. § 12-4-320, S. C. Code, ann. creates the regulatory powers of the Department of Revenue, and authorizes the Department to "make rules and promulgate regulations, **not inconsistent with law**, to aid in the performance of its duties." (emphasis added) The General Assembly is clear that "sight-seeing" and "excursion" and "private charter" on boats do not require an admissions tax. The Department cannot rewrite the statute to increase its collections. In *Hay v. South Carolina Tax Commission*, 273 S.C. 269, 255 S.E.2d 837 (1979), the question raised is almost identical to the question raised here. There, the Department of Revenue contended the taxpayer owed taxes in 1971 even though he realized his gain in 1972. The Department of Revenue managed this by reinterpreting the statutory definition of "sale" to

conclude that a "sale" took place in 1971 even though the taxpayer did not receive the payment until 1972. This reinterpretation of a state statute is very close to the issue here where the Department of Revenue rewrites the General Assembly's statute. The *Hay* case is dispositive of the issue now before the Court, the only difference between *Hay* and the present matter is that *Hay* involved an income tax rather than an amusement tax:

> A statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. [citation omitted] Upon review the statute, it is logical and practical to conclude that the legislature intended that an election could be reflected in the return of the year in which the first payment is actually received by inserting in the return the amount reportable as taxable income. Although the South Carolina Tax Commission is vested with rule making power for the purposes of carrying out legislative will expressed in statutory terms, it has *no* authority to enact new laws in the nature of regulations to satisfy its own theory of income tax. *Heyward v. South Carolina Tax Commission*, 240 S.C. 347, 126 S.E.2d 15 (1962) (emphasis in original)

Instead of applying the law correctly as laid down by the Supreme Court in *Hay*, the Court erroneously concludes that it was bound to give deference to the Department's rewriting the statute to capture parasailing. The Court cites *Kiawah Development Partners, II v. S. C. Dep't. of Health & Env't Control*, 411 S.C. 16, 766 S.E.2d 707 (2014) even though that case involved the highly abstruse calculation of what constitutes a "critical area" in an area changing by simultaneous erosion and accretion. The Supreme Court made clear that state agencies do not possess the authority to rewrite state law:

> [T]he pertinent inquiry is the cumulative impacts of the project *within* the critical area, not the impact of future development on the high ground *outside* the critical area. In other words, the area for which [DHEC] has regulatory authority is the critical area, not the high ground *outside* the critical area.
>
> In reaching this conclusion, the ALC erred by failing to give deference to DHEC's interpretation of its regulation. Interpreting and applying statutes and regulations administered by an agency is a two-step process. **First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation.** *See Brown v. Bi–Lo, Inc.*, 354 S.C. 436, 440, 582 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own

regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." (citations omitted)); *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) ("Where the terms of the statute are clear, the court must apply those terms according to their literal meaning."). If the statute or regulation "is silent or ambiguous with respect to the specific issue," the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ; *see also Brown v. Bi–Lo*, 354 S.C. at 440, 581 S.E.2d at 838. (emphasis added)

Both the Administrative Law Court and the Court of Appeals addressed this exact issue in an ad valorem tax case, Dorchester County Assessor v. Middleton Place Equestrian Center, L.L.C., 414 S.C. 453, 778 S.E.2d 919 (Ct. App. 2015) where both courts reversed the County Assessor's reliance on his "assumptions" about the terms and conditions of restrictive covenants to abrogate the property owner's agricultural status. Just like the case now before the Court, the County tax Assessor limited the definition of "agricultural" in derogation of the clear statement of the legislature expressed in § 12-43-230(a), which defines "agricultural real property":

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013) (quoting *State v. Scott*, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002)) "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Id.* (quoting *Scott*, 351 S.C. at 588, 571 S.E.2d at 702). "Therefore, [i]f a statute's language is plain, unambiguous, and conveys a clear meaning [,] the rule of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* (first alteration in original) (quoting Scott, 351 S.C. at 588, 571 S.E.2d at 702)); see also *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000) ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.").

Dorchester County Assessor at page 461

The method in which the Dorchester County Tax Assessor redefined "agricultural" to increase tax collection is identical to the method in which the Department of Revenue redefines "boat" and "excursion" and "sight-seeing" and "private charter" to increase collections here: "In denying the eleven parcels the "agricultural use" classification, the Assessor, by his own admission

made a number of assumptions about the application of the Middleton Oaks Covenant and Restrictions to the parcels." *Dorchester County Tax Assessor v. Middleton Place Equestrian Center, LLC* at page 465. Both the Dorchester County Assessor and the Department of Revenue each rely on "assumptions" that are not contained in the governing statute, and this dispute at least raises a genuine issue of material fact as to legislative intent. See *Schmidt v. Courtney and Kemper Sports*, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003) and numerous citations set forth above on page 2: "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law."

Because there is nothing ambiguous about the General Assembly's decision to exclude boats from charging admissions or amusement taxes, the Order under review is controlled by an error of law **especially at the summary judgment stage**. "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Redwend Ltd. P'ship*, 354 S.C. at 468, 581 S.E.2d at 501

4. Ambiguous vs. Precise

Finally, the Order under review is on both sides of the debate of whether § 12-21-2420 is ambiguous or precise. If it is precise (and it is), then the Department cannot impose an admissions/amusement tax on Petitioner because the statute is clear and because Petitioner's entire business is connected to sightseeing/excursion/private charter on a boat, and as set forth above, the Department does not possess veto power over the General Assembly. The parties can debate whether an eco-tour or dolphin watching is an "excursion" or "sight-seeing" or "private charter" until the end of time, another distinction without a difference because the General Assembly exempts sight-seeing activities on **boats**. On the other hand, if the Court believes the question being asked is ambiguous, then the Court must resort to the ordinary rules of statutory construction

to answer the question whether "para sailing" is a species of the genus "sight-seeing," "excursion," or "private charter," which is not something that can be determined at summary judgment. When the Court writes on page 4 of the Order under review that "[t]he parties do not dispute any of the material facts of this case," that statement begs the question before the Court because the question is not how expansive can the Department stretch ordinary language but whether the General Assembly spoke clearly or not. The parties do agree that all of Tidalwave's activities take place on the water and involve sight-seeing, excursion, and private charter. The dispute is whether parasailing is a distinct activity excluded by the definitions of "sight-seeing" or "excursion" or "private charter," and on this question, the parties could not be further apart. As a result the "conclusions or inferences to be drawn from them" is widely divergent, which makes summary judgment for the Department of Revenue improper. See *Redwend Ltd. P'ship*, 354 S.C. at 468, 581 S.E.2d at 501; *Baril,* 352 S.C. at 280, 573 S.E.2d at 835; *Hall*, 349 S.C. at 173-74, 561 S.E.2d at 656; *Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001); *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000); see also *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003). The parties agree what the statute clearly and unambiguously says and what Petitioner's operation is, but they are miles apart on the Department of Revenue's assumption that "sight-seeing," "excursion," and/or "private charter excludes parasailing. The Petitioner asks nothing more than to apply the words in their plain and ordinary meaning, while the Department of Revenue asserts it can expand the definition beyond plain and ordinary because everyone must defer to them, a principle of language parodied by the logician Charles Dodgson.

"When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.'

"The question is,' said Alice, 'whether you can make words mean so many different things.'

Another divergent fact preventing summary judgment, not addressed in the Order under review, is the undisputed fact that the Department of Revenue has changed its legal position. The Petitioner has operated the business since 2005 without collecting an admissions tax, and the Department never demanded an admissions/amusement tax until 2018, even after conducting an audit of the Petitioner in 2014. This acquiescence and change of legal position is a fact the Order under review fails to address or to construe. It is the Department's responsibility to speak clearly. See § 12-58-50(B), which places the responsibility on the department as regards "uniform administration including, but not limited to: (1) changes in statute or department regulations. . ." Whatever motivated the Department to change its legal position after 13 years is both unknown and a genuine issue of material fact.

Finally, the power to tax is a limited one. Since 1819 in *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819), generations of judges and lawyers have trained on Daniel Webster's famous observation that the power to tax is the power to destroy, which is why the U. S. Supreme Court put a firm hand on the power to tax 225 years ago. Here, the Order under review grants unlimited power to the Department of Revenue to tax by the simple expedient of expanding definitions, or as this Court said in *Dorchester County Tax Assessor, ibid.*, by making assumptions. In *Home Medical Systems, Inc.*, there was no genuine issue of material fact that the devices sold by the taxpayer did not require a prescription, and the General Assembly required a prescription as a statutory prerequisite under the tax statute being evaluated. Likewise, the question raised in *Alltel*—is the taxpayer a telephone company—is almost identical to the definitional question being raised here—is parasailing sight-seeing, excursion, or private charter? The Department's answer is as unsatisfying as Humpty Dumpty's answer. The Order under review grants summary judgment to the Department of Revenue on the ground that taxpayers must pay defer to the

Agency's creation of definitions no matter what, but South Carolina's rules of statutory construction—and the limitation on agency action—do not grant to the Department the power to rewrite legislation to increase revenue collection. The Department must give words their ordinary and plain meaning. If the General Assembly wanted to define parasailing, it was free to do so, but what is an undisputed fact is that all of Tidalwave's activities take place on a **boat**, which is as far as this inquiry need go because clearly parasailing is excursion, sight-seeing, and private charter, and if it is not, the Court fails to say how or why, relying entirely on the dubious proposition that the Department of Revenue cannot be questioned.

Conclusion

Whether the Court chooses to reevaluate its legal conclusions or not, it is indisputable that the rules of statutory construction demand the same application no matter who is standing before the Court, and whether § 12-21-2420, S. C. Code, ann., is precise or ambiguous, the outcome is the same. The Order under review errs in granting super veto power to the Department of Revenue. The Petitioner respectfully submits that there is at least a genuine issue of material fact as to whether its activities are covered by Exemption 13 in the statute, § 12-21-2420. The Petitioner prays that the Court reconsider its decision and amend or alter its April 18, 2024, Order to find the Petitioner has raised at least a genuine issue of material fact.

Respectfully submitted,

April 24, 2024

/s/Thomas R. Goldstein
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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, L.L.C., d/b/a Tidalwave Watersports, Petitioner, v. South Carolina Department of Revenue, Respondent.	)	Docket No. 23-ALJ-17-0362-CC **CERTIFICATE OF SERVICE**

I certify that I served the within Motion For Reconsideration upon opposing counsel by mailing a copy properly addressed with sufficient postage affixed thereto to Marcus D. Antley, III, at 300A Outlet Pointe Boulevard, Columbia, S. C. 29210 and via electronic mail to marcus.antley@dor.sc.gov this 24th day of April, 2024.

April 24, 2024

/s/Thomas R. Goldstein
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STATE OF SOUTH CAROLINA
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May 6, 2024

VIA ELECTRONIC MAIL AND US MAIL
The Honorable Deborah Brooks Durden
Administrative Law Judge
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: Watertoys, LLC, d/b/a Tidalwave Watersports vs. South Carolina Department of Revenue
Docket No.: 23-ALJ-17-0362-CC
DOR File No.: 230028

Dear Judge Durden:

Enclosed please find the Department's Response to Petitioner's Motion for Reconsideration in the above-captioned matter. Additionally, I have enclosed a Proof of Service for the same.

If you have any questions or need any further information from me, please do not hesitate to contact me at 803.898.5623 or Marcus.Antley@dor.sc.gov. If I am not available, you can reach my paralegal, Jennifer Gamble, at 803.898.5031or Jennifer.Gamble@dor.sc.gov.

Sincerely,

Marcus D. Antley, III, Esquire

Enclosures
MDA/jdg

cc: Thomas R. Goldstein, Esquire

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, LLC, d/b/a Tidalwave Watersports, Petitioner, vs. South Carolina Department of Revenue, Respondent.	DOCKET NO. 23-ALJ-17-0362-CC **THE DEPARTMENT'S RESPONSE TO PETITIONER'S MOTION FOR RECONSIDERATION**

Pursuant to SCALC Rules 29(D)(1), Respondent, South Carolina Department of Revenue (Department), submits this response to Watertoys, LLC, d/b/a Tidalwave Watersports' (Petitioner's) Motion for Reconsideration. The Department incorporates by reference the arguments in its Motion for Summary Judgment, Response to Petitioner's Motion for Summary Judgment, and Reply to Petitioner's Response to the Department's Motion for Summary Judgment. As discussed below, the Department requests that the Court deny Petitioner's Motion for Reconsideration.

ARGUMENT

I. Petitioner fails to meet the appropriate legal threshold for a motion to reconsider.

SCALC Rule 29(D) permits a party to move for reconsideration of a final decision of an administrative law judge in a contested case, subject to the grounds for relief in Rule 59, SCRCP. A Rule 59(e) motion is "an extraordinary remedy that should be applied sparingly." *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 378 (4th Cir. 2012).[1] Thus, "[t]he

[1] South Carolina's appellate courts have not addressed in detail the standards governing a motion for reconsideration under Rule 59(e). However, the Notes for Rule 59, SCRCP, provide that "This

standard governing motions to reconsider are strict." *Greenville Cnty. Republican Party Exec. Comm. v. South Carolina*, No. 6:10–cv–01407–JMC, 2011 WL 2910360, at 1 (D.S.C. July 18, 2011). A court may only alter or amend its judgment if the movant shows: (1) an intervening change in the controlling law; (2) new evidence that was not available at the time of the ruling; or (3) that there has been a clear error of law or a manifest injustice. *Robinson v. Wix Filtration Corp.*, 599 F.3d 403, 407 (4th Cir. 2010). Petitioner's Motion fails to show any of these three requirements.

Instead, Petitioner's Motion rehashes the same issues it raised in its Motion for Summary Judgment and Response to the Department's Motion for Summary Judgment, and upon which this Court has already ruled. The Motion should be denied because this is an improper basis for a motion to reconsider. *In re Building Materials Corp. of America Asphalt Roofing Shingle Products Liability Litigation*, 2013 WL 3337833, 2 (D.S.C. 2013) ("It is inappropriate to use a motion to reconsider as a means to rehash issues upon which the court has already ruled merely because the movant disagrees with the court's ruling. Accordingly, to prevail, the moving party must advance a legal basis for its motion beyond simply disagreeing with the court's judgment.")

II. The Court applied the correct summary judgment standard.

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 &*

Rule 59 is substantially the Federal Rule." *See also*, *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004) ("Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical."). Thus, "[s]ince our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure." *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991).

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). 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). "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).

Petitioner again attempts to insert immaterial and unsupported facts from outside of the Periods at Issue. Whether Petitioner operated para sail rides since 2005 without filing admission tax returns is not relevant here. However, if true, Petitioner has potentially opened itself to a separate admissions tax audit of years predating the Periods at Issue. *See* S.C. Code Ann. § 12-54-85(C)(2) (2014) (the general time limitation of thirty-six months does not apply if "the taxpayer failed to file a return or document as required by law"). Regardless, the Department asks the Court

strike these unsupported and immaterial facts from outside the Periods at Issue contained in Petitioner's Motion for Reconsideration.

The material facts in this case are not in dispute. Petitioner concedes such when it filed its Motion for Summary Judgment. Petitioner now argues that summary judgment is a drastic remedy and a genuine issue of material is present only because the Court ruled against Petitioner. The parties stipulated to the material facts, which are straightforward and leave little, if any, room for interpretation. Consequently, even if those facts are viewed in the light most favorable to Petitioner, the Department is entitled to judgment as a matter of law. In the interest of judicial economy, the services of a fact finder are unnecessary. The only question before the Court is a question of law—whether section 12-21-2420(13) exempts para sail rides from admissions tax. Because section 12-21-2420(13) does not exempt para sail rides from admissions tax, the Court correctly held as a matter of law that the Department was entitled to judgment in its favor.

III. The Department's interpretation of Section 12-21-2420(13) is entitled to deference.

"[C]ourts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations 'unless there is a compelling reason to differ.'" *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014). The General Assembly entrusted the Department with administration of section 12-21-2420. *See* S.C. Code Ann. § 12-21-10 ("The department shall administer and enforce the taxes imposed by [chapter 21]…"). Because there is no compelling reason to differ from the Department's interpretation, it is entitled to deference.[2]

[2] Contrary to Petitioner's bald accusations, the Department is concerned about increasing compliance, not collections.

Petitioner conflates deference to an agency's interpretation of the law with deference to an agency's factual findings. Petitioner's confusion is illustrated by its analogy of a criminal charge of driving too fast for conditions where a motorist and a police officer disagree over what the conditions (i.e. material facts) were. However, the Court properly followed the agency deference case law regarding statutory construction. Further, the Court did not and could not have improperly deferred to the Department's factual findings because the material facts are not in dispute. Therefore, the Court correctly deferred to the Department's interpretation of the section 12-21-2420(13) exemption.

IV. Petitioner's position is contrary to long-established state and federal law regarding the interpretation of exemption statutes.

Petitioner persists in its confusion over the clearly distinct treatment of tax imposition statutes and tax exemption statutes under the rules of statutory construction. Both the Department and the Court cite multiple cases that support the rule that tax exemption statutes must be strictly construed against the taxpayer. Summarizing the rule again:

> Courts ordinarily give tax exemptions a strict construction, against the taxpayer and in favor of the taxing power. Quite simply..., "Taxation is the rule and exemption therefrom the exception; and the claimant of such an exemption must show his right thereto by evidence which leaves the question free from doubt .... The claimant for an exemption must show that his demand is within the letter as well as the spirit of the law." This rule of strict construction derives from the same rationale supporting strict construction of positive revenue laws, that the burdens of taxation should be distributed equally and fairly among members of society. § 66:9. Tax exemptions, 3A Sutherland Statutory Construction § 66:9 (8th ed.).

The Court's Order Granting the Department's Motion for Summary Judgment explains the correct rules of statutory construction that Petitioner dismissively describes as based on "a line of cases."

However, Petitioner's flawed logic must succumb to the long-established law of narrowly and strictly construing an exemption statute against the taxpayer.

Under the guise of statutory construction, Petitioner seeks to rewrite the section 12-21-2420(13) to add parasailing the exclusive list provided by the General Assembly. Through the Court, Petitioner wants to a create an admissions tax exemption for parasailing—i.e. legislate—where no such exemption exists. Petitioner asks this Court to commit the same reversible error as in the *Home Med. Systems* case. *Home Med. Sys., Inc. v. S.C. Dep't of Revenue*, 382 S.C. 556, 565, 677 S.E.2d 582, 587 (2009) ("we hold that the ALC erred in applying its own, broad definition of prosthetic device to find that Taxpayer's durable products were prosthetic devices"). Specifically, Petitioner requests that the Court apply its own, broad definition of sight-seeing, excursion, and private charter to find that Petitioner's parasailing rides are sight-seeing, excursion, and private charter. However, the Court correctly applied the law as written and should deny Petitioner's Motion for Reconsideration.

CONCLUSION

Under the undisputed material facts, the Court appropriately granted the Department's Motion for Summary Judgment as a matter of law. Therefore, the Department asks that this Court deny Petitioner's Motion for Reconsideration.

{Signature on following page}

Respectfully submitted,

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May 6, 2024

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, LLC, d/b/a Tidalwave Watersports, Petitioner, vs. South Carolina Department of Revenue, Respondent.	Docket No.: 23-ALJ-17-0362-CC **PROOF OF SERVICE**

I, the undersigned employee of the South Carolina Department of Revenue, do hereby certify that I have served a copy of the foregoing, the Department's Response to Petitioner's Motion for Reconsideration, for the above-captioned matter by electronic mail and by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

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May 7, 2024

Hon. Deborah Brooks Durden
Administrative Law Judge
Edgar A. Brown Building
1205 Pendleton Street
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Columbia, S. C. 29201

RE: Dept. of Revenue Case I.D. 0-001-559-662
Tidalwave Watersports Admissions Tax Appeal, Docket No. 23-ALJ-17-0362-CC
D.O.R. File No.: 230028

Dear Judge Durden,

I enclose an original and an extra copy of the Petitioner's Reply to the Department of Revenue's Return (and an extra copy to return a filed copy) along with an original and an extra copy of an affidavit from Michael Fiem. (I assume I am not required to file a motion to file this affidavit, but if that is what is required, please advise, and I will send a motion along with a $50.00 filing fee.) By copy of this letter, I am providing a copy to opposing counsel both electronically and by regular mail. Please let me know if anything further is required to perfect this filing. With kind regards, I am

Very truly yours,

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein

enclosure: Reply to Department's Return to Motion for Reconsideration, affidavit, return envelope

cc:
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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, L.L.C., d/b/a Tidalwave Watersports, Petitioner, v. South Carolina Department of Revenue, Respondent.	)	Docket No. 23-ALJ-17-0362-CC **REPLY TO D.O.R.'S RESPONSE TO PETITIONER'S MOTION FOR RECONSIDERATION**

1. The South Carolina Department of Revenue does not understand the *South Carolina Rules of Civil Procedure*, Rule 59 Standard

It is astonishing that the Department of Revenue forces a Petitioner to respond to the bogus allegation that its Rule 59 motion is improper. The Department cites a Fourth Circuit case for the proposition that Reconsideration motions are disfavored, citing *Mayfield v. Nat'l Ass'n for Stock Car Racing, Inc.*, 674 F.3d 369 (4th Cir. 2012), and for the assertion that such applications demand a strict application of the rules. Not satisfied with just one introduction of an unproductive discussion, the Department of Revenue goes even further and asserts Petitioner has filed an improper motion based on an unpublished trial court decision.[1] These are astonishing assertions for two reasons:

First, the Fourth Circuit in *Mayfield* held that it would have granted the motion for reconsideration because the District Court erred in not allowing the plaintiff to amend. However,

[1] "It is inappropriate to use a motion to reconsider as a means to rehash issues upon which the court has already ruled. . ." *In re Building Materials Corp. of American Asphalt Roofing Shingle Products Liability Litigation*, District Court 2013

the Fourth Circuit went on to explain that it was affirming the denial because the amendment would have been futile, and the Court was put out with the plaintiff's numerous dilatory filings.

Second, and more important, with all due respect to the federal district court, South Carolina has a well-developed body of law on Rule 59. The Court of Appeals and the Supreme Court have handed down hundreds if not thousands of cases refusing to address an issue on appeal because counsel failed to ask for reconsideration. The well-spring of Rule 59 practice in this state is *Elam v. South Carolina* 361 S.C. 9, 602 S.E.2d 772 (2004), which refutes the Department's misunderstanding about the purpose of Rule 59:

> We believe this view of the propriety of post-trial motions to be the correct approach for several reasons. First, it is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court "alter or amend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments. A motion under Rule 59(e) long has been viewed as "motion for reconsideration" despite the absence of those words from the rule. **Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented**. *See, e.g., Arnold v. State,* 309 S.C. 157, 420 S.E.2d 834 (1992) ("purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the judge to reconsider matters properly encompassed in a decision on the merits"); *Curcio v. Caterpillar, Inc.,* 356 S.C. 316, 585 S.E.2d 272 (2003) (an example of the many cases in which trial and appellate courts describe a Rule 59(e) motion as a "motion to reconsider" or "motion for reconsideration"); James Flanagan, *South Carolina Civil Procedure* 474-475 (2d ed. 1996). There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity.
>
> Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical. Neither contains any provision for a motion for "reconsideration." However, federal courts consider it appropriate for a party to make a "motion for reconsideration" under Rule 59(e) even though the rule mentions only a "motion to alter or amend a judgment." This view holds true even when a party mislabels a post-trial motion. *See Blair v. Equifax Check Services, Inc.,* 181 F.3d 832, 837 (7th Cir. 1999) (Rule 4(a)(4), FRAP, restates long-accepted practice of considering motions for reconsideration, a practice independent of any appellate rule); 12 *Moore's Federal Practice* § 59.30[2][a] and [7]; 11 Wright, Miller Kane § 2810.1; 20 *Moore's Federal Practice* §§ 304.13[2] and 304.13[4][b] (3d ed. 2003). "[T]he wisdom of giving district courts the opportunity promptly to correct their own alleged errors is all the justification needed" for the practice of freely allowing a motion for reconsideration. *Blair,* 181 F.3d at 837. (emphasis added)

Elam v. South Carolina Department of Transportation, 361 S.C. 9, 21-22, 602 S.E.2d 772 (2004)

Therefore, when the Department of Revenue suggests a trial court's unpublished decision[2] establishes civil procedure in South Carolina instead of the South Carolina Supreme Court, the Department grounds its procedural argument in pure chutzpah. With all due respect to a district trial court, its decision is in direct conflict with controlling South Carolina precedent. So, if he Department wishes to mischaracterize Petitioner's arguments as "rehashing," it is free to do so, but even if this were the case, there is nothing improper by directing the Court to allegations of error, and moreover, it is a prerequisite to preserve issues on appeal.

2. The error in invoking the "drastic remedy" of summary judgment is failing to construe facts and inferences properly, which is now compounded by a failure to permit the Petitioner an opportunity to be heard.

Petitioner never quarreled with the Court's recitation of the summary judgment. Instead, Petitioner pointed out that the Court followed the summary judgment standard approximately halfway, never identifying, let alone addressing, the Court's obligation to construe facts and the inferences reasonably deducible from them in the light most favorable to Petitioner as the non-moving party, a defect the Department of Revenue neither approaches nor discusses. The failure to construe evidence in the proper light for summary judgment is compounded by the distressing error that the Court prevented Petitioner an opportunity even to address the Court. While the practice of law is always evolving, the concept of ending a case without an opportunity to address the Court is unknown to Petitioner's counsel in a career beginning in 1982.

In *Dedes v. Strickland*, 307 S.C. 152, 414 S.E.2d 132 (1992), the Supreme Court of South Carolina reversed a grant of summary judgment because the non-moving party did not receive ten-day's notice of the date and time of the hearing on summary judgment even though the actual hearing took place more than ten days later. The Court held:

---

[2] *In re Building Materials Corp. of American Asphalt Roofing Shingle Products Liability Litigation*, (D.S.C. 2013)

We find that the appellant did not receive timely notice of the motion hearing as required by Rule 6(d), SCRCP, that he was wrongfully denied the opportunity to submit affidavits, documents, or testimony opposing respondent's motion for summary judgment, and the rights of the appellant were prejudiced thereby. *Dedes* at page 134.

The prejudice to this Petitioner is much greater. Contrary to over four decades of trial experience, the Court threw Petitioner out of court without even allowing him to address the Court, and without notice of a hearing date or an opportunity to be heard, the Court's disposal of the case without allowing Petitioner to participate "wrongfully denied [Petitioner] the opportunity to submit affidavits, documents, or testimony opposing respondent's motion for summary judgment, and the rights of the appellant were prejudiced thereby."

3. The Department of Revenue does not have the authority to veto the General Assembly.

The Department once again mischaracterizes Petitioner's legal position into a straw man, which is an easy task when, as set forth in the preceding section, the Court disallows the parties an opportunity to appear and debate the issues. Without the give and take of vigorous debate provided in courtrooms by lawyers, the administration of justice becomes the province of Chat GBT or other algorithms. The Petitioner is not challenging the Department's prerogative to interpret its own "regulations." D.O.R. "regulations are not the issue before the Court. What is before the Court is a statute duly enacted into law by the General Assembly, and thus the outcome of this case is determined by the Court's application of the universal rules of statutory construction. Petitioner agrees the Department has the duty and obligation to "administer and enforce the taxes imposed by [chapter 21]," (Department's Return at page 7), but this power does not include the veto of the General Assembly's statutes, and it is at least a genuine issue of material fact that the Department has done exactly that. (The Department also adds a footnote that the Department is only interested in increasing compliance, not collections which is inconsistent with the issue arising for the first

time in 2018, combined with constant drumbeat of threats of interest and penalties. As my recently deceased law partner often said: "the distinction is based on whose ox is being gored.)

In short, the Department's "interpretation" of § 12-21-2420 is limited by the rules of statutory interpretation, and the Department is not free to create a restrictive definition of "parasailing" out of whole cloth.

4. The Rules of Statutory Construction and the Summary Judgment Standard determine the outcome.

The Department's fourth argument is a repetition of its third. Once again it mischaracterizes the Petitioner's argument as a straw man: "Petitioner requests that the Court apply its own, broad definition of sight-seeing, excursion, and private charter." (Department's Return at page 6. Once again, the Department seems to have forgotten that the Court threw the Petitioner out on summary judgment, not after a plenary hearing on the merits. Not only did the Court fail to construe the facts and inferences in the light most favorable to the Petitioner as the non-moving party, but also prevented the Petitioner from even being heard in open court. The closest the Department can come to authority for its demand to be arbiter of language is Humpty-Dumpty. Words do have meanings, and the General Assembly chose the words:

Excursion

Sight-seeing

Private charter

as being exempt if conducted on the water. With a wave of a Charles Dodgson like pen, the Department claims the right to rewrite these definitions in derogation of their plain and ordinary meaning, and that is a power the Department does not possess. Even the Department asks this Court to ignore that from 1996 until the end of 2018, it agreed with Petitioner's legal position, so

what changed? This change in legal position is alone sufficient to create a genuine issue of material fact. The Petitioner has raised at least a genuine issue of material fact on these issues and deserves at least an opportunity to present its case and allow the issue to be fully and fairly debated.

Based on the foregoing, the Petitioner respectfully asks the Court to vacate its Order of Summary Judgment and grant the Petitioner an opportunity to be heard.

Respectfully submitted,

May 7, 2024

/s/Thomas R. Goldstein
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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, L.L.C., d/b/a Tidalwave Watersports, Petitioner, v. South Carolina Department of Revenue, Respondent.	)	Docket No. 23-ALJ-17-0362-CC **CERTIFICATE OF SERVICE**

I certify that I served the within Reply to Department of Revenue's Return to Petitioner's Motion for Reconsideration upon opposing counsel by mailing a copy properly addressed with sufficient postage affixed thereto to Marcus D. Antley, III, at 300A Outlet Pointe Boulevard, Columbia, S. C. 29210 and via electronic mail to marcus.antley@dor.sc.gov this 7th day of May, 2024.

May 7, 2024

/s/Thomas R. Goldstein
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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, L.L.C., d/b/a Tidalwave Watersports, Petitioner, v. South Carolina Department of Revenue, Respondent.	)	Docket No. 23-ALJ-17-0362-CC **AFFIDAVIT OF MICHAEL FIEM**

Personally appeared me, Michael Fiem, who being duly sworn does depose and say:

I am Michael Fiem, and one of the owners and operators of Tidalwave Water Sports, and I am the person responsible for all bookkeeping, tax-filing, and business related duties, including contact with the Department of Revenue since 2005. Because of this dispute and other reasons, Tidalwave is in the process of closing down, and looking at bankruptcy options. 2024 will be the final year for Tidalwave tax returns for proceeds of equipment asset liquidation sales only. Tidalwave has no operation income for 2024.

Tidalwave began business in 2005, when I purchased it as a going concern. The original Tidalwave began in 1996.

We provided sightseeing charters, excursion/tours as set forth in the Stipulation of Facts.

Prior to closing down in 2023, we offered sightseeing, charter excursion tours, eco tours, and chartered parasailing. If a passenger wished to go aloft, we launched him or her from the boat while we were underway and we returned the passenger to the deck of the boat while underway. In other words, we did not offer parasailing rides like other companies in Myrtle Beach and other

places operated. (There are even other companies that offer parasailing using a motor vehicle on land. See photo below discussed more fully below.)

Participation in Tidalwave's parasailing is only a part of a minimum 2-hour excursion, charter, tour, but other passengers take in sights either seated or standing, and we take passengers on tours whether one or more elect to parasail. Each passenger pays the same fee whether he or she goes aloft or not (although we did offer a discount for parents who insisted that they be present to monitor their children). Even though we were in business since 2005, and audited by the Department of Revenue in 2014, it was not until late 2018 that the Department of Revenue made for the first time, a demand that we collect an admissions/amusement tax for parasailing passengers. The Department has never grasped that what our company specifically offered is different from other parasailing offerings. Tidalwave's activity is a minimum 2-hour private sightseeing, excursion charter, which may or may not include parasailing. That decision is left entirely to the paying customer, and a typical charter usually does not have 100% parasailing participation. Passengers pay the same amount whether they go aloft or remain seated during the entire charter. Every charter included a discussion of the sights, history, marine life, plant life, bird life, *etc.*

Finally, as mentioned above, the Department of Revenue audited us in 2014 and found some deficiencies unrelated to admissions/amusement tax, but did not claim we were supposed to be collecting an admissions/amusement tax, and our operation did not change in any way from 2014 until we closed up in 2023. The Department of Revenue has never identified a definition of para-sailing other than its unsupported assertion. The Department of Revenue fails to acknowledge the undisputed fact that the activity of parasailing can be offered/conducted in significantly different manners. For example, parasailing is offered in the Midwest as a carnival

ride behind a motor vehicle. Closer to home, companies in South Carolina have launched customers from the beach and landed them on the beach, all without ever being a passenger on a vessel or participating in a minimum 2-hour charter, excursion, sightseeing tour, which distinguished our operation from others. See sample photo:

Simply stated, we offered charter tours that included sightseeing and educational components. We offered charter tours, which is why Exemption 13 specifically applied to our operation.

Our operation has not materially changed since 2005, and all our activities took place on the water.

Further your deponent says not.

Michael Fiem

SWORN TO BEFORE ME THIS

6th day of May, 2024

Notary Public for South Carolina
My Commission expires: April 22, 2030
Thomas R. Goldstein

RECEIVED
Jun 10 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM S. C. ADMINISTRATIVE LAW COURT

Debra B. Durden, Judge

Administrative Law Court Docket No.: 23-ALJ-17-0362-CC

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

v.

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

NOTICE OF APPEAL

Watertoys, L.L.C. d/b/a Tidalwave Watersports appeals the orders of the Honorable Debra Durden dated April 18, 2024 and May 14, 2024.

June 7, 2024

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CERTIFICATE OF SERVICE

I certify that I served the within Notice of Appeal and Appeal Bond surety upon counsel for the Department of Revenue by mailing a copy properly addressed with sufficient postage affixed thereto to Marcus D. Antley, III, at 300A Outlet Pointe Boulevard, Columbia, S. C. 29210 and via electronic mail to marcus.antley@dor.sc.gov this 10th day of June, 2024.

June 10, 2024

/s/Thomas R. Goldstein
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June 7, 2024

Hon. Jenny Abbot Kitchings
Clerk of Court
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P. O. Box 11629
Columbia, South Carolina 29211

RE: Dept. of Revenue Case I.D. 0-001-559-662
Administrative Law Court Docket No. 23-ALJ-17-0362-CC
D.O.R. File No.: 230028

Dear Ms. Kitchings,

I enclose an original and an extra copy of a Notice of Appeal along with an Appeal Bond and certificate of mailing. I also enclose our firm's check in the amount of $250.00 to cover the filing fee. Would you be so kind as to file the original and return a filed copy in the envelope provided? By copy of this letter, I am providing a copy of the same documents to the Administrative Law Court and to opposing counsel by regular mail and by electronic means. Please let me know if you require anything further to perfect this filing. I thank you in advance for your attention to this. With kind regards, I am

Very truly yours,

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein

enclosure: Notice of Appeal, Appeal Bond, check No. 20711, return envelope

cc:
Hon. Jana E. Shealy,
Clerk of Court
Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street
Columbia, S. C. 29201

Mr. Marcus D. Antley, III
Office of General Counsel
S. C. Dept. of Revenue
300A Outlet Pointe Boulevard
Columbia, S. C. 29210
Marcus.Antley@dor.sc.gov

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM S. C. ADMINISTRATIVE LAW COURT

Debra B. Durden, Judge

Administrative Law Court Docket No.: 23-ALJ-17-0362-CC

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

v.

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

APPEAL BOND & PERSONAL SURETY

In accordance with § 12-60-3370, S. C. Code, ann.,[1] we, Michael Fiem and Mark Fiem, principals of the Appellant, Watertoys, L.L.C. d/b/a as Tidalwave Watersports acknowledge ourselves bound and indebted unto the Respondent, Department of Revenue in the principal amount of $33,296.00, subject to the following conditions:

That is in the event the Appellant, Watertoys, L.L.C. d/b/a Tidalwave Watersports, should fail to have this appeal disposed of in its favor, or should the appeal be dismissed, the Appellant shall pay the principle amount of the disputed taxes and an additional amount as interest as

[1] 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.

calculated in accordance with South Carolina law as well as any costs awarded in consequence of this action as provided by the *South Carolina Appellate Court Rules*,

Witness # 1

Watertoys, L.L.C. d/b/a Tidalwave Watersports
By its managing member, Michael Fiem

Witness #2

We unconditionally guarantee the above described payment in the event the appeal is resolved in favor of the Department of Revenue or if the appeal is otherwise dismissed.

Michael Fiem, Principal and Member

Mark Fiem, Principal and Member

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM S. C. ADMINISTRATIVE LAW COURT

Debra B. Durden, Judge

Administrative Law Court Docket No.: 23-ALJ-17-0362-CC

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

v.

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

AMENDED APPEAL BOND & PERSONAL SURETY

In accordance with § 12-60-3370, S. C. Code, ann.,[1] we, Michael Fiem and Mark Fiem, principals of the Appellant, Watertoys, L.L.C. d/b/a as Tidalwave Watersports acknowledge ourselves bound and indebted unto the Respondent, Department of Revenue in the principal amount of $33,998.00, subject to the following conditions:

That is in the event the Appellant, Watertoys, L.L.C. d/b/a Tidalwave Watersports, should fail to have this appeal disposed of in its favor, or should the appeal be dismissed, the Appellant shall pay the principle amount of the disputed taxes and an additional amount as interest as

[1] 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.

calculated in accordance with South Carolina law as well as any costs awarded in consequence of this action as provided by the *South Carolina Appellate Court Rules*,

Witness # 1

Watertoys, L.L.C. d/b/a Tidalwave Watersports
By its managing member, Michael Fiem

Witness #2

We unconditionally guarantee the above described payment in the event the appeal is resolved in favor of the Department of Revenue or if the appeal is otherwise dismissed.

Michael Fiem, Principal and Member

Mark Fiem, Principal and Member

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, LLC, d/b/a Tidalwave Watersports, Petitioner, v. South Carolina Department of Revenue, Respondent.	)	Appellate Tracking No.: 2024-000962 Docket No. 23-ALJ-17-0362-CC

MEMORANDUM OF LAW ON REMAND

Question Presented

On June 10, 2024, the taxpayer filed a notice of appeal accompanied by an appeal bond with an irrevocable cash surety deposit of $33,296.00 into the *I.O.L.T.A.* account of taxpayer's counsel. On June 19, 2024, the Department of Revenue filed a motion to dismiss with prejudice raising several grounds attacking the timeliness and sufficiency of the appeal bond. The Department of Revenue asserted the appeal bond was not timely because it was not filed **before** the Notice of Appeal, that it did not include interest, and that the June 10th deposit was $702.00 short (or 2%) of the full amount of admissions/amusement taxes the Department alleges are due. The taxpayer responded by filing a Return, including an amended appeal bond verifying the taxpayer deposited an additional $702.00 bringing the total deposit to $33,998.00, the full amount of the admissions/amusement tax the Department alleges is due. The Court of Appeals denied the motion to dismiss and remanded the case with instructions to determine the appropriate amount of

the appeal bond: "The matter is hereby remanded to the Administrative Law Court for an Order specifying the amount **of taxes** Watertoys must pay **and/or** the amount of the bond Watertoys must post pursuant to § 12-60-3370." (emphasis added) The taxpayer has fully complied with the appeal bond statute, § 12-60-3370, S. C. Code, ann., by depositing the full amount of the alleged taxes into escrow as surety and posting an irrevocable pledge committing the funds to the Department of Revenue in the event taxpayer does not prevail. As a result, the taxpayer has complied fully with the statute, and this Court is not required to do more than confirm the amount deposited, the sufficiency of the appeal bond, and allow the Court of Appeals to examine the merits of the appeal.

Procedural History

On June 7, 2024, the Appellant filed a Notice of Appeal along with a properly executed appeal bond, accompanied with a deposit of $33,296.00 into counsel's *I.O.L.T.A.* escrow account. The taxpayer simultaneously[1] filed an Appeal Bond, verifying the deposit under oath and irrevocably pledging the deposit as security for the disputed amount, citing § 12-60-3370, S. C. Code, ann., which says: "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." (emphasis added)

After Appellant deposited the funds and filed the Appeal Bond on June 10th (mailed on the 7th, received on the 10th), 12 days later, on June 19, 2024, without a pre-filing consultation,[2] the

[1] The Department alleged the simultaneous filing prevented appellate court jurisdiction vesting because the statute says the appeal bond must be filed **before** the Notice of Appeal, not simultaneously. Taxpayer assumes this issue is no longer extant because the Court of Appeals remanded the case as to amount only.

[2] Appellate rules do not require pre-filing consultation as required at the trial level. However, no rule prevents or discourages consultation, and courtesy of advance notice would have resolved the $702.00 shortfall and fosters cooperation, promoting judicial economy. Instead, the Department laid in wait until the 30-day appeal period expired on June 13, 2024, and then asserted lack of appellate jurisdiction. Such sharp practice casts a pall on lawyers everywhere and conflicts with the Department's published mission statement.

Department of Revenue asked the Court of Appeals to dismiss the appeal with prejudice for alleged deficiencies. The Department of Revenue asserted, falsely, that the taxpayer did not file an appeal bond, but later in its motion to dismiss, modified its assertion to assert the filed appeal bond was either untimely, deficient or both. The Department of Revenue contended that the deficiencies defeated appellate jurisdiction and asked the Court of Appeals to dismiss the appeal **with prejudice**. The Court of Appeals disagreed but remanded the appeal bond back to this Court to set the amount of the bond as quoted on page 1.

Aside from the appeal being obviously timely filed, the Department alleged first the deposit was $702.00 short of the amount of taxes the Department of Revenue alleges are due. Taxpayer's counsel recognized the discrepancy and immediately corrected the alleged deficiency by asking the taxpayer to deposit an additional $702.00, after which he filed an Amended Appeal Bond on June 25, 2024, verifying the taxpayer brought the cash surety to the full amount of taxes the Department alleges are due: $33,998.00. It is an undisputable fact that this amount is on deposit in an *I.O.L.T.A.* account and irrevocably pledged to the Department as surety. (The Department refuses to stipulate that this amount is on deposit, so taxpayer will provide proof of deposit to the Court, another example of unnecessarily burdening the Court.)

Second, the Department alleged the taxpayer waived its right to appeal because the deposit does not include interest the Department alleges is due. As set forth above, on July 18, 2024, the Court of Appeals denied the motion to dismiss and remanded the amount of the appeal bond to this Court to decide, and the question of the amount of the appeal bond is now before this Court.

Right to Appeal

Before turning to an analysis of the Department's allegations, it is important to recall the right to judicial review is a core, essential right of every citizen. Article I § 9 of the South Carolina

Constitution says: "All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained." Every first-semester law student learns on the first day of class that judicial review applies to everyone, *Marbury v. Madison*, 5 U.S. 137 (1803). A few days later students learn that judicial review includes the due process right to be heard in a meaningful manner at a meaningful time even for trivial legal disputes such as replevin of furniture. *Fuentes v. Shevin*, 407 U.S. 67 (1972). The Department's hyper-aggressive effort to prevent the taxpayer's access to judicial review highlights the importance of courts to prevent government overreach.

Consistent with the fundamental right of access to the courts, the General Assembly provides the mechanism for appeals from Common Pleas and General Sessions in Title 18, Chapter 9. Appeals from the Administrative Law Court are almost identical, but they are governed by the General Assembly's procedure set out in Title 1, Chapter 23, § 610. Subsection A says:

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

There are no South Carolina cases defining "by right" in this context, but *Black's Law Dictionary* defines "by right" as: "A power, privilege, or immunity guaranteed under a constitution, statutes, or decisional laws, or claimed as a result of long usage." *Black's Law Dictionary* 5th Ed. ("By right" appears frequently in zoning codes to designate land uses that do not require governmental approval.) Consistent with the statutory classification of judicial review as "by right," the Department of Revenue's policy—its "mission statement"—is a pledge to all taxpayers to assist them and simplify tax procedures: "Our mission is to administer the revenue and regulatory laws of the State with integrity, effectiveness, and fairness to all taxpayers. . . ." The Department's aggressive sharp practice to prevent the taxpayer's access to the Court is the

opposite of "fairness" and inconsistent with "by right." The Department of Revenue demonstrates both hyper aggressiveness and the opposite of fairness by bringing its disproportionate and unlimited state power to prevent the taxpayer's access to judicial review. In its effort to prevent review, not only has the Department misrepresented the indisputable procedural facts, but also relied upon hyper-technical and a tortured reading of clear statutory rules to prevent the taxpayer's appeal on the merits. The Department is forcing a small business to spend its limited resources fighting off technical procedural objections that unnecessarily complicate a straight-forward legal dispute. Like the fireside reflections of unseen activity flickering on the walls of Plato's cave, the Department's intimidating acts cast unflattering shadows of obscure motives. For example, because no judge has evaluated the merits of this case, no one knows why the Department of Revenue, which has accepted taxpayer's returns since 1996 and audited the taxpayer in 2014, raised the amusement tax for the first time in 2018. The posturing over procedure obscures the important legal issue raised while diverting taxpayer's limited resources to address peripheral issues designed to wear down the taxpayer and thwart access to judicial review.

The Rules of Statutory Construction

§ 12-60-3370, S. C. Code, ann. is not ambiguous. It requires an appealing taxpayer to do one of two things: either (1) pay the disputed taxes under protest or (2) post an appeal bond for the taxes alleged to be due. The statute excludes "penalties and civil fines" from the amount required. The Department alleges that **prior** to filing an appeal, the statute requires a taxpayer to pay to the Department the full amount of the alleged taxes **and all interest** as a condition precedent of appeal. (On remand, taxpayer predicts that the Department will modify its naked assertion following the Court of Appeals' Order of Remand and soften its position to be consistent with its footnote 1 to the Court of Appeals.) As discussed more fully below, interest is clearly a

"penalty"—it is not a "tax." Moreover, interest cannot be calculated until a final adjudication determines the amount of taxes, if any, are due. In its Motion to Dismiss with Prejudice, the Department falsely asserted the taxpayer "neither paid these taxes nor posted a bond for such taxes" (Department of Revenue's Motion to Dismiss with Prejudice at page 1), which is a demonstrably false statement. It demonstrates the Department's aggressive conduct, which conflicts with its published mission statement because even if there had been a deficiency, the remedy is not to dismiss an appeal with prejudice, but rather to give a litigant an opportunity to correct any deficiency. See *South Carolina Appellate Court Rules*, Rule 204, which requires an appellate court to transfer, not dismiss, a case filed in the wrong court. South Carolina jurisprudence has a long history of preferring to reach cases on their merits rather than on technicalities, something the Department knows from its own jurisprudence. See *Mictronics Inc. v. S. C. Dept. of Revenue*, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001)

As discussed more fully below, the taxpayer both paid the disputed taxes into escrow, albeit initially $702.00 short—which was immediately corrected—and filed a properly executed appeal bond with the Court. The written appeal bond (and the amended written appeal bond correcting the shortfall) irrevocably commits the escrowed funds to the Department if the taxpayer does not prevail on the merits. There is no more liquid surety than cash. Notwithstanding these indisputable facts, the Department asserted that the way the taxpayer paid over the funds and filed its appeal bond deprived the Court of Appeals of jurisdiction even though South Carolina law is clear that such deficiencies are appellate questions, not jurisdictional ones. See *Great Games Inc. v. S. C. Dept. of Revenue*, 339 S.C. 79, 529 S.E.2d 61 (2000), discussed in more detail below.

As set forth above, after falsely asserting to the Court of Appeals the taxpayer did not file an appeal bond, the Department of Revenue hedged its bet in footnote 1, saying, in its opinion, the

taxpayer's appeal bond does not "constitute" a bond, which is a much different assertion than saying the taxpayer did not post a bond. The Department of Revenue repeated its partially misleading statement on page 2, saying again "Appellant has not paid or posted a bond for the amount of the tax **including interest**," and repeated the false statement again on page 4, "Appellant has neither paid nor posted bond for the tax determined by the ALC."[3] (emphasis added) The taxpayer assumes the Department will stick to its guns on remand especially since the Department has rebuffed all the taxpayer's efforts to resolve this peripheral controversy. The Court of Appeals rejected the Department's assertion and remanded the case to this Court to enter an Order as to the **amount** the taxpayer must pay or post in an appeal bond. The Court's evaluation on remand necessarily requires the Court to weigh the good and bad faith of the parties because the Department's assertions are not supported by anything other than its bad faith. As set forth above, Taxpayer's original June 7th filings included both a Notice of Appeal and an appeal bond accompanying the Notice of Appeal on June 7th. These filings are undisputed facts, but the Department sought dismissal because the taxpayer did not file the appeal bond **before** the Notice of Appeal.

Cutting through the Department's sharp posturing, its real argument is that it challenges the **sufficiency** of the appeal bond because the taxpayer did not escrow the interest the Department alleges must be included, and the disputed funds are escrowed rather than paid over to the Department. To arrive at this legal position, the Department commits two logical fallacies. First, it assumes that it can charge interest on taxes that have not been judicially determined to be due. The universal application of appellate procedure is while prejudgment interest potentially accrues, pre-judgment interest is not due because the amount, if any, of the tax allegedly due has yet to be

[3] As discussed in detail later, looking at the procedure in the light most favorable to the Department, then the amount of taxes allegedly due as "determined by the ALC" would be the earliest date interest would accrue.

determined. A litigant is not required to pay an interest penalty as a condition of appeal. See § 18-9-220, S. C. Code, and *Appellate Court Rules*, Rule 241. (Rule 241 references the *Administrative Procedures Act*, § 1-23-600(G), which requires an appellant to ask the Administrative Law Court to stay enforcement on appeal. However, in a tax appeal, the General Assembly adopted a specific statute governing tax appeals, § 12-60-3370, S. C. Code, ann., which provides two alternative methods to perfect an appeal—either pay the disputed taxes under protest or file an appeal bond. Specific statutes govern over general statutes. *Hodges. v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000):

> Because § 1-3-240(B) and § 58-31-20 are clearly in conflict, the latter, as the specific act, controls, even though it was passed before § 1-3-240(B). *Atlas Food Systems and Services, Inc., v. Crane Nat'l Vendors*, 319 S.C. 556, 462 S.E.2d 858 (1995); see Norman J. Singer, *Sutherland Statutory Construction* § 51.05 at 174 (5th ed. 1992) ("[w]here one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, . . .").

Obviously, the appellant filed an appeal bond as required by the specific governing statute, § 12-60-3370, and the matter is back before the Court on remand to determine the **amount** of the appeal bond. No one must torture the controlling statute to discover its plain meaning because the statute clearly gives every taxpayer an option either to pay the disputed taxes under protest to the Department **or** post an appeal bond. In determining the amount of the appeal bond, the statute specifically excludes "penalties or civil fines." As discussed in greater detail below, the appeal bond statute[4] gives a taxpayer the option to do either—pay the taxes **or** post a bond—and does not require a taxpayer to pay alleged interest as condition precedent of filing an appeal. (The

[4] There is a fascinating constitutional legal issue of whether § 12-60-3370, S. C. Code is unconstitutional because it improperly conditions access to judicial review upon payment of a disputed debt. This is a fertile constitutional question. However, South Carolina law does not allow a taxpayer to challenge its constitutionality in this Court. *Great Games Inc. v. S C. Dept. of Revenue*, 339 S.C. 79, 529 S.E.2d 6 (2000) (Administrative Law Court has no authority to pass on the constitutionality of a statute.)

deficiency of the original amount of the escrow being $702.00 short is an oversight the taxpayer admitted and immediately corrected, discussed separately below.)

Even though the Department of Revenue sought, on one hand, a dismissal with prejudice on the ground that the taxpayer fatally failed to invoke subject matter jurisdiction, it acknowledged on the other hand that questions raised about the sufficiency of an appeal bond are appellate questions, not jurisdictional ones. See Department's Motion to Dismiss with Prejudice on page 3, citing *Great Games Inc. v. S. C. Dept. of Revenue*, 339 S.C. 79, 529 S.E.2d 61 (2000). Because the taxpayer immediately corrected the $702.00 shortfall and the amount of the appeal bond is remanded to this Court, it might evaluate the Department's misuse of procedural arguments with a jaundiced eye because as set forth throughout, the operative statute is clear, contains an obvious disjunction the Department refuses to acknowledge. The disjunctive "or" provides an option to taxpayers, which the Department steadfastly refuses to acknowledge. (When the discussion below addresses whether an appeal bond must include alleged interest, it is important to note that in *Great Games Inc. v. S. C. Dept. of Revenue, op. cit.*, the Supreme Court reversed the circuit court's conclusion that a taxpayer must post a bond including a "fine" as a condition of appeal.)

Before the Court of Appeals, the Department not only ignored controlling precedent in tax cases and misrepresented the procedural history of the case, but also the Department of Revenue broke through another legal norm, citing two unpublished cases despite the clear prohibition against citing unpublished cases. In footnote 3 to the Court of Appeals, the Department of Revenue cited two **unpublished** cases[5] for the proposition that the Court of Appeals twice dismissed tax appeals for failure to post an appeal bond. While the Department's representation of the Court's action is 100% correct, the Department misled the Court of Appeals by failing to disclose why the

[5] Unpublished cases contain a prohibition against citing them for precedent, but the Department of Revenue blew through that norm.

Court dismissed the two cases. In the unpublished cases, the Court of Appeals dismissed the appeals because the taxpayers in those two cases **refused to file an appeal bond** and, in fact, each argued it was not obligated to file one. The Department's error in asserting those unpublished cases as authoritative is compounded by the fact that neither comes close to the issue before the Court now. (As set forth above in footnote 2, this Court cannot pass on the constitutionality of a statute.) This Court dismissed the two cited cases, *CDT, Inc. v. S.C. Dep't of Rev*., 2021-001528 and *Patel v. S.C. Dep't of Rev.*, 2021-001547, because in each case, the two taxpayers ignored the statute now being examined because each contended the law relieved each from filing an appeal bond, contending other statutes excused them from filing an appeal bond. The Department again misled the Court of Appeals, citing *State v. Brown*, 358 S.C. 382, 596 S.E.2d 39 (2004), which was an appeal the Court dismissed because the appellant filed the Notice of Appeal **outside of the time allowed for filing**. Unlike a putative deficiency in a timely filed appeal bond here, the question in *Brown* was a jurisdictional issue. Thus, reliance on these cases is both improper and dishonest, and citing those cases as controlling here is an affront to a lawyer's duty to speak honestly, especially when a lawyer is speaking for the vast power of the State, which has an obligation to treat all citizens fairly. Furthermore, the misrepresentations violate the Department's own mission statement quoted above, and as a result, when—taxpayer suspects—the Department urges this Court to set a prohibitively high appeal bond to thwart taxpayer's access to the court, its credibility is seriously eroded, and its motives suspect by prior conduct.

The operative statute now before the Court on remand is clear, and the rules of statutory construction are also clear, so this Court should have no difficulty approving the appeal bond as filed sufficient and resist the Department's invitation to obfuscate the issue as outlined above. § 12-60-3370 grants every taxpayer an option of either (1) paying the taxes under protest **or** (2)

posting an appeal bond with the Court. The statute contains the disjunctive "or," a controlling grammatical/logical disjunction the Department ignores. The Department of Revenue does this by ignoring the General Assembly's clear and unambiguous **disjunctive** requirement, which the Department quoted verbatim in partial boldface[6] on pages 2-3 of its Motion to Dismiss with Prejudice to the Court of Appeals:

> "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**." (emphasis in original)

The taxpayer assumes the Department will make the same arguments here when arguing that the taxpayer must pay both all taxes alleged as due, and all interest alleged as due even though the Department fails to recognize that by its own legal position, the earliest that interest could begin to accrue was when the Court determined the amount due in April (Order granting summary judgement) or May (Order denying reconsideration). The Department of Revenue ignores that until the issue is settled judicially, there are only potential taxes due, and interest is not due on a potential debt.[7] Before the Court of Appeals, the Department put a bold face emphasis on "**before appealing the decision to the court of appeals**," (Motion to Dismiss with Prejudice, page 3), arguing that the taxpayer failed to invoke appellate jurisdiction in time, citing *State v. Brown, op. cit*. This bogus argument ignored that the amount of taxes potentially due has not yet been determined, and even if it had, it could only have occurred at the earliest on April 18, 2024, when this Court granted summary judgment, which means the alleged interest due would be minimal. However, the most blatant bogus argument is the Department's continued disregard for the

[6] The Department placed the "**before appealing the decision to the Court of Appeals**" in boldface because it contended taxpayer must file the appeal bond **before** filing the Notice of Appeal. Taxpayer believes the Department may have abandoned this line of argument, but either way, it demonstrates an astonishing level of sharp practice.

[7] *Olds v. City of Goose Creek*, 424 S.C. 240, 818 S.E.2d 5 (2018) is illustrative of when taxes might become due. In that business license tax dispute, the taxpayer lost his appeal at the administrative level, lost his appeal at the City Council, lost his appeal at the circuit court review, lost his appeal at the Court of Appeals, and prevailed in the Supreme Court. Similarly, interest does not accrue on a credit card until a debtor makes a purchase.

disjunctive, "or," in the statute. That important disjunction is where the emphasis belongs because now that the Court of Appeals remanded the case to determine the amount of the appeal bond, the Department will probably continue to ignore the disjunction, especially since the Department has rebuffed all efforts by the taxpayer's counsel to reach an accommodation on this issue. The General Assembly gives taxpayers an option—either "pay" or "post a bond" for the disputed taxes, excluding "penalties and civil fines." It is one thing for the Department of Revenue to allege the appeal bond was executed improperly, but it lost all credibility by arguing the taxpayer never filed one. The "jurisdictional" allegation was an unnecessary flexing of the State's might because it forces the taxpayer to expend unproductive time, energy, and money arguing over a statute so clear that it is frivolous to be put to the test of briefing what it means. It burdens two courts with work that does not reach the merits and is anathema to judicial economy. As discussed in more detail in the next section further addressing the rules of statutory construction, the Department plows over the disjunctive "or" in the statute, which is important on remand since the statute gives the option to pay the disputed taxes or post an appeal bond.

The General Assembly gives the taxpayer an option of either paying the taxes to the Department under protest **or** posting an appeal bond. Notably absent from the Department's Motion to Dismiss with Prejudice to the Court of Appeals or in briefing to this Court is any supporting authority that escrowed funds are not sufficient surety for an appeal bond. An appeal bond is nothing more than a pledge to pay inchoate taxes if they ever become due. Even in cases of interpleader (Rule 22(b) *S. C. Rules of Civil Procedure*), a litigant has the option of tendering money to the Clerk of Court **or** providing a bond "payable to the clerk of the court in such amount and with such surety as the court may deem proper, . . ." (emphasis on "or" added) An appeal bond is nothing more than a promise to pay. A deposit into an *I.O.L.T.A.* account is more certain,

more available, and more liquid than a pledge from a bonding company. A cash deposit is the ultimate surety, especially because the amount tendered is the full amount of the claimed taxes, which is exactly what the statute requires. The Department of Revenue identifies no authority or reason otherwise why cash is not a sufficient surety. (As discussed in the next section, the Department's calculation of interest is a demand for a penalty, something that might or might not be due. Either way, the statute excludes penalties.) Instead of simply applying the statute as written, the Department resorts to sharp practice by deliberately misapplying a statute to intimidate a taxpayer for exercising the right of judicial review. This aggressive posture unnecessarily adds to the workload of an already overtaxed judicial system—not to mention forces a struggling small business to divert limited resources to respond—all to defeat a litigant's access to judicial review without making the slightest effort address the issue with a taxpayer. Such conduct is at variance with the Department's published mission statement to "administer the revenue and regulatory laws of the state with integrity, effectiveness and fairness to all taxpayers." This Court should not condone State sharp practice.

Alleged Appeal Bond deficiencies

1. **The $702.00 short fall.**

2. **The Department's demand for interest**

The $702.00 error in computation of the appeal bond.[8]

In instructing the taxpayer the amount necessary to post, counsel made a minor miscalculation by relying on imperfect memory under unusual conditions. In June, Belk, Cobb, Infinger & Goldstein, P.A. sold our building and began the process of vacating, an incredibly

[8] The Department will not divulge whether the temporary shortfall remains an issue or not. On the one hand, the Court of Appeals disposed of this issue, but the taxpayer addresses it in an abundance of caution. When lawyers fail to communicate, the workload mushrooms because the taxpayer has no idea what arguments he must address on remand.

stressful process that involved (and still involves) moving files and disconnecting from the firm server that manages all e-mail and file storage. (These difficulties continue as the new location will now not be ready until September 1.) Because counsel's computer network system was (and still is) disconnected and paper files boxed up, Appellant's counsel operated on a faulty memory and communicated an incorrect amount to secure the appeal bond, inadvertently understating the amount in dispute by $702.00.[9] Instead of calling counsel and pointing out the incorrect amount, the Department waited for the 30-day appeal period to elapse and then sought to have the taxpayer thrown out of court on the ground that any correction was too late, misplacing reliance on cases like *State v. Brown*, 358 S.C. 382, 596 S.E.2d 39 (2004).

The first notice of the shortfall deficiency was the Department's filing its Motion to Dismiss with Prejudice. When a phone call to the Department failed to resolve that issue, the taxpayer immediately corrected this minor error by supplementing the deposit into escrow by $702.00 and filing an Amended Appeal Bond on June 25. 2024. Such a minor and temporary mistake was both excusable neglect under such circumstances and, more importantly, not a basis for the Department to assert a fatal jurisdictional deficiency that prevented appeal jurisdiction, especially when there was not the slightest prejudice to the Department of Revenue. Because the Department of Review could not identify any prejudice, it fell back on this unsupported statement: "Such action harms the State and its citizens." (Motion to Dismiss with Prejudice at page 5) The taxpayer assumes the Department will assert the same "prejudice" on remand when arguing for the largest amount possible even though the taxpayer has already posted the full amount of the

[9] On page 1 of its Motion to Dismiss, the Department states that it e-mailed the correct amount of the bond to Appellant's counsel. There is no dispute about this, but the Department was not aware that Appellant's counsel was in the chaotic midst of shutting down a law office and was temporarily disconnected from e-mail. Within five minutes of getting the Department's Motion to Dismiss, counsel called opposing counsel, admitted and explained the mistake, and affirmed it would be immediately corrected. It made no difference.

claimed taxes. The Department's ontological speculation about damage to citizens of South Carolina overlooks the definition of "escrow" and does not meet the legal definition of legal prejudice. Legal prejudice means the loss of an ability to defend (in this case, assert) a claim such as by losing witnesses or evidence:

> **"Legal Prejudice**. A condition that, if shown, by a party, will usually defeat the opposing party's action; especially a condition that, if shown by the [respondent] will defeat a plaintiff's motion to dismiss a case without prejudice. The [respondent] may show that dismissal will deprive the [Department of Revenue] of a substantive property right or preclude the [Department of Revenue] from raising a defense that will be unavailable or endangered." *Black's Law Dictionary*, 5th Ed.

See also *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001): "Legal prejudice means 'prejudice to some legal interest, some legal claim, some legal argument." Legal prejudice is not "merely because the [Department] will be inconvenienced by having to defend in another forum or where a [taxpayer] would gain a tactical advantage by that dismissal." (Court upheld dismissal of counterclaims when the plaintiff elected to end his federal claims and limit his claims to relief provided in state court.) In other words, the Department of Revenue will probably urge this Court on remand to impose a prohibitively high bond, not because the Department seeks to protect some undifferentiated, inchoate harm, but rather because it will pull out the stops to prevent judicial review because it is unwilling to defend its legal position on the merits, including, but not limited to the undisputed fact that from 1996 until 2018, the Department of Revenue agreed with the taxpayer's legal position. Because the Administrative Law Court ended the case on summary judgment, the record is undeveloped on what changed the Department's view in 2018 and caused it to reverse course on 22 years of precedent and reach the opposite conclusion with the taxpayer. The disproportionate emphasis on small taxpayers is not new. An October 2, 2019, *Pro Publica* article, "IRS: Sorry, but It's Just Easier and Cheaper to Audit the Poor," by Paul Kiel quotes the Director of the IRS explaining that it is too hard to audit big companies, so 39% of their audits

target the lowest income earners. Even though the Court of Appeals declined to dismiss the case, the taxpayer predicts the Department will take another bite at the apple by arguing the initial shortfall prejudiced the people of South Carolina in some undefined manner. Even with the $702.00 shortfall, the initial taxpayer's tender into *I.O.L.T.A.* escrow was materially correct, and the taxpayer immediately corrected the amount upon first notice. The $702.00 short fall was never a substantial deficiency, and taxpayer already corrected it. The minor error did not prejudice the Department of Revenue (or the people of South Carolina) in the slightest.

As mentioned above, the Court of Appeals addressed the Department's sharp practice in another tax exemption case in its analysis of a dismissal in *Mictronics, Inc. v. South Carolina Department of Revenue*, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001). There, the taxpayer missed a rescheduled court date because, like here, the taxpayer relied upon his memory for the new court date and missed the hearing. The Administrative Law Judge dismissed the case with prejudice. The taxpayer appealed to the circuit court, and the circuit court remanded the case to the Administrative Law Judge to make findings of fact and conclusions of law "about whether Mictronics should be relieved of its default." *Mictronics* at page 509. Before the Administrative Law Court the second time, the administrative law judge affirmed the dismissal, concluding Mictronics received "adequate notice of the hearing and that its failure to attend could not be excused based on mistake, inadvertence, surprise, or excusable neglect." The circuit court reversed a second time for obvious reasons, and rather than address the issue on the merits, the Department of Revenue took an appeal to the Court of Appeals, which affirmed the circuit court's decision to allow the taxpayer an opportunity to be heard. In affirming the circuit court, the Court of Appeals said:

Here, Mictronics made an error with respect to the hearing date and immediately sought relief from the dismissal. In *Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 339 S.E.2d 524 (Ct. App. 1986), this court found that a trial judge abused his discretion in refusing to grant a motion to set aside a default judgment granted after an answer was received one day late. The court there held that "where there is a good faith mistake of fact, and, no attempt to thwart the judicial system, there is basis for relief." 288 S.C. at 61, 339 S.E.2d at 525. This is consistent with South Carolina's policy favoring the disposition of issues on their merits rather than on technicalities. *Id.*; see also *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 153, 399 S.E.2d 439, 440 (Ct. App. 1990) (finding sanction dismissing counterclaim too severe). We find no evidence in the record that the mistake was anything but a good faith error, as shown by Blocker's explanation coupled with his speed in asking the ALJ for relief.

Here, the taxpayer made an even more inconsequential ("good faith") error in posting a slightly incorrect appeal bond amount (the legal issue of interest is discussed separately next) because counsel relied on an imperfect memory while temporarily disconnected from files by the unusual circumstances brought about by selling a building and relocating a law office. The taxpayer easily meets the four criteria established in the tax case, *Mictronics* to qualify for relief: "(1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other party." *Mictronics*, page 511, citing *New Hampshire Ins. Co. v. Bey Corp*., 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993 (quoting Harry M. Lightsey & James F. Flanagan, *South Carolina Civil Procedure* 82 (1985). Even though the Court of Appeals disposed of this issue by denying the Department's Motion to Dismiss with Prejudice, the Department's continued refusal to negotiate predicts the taxpayer will be called upon to revisit the issue on remand because the Department's strategy has been to pull out all the stops and urge the Court to prevent the taxpayer having his day in court.

Is interest a penalty?

As set forth throughout this brief, § 12-60-3370, S. C. Code specifically excludes "penalties or civil fines" from the appeal bond. A central pillar of the Department's Motion to Dismiss with Prejudice was the Department's assertion that interest is neither a "civil fine" nor a "penalty," and

therefore, the appeal bond must include "interest" in the appeal bond. The Department also conceded that if interest is due, it started to accrue on the date the Court determined the amount of the taxes due, which, if true, would require approximately one month's interest.

First, the legal issue of whether the admissions/amusement tax is or is not due has yet to be determined. Thus, there can be no interest due. Second, even assuming *arguendo* the Department is correct, then interest would begin running on May 14, 2024, when this Court denied reconsideration of its April 18, 2024, Order granting summary judgment. Instead, the Department contends the taxpayer must pay the interest from 2018 in full as a precondition to filing an appeal! Its contention that the failure to do so defeats the appellate Court's jurisdiction failed. The taxpayer is confident that this will be the Department's main assertion on remand; to wit, that the appeal bond "amount" must include all interest from 2018 even though there has not been a final determination as to whether any tax is due. The Department's contention is wrong for two reasons.

The Rules of Statutory Construction

Just as the Department misrepresents § 12-60-3370, S. C. Code, ann. by disregarding the disjunctive "or," it also adds an invisible requirement that an appeal bond must include all interest even though the statute is clear and unambiguous that the appeal bond includes **only the taxes** the Department claims are due. The governing statute, §12-60-3370, quoted **in full** above is both clear and concise about the appeal bond required. The statute requires an appeal bond for "all taxes, **not including penalties or civil fines**." (emphasis added) The Department of Revenue contorts the ordinary rules of statutory construction and seeks to deprive the taxpayer of a path for judicial review, which it possesses as a "right." The General Assembly specifically excluded "penalties and civil fines," from appeal bonds, but the Department asserts that because interest is not specifically excluded, it is included in "taxes"! The entire world knows that statutory interest is a

penalty for noncompliance, *i.e.*, damages. *Webster's New Collegiate Dictionary* defines interest as: "a charge for borrowed money, generally a percentage of the amount borrowed, an excess above what is due." No one voluntarily pays interest. The General Assembly omitted the word "interest" as a mandatory payment from the statute because it excluded "penalties" and "fines," and no one thinks interest is anything other than a "fine" or "penalty." By excluding "penalties" and "fines," the statute is clear and encompasses "interest," which is a synonym for either. The General Assembly knows how to write statutes, and the Courts of this state are equally clear in how to read them, including a prohibition of adding words that are absent. See *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000). In explicating the rules of statutory construction, the Supreme Court said:

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. V. State Budget and Control Bd*., 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Id.* at 233, 509 S.E.2d at 262 (citing *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992).
>
> . . .
>
> The canon of construction *"expressio unius est exclusio alterius"* or *"inclusio unius est exclusio alterius"* holds that "to express or include one thing implies the exclusion of another, or of the alternative." *Black's Law Dictionary* 602 (7th ed. 1999). Section 1-3-240(C) does not specifically exempt the Santee Cooper Board of Directors from its operation, as it does ten other boards. The fact that the Santee Cooper Board of Directors was not included in the list of exclusions implies that the General Assembly intended for section 1-3-240(B) to apply to the Board. "The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. Exceptions strengthen the force of the general law and enumeration weakens it

> as to things not expressed." Norman J. Singer, *Sutherland Statutory Construction* § 47.23 at 227 (5th ed. 1992) (citations omitted).

An assertion that "interest" is neither a "fine" nor a "penalty" flies in the face of universal common sense—there are eight billion people on the planet, and not one of them has ever voluntarily or gratuitously paid interest. The statute allowing an appeal from the Department's claim could not be clearer, and the Department of Revenue cannot block a taxpayer's access to judicial review by resetting the appellate procedure to demand an inflated appeal bond to its liking. To avoid the clear holding of §12-60-3370, the Department shifted direction and cited to the Court of Appeals a collection statute §12-54-25, S. C. Code, ann. as authority for its argument that the appeal bond must include interest. Assuming the Department will re-assert these claims on remand, §12-54-25, S. C. Code, ann. is a collection statute—it says nothing about appellate jurisdiction or appellate practice. Second, it says "interest is due on the unpaid portion from the time the tax was due until paid in its entirety." Assuming *arguendo* the Department's misplaced reliance on this collection section overrules § 12-60-3370 as the appellate jurisdictional statute, according to the Department of Revenue, the date the tax became due is the date the Administrative Law Court determined them to be due, which at the earliest is the date of the Order for Summary Judgment, April 18, 2024, or the latest, May 14, 2024, when the Administrative Law Court denied Appellant's motion for reconsideration.

Interest is obviously a penalty.

There are only two ways debtors pay interest on money, and neither is voluntary. No one ever walked into a bank and said: "I want to borrow money, but I do not agree to pay interest." The first is by negotiated agreement, loans, mortgages, *etc.* All loans include a negotiated (and amortized) rate of return, which the courts enforce. With credit card debt, interest rates often increase as punishment or penalty for late payment. A negotiated rate of return is not implicated

in this case, and neither are reoccurring credit charges, but even in those purely contractual civil disputes, the law imposes pre and post judgment penalties in the form of interest, and it is impossible to characterize the imposition of such interest, whether statutory or negotiated, as anything other than a penalty, *i.e.* damages:

> Prejudgment interest is normally designed to make the plaintiff whole and is part of the actual damages sought to be recovered. Such interest is merely another element of pecuniary damages and is in the nature of compensatory damages.
>
> *Am. Jur. 2d* "Damages" § 426 Interest Generally

The interest implicated in this case is the second form of interest: statutory interest, which if not "punitive," are clearly coercive, designed to compel taxpayers to adhere to the State's demand, which is, as identified above, the State's analogue to the civil court's compensatory damages. Just as interest is a punitive consequence for late payment in the civil context, the law imposes a statutory punishment in the form of interest on taxpayers as an administrative cudgel to compel citizens to obey the law, and no litigant must be punished first (in a civil case) as a condition to judicial review. The purpose of interest is to compel a debtor to perform, and interest might continue to accrue as the case progresses, but it is not collectible unless the taxpayer's appeal fails, and the General Assembly is clear that the only condition a taxpayer must meet to gain access to judicial review is either payment or an appeal bond for the taxes allegedly due. As the Supreme Court said in *Sears*: "The reason most frequently given for the majority's position is that the purpose of post judgment interest is **to penalize** nonpayment of a judgment by a judgment debtor." *Sears v. Fowler*, 293 S.C. 43, 358 S.E.2d 574 (1987) (emphasis added) Interest as a form of penalty is so obvious that the Department's assertion to the contrary is frivolous, and even if the Department were correct, interest could only theoretically begin to accrue when the Administrative Law Court issued an Order determining the amount due.

Conclusion

The taxpayer's deposit of the taxes claimed by the Department along with its irrevocable pledge is sufficient surety for the Department. The Department is fully protected, and the amount paid into escrow is 100% of the Department's claim. As a result, there is nothing required of the Court other than to confirm that the amount of the deposit is sufficient. Notwithstanding the taxpayer's obvious good faith, the Department exploits every alleged technical defect to frustrate the taxpayer's path to judicial review. It has already made demonstrably false statements of fact and improperly relied on unpublished cited caselaw that has no precedential value as well as cited cases inapplicable to this narrow issue. Before the Court of Appeals, it sought the civil equivalent of the death penalty for an immaterial computational error in the escrowed deposit and even denied the appellant filed an appeal bond when it was attached to the Notice of Appeal, arguing the taxpayer had to file the appeal bond first and the Notice of Appeal second! Now that the parties are before the Court on remand to set the amount of the appeal bond, the Department will throw everything at the taxpayer to get the highest possible amount to prevent an appeal. Perhaps on remand, the Department will acknowledge for the first time that a taxpayer has an alternative of either paying the disputed taxes to the Department under protest or posting an appeal bond. The amount of the deposit is not required to contain either penalties or civil fines, and even if the statute required interest be escrowed, the Department's own pleadings assert that interest would accrue at the earliest when this Court decided that the taxes are due. The Department has not produced a single precedent demonstrating why the taxpayer's tender of **the entire disputed amount** into escrow along with an irrevocable pledge as bond is insufficient. The Department's effort to prevent an appellate court reviewing a summary judgment case on the merits is unconscionable—and inconsistent with its mission statement. This bellicose and aggressive strategy is especially galling where the Department's claim of an alleged admissions/amusement tax deficiency is a

recent change in its policy, which it asserted for the first time in 2018. From 1996 until 2018, the Department of Revenue agreed with the taxpayer's exemption even though it put Tidalwave through an audit in 2014. The taxpayer has no idea what changed from 1996 until 2018, and the taxpayer seeks only to challenge the Administrative Law Court's determination that there is no genuine issue of material fact in a highly disputed matter. However, it is indisputable the taxpayer timely filed an appeal bond in accordance with the governing statute. The tender of the disputed taxes into escrow accompanied with an irrevocable appeal bond meets the conditions of the statute, and the Court should approve the appeal bond as filed and allow the case to move forward to be addressed on the merits.

Respectfully submitted.

August 20, 2024

/s/ Thomas R. Goldstein
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CERTIFICATE OF SERVICE

I certify that I served the within Return to Respondent's Motion to Dismiss upon the Department of Revenue, by mailing a copy properly addressed with sufficient postage affixed thereto to Marcus D. Antley, III, S. C. Department of Revenue, 300 A Outlet Pointe Blvd., Columbia, South Carolina 29210 and via electronic mail to marcus.antley@dor.sc.gov this 20th day of August, 2024.

August 20, 2024

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STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
OFFICE OF GENERAL COUNSEL

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Main Line: 803.898.5130
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August 26, 2024

VIA ELECTRONIC MAIL AND US MAIL
The Honorable Deborah Brooks Durden
Administrative Law Judge
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: Watertoys, LLC, d/b/a Tidalwave Watersports vs. South Carolina Department of Revenue
Docket No.: 23-ALJ-17-0362-CC
DOR File No.: 230028

Dear Judge Durden:

Enclosed please find the Department's Brief on Remand from the South Carolina Court of Appeals in the above-captioned matter. Additionally, I have enclosed a Proof of Service for the same.

If you have any questions or need any further information from me, please do not hesitate to contact me at 803.898.5623 or Marcus.Antley@dor.sc.gov. If I am not available, you can reach my paralegal, Jennifer Gamble, at 803.898.5031or Jennifer.Gamble@dor.sc.gov.

Sincerely,

Marcus D. Antley, III

Marcus D. Antley, III

Enclosures
MDA/jdg

cc: Thomas R. Goldstein, Esquire

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, LLC, d/b/a Tidalwave Watersports, Petitioner, vs. South Carolina Department of Revenue, Respondent.	)	DOCKET NO. 23-ALJ-17-0362-CC **THE DEPARTMENT'S BRIEF ON REMAND FROM THE SOUTH CAROLINA COURT OF APPEALS**

On June 10, 2024, Watertoys, LLC, d/b/a Tidalwave Watersports (Petitioner) filed a Notice of Appeal of this Court's Orders Granting the Department's Motion for Summary Judgment and Denying Petitioner's Motion for Summary Judgment on April 18, 2024 and Denying Petitioner's Motion for Reconsideration on May 14, 2024. With Petitioner's Notice of Appeal, it purported to post a bond by depositing $33,296 in the I.O.L.T.A. account of Petitioner's counsel. On June 19, 2024, the Department filed a Motion to Dismiss Petitioner's appeal for lack of appellate jurisdiction due to Petitioner's failure to comply with S.C. Code Ann. § 12-60-3370 (2014). Specifically, Petitioner had not posted a proper bond and even if Petitioner's actions constituted posting a bond, the amount of the "bond" was insufficient.[1] On Jue 26, 2024, Petitioner filed an amended "bond" of $33,998.[2] On July 18, 2024, the Court of Appeals denied the Department Motion to Dismiss while allowing the parties to raise the issue of jurisdiction in their briefs.

[1] To comply with section 12-6-3370, "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." Undisputedly, Petitioner did not pay the taxes.

[2] This is approximately the amount of the tax excluding interest and penalties.

Further, the Court of Appeals remanded the matter to the ALC for an order specifying the amount of taxes Petitioner must pay and/or the amount of the bond Petitioner must post pursuant to § 12-60-3370. Pursuant to this Court's order filed August 1, 2024, the Department files this brief on the current amount of tax, interest, and penalties due.

ARGUMENT

The subject of this remand is limited to issuance of an order "specifying the amount of the taxes Petitioner must pay and/or the amount of the bond Petitioner must post pursuant to § 12-60-3370." While interest and penalties increase with time, the amount of the tax excluding interest and penalties is fixed and remains the amount indicated in the Department Determination issued August 18, 2023. At no point has Petitioner indicated its dispute of the calculation of the taxes or penalties owed. Petitioner has only challenged whether "all taxes" includes interest and when interest begins to accrue. As explained below, "all taxes" includes interest, and interest accrues from the date the tax was due during September 1, 2018 – December 31, 2021 (Periods at Issue). Importantly, this Court may satisfy the purpose of the remand by finding and separately stating the amount of tax, interest, and penalties without deciding the appellate jurisdiction question of whether "all taxes" in section 12-60-3370 includes interest.

I. "All taxes" includes interest under section 12-60-3370.

Section 12-60-3370, in relevant part, provides: "[e]xcept 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." (emphasis added). S.C. Code Ann. § 12-60-30 (2014), the definition section of Chapter 60 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). "[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.[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 surplusage, or superfluous'"). 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, Petitioner did not file an admission tax return or pay admissions tax for the Periods at Issue. Regardless, unlike interest,

[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.

penalties expressly are not included in the amount of taxes Petitioner must pay and/or the amount of the bond Petitioner must post pursuant to § 12-60-3370. Accordingly, tax—as used in section 12-60-3370—includes interest.[4]

II. Interest accrues from the date tax was due during the Periods at Issue.

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); *see 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."). The statute that imposes interest in this matter S.C. Code § 12-54-25 (A) (2014) provides: "[i]f any tax is not paid when due, interest is due on the unpaid portion from the time the tax was due until paid in its entirety." Section 12-54-25(D) mandates that "the rate of interest on underpayments and overpayments is established by the department in the same manner and at the same time as the underpayment rate provided in Internal Revenue Code Sections 6621(a)(2) and 6622." SC Information Letter #24-11 publishes the interest rates for the periods from September 1, 1985 to September 30, 2024.

Section 12-54-25(B) explains:

> For purposes of this section, a tax is due on the last day provided for its payment, without regard for any extension of time for payment and without regard for or to any assessment under Section 12-60-910. Stamp taxes and any other tax for which no payment date is provided are due on the day the liability arises.

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[4] Although not precedent, in an unpublished decision *Anonymous Taxpayer v. S.C. Dep't of Rev.*, 2008-UP-124, 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.

In this case, the admissions tax returns should have been filed monthly during the Periods at Issue. Therefore, the liability arose during the Periods at Issue. However, Petitioner argued incorrectly that the tax was not due until this Court issued its an order. While this Court confirmed that the tax was in fact due, the tax liability was incurred during the Periods at Issue. Petitioner's interpretation to the contrary 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 generally is greater than the future value of money. Interest neutralizes the effect of one party having the use of another party's funds. Under Petitioner's interpretation, no rational taxpayer would pay any tax until ordered to do so by a court. Adopting the Petitioner's position would grant it an interest-free loan from the State. The Legislature could not have intended such an absurd result. Further, Petitioner conflated 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 accruing from the Periods at Issue.

CONCLUSION

"All taxes" under section 12-60-3370 includes interest accrued from when the tax was due. The following amounts are calculated through the date of the hearing on August 28, 2024:

Tax	$ 33,998.40
Penalty	$ 15,915.60
Interest	$ 7,842.52
Amount Due	**$ 57,756.52**

Therefore, the Department respectfully asks the Court to specify the above amounts in its order noting that interest and penalties will continue to accrue.

Respectfully submitted,

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August 26, 2024

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Watertoys, LLC, d/b/a Tidalwave Watersports, Petitioner, vs. South Carolina Department of Revenue, Respondent.	)	Docket No.: 23-ALJ-17-0362-CC **PROOF OF SERVICE**

I, the undersigned paralegal with the South Carolina Department of Revenue, do hereby certify that I have served a copy of the foregoing, The Department's Brief on Remand from the South Carolina Court of Appeals, for the above-captioned matter by electronic mail and via US Mail, postage prepaid, to the following address(es):

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Attorney for Petitioner

Jennifer D. Gamble
Senior Paralegal

Columbia, South Carolina
August 26, 2024

RECEIVED
Sep 26 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM S. C. ADMINISTRATIVE LAW COURT

Debra B. Durden, Judge

Appellate Tracking No.: 2024-000962
Administrative Law Court Docket No.: 23-ALJ-17-0362-CC

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

v.

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

AMENDED NOTICE OF APPEAL

Watertoys, L.L.C. d/b/a Tidalwave Watersports appeals the orders of the Honorable Debra Durden dated April 18, 2024 and May 14, 2024 (said Orders previously appealed and filed with the Court), and the Order Setting Appeal Bond following remand, dated September 4, 2024.

September 22, 2024

/s/Thomas R. Goldstein
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Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that I served the within Amended Notice of Appeal upon counsel for the Department of Revenue by mailing a copy properly addressed with sufficient postage affixed thereto to Marcus D. Antley, III, at 300A Outlet Pointe Boulevard, Columbia, S. C. 29210 and via electronic mail to marcus.antley@dor.sc.gov this 26th day of September, 2024.

September 25, 2024

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September 25, 2024

Hon. Jenny Abbot Kitchings
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P. O. Box 11629
Columbia, South Carolina 29211

RE: Appellate Case No. 2024-000962
Dept. of Revenue Case I.D. 0-001-559-662
Administrative Law Court Docket No. 23-ALJ-17-0362-CC
D.O.R. File No.: 230028

Dear Ms. Kitchings,

I enclose the Appellant's Amended Notice of Appeal and a copy of the new Order being appealed. I did not provide additional copies of the two original Orders previously appealed because both are already filed with the Court, but if your office desires that I include both Orders again, please advise. I assume that the Court does not require an additional filing fee for an Amended Notice of Appeal, but if I am in error on this, please advise, and I will immediately remit an additional fee. By copy of this letter via regular mail, I am providing the Amended Notice of Appeal to the Administrative Law Court, and I will make immediate arrangements for preparation of the hearing transcript. Please let me know if your office requires me to do anything further to perfect this updated appeal. I thank you in advance for your attention to this request. With kind regards, I am

Very truly yours,

/s/ Thomas R. Goldstein
Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein
tgoldstein@cobblaw.net

cc:

Hon. Jana E. Shealy
Marcus D. Antley, III

Hon. Jana E. Shealy,
Clerk of Court
South Carolina Administrative Law Court
Edgar Brown Building
1205 Pendleton Street
Suite 224
Columbia, S. C. 29201

Mr. Marcus D. Antley, III
Office of General Counsel
S. C. Dept. of Revenue
300A Outlet Pointe Boulevard
Columbia, S. C. 29210
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RECEIVED
Oct 22 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM S. C. ADMINISTRATIVE LAW COURT

Debra B. Durden, Judge

Administrative Law Court Docket No.: 23-ALJ-17-0362-CC

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

v.

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

SUPPLEMENTAL APPEAL BOND (INTEREST)

In accordance with § 12-60-3370, S. C. Code, ann.,[1] the appellant, Watertoys, L.L.C. d/b/a as Tidalwave Watersports acknowledges itself potentially indebted unto the Respondent, Department of Revenue in an interest amount of $7,842.52, said amount being the amount of alleged interest the Administrative Law Court is requiring be posted as an additional condition of appeal.

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[1] The appellant filed an appeal of the administrative Law Court's September 8, 2024, Order on September 28, 2024, and does not waive its legal argument that alleged interest is **not** a requirement to gain access to judicial review. The appeal bond statute says: "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." (emphasis added) Appellant's posting interest is **not a waiver** of its legal position that the D.O.R. cannot demand interest as a condition to judicial review under **at least** the controlling statute and Article I, § 9 of the *South Carolina Constitution.* (See also Article I, §§ 3 and 4.)

Without waiving its right to challenge the Administrative Law Court's conclusion that alleged interest must be posted as a condition of appeal, the Appellant, Watertoys, L.L.C. d/b/a Tidalwave Watersports, acknowledges that should it fail to have this appeal disposed of in its favor, or should the appeal be dismissed for cause, the Appellant shall release the posted interest along with the amount of the disputed taxes in accordance with South Carolina law as well as any costs awarded in consequence of this action as provided by the *South Carolina Appellate Court Rules*. The appellant reserves the right to contest the Administrative Law Court's decision that interest is required as a pre-condition to seek judicial review.

Witness # 1

Witness #2

Watertoys, L.L.C. d/b/a Tidalwave Watersports
By its managing member, Michael Fiem

BELK, COBB, INFINGER & GOLDSTEIN, P.A.
P. O. Box 71121
N. Charleston, S. C. 29415-1121

October 21, 2024

Hon. Jenny A. Kitchings,
Clerk of Court
South Carolina Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

RE: Watertoys, LLC d/b/a Tidalwave Watersports v. S. C. Dept. of Revenue
Appellate Tracking No.: 2024-000962

Dear Ms. Kitchings,

I am providing a copy of the supplemental appeal bond in conformity with the Administrative Law Court's September 4, 2024, Order (appealed by amended Notice of Appeal dated September 22, 2024). I am unsure if an appeal of an Order requiring pre-hearing interest as a pre-condition to judicial review is or is not automatically stayed by Rule 241, *South Carolina Appellate Court Rules*. Therefore, in an abundance of caution, we have deposited the disputed interest amount in addition to the previously posted admissions/amusement taxes allegedly due.

We received the transcript of the Administrative Law Court hearing on October 14, 2024, making the Appellant's Initial Brief due on or before Wednesday November 13, 2024 (one day later if the 14th—Columbus Day—is not counted). Please let me know if you require anything further. By copy of this letter, I am providing a copy of this Supplemental Appeal Bond to opposing counsel. With kind regards, I am

Very truly yours,

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein
(843) 729 0928
tgoldstein@cobblaw.net

cc: Marcus Antley, III (with enclosure)

State of South Carolina
Department of Revenue
301 Gervais Street, P. O. Box 125, Columbia, South Carolina 29214
Website Address: http://www.sctax.org

SC REVENUE RULING #05-14

SUBJECT:	Places of Amusement (Admissions Tax)
EFFECTIVE DATE:	Applies to all periods open under the statute**.**
SUPERSEDES:	All previous advisory opinions and any oral directives in conflict herewith.
REFERENCES:	S. C. Code Ann. Section 12-21-2420 (2000; Supp. 2004) S. C. Code Ann. Section 12-21-2410 (2000) S. C. Code Ann. Section 12-21-2430 (2000)
AUTHORITY:	S. C. Code Ann. Section 12-4-320 (2000) S. C. Code Ann. Section 1-23-10(4) (Supp. 2004) SC Revenue Procedure #03-1
SCOPE:	The purpose of a Revenue Ruling is to provide guidance to the public and to Department personnel. It is a written statement issued to apply principles of tax law to a specific set of facts or a general category of taxpayers. **A Revenue Ruling does not have the force or effect of law, and is not binding on the public.** It is, however, the Department's position and is binding on agency personnel until superseded or modified by a change in statute, regulation, court decision, or advisory opinion.

Introduction:

The State of South Carolina imposes an admissions tax for the privilege of entering and using a place of amusement. The purpose of this advisory opinion is to provide examples of places of amusements that are subject to this tax. The list of examples is not all-inclusive and is being provided as guidance for taxpayers.

Law and Discussion:

Code Section 12-21-2420 imposes the admissions tax and states in part:

> There must be levied, assessed, collected, and paid upon paid admissions to places of amusement within this State a license tax of five percent. The license tax may be listed separately from the cost of admission on an admission ticket. …

Code Section 12-21-2410 defines the terms "admissions," "place," and "person" and states:

> For the purpose of this article and unless otherwise required by the context:
>
> (1) The word "admission" means the right or privilege to enter into or use a place or location;
>
> (2) The word "place" means any definite enclosure or location; and
>
> (3) The word "person" means individual, partnership, corporation, association, or organization of any kind whatsoever.

In summary, the admissions tax is imposed upon the paid right or privilege to enter into or use a place of amusement.

It is important to note that the statute taxes charges to "use" a place of amusement, as well as charges to enter a place of amusement. This is seen in *Beach v. Livingston*, 248 SC 135, 149 SE2d 328 (1966), where the South Carolina Supreme Court held that the admissions tax applied to charges paid for the "use" of a bowling alley even though no charge was required for a person to "enter" the bowling alley. Additionally, an Attorney General's Opinion dated August 2, 1956 (See Attorney General's Report, July 1, 1955 to June 30, 1957) concluded the charge made by a person operating a golf driving range was subject to the admissions tax.

The statute, however, does not define the term "amusement." However, the following from SC Revenue Ruling #89-8 outlines the Department's longstanding position as to what constitutes an "amusement" and a "place of amusement."

> One of the primary rules of statutory construction is that words used in a statute should be taken in their ordinary and popular meaning, unless there is something in the statute which requires a different interpretation. *Hughes v. Edwards*, 265 S.C. 529, 220 S.E. 2d 231 (1975); *Investors Premium Corp. v. South Carolina Tax Commission*, 260 S.C. 13, 193 S.E. 2d 642 (1973). Also, where the terms of a statute are clear and unambiguous and leave no room for construction, they must be applied according to their literal meaning. *Mitchell v. Mitchell*, 266 S.C. 196, 222 S.E. 2d 217 (1976); *Green v. Zimmerman*, 269 S.C. 535, 238 S.E. 2d 323 (1977).

It is an accepted practice in South Carolina to resort to the dictionary to determine the literal meaning of words used in statutes. For cases where this has been done, see *Hay v. South Carolina Tax Commission*, 273 SC 269, 255 SE 2d 837 (1979); *Fennell v. South Carolina Tax Commission*, 233 S.C. 43, 103 SE2d 424 (1958); *Etiwan Fertilizer Co. v. South Carolina Tax Commission*, 217 SC 484, 60 SE2d 682 (1950).

Black's Law Dictionary, Fifth Edition, defines the term "amusement" to mean: "Pastime, diversion, enjoyment. A pleasurable occupation of the senses or that which furnishes it."

The Second College Edition of the American Heritage Dictionary provides the following definitions:

“Amusement"	1. The state of being amused, entertained, or pleased. 2. Something that amuses.
"Pastime"	An activity that occupies one's spare time pleasantly.
"Diversion"	Something that distracts the mind and relaxes or entertains.
"Enjoyment"	1. The act or state of enjoying. 2. The use or possession of something beneficial or pleasurable. 3. Something that gives pleasure.

In summary, a "place of amusement" is any enclosure or location consisting of an activity that occupies one's spare time, distracts the mind, relaxes, entertains, or gives pleasure.

Further, in *Radcliff v. Query*, 153 S.C. 76, 150 S.E. 352 (1929), an Admission's Tax case, the Supreme Court of South Carolina held:

> The statute is broad enough to include all classes of public exhibitions,.... (emphasis added).

Black's Law Dictionary, Fifth Edition, defines "public" in part, as:

> Public, adj. Pertaining to a state, nation, or whole community; proceeding from, relating to, or affecting the whole body of people or an entire community. Open to all; notorious. Common to all or many; general; pen to common use. Belonging to the people at large; relating to or affecting the whole people or a state, nation, or community; not limited or restricted to

> any particular class of the community. Peacock v. Retail Credit Co., D.C.Ga., 302 F.Supp.418, 423 (emphasis added).

In addition, the Appellate Division of the New York Supreme Court held in *Wien v. Murphy*, 284 N.Y.S. 2d 303, 28 A.D. 2d 222 (1967) that:

> ... if in fact a place or facility provides something edifying or educational in addition to enjoyment, entertainment or amusement, it is no less a place of amusement.

In other words, the term "place of amusement" is not to be strictly construed so as to exclude places which may also have a business or other purpose. If a place distracts the mind, relaxes, entertains, or gives pleasure, then such place is a "place of amusement".

Finally, Code Section 12-21-2420 establishes various exemptions from the admissions tax and states in part:

> … , no tax may be charged or collected:
>
> (1) On account of any stage play or any pageant in which wholly local or nonprofessional talent or players are used;
>
> (2) On admissions to athletic contests in which a junior American Legion athletic team is a participant unless the proceeds inure to any individual or player in the form of salary or otherwise;
>
> (3) On admissions to high school or grammar school games or on general gate admissions to the State Fair or any county or community fair;
>
> (4) On admissions charged by any eleemosynary and nonprofit corporation or organization organized exclusively for religious, charitable, scientific, or educational purposes; or the presentation of performing artists by an accredited college or university; provided, that the license tax herein levied and assessed shall be collected and paid upon all paid admissions to all athletic events of any institution of learning above the high school level; provided, however, that carnivals, circuses, and community fairs operated by eleemosynary or nonprofit corporations or organizations organized exclusively for religious, charitable, scientific, or educational purposes shall not be exempt from the assessment and collection of admissions tax on charges for admission for the use of or entrance to rides, places of amusement, shows, exhibits, and other carnival facilities, but not to include charges for general gate admissions except when the proceeds of any such carnival, circus, or community fair are donated to a hospital; provided, further, that no admission tax shall be charged or collected by reason of any charge made to any member of a nonprofit organization or corporation for the use of the facilities of the organization or corporation of which he is a member.

(5) On admissions to nonprofit public bathing places;

(6) On admissions to any hunting or shooting preserve;

(7) On admissions to privately owned fish ponds or lakes; and

(8) On admissions to circuses operated by eleemosynary, nonprofit corporations or organizations organized exclusively for religious, charitable, scientific, or educational purposes when the proceeds derived from admissions to the circuses shall be used exclusively for religious, charitable, scientific or educational purposes.

(9) On admissions to properties or attractions which have been named to the National Register of Historical Places.

(10) On admissions charged to classical music performances of a nonprofit or eleemosynary corporation organized and operated exclusively to promote classical music.

(11) On admissions to events other than those events enumerated in item (4) of this section, sponsored and operated exclusively by eleemosynary, nonprofit corporations or organizations organized exclusively for religious, charitable, scientific, civic, fraternal, or educational purposes when the net proceeds derived from admissions to the events shall be immediately donated to an organization operated exclusively for charitable purposes. The term “net proceeds” shall mean the portion of the gross admissions proceeds remaining after necessary expenses of the event have been paid. This item shall not apply to an event in which the above organizations receive a percentage of gross proceeds or a stated fixed sum for the use of its name in promoting the event.

(12) On admissions charged by nonprofit or eleemosynary community theater companies or community symphony orchestras, county and community arts councils and departments and other such companies engaged in promotion of the arts.

(13) On admissions to boats which charge a fee for pleasure fishing, excursion, sight-seeing and private charter.

(14) On admissions to a physical fitness center subject to the provisions of Chapter 79 of Title 44, the Physical Fitness Services Act, that provides only the following activities or facilities:

(a) aerobics or calisthenics;
(b) weightlifting equipment;
(c) exercise equipment;

(d) running tracks;
(e) racquetball;
(f) swimming pools for aerobics and lap swimming; and
(g) other similar items approved by the department.

The entire admission charge of a physical fitness center which provides any other activity or facilities is subject to the tax imposed by this article. Physical fitness facilities or centers of the State of South Carolina and any of its political subdivisions which are exempt from the Physical Fitness Services Act, pursuant to Section 44-79-110 and, therefore, subject to the admissions tax under this article are nevertheless exempt from the admissions tax if they meet other requirements of this subsection.

(15) for entry into the pit area of NASCAR sanctioned motor speedways or racetracks for drivers, crew members, or car owners where a participation fee is charged these persons by NASCAR, or by the speedway or racetrack, where a charge to these persons is made on a per event basis for entry into the pit area, or where a combination of annual and per event charges to these persons is made for entry into the pit area.

The tax imposed by this section must be paid by the person or persons paying the admission price and must be collected and remitted to the South Carolina Department of Revenue by the person or persons collecting the admission price. The tax imposed by this section does not apply to:

(a) any amount separately stated on the ticket of admission for the repayment of money borrowed for the purpose of constructing an athletic stadium or field by any accredited college or university; or
(b) any amount of the charge for admission, whether or not separately stated, that is a fee or tax imposed by a political subdivision of the State.

The revenue derived from the provisions of this section from fishing piers along the coast of South Carolina is allocated for use of the Commercial Fisheries Division of the Department of Natural Resources.

Also, Code Section 12-21-2430 provides an exemption for certain ponds, and states:

No private pond shall be declared an amusement for tax purposes. But this section shall not apply to a pond stocked with fish from a State or Federal hatchery.

Examples of Places of Amusements Subject to the Admissions Tax

The following list of places of amusements is not all inclusive and is merely provided as guidance. Charges to enter or use these places, events, facilities and rides and all other amusement facilities are subject to the tax **unless specifically exempted under Code Section 12-21-2420 or Code Section 12-21-2430**:

air shows

amusement parks

amusement rides, shows and exhibits

animal shows

antique shows

aquariums

aquatic shows

archery range

art and craft exhibitions (See SC Revenue Ruling #89-8.)

automobile shows

balloon shows

baseball batting cages (See SC Revenue Ruling 91-14.)

basketball courts

boat cruises (See, however, Code Section 12-21-2420(13). Charges for cruises with entertainment, such as one in which patrons attempt to solve a murder mystery, do not come within the exemption in Code Section 12-21-2420(13).)

boat shows

botanical gardens

bowling alleys

bungee jumping

carnival, circus and fair entrance fees, rides, shows, exhibits, games and other amusement charges

college, professional and other sporting events (football, basketball, baseball, or hockey games; golf tournaments, tennis tournament, rodeos, car racing, polo, horse racing, wrestling, boxing, etc.)

comedy clubs

cruises that offer entertainment (i.e. bands, audience role participation, or plays)

dance halls

dance shows

dinner theaters and attractions (See SC Private Letter Ruling #92-5.)

dog shows

fishing piers and ponds

flight and similar simulators

go cart or car racing tracks to include “pit passes”

golf courses and country clubs (green fees, range fees, membership dues) (See SC Revenue Ruling #91-18 and SC Private Letter Ruling #91-5.)

golf driving ranges

gun and knife shows

handball courts

health clubs (See, however, SC Revenue Ruling 92-1 for a discussion of exempt health clubs.)

historical attractions (See, however, Code Section 12-21-2420(9). Note: Charges for entertainment events, such as rock concerts, on the grounds of a location on the National Register of Historical Places do not come within the exemption in Code Section 12-21-2420(9).)

holiday celebrations and events (Halloween haunted houses, New Year Eve parties, firework shows, crop circles and mazes, etc.)

historical dramas

home shows

home tours (new homes, historical homes, Christmas tours, etc.)

horse shows

laser tag

mazes, including crop mazes

miniature golf or putt-putt courses

miniature or slot car tracks

“monster” truck shows

motorcycle expositions, races and shows

movie theaters or movie “peep show” machines

museums

music concerts

nightclubs, lounges, or bars with a cover charge

pageants

paint ball or laser gun facilities

para sail rides

Parade of Homes tours

planetariums

plays

promotional events such as boat shows, home shows, antique shows, gun and knife shows, and wildlife shows (See SC Revenue Ruling #89-8.)

race car or similar tracks (reality racing, ATV tracks, etc.)

racquetball courts

rock climbing facilities

rodeos

serpentariums

skating rinks or skate board parks

shooting ranges (target, skeet, trap sporting clays, etc.)

spas

spectator events (football, basketball, baseball, or hockey games; golf tournaments, tennis tournaments, rodeos, car racing, polo, horse racing, wrestling, boxing, etc.)

sport clubs

sporting events for spectators (football, basketball, baseball, or hockey games; golf tournaments, tennis tournaments, rodeos, car racing, polo, horse racing, wrestling, boxing, etc.)

squash courts

stage plays or performances

swimming pools and clubs (pool fees, membership dues)

target, skeet, trap or sporting clay ranges

theaters

tractor pulls

tennis or racquetball courts (court fees, membership dues)

water parks

water-skiing shows

water slides

wildlife preserves

wildlife expositions and shows

zoos

It should be noted that it has been the longstanding position of the Department that (1) fees for golf, tennis, dancing, and self-defense lessons from an instructor; (2) tournament participant entry fees (exclusive of the normal and customary charges to utilize the place of amusement, i.e. green or court fees); (3) fees for boat, carriage, helicopter, plane or bus rides for touring, charter, fishing, or excursion (see SC Technical Advice Memorandum #95-2.); (4) golf cart fees (subject to sales tax as rentals); (5) "trail fees" (fees charged by golf courses for someone using their own golf cart); (6) boat or jet ski rental fees (subject to sales tax); (7) fees for using tanning beds; (9) initiation fees for country clubs, golf clubs, tennis clubs and similar facilities[1] provided the initiation fee is a one-time (nonrecurring) charge paid as a prerequisite to joining the club; and (10) fees for equestrian lessons are not fees to enter or use a place of amusement and are not subject to the admissions tax.

Note: Organizations, event organizers, and others operating places of amusement should review Code Sections 12-21-2420 and 12-21-2430 to determine if there organization, location or event falls within one of the statutory exemptions. The burden of proof that an organization, location or event falls within an exemption rests with the operator of the place of amusement.

An application for admissions tax exemption under Code Section 12-21-2420 may be submitted to the Department on Form L-2068. A copy of this "License Tax" form can be found on the Department's website (www.sctax.org) under "Quick Links" ("Forms and Instructions"). An organization, location or event does not need to apply for the exemption in order to be exempt, but must be able to document (charter, by-laws, financial records, etc) that an exemption is applicable.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Burnet R. Maybank III
Burnet R. Maybank III, Director

September 15, 2005
Columbia, South Carolina

[1] An initiation fee should not allow a person to utilize the facilities of the club without payment of a recurring charge (membership dues). In other words, a one-time charge that is a substitute for recurring membership dues is not an initiation fee.

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

SC TECHNICAL ADVICE MEMORANDUM #95-2 (TAX)

TO: Marvin Davant, Assistant Administrator
Field Services Division

SUBJECT: Sight-Seeing Tours
(Admissions Tax)

DATE: October 18, 1995

SCOPE: This Technical Advice Memorandum is Policy's **official advisory opinion** of how laws administered by the Department of Revenue are to be applied to a specific issue or set of facts.

Question:

Are fees paid for sight-seeing tours conducted by carriage, bus, helicopter, airplane, trolley, boat, and other similar modes subject to the admissions tax imposed under Code Section 12-21-2420?

Conclusion:

Fees paid for sight-seeing tours conducted by carriage, bus, helicopter, airplane, trolley, boat, and other similar modes are not subject to the admissions tax imposed under Code Section 12-21-2420.

Facts:

Tourist areas in South Carolina provide a variety of sight-seeing tours to our State's visitors. The mode of tour includes boats, buses, motorized trollies, helicopters, airplanes and horse drawn carriages. Generally, the visitor pays the tour business a set fee to take a specific area tour. The visitor may, for example, take a tour by air over the beach, a trolley ride to view museums and local landmarks, a bus ride to view churches, battle grounds, and historic homes, or a carriage tour of blooming gardens. Upon completion of the tour, the visitor is returned to his original place of departure.

Advice has been requested concerning the applicability of the admissions tax to these various sight-seeing tours.

Discussion:

Code Section 12-21-2420 imposes the admissions tax and reads, in part:

> There must be levied, assessed, collected, and paid upon paid admissions to places of amusement within this State a license tax of five percent...
>
> * * *
>
> The tax imposed by this section shall be paid by the person or persons paying such admission price and shall be collected and remitted to the South Carolina Department of Revenue and Taxation by the person or persons collecting such admission price...

It has been the longstanding policy of the Department of Revenue not to impose the admissions tax on fees paid solely for sight-seeing tours conducted by carriage, bus, helicopter, airplane, trolley, boat, and other similar modes. The rationale for this policy is twofold:

(1) Prior to 1981, the Department considered an excursion boat with a dance hall to be a place of amusement, but did not consider boat or other sight-seeing tours to be places of amusement. In March 1981, Attorney General Opinion No. 81-30 concluded that an excursion boat offering sight-seeing or fishing was a place of amusement. Later in 1981, the Legislature amended Code Section 12-21-2420 to exempt from the admissions tax "admissions to boats which charge a fee for pleasure fishing, excursion, sight-seeing and private charter." A result of this amendment was to confirm the Department's prior longstanding administrative policy of not taxing fees charged for sight-seeing tours.

(2) For years the Department's Audit Training Manual for Admissions Tax has stated that carriages, helicopter, or plane rides for touring or pleasure are not subject to the tax.[1]

It is well settled that the construction of a statute by an agency charged with its administration will be accorded the most respectful consideration and will not be overturned absent compelling reason. Laurens County School Districts 55 & 56 v. Cox, 308 S.C. 171, 417 S.E. 560 (1992). Jasper County Tax Assessor v. Westvaco Corp., 305 S.C. 346, 409 S.E. 2d 333 (1991); Dunton v. S.C. Bd. of Examiners of Optometry, 291 S.C. 221, 353 S.E. 2d 132 (1987).

[1]It should be noted that the admissions tax applies to charges for admission to a carriage, bus, trolley, etc. when admission to the vehicle is for entertainment, dancing, or drinking in a social environment, and not solely for sight-seeing.

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
300A Outlet Pointe Blvd., Columbia, South Carolina 29210
P.O. Box 125, Columbia, South Carolina 29214-0575

SC INFORMATION LETTER #24-13

SUBJECT: Interest Rate

DATE: August 23, 2024

REFERENCE: S.C. Code Ann. Section 12-54-25 (2014)
2024 S.C. Act No. 226, Provisos 41.2 and 117.81

AUTHORITY: S.C. Code Ann. Section 12-4-320 (2014)
SC Revenue Procedure #09-3

SCOPE: An Information Letter is a written statement issued to the public to announce general information useful in complying with the laws administered by the Department. An Information Letter has no precedential value.

The interest rate to be applied to underpayments and overpayments* of taxes is listed below. The rate is compounded daily except simple interest applies to the underpayment of declaration of estimated tax.

Period	Rate*	Period	Rate*	Period	Rate*
09/01/85 – 12/31/85	11%	04/01/98 – 12/31/98	8%	01/01/09 – 03/31/09	5%
01/01/86 – 06/30/86	10%	01/01/99 – 03/31/99	7%	04/01/09 – 12/31/10	4%
07/01/86 – 09/30/87	9%	04/01/99 – 03/31/00	8%	01/01/11 – 03/31/11	3%
10/01/87 – 12/31/87	10%	04/01/00 – 03/31/01	9%	04/01/11 – 09/30/11	4%
01/01/88 – 03/31/88	11%	04/01/01 – 06/30/01	8%	10/01/11 – 03/31/16	3%
04/01/88 – 09/30/88	10%	07/01/01 – 12/31/01	7%	04/01/16 – 03/31/18	4%
10/01/88 – 03/31/89	11%	01/01/02 – 12/31/02	6%	04/01/18 – 12/31/18	5%
04/01/89 – 09/30/89	12%	01/01/03 – 09/30/03	5%	01/01/19 – 06/30/19	6%
10/01/89 – 03/31/91	11%	10/01/03 – 03/31/04	4%	07/01/19 – 06/30/20	5%
04/01/91 – 12/31/91	10%	04/01/04 – 06/30/04	5%	07/01/20 – 03/31/22	3%
01/01/92 – 03/31/92	9%	07/01/04 – 09/30/04	4%	04/01/22 – 06/30/22	4%
04/01/92 – 09/30/92	8%	10/01/04 – 03/31/05	5%	07/01/22 – 09/30/22	5%
10/01/92 – 06/30/94	7%	04/01/05 – 09/30/05	6%	10/01/22 – 12/31/22	6%
07/01/94 – 09/30/94	8%	10/01/05 – 06/30/06	7%	01/01/23 – 09/30/23	7%
10/01/94 – 03/31/95	9%	07/01/06 – 12/31/07	8%	10/01/23 – 12/31/24	8%
04/01/95 – 06/30/95	10%	01/01/08 – 03/31/08	7%		
07/01/95 – 03/31/96	9%	04/01/08 – 06/30/08	6%		
04/01/96 – 06/30/96	8%	07/01/08 – 09/30/08	5%		
07/01/96 – 03/31/98	9%	10/01/08 – 12/31/08	6%		

***Note reduction of interest rate on refunds.** **For fiscal year 2024-2025 (July 1, 2024, through June 30, 2025), Budget Provisos 41.2 and 117.81 direct the Department to reduce the rate of interest paid on eligible refunds by a total of three percentage points from the above listed rates.**

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
OFFICE OF GENERAL COUNSEL

300A Outlet Pointe Blvd.
Columbia, SC 29210

Main Line: 803.898.5130
Facsimile: 803.896.0171

August 18, 2023

VIA US MAIL
Thomas R. Goldstein, Esquire
Belk, Cobb, Infinger & Goldstein, P.A.
P.O. Box 71121
Charleston, SC 29405-7644

Re: Watertoys, LLC d/b/a Tidalwave Watersports
Admissions Tax
Period(s) Involved: September 1, 2018 through December 31, 2021
DOR File Number: 230028

Dear Mr. Goldstein,

Enclosed is the South Carolina Department of Revenue's Determination in the above-referenced matter. If you disagree with the Determination, you may request a contested case hearing before an Administrative Law Judge. If you choose to pursue such remedy, you must do so within thirty (30) days of the date of this letter. If you fail to respond within this time limitation, you will lose your right to appeal the Department Determination and your protest will be ended. Should you desire a contested case hearing, you must complete the enclosed request form and mail it, along with a $150.00 filing fee, to the Administrative Law Court at the address stated on the form's instruction sheet.

The Administrative Law Court rules require that you also send me a copy of your request. My address is as follows: 300A Outlet Pointe Boulevard, Columbia, SC 29210.

Sincerely,

OFFICE OF GENERAL COUNSEL

Marcus D. Antley, III
Associate Counsel

MDA/hch

Enclosures

DEPARTMENT DETERMINATION

Taxpayer:

Watertoys, LLC
d/b/a Tidalwave Watersports
1285 Llewellyn Road
Mount Pleasant, SC 29464-3818

Periods Involved:

September 1, 2018 – December 31, 2021

Matters in Dispute:

1. Is the price paid to Watertoys, LLC d/b/a Tidalwave Watersports (the Taxpayer) for parasailing rides subject to admissions tax?

2. Is Taxpayer liable for penalties?

Tax	$	33,998.40
Penalty	$	14,356.74
Interest*	$	4,808.41
Amount Due	**$**	**53,163.55**

****The interest amount has been updated from the Proposed Notice of Assessment and is computed through September 18, 2023, and will continue to accrue until this matter is resolved.***

Determinations:

1. The price paid to the Taxpayer for parasailing rides is subject to admissions tax.

2. The Taxpayer is liable for penalties.

Relevant Facts:

1. During the Periods Involved, the Taxpayer operated a parasailing ride business based out of Isle of Palms, South Carolina.

2. The Taxpayer charges $85.00 for a parasailer and $35.00 for an observer.

3. The South Carolina Department of Revenue (the Department) conducted an audit examination of the Taxpayer to determine the Taxpayer's compliance with admissions tax requirements for the periods of September 1, 2018 – December 31, 2021. During the audit, the Department discovered the Taxpayer did not file admissions tax returns, nor did it collect or remit admissions tax for the amounts received for parasailing rides.

MSC

4. The Department issued the Taxpayer a Proposed Assessment on February 17, 2022, assessing admissions tax and interest, as well as penalties for failure to file returns and failure to pay taxes due.[1]

5. The Taxpayer timely protested the Proposed Assessment by correspondence dated March 17, 2022.

6. The Department conducted an appeals conference with the Taxpayer on June 15, 2022 to discuss the audit. Despite the conference, the Department and the Taxpayer were unable to resolve the issues in dispute and the file was forwarded to the Office of General Counsel for issuance of this Determination.

Analysis:

I. **The price paid to the Taxpayer for parasailing rides is subject so admissions tax.**

S.C. Code Ann. § 12-21-2420 (2014) imposes an admissions tax on amounts paid to enter places of amusement. For purposes of that section, "admission" is defined in S.C. Code Ann. § 12-21-2410 (2014) as "the right or privilege to enter into or use a place or location." Thus, the admissions tax, a license tax of five percent, is imposed upon the paid right or privilege to enter into or use a place of amusement. A place of amusement is "any enclosure or location consisting of an activity that occupies one's spare time, distracts the mind, relaxes, entertains, or gives pleasure." S.C. Rev. Rul. # 05-14. Further, S.C. Rev. Rul. # 05-14 specifically includes "para sail rides" as a places of amusement subject to admissions tax. Here, the Taxpayer charges for admission to its parasailing rides. Therefore, the price paid to Taxpayer for parasailing rides is subject to admissions tax.[2]

II. **The Taxpayer is liable for penalties.**

S.C. Code Ann. § 12-54-43(C)(1) (2014) states:

> In the case of failure to file a return on or before the date prescribed by law, determined with regard to any extension of time for filing, there must be added to the amount required to be shown as tax on the return, a penalty of five percent of the amount of the tax if the failure is for not more than one month, with an additional five percent for each additional month or fraction of the month during which the failure continues, not exceeding twenty-five percent in the aggregate.

---

[1] The original assessment included an admissions tax assessment on the $35.00 observer charges, which the Department later removed from the assessment.

[2] The Taxpayer argues that its parasailing rides fall under § 12-21-2420(13), which exempts admissions to boats which charge a fee for pleasure fishing, excursion, sight-seeing and private charter. However, parasailing is not pleasure fishing, excursion, sight-seeing and private charter but rather its own distinct amusement activity. *See Home Med. Sys., Inc. v. S.C. Dep't of Revenue*, 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.").

MDA

Pursuant to the foregoing, a taxpayer is liable for failure to file penalties if it fails to file a return before the due date prescribed by law plus any extension. The Taxpayer did not file admissions tax returns for any of the periods at issue despite being required to file. Because the Taxpayer failed to file admissions tax returns, it is liable for failure to file penalties.

In addition, S.C. Code Ann. § 12-54-43(E) (2014) states:

> In case of failure to pay any amount of any tax required to be shown on a return which is not shown, including an assessment within ten days of the date of the notice and demand for payment, there must be added to the amount of tax stated in the notice and demand one-half of one percent of the amount of the tax if the failure is for not more than one month, with an additional one-half of one percent for each additional month or fraction of a month during which the failure continues, not exceeding twenty-five percent in the aggregate.

Therefore, a taxpayer is liable for failure to pay penalties if it fails to pay a tax on or before the date prescribed by law. The Taxpayer did not pay any admissions tax for the periods at issue despite being required to pay. Because the Taxpayer failed to timely pay its admissions tax liability, it is liable for failure to pay penalties.

Conclusion:

The amounts collected by the Taxpayer from its customers are paid admissions for the privilege of entering a place of amusement and are accordingly subject to admissions tax pursuant to § 12-21-2420. Further, because the Taxpayer failed to file and failed to pay its admissions tax, it is liable for failure to file and failure to pay penalties pursuant to §§ 12-54-43(C)(1) and 12-54-43(E). Therefore, the Taxpayer is liable for admissions tax, interest[3], and penalties.

Department Determination drafted by Department Representative:

Marcus D. Antley, III, Esquire
Associate Counsel
South Carolina Department of Revenue

August 18, 2023

[3] S.C. Code Ann. § 12-54-25(A) (2014) mandates, "[i]f any tax is not paid when due, interest is due on the unpaid portion from the time the tax was due until paid in its entirety."

Filing and Assignment of a Contested Case with the Administrative Law Court

Complete the Request for Contested Case Hearing **and** Certificate of Service form in its entirety. File the original by mailing it or hand delivering it to the Administrative Law Court, along with a copy of the decision from the agency (for example: Department Determination) **and** the appropriate filing fee. Be sure to serve a copy of the Request on the agency which you are appealing (see address below) as well as any other known parties or protestants.

Your case will be deemed filed with the Administrative Law Court upon receipt of your request and filing fee, and will normally be assigned to an administrative law judge within a week of filing. You should receive a Notice of Assignment within a few days of your case being assigned. The Notice of Assignment will have the case caption, docket number, date of filing and the name of the administrative law judge assigned to your case. Once your case has been assigned, all filings and questions regarding your case should be directed to the assigned judge.

Clerk's Office
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

South Carolina Department of Revenue
Office of General Counsel
300A Outlet Pointe Boulevard
Columbia, SC 29210

South Carolina Administrative Law Court (SC ALC)

Request for Contested Case Hearing FORM

Mail to: 1205 Pendleton St., Suite 224, Columbia, SC 29201

Last Name:	First:	Middle:	Docket No. (To Be Completed by ALC)

Mailing Address:	City:	State and Zip:

Home Number:	Work Number:	Cell Number:	*E-Mail Address:

*By providing your e-mail address, you consent to receive court orders and notices via electronic transmission

REPRESENTATION

Are you representing yourself? ☐ Yes ☐ No

Are you represented by an Attorney? ☐ Yes ☐ No	Name of Attorney:
Attorney Mailing Address:	City, State and Zip:
Attorney Work Number and Cell Number:	Attorney E-Mail Address:

CASE INFORMATION

Name of Agency that Issued the Decision: (Example – Dept. of Revenue, Dept. of Insurance, DHEC)

In order to have your case processed, **you must attach the agency decision.** Is it attached?: ☐ Yes ☐ No	If no, please explain:
Date the decision was issued:	Date the decision was received:

Please provide a brief statement regarding why the hearing is being requested and the relief sought:

Payment (applicable **filing fee pursuant to** ALC Rule 71) is being submitted today to the Administrative Law Court

via ☐ Check ☐ Money Order ☐ Cash

via ☐ U.S. Postal Service ☐ Hand-delivery

_____	_____
X *Your Signature or Signature of Attorney*	*Date*

PROOF OF SERVICE (MUST BE COMPLETED)

Your Name:	Date:	City:	State:

I hereby certify that on the date and place listed above, I served a copy of the foregoing Request for Contested Case Hearing **on all other parties** to this matter by depositing the same in the United States Mail, postage paid, and addressed as follows (use the reverse side for any additional names):

_____	_____	_____
Name and/or Agency Name	Address	City, State and Zip
_____	_____	_____
Name and/or Agency Name	Address	City, State and Zip

_____	_____
X *Your Signature or Signature of Attorney*	*Date*

Attention: All cases filed in the Administrative Law Court are subject to the Rules of Procedure found at the Court's website www.scalc.net or from the Clerk of Court. Failure to follow these rules may result in dismissal of your case.

2000 WL 35722072 (S.C.Tax.Com.)

Department of Revenue

State of South Carolina

SUBJECT: TAX LEGISLATIVE UPDATE FOR 2000

SC Revenue Informational Bulletin No. 00-15
DATE: September 19, 2000

AUTHORITY:

***1** S. C. Code Ann. Section 12-4-320 (2000)

SC Revenue Procedure # 99-4

SCOPE:

A Revenue Informational Bulletin is a written statement issued to the public by the Department to announce general information useful in complying with the laws administered by the Department. **A Revenue Informational Bulletin has no precedential value, and is not binding on the public or the Department**.

Attached is a brief summary of most of the significant changes in laws that were enacted by the General Assembly during the past legislative session. The summary is divided into four categories of legislation and can be found as indicated below.

Also attached is a brief summary of three bills, House Bill 3358, House Bill 3393, and House Bill 3649, that have not been signed or vetoed by the Governor as of the date of this informational bulletin. These bills are summarized by tax type on pages 64 - 66 for your reference. At such time when these bills are signed or vetoed by the Governor, the Department will issue an informational bulletin stating the action taken by the Governor and the effective dates of any signed legislation.

The law changes are summarized in bill number order, except that changes in the "Miscellaneous" category are summarized by subject matter. Also, there are several instances where more than one bill with related subject matters were enacted. In such cases, these summaries are cross referenced. Further, some laws have not been assigned act numbers as of the date of this informational bulletin and this is indicated in the summary.

WARNING: This is intended to be a summary of the main points of the legislation. Please refer to the full text of the legislation for specific details and requirements. A complete copy of the legislation discussed can be obtained from the South Carolina Legislative Council's website at www.lpitr.state.sc.us.

INCOME TAXES, CORPORATE LICENSE FEES, AND WITHHOLDING

Senate Bill 80, Section 2. (Act No. A314)

Community Development Corporation Investment Credit

Code Section 12-6-3530 has been added to provide an income tax, bank tax, or insurance premium tax credit equal to 33% of an investment (see exceptions below) in a community development corporation or community development financial institution. The total credit that may be claimed by all taxpayers is $ 1 million in one year and $5 million for all years. Any unused credit may be carried forward, however, the carry forward must be used before the taxable year that begins on or after 10 years from the date of the acquisition of stock or other equity interest that is the basis for the credit.

***2** Exceptions to the amount of credit eligible to be claimed include:

1. One community development corporation or community development financial institution may not receive more than 25% of the total tax credits authorized in any one tax year.

2. If on April 1, 2001, or as soon thereafter as the Department of Commerce is able to determine, the total amount of tax credits claimed by all taxpayers exceeds the limitations, the credits will be determined on a pro rata basis.

The following requirements apply to the credit:

1. A taxpayer must obtain a certificate from the Department of Commerce certifying that: (a) the investment is in a certified community development corporation as defined in Code Section 34-43-20(2) or a certified community development financial institution as defined in Code Section 34-43-20(3) and (b) the credit available will not exceed the $1 million or $5 million limitation.

2. The community development corporation or community development financial institution must be certified by the Department of Commerce at the time the investment is made. A taxpayer who invested in good faith in a certified corporation or institution may claim the credit if the Department of Commerce later revokes or does not renew the certification.

3. The taxpayer must file with the Department of Revenue the form issued by the Department of Commerce certifying the stock or other equity interest. The Department of Commerce will provide these forms to the taxpayer before the fifteenth day of the second month following the month of acquisition and to the Department of Revenue before the fifteenth day of the third month following the month of acquisition.

4. Banks and financial institutions chartered by the State of South Carolina may invest up to 10% of their total capital and surplus in a community development corporation or community development financial institution.

4. A person, including a pass through entity, who conducts a trade or business (other than that of being an employee) must notify the Department in writing within 180 days after a final determination of tax adjustment *(i.e.* the federal assessment date) is made by the Internal Revenue Service. Previously, the statute only required corporations to notify the Department of changes in taxable income by the Internal Revenue Service within 90 days after receipt of a final determination from the Internal Revenue Service.

5. Notwithstanding the time limitations on filing a claim for refund in Code Section 12-54-85(F), a person may file a claim for refund within 180 days after the federal assessment date for the overpayment of taxes due to changes in taxable income made by the Internal Revenue Service. Previously, this provision only applied to corporations who filed a claim for refund within 90 days from the date the Internal Revenue Service changed the taxable income.

Effective Date: August 17, 2000

Senate Bill 575, Section 3.J.1. (Act No. A399)

Interest on Refunds When No Return is Due

Code Section 12-54-25(C), concerning interest on tax refunds or credits, has been amended to clarify the amount of interest to be paid to a taxpayer when a return is not required to be filed with a payment. In such instances, any tax refund or credit must include interest from the later of: (1) the date the tax was paid or (2) the last day prescribed for paying the tax, to the date the credit was made, or the refund was sent, to the taxpayer. The amendment also clarifies that the Department does not pay interest on an overpayment that is refunded within 75 days after the last day prescribed for paying the tax if no return is required.

***30** Effective Date: Taxable periods ending after December 31, 1999.

Senate Bill 575, Section 3.X.1. (Act No. A399)

Refund of Overpayment of Property Tax

Code Section 12-45-78 has been added to provide that any overpayment of property tax that results from the granting of a homestead exemption under Code Section 12-37-250 or from the property qualifying for the 4% assessment ratio for legal residences under Code Section 12-43-220(c) shall be refunded if either of these events occurs after the payment of the property tax for that year. Any overpayment must be refunded to the owner of record at the time that the exemption is granted or the classification is made.

Effective Date: January 1, 2001

Senate Bill 575, Section 3.J.2. (Act No. A399)

Failure to File Penalty

Code Section 12-54-43(C)(2), concerning a minimum failure to file penalty of the lesser of $100 or 100% of the tax when the tax owed is more than $100, has been deleted.

Code Section 12-54-43(C)(1) continues to impose a failure to file penalty of 5% of the tax amount for each month or fraction thereof, not to exceed 25%, in the case of a failure to file a return on or before the due date, determined with regard to any extension of time for filing.

Effective Date: Tax returns due after October 31, 2000, and does not affect an action or proceeding commenced or a right accrued before October 1, 2000.

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
300A Outlet Pointe Blvd., Columbia, South Carolina 29210
P.O. Box 125, Columbia, South Carolina 29214-0575

SC INFORMATION LETTER #23-11

SUBJECT: Tax Legislative Update for 2023

DATE: August 29, 2023

AUTHORITY: S.C. Code Ann. § 12-4-320 (2014)
S.C. Code Ann. § 1-23-10(4) (2005)
SC Revenue Procedure #09-3

SCOPE: An Information Letter is a written statement issued to the public to announce general information useful in complying with the laws administered by the Department. An Information Letter has no precedential value.

Attached is a brief summary of the significant changes in tax and regulatory laws enacted during the past legislative session. The summary is divided into categories, by subject matter, as indicated below.

DISCLAIMER:

This is intended to be a summary of the main points of the recently enacted legislation; it is not an interpretation by the Department. It is written in general terms for widest possible use and may not contain all the specific requirements or provisions of authority. It is intended as a guide only, and the application of its contents to specific situations will depend on the particular circumstances involved. It does not represent official Department policy. You should always refer to the full text of the legislation for specific details and requirements.

There may be instances where some tax or incentive related legislation summarized herein is under the jurisdiction of another state agency or political subdivision and not the Department. In such cases, questions concerning these provisions should be made directly to the agency or political subdivision having primary responsibility for the administration of these acts.

TEXT OF LEGISLATION:

A complete copy of the legislation discussed can be obtained from the South Carolina Legislature's website at scstatehouse.gov.

REENACTED TEMPORARY PROVISOS

The following temporary provisos were enacted in a prior legislative session and were reenacted by the General Assembly in 2023. Temporary provisos are effective for the State fiscal year July 1, 2023 through June 30, 2024, and will expire June 30, 2024, unless reenacted by the General Assembly in the next legislative session.

ADMINISTRATIVE and PROCEDURAL MATTERS

House Bill 4300, Part IB, Sections 41 and 117, Provisos 41.2 and 117.82 (Act No. 84)

3% Reduction on Interest Rate on Tax Refunds

The interest rate for tax refunds paid is reduced by 3% as follows:

1. Temporary Proviso 41.2 decreases by 2% the interest rate for tax refunds paid during the current fiscal year. The revenue resulting from this 2% reduction must be used for operations of the State's Guardian ad Litem Program.

2. Temporary Proviso 117.82 decreases by 1% the interest rate for tax refunds paid during the current fiscal year. Of the revenue resulting from this 1% reduction, $475,000 must be used by the Senate for operating expenses of the Joint Citizens and Legislative Committee on Children. The remaining revenue must be used by the Department of Juvenile Justice for programs for mentoring or other alternatives to incarceration.

House Bill 4300, Part IB, Section 109, Proviso 109.14 (Act No. 84)

Certain License or Permit Applications – Electronic Filing Option under Penalties of Perjury

This temporary proviso provides that the Department may require a statement subject to penalties of perjury instead of a statement under oath for the purpose of allowing certain applications for licenses or permits to be filed electronically.

House Bill 4300, Part IB, Section 109, Proviso 109.15 (Act No. 84)

Advance Referendum Notification by Election Commission to SCDOR

This temporary proviso provides that a county or municipal election commission must notify the Department 60 days prior to a referendum on the imposition of a local sales tax or local option permit.

Marcus 'Trey' Antley, III

From: Robin Coleman <rcoleman@scalc.net>
Sent: Thursday, March 21, 2024 11:47 AM
To: tgoldstein@cobblaw.net; Marcus 'Trey' Antley, III
Subject: RE: Do not print

Follow Up Flag: Follow up
Flag Status: Completed

Dear Counsel,

You may file cross motions for summary judgment. Judge Durden will review your briefs on the motion and rule, or schedule oral argument if she has questions after reading the briefs. She will then either grant summary judgment to one party, or deny summary judgment in order to take testimony from the designated witness. Please let me know if you have any further questions.

Thank you.

Robin E. Coleman
Judicial Aide to Judge Deborah Brooks Durden
S.C. Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201
(803) 734-6407

From: tgoldstein@cobblaw.net <tgoldstein@cobblaw.net>
Sent: Thursday, March 21, 2024 11:00 AM
To: Robin Coleman <rcoleman@scalc.net>; 'Marcus 'Trey' Antley, III' <Trey.Antley@dor.sc.gov>
Subject: Do not print

Robin,

Here is a letter to Judge Durden and our agreed upon stipulation of facts. As set forth in the attached letter, which I've already mailed, I do not know if the Judge wants to set a briefing schedule or hear argument of counsel or both or neither. I'm in unfamiliar territory here.

Tommy
(843) 554 4291

Marcus 'Trey' Antley, III

From: Marcus 'Trey' Antley, III
Sent: Monday, May 13, 2024 4:22 PM
To: tgoldstein@cobblaw.net; 'Robin Coleman'
Subject: RE: [EXTERNAL] Reply to Department's Return, Affidavit, 23-ALJ-17-0362-CC

Good morning Robin,

The more specific SCALC Rule 29(D)(1) only provides for a Motion to Reconsider and a Response to that Motion. This contrasts with the more general SCALC Rule 19(A) regarding motions, which allows for a Reply. Specific rules usually trump general rules, so it appears a Reply is not allowed here. Will the Court entertain Petitioner's Reply? If so, the Department asks that the Court allow the Department to respond to the Reply and the newly submitted affidavit. In particular, the affidavit appears to include immaterial facts or contradict the stipulated facts. Either way, introducing new facts at this stage to now claim that the material facts are in dispute is inappropriate and violates the principle of judicial economy.

Thank you,
Trey

From: tgoldstein@cobblaw.net <tgoldstein@cobblaw.net>
Sent: Tuesday, May 7, 2024 7:36 PM
To: 'Robin Coleman' <rcoleman@scalc.net>
Cc: Marcus 'Trey' Antley, III <Trey.Antley@dor.sc.gov>
Subject: [EXTERNAL] Reply to Department's Return, Affidavit, 23-ALJ-17-0362-CC

Dear Judge Durden,

Here is a digital copy of Petitioner's Reply, affidavit of Michael Fiem, and a certificate of mailing I put in today's mail.

Tommy Goldstein
(843) 554 4291

Marcus 'Trey' Antley, III

From: tgoldstein@cobblaw.net
Sent: Monday, June 10, 2024 10:59 AM
To: Marcus 'Trey' Antley, III
Subject: [EXTERNAL] Notice of Appeal
Attachments: Kitchings ltr. (June 7, 24).pdf; Appeal Bond executed (June 10, 24).pdf; Notice of Appeal (June 7, 24).pdf

Follow Up Flag: Follow up
Flag Status: Completed

Marcus,

I am sending you by regular mail the attached Notice of Appeal, Appeal Bond, and a copy of my letter to the Court of Appeals. I did not include another set of paper copies of the Orders being appealed because you already have those. I have the disputed taxes in my escrow account, which I assume is a satisfactory deposit.

Tommy

Marcus 'Trey' Antley, III

From: Marcus 'Trey' Antley, III
Sent: Monday, June 10, 2024 4:53 PM
To: tgoldstein@cobblaw.net
Subject: RE: [EXTERNAL] Notice of Appeal

Good afternoon Tommy,

We do not believe this qualifies as a bond under S.C. Code Ann. § 12-60-3370. Further, the taxes must include interest. *See* S.C. Code Ann. § 12-60-30(27). Also, interest will continue to accrue on any tax, interest, or penalty not paid to the Department.

I gave you these amounts when we spoke on May 21, 2024, but I wanted to be sure you have them handy:

Tax: $33,998.40
Penalty: $15,536.14
Interest $7,15137
Total: $ 56,685.91

Feel free to give me a call.

Best,
Trey

From: tgoldstein@cobblaw.net <tgoldstein@cobblaw.net>
Sent: Monday, June 10, 2024 10:59 AM
To: Marcus 'Trey' Antley, III <Trey.Antley@dor.sc.gov>
Subject: [EXTERNAL] Notice of Appeal

This Message Is From an External Sender
This message came from outside your organization.

Marcus,

I am sending you by regular mail the attached Notice of Appeal, Appeal Bond, and a copy of my letter to the Court of Appeals. I did not include another set of paper copies of the Orders being appealed because you already have those. I have the disputed taxes in my escrow account, which I assume is a satisfactory deposit.

Tommy

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 23-ALJ-17-0362-CC

Watertoys, LLC, d/b/a Tidalwave Watersports,	)
Petitioner,	)
v.	)
South Carolina Department of Revenue,	)
Respondent.	)

ADMINISTRATIVE HEARING

****

Wednesday, August 28, 2024
10:00 a.m. - 10:33 a.m.

The hearing before the Honorable Deborah Brooks Durden was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 28th day of August 2024, before Cortney N. Glover, RPR, Certified Court Reporter and Notary Public in and for the State of South Carolina.

APPEARANCES

Thomas R. Goldstein, Esquire
Belk Cobb Infinger & Goldstein, P.A.
2344 Cosgrove Avenue
Charleston, South Carolina 29405
Post Office Box 71121
North Charleston, South Carolina 29415
Attorney for the Petitioner

Marcus D. Antley, III, Esquire
South Carolina Department of Revenue
300A Outlet Pointe Boulevard
Post Office Box 12265 (29211)
Columbia, South Carolina 29210

INDEX

EXHIBITS

(All Exhibits were retained by the Court. The Court's Exhibit Inventory List is attached and incorporated herein by reference. Exhibits were admitted as follows:)

STIPULATIONS

It is stipulated and agreed that this hearing is being taken pursuant to the rules of the Administrative Law Court and the South Carolina Rules of Civil Procedure.

(RESPONDENT'S EXHIBIT NUMBER 1 WAS MARKED PRIOR TO THE HEARING.)

CALL TO ORDER:

THE COURT: All right. So evidently the Court of Appeals didn't think I said enough in my earlier order, so we are here to correct that today.

Do we have any preliminary matters or procedural matters y'all want to take up at the outset?

PRELIMINARY MATTERS:

MR. ANTLEY: I think we just have one exhibit that we both agree. It's Respondent's Exhibit 1. It's a copy of the South Carolina Information Letter Number 24-13. And so that just shows the interest rates for the periods at issue and even some subsequent prior periods as well.

THE COURT: Okay. All right. I'll take that then if everybody's in agreement that it's admissible.

MR. GOLDSTEIN: That's without objection.

THE COURT: All right. Thank you.

(Respondent's Exhibit Number 1 was admitted into evidence.)

THE COURT: Mr. Goldstein, would you like to begin?

POSITION OF THE PETITIONER:

MR. GOLDSTEIN: I would. May it please the Court. My name's Tommy Goldstein. I represent the -- I guess we're the petitioner in this case.

THE COURT: I think so. I think we're back to that.

MR. GOLDSTEIN: And I'd like to, if I may, correct the statement of the Court. I do not believe we're here before the Court because you didn't set enough of an amount. I think we're here because the Court has not set an amount.

THE COURT: What -- that -- I'm sorry. If I misspoke, that's what I meant to say.

MR. GOLDSTEIN: Okay.

THE COURT: I did not include an amount because ---

MR. GOLDSTEIN: Okay.

THE COURT: --- I did not realize the amount was in dispute. And so it was not included in my order.

MR. GOLDSTEIN: Right.

THE COURT: But in the interest of thoroughness, maybe it should have been. Could've have prevented y'all from a lot of trouble, and I apologize for that.

MR. GOLDSTEIN: Well, I -- no apologies necessary. But I'm much happier with that statement,

because otherwise it sounded like it was only gonna go up when I contend that the amount that -- well, let me just get to the heart of our argument. I have with me Mr. Fem [ph], who's prepared to take the stand and testify as to a few minor but probably necessary factual matters.

But we're here today on a very narrow issue. And I wish Mr. Antley and I had spoken before yesterday. My brief would have two-thirds shorter than it was. It's unnecessarily long because I think -- and he can correct me if I'm wrong. I think we now agree that the sole issue for the Court today is whether the appeal bond should or should not include interest. I think that's the -- maybe he disagrees with that assessment. And if so, he can correct it. But I believe that's the sole narrow issue.

And so with that as our starting point, I would point out to your Honor that the taxpayer in this case -- I don't know if I should refer to the -- I'm just gon' call him taxpayer, as opposed to Mr. Fem or Tidalwave. Tidalwave now, by the way, is out of business and no

longer stands, so this won't be an issue going forward -- has already deposited the $33,298 into our IOLTA account.

I don't think there is any more disagreement about that the taxpayer has the option to file an appeal bond or pay the money. I think we're past that. I think the sole issue is interest. And if that's the sole issue, I was surprised to receive the Department's brief yesterday because the Department cites a Footnote 3 on page 3 of its well-written and cogent brief where he discloses something that I didn't know. And I feel a little embarrassed that I didn't know it. And I tried to do some legislative history on 33 -- 12-16-3370 but was unable to do it. I think I'll have to physically go to the law school and get the reference librarian to do it 'cause -- there may be a way to do it online, but I couldn't find it.

But anyway, in Footnote 3 Mr. Antley points out that in the year 2000 the legislature amended the statute that we are here on, deleting the requirements that interest be included in the appeal bond. Well,

I take the position -- I called him yesterday, and I send, well, doesn't that end our dispute? I mean, if they -- if the statute previously required a deposit of interest and they took it out, isn't that a clear expression of legislative intent using the normal rules of statutory construction?

His position is, no, Goldstein, it's exactly the opposite. It shows that it -- they intended it to be in. And I said, well, we're just ---

THE COURT: And this amount was in what year?

MR. GOLDSTEIN: 2000.

THE COURT: Okay.

MR. GOLDSTEIN: So I -- and, of course, I have briefed the rules of statutory construction and the general principle that the exclusion of one is the -- the inclusion of one is the exclusion of the others, and the exclusion of one is the inclusion of others.

So I think -- I mean, Judge, I don't need to sit here and read Hodges versus Rainey to you. I mean, you're probably more familiar with it than I am. So the question ---

THE COURT: We talk about that case a lot in this

court.

MR. GOLDSTEIN: I would imagine you have.

The real reason -- not the real reason -- an important reason we're here is because I wanted you to see us and hear us. Because this is not some academic exercise. Mr. Fem is a real living human being, and he wants his right of appeal. Respectfully, Judge, we believe that your Honor erred in granting summary judgment. And we're not here to argue that now. That's for another day. But what we're here today for is to ask for, pray for, beg for the right to go forward on our appeal.

Mr. Antley's position is that unless we tender the interest or post an appeal bond for the interest, then we can't go forward on the appeal. Well, the right to go forward on appeal is a pretty fundamental core right. I mean, it's enshrined in our State and federal constitution.

You know, we all went to the same law -- no. I think -- I don't know where you went to law school. I assume you went to Carolina.

OBJECTION BY THE PETITIONER:

MR. ANTLEY: Your Honor, I just want to object at

this point. We're talking about issues that are beyond the scope of the remand. The remand is the amount of tax penalties and interest due. It's not whether or not the Court of Appeals has appellate jurisdiction over this case.

COURT'S DECISION ON OBJECTION:

THE COURT: Yeah. Let's kind of stick -- try to stick to the -- what we're here to decide today.

MR. GOLDSTEIN: Okay. We're here to decide: Are we allowed to go forward on our appeal or not?

THE COURT: Well, no, no. That's an issue for the court of Appeals. And you'll have lots of opportunities to argue that once I make this decision.

MR. GOLDSTEIN: That's right. So ---

THE COURT: My decision is very narrow.

MR. GOLDSTEIN: Yeah. The amount. We're here on the amount. So it is clear that interest, whatever interest is, it is not a tax. And I know you've got our briefs. I don't need to read it to you. The statute is not ambiguous. The Court should apply the ordinary rules of statutory construction.

He wants to torture the statute. He wants this Court to add in a word that is, by agreement, missing from the statute. He can't do that. You've got to apply. And when I say you, I don't mean you personally. The Court has to apply the statute as it is written.

If there's an ambiguity in it, the ambiguity would have to be resolved by recourse to the general rules of statutory construction, which brings us to a conversation about what is interest.

Now, whatever the Court thinks interest is, it's not a tax. It's clearly on the continuum of existence. If tax is on one end and penalty is on the other, where would interest fall in that continuum? It would fall closer to penalty. 'Cause no one pays interest voluntarily. Interest is always a manner of either a negotiated rate of return, or it's a statutorily imposed punishment for failure to adhere. As he says, it's to compensate a party from the wrongful retention of funds. But there's been no determination as to whether this tax is even due or not, so interest wouldn't even begin to accrue.

The fallback position is that, according to his brief, interest becomes due at the time that the Court pronounces that the taxes are due, which happened in this case at the earliest in May when the Court granted summary judgment or at the latest in June when this Court denied reconsideration. If interest is due -- and I respectfully submit it is not -- then that's the earliest it would begin to accrue, not when they allege. Especially when his business has been in existence since 1996, and they didn't come up with this amusement tax until 2018. And we don't know what changed. Why -- what was the change?

Now, I have Mr. Fem here. I also have exhibits verifying that the full amount of taxes are on deposit in my IOLTA account. I have pre-marked the exhibits to demonstrate that, although maybe that's no longer ---

THE COURT: Doesn't sound to me like that's necessary if there's no dispute between you as to that. I'd also like to ask Mr. Antley.

I'm assuming by your brief that none of that is still at issue bean the parties? Is the fact -- so let me rephrase the question.

Is the fact that the petitioner has conceded that when they first filed the -- when they first did the deposit into the IOLTA account, they conceded that it was short and that they then remedied that as soon as they were made aware of it. Is that shortage in the initial deposit into the IOLTA account at issue?

MR. ANTLEY: The only way that that is relevant today is when you add that shortage, you'll get a number that is only 40 cents off what the Department has stated that the tax due is. That -- and the only issue before the Court today are the amounts of the tax, penalties, and interest. It's not whether or not Mr. -- whether or not the petitioner posted a bond, if they paid the proper amount for appellate jurisdiction purposes. It's only what those amounts are.

And, I think, your Honor, at the beginning when we were speaking about this the Department didn't realize either that those amounts were at issue. So it's understandable the way the order was written that it did not specify what those amounts were. And so the only thing that

we're here for today is to specify what those amounts are. And it is the Department's understanding that there is not a dispute over the amount of the tax. There's not a dispute over the calculation of penalties. They -- and the only dispute with regards to interest, it's not -- there's not a dispute to the calculation other than at what point interest should begin to accrue.

So there's only one of the three amounts that is even at issue for this Court. And so the only kind of argument that would be relevant would be arguments surrounding when interest starts.

THE COURT: Okay. Mr. Goldstein, do you agree with that assessment of what the issue before me is?

MR. GOLDSTEIN: No.

THE COURT: Okay.

MR. GOLDSTEIN: And the ---

THE COURT: So I'll allow you to finish. I'm sorry for interrupting, but I'm just trying to kind of narrow and understand exactly what it is that I need to be focused on.

MR. GOLDSTEIN: I was close to being in agreement, but he keeps bringing up penalties. And the

statute specifically says that the appeal bond for the amount tendered does not include penalties.

THE COURT: I think you -- that was not the way I understood what he said.

MR. GOLDSTEIN: Okay. Well, I misunderstood that -- I misunderstood what he said. I though he said that we're here today to determine the amount of the taxes, interest, and penalties that have to be posted. I thought that's what he said. I apologize if I misunderstood.

I think we're here today on the narrowest of the issues. I think we're in agreement on the taxes. I think we're in agreement on the penalties, that those are not part of the appeal bond or the -- I think we're here on this Court has to declare what amount of interest, if any, is required to be posted as a condition of appeal. And if interest is required, when it began to accrue. I think that's the legal issue before the Court.

THE COURT: All right. That's very well stated. What amount of interest, if any, is required to be posted as part of the appeal bond?

MR. GOLDSTEIN: That's a question you're directing

to me?

THE COURT: I'm repeating what you said.

MR. GOLDSTEIN: Okay. Yes.

THE COURT: What amount of interest, if any, is required to be posted as part of the appeal bond? And if required, what is the amount?

MR. GOLDSTEIN: That's correct.

THE COURT: All right. Anything more?

MR. GOLDSTEIN: No. That is the issue. I think we finally -- I apologize for not being as articulate as I should be. But I think that -- I think we've arrived at common ground as to what the issue is. And our legal position is that interest is not required by clear application of the standard rules of statutory construction to Section 12-60-3370.

THE COURT: All right.

All right, Mr. Antley.

POSITION OF THE RESPONDENT:

MR. ANTLEY: Good morning, your Honor. Marcus Antley, III, counsel for the Department. As I mentioned earlier, the Court of Appeals remanded this matter for a very narrow issue, determination of the amounts -- an order -- what they're looking for is an order from this

Court specifying the amounts. We -- the relevant amounts are included in the initial filing, specifically the Department determination, which was attached to the agency information sheet. And the Department provided Petitioner with the updated numbers prior to the filing of its appeal actually shortly after the Court's final order in this matter.

Section -- to the extent that it's relevant to the Court to understand whether or not we should even talk about interest today, Section 12-60-30, which is the definitional section of the Revenue Procedure Act, that defines what taxes are. And in that definition the amounts that are relevant for this Court, for this issue are taxes, interest, and penalties. Those are explicitly included in the definition of "taxes." And unless it otherwise stated, the taxes as used in the Revenue Procedure Act include those terms.

So the -- this statute that confers appellate jurisdiction on -- or has to do with appellate jurisdictional issue that Mr. Goldstein discussed is 12-60-3370. And so that statute said -- says that a petitioner or

a taxpayer must pay or post a bond for the -- for all taxes, excluding penalties and civil fines. So there's no exclusion there for interest. For that reason, interest is relevant today, and it's important for this Court to specify that amount.

But it does not have to be complicated. Or it sort of can simply -- we can simply discuss what the amounts of taxes, interest, and penalties are. The Courts or can simply list those items, and then the Court of Appeals then can make a determination which of those items need to be paid or posted a bond for.

So it's not -- in fact, I'm not sure how this Court will be able to decide the question of appellate jurisdiction. So it's a -- there's a simple solution, and it's to determine what those amounts are. There -- of those three amounts, only one is in dispute and that is interest, and it's not based on the calculation of interest; it's just based on when that interest should start accruing.

THE COURT: Okay.

MR. ANTLEY: It says ---

THE COURT: Mr. Goldstein has argued that it should

start accruing as of the day of my order on reconsideration. To my knowledge, that's not the way it's normally been done. But if you could point me to what your argument is as to that?

MR. ANTLEY: Yes, your Honor. In fact, the Department's unaware -- so this particular -- well, the Department is unaware of an instance where interest has started accruing at a date later than when the tax was actually due. And there is a statute. It's at 12-54-25. And that statute, Subsection A is where the General Assembly lays out that interest is, in fact, due. That if a tax is not paid, then interest is then due.

Subsection B says that the tax is due. So the question is: When is the tax due? So we don't want to have to engage in statutory construction or any kind of arguments because the statute tells us. And it says a tax is due on the last day provided for its payment without regard for any extension of time for payment and without regard for or to any assessment under Section 12-60-910. And that stamp taxes and any other tax for which no

payment date is provided or due on the day the liability arises.

So in this case this is an admissions tax case. This -- they will need to -- they should have had, not have, but an admissions tax license during this entire audit period. Admission tax returns are filed monthly. So every month that that tax was not paid, that's when it starts to accrue. So the tax would start -- it was due during the audit period. It's due when someone pays admissions to, in this case, parasail. It's not due months, years later after a -- after there's been a judicial determination. That's -- that goes against the purpose of interest, which is to put parties on an even playing field. It's a neutralizing factor so that someone doesn't get the benefit of having someone else's funds and denying that other person the benefit of those funds.

THE COURT: All right. So ---

MR. ANTLEY: I would just say the amounts are in the Department's brief that would update it through today's date. Penalties and interest are dynamic. They don't stay. They're -- they

continue to accrue until the tax is paid, or in the case the penalty, the tax is paid and the returns are filed and the taxes are paid.

THE COURT: Okay. So here's my next question. With respect to the appeal bond, should my order that goes out after today's hearing calculate -- if I -- if we assume that the interest is due, should I calculate the interest up to the date of my former order or to today's date?

MR. ANTLEY: Well, the Department states this in its brief. But interest continues to accrue. So up until the point that it has been paid, it's still due. So it would be until -- up until the point that now they've satisfied the appellate jurisdictional question of paying or posting a bond for that amount. So the Department previously have calculated and provided that amount to petitioners so they could have it and have paid the tax and the interest up until the date that they would have filed.

There is a -- and there's another statute -- and I'm sorry I don't have this one off the top of my head but -- that allows for a waiver of up to 30 days of interest for

administrative purposes. So if the Court would like to calculate interest through today's date if the -- depending on what the taxpayer decides to do with the appellate issue, whether it's increase the amount or pay the Department to -- which would then stop it, the accruing of interest, that would give them a little -- there'll this 30-day window where they could -- that interest could -- be waived. But it's only a 30-day window.

THE COURT: Okay. All right. Mr. Goldstein, what do you have to respond?

REPLY BY THE PETITIONER:

MR. GOLDSTEIN: Yes, ma'am. May it please the Court. I think we've got the cart before the horse. The first rule of statutory construction is that a specific statute trumps a general statute. He's relying upon a definitional statute, which would have no applicability in this case where there's a specific appellate requirement, 3370, that set us out what a taxpayer must do.

Sectionally, the collection statute that he is relying on 15- -- I'm sorry -- 12-54-25 is a material implication statute. It's a if-

then. If any tax is not paid when due, then. We'll, we haven't established that there's any tax due. I understand. I'm the appellant across the street or next building over. And then I have the burden on the appeal. But the tax -- the amount of the tax being due has not yet been determined. It's an inchoate claim that they are making. And I understand if they prevail, then they would be entitled to interest. But they may not prevail. I might prevail.

The example I cited in my brief is an example of that was Olds versus City of Goose Creek. Now, that wasn't a amusement tax. That was a business license tax. But in that case the taxpayer lost the administrative level, lost at the appeal to the City council, lost at the circuit court level, lost at the Court of Appeals, but prevailed in the Supreme Court. So the fact that there's an amusement tax or admissions tax due has not yet been determined.

If looking at it in a light most favorable to Mr. Antley, if it has been determined, the earliest it was determined is when this Court issued its order, either, A, granting summary

judgment court or, B, denying reconsideration, which would mean that the interest has just now begun to accrue.

But no one has established that this admissions tax is due. There's a case on appeal, and the issue before the Court is, is the taxpayer gonna be allowed to go forward on his appeal or not? Well, we know that he is 'cause the motion to dismiss was denied. And he can renew his jurisdictional issue. Right now, the issue before the Court is, how much money does he have to put up in order to takes his appeal next door? That's the issue before the Court. So there's no interest due. And if there is, it would only begin to accrue two months ago.

THE COURT: All right. Anything more, Mr. Antley?

REPLY BY THE RESPONDENT:

MR. ANTLEY: I'd just like to make a point that interest also cuts both ways. So it would be similar if they paid the tax and it was later determined that the Department was wrong, the tax -- he should not pay the tax, the Department would then owe a tax plus interest. So it's not -- again, it's this neutralizing

factor. And we're thinking about when taxes are due. So when your income taxes are due April 15th, not 20 years later when you get through litigation over that issue.

And I also want to tell us -- point out the -- well, first the Court does not have to get into the issue of statutory construction. They can leave -- this Court can leave issue for the Court of Appeals and just specify the amounts. But to the extent that it is important or the Court is -- would like to know whether or not interest should even be discussed today, the Hodges v. Rainey case cited by Petitioner -- this is from Petitioner's memorandum. So I'm reading this from his memorandum on page 19.

The enumeration of exclusions from the operation of a statute indicates the statute should apply to all cases not specifically excluded.

So this is a statute that has an exclusion a limited exclusion of civil fines and penalties and does not include interest in that exclusion, so therefore interest would apply.

THE COURT: Okay.

CLOSING ARGUMENTS:

MR. GOLDSTEIN: Your Honor, in closing, I have my client here. And I don't know if the Court is interested or not about hearing the financial hardship that would result from having to post interest. I have that testimony and that evidence available if the Court is interested in considering that.

THE COURT: I appreciate that. But unfortunately I really don't think I -- it would be appropriate for me to consider that.

MR. GOLDSTEIN: I understand.

THE COURT: All right. Any more procedural or housekeeping matters that we need to discuss? I will -- I have read your briefs already. I thank you for your good briefs. And I will get an order out just as quickly as I can.

CLOSING ARGUMENTS:

MR. ANTLEY: Your Honor, the -- if the Court would like to hear, the Department has a sales tax auditor who can you present to support the numbers provided in the Department's brief, if the Court feels ---

THE COURT: Now, my understanding is that there are ---

MR. ANTLEY: --- it's evidence.
THE COURT: --- there is no dispute between the parties as to those numbers, only as to how I -- which numbers I apply in coming up with my order. Is that -- am I correct in that understanding, that there's not a dispute as to what the numbers are, only as to which numbers are included in my final order?
MR. GOLDSTEIN: That's correct. While they were in existence they did file monthly returns, which they have. So I don't think we need to have a trial on ---
THE COURT: Okay.
MR. GOLDSTEIN: --- what the reports were for that month.
THE COURT: All right.
MR. ANTLEY: So ---
THE COURT: I need to be -- make sure that I -- my understanding was correct on that.
MR. ANTLEY: Then if the -- if that means that the numbers provided in the Department's brief would be adopted if the Court agrees with the Departments position, then we would not need to offer any evidence -- live testimony.
THE COURT: My understanding is there's no objection

to -- from the Petitioner as to those numbers. So I don't think we need to take testimony. But thank you.

MR. ANTLEY: Thank you, your Honor.

FINAL REMARKS:

THE COURT: All right. Well, y'all came very prepared with -- just in case I went off on a tangent today. But I'm gonna try to stick to what the Court of Appeals has asked us to do here. And I thank you for your good briefs. And as you can probably tell by the banging in the hallway, things are very disruptive around the Administrative Law Court right now. They're renovating our office. I have no office. So that makes getting my orders out a little more complicated then usual. I would have -- under normal circumstances, I would say I'm gonna have an order out by the end of the week on this with your good briefs. But I won't promise that today. But it'll be very soon that I will get an order out.

MR. GOLDSTEIN: Well, we have something in common. I've been officeless now. We're supposed to be in September 1st.

THE COURT: Well, these construction projects never

go quite as smoothly as promised. So we were all already to move in -- what was that? -- a week and a half ago when we were told that we could return to our offices. And when our IT guy went to my office to set up my computer, there are no computer ports. So they're having to tear out what they did and make a place to plug in the computers with data ports. And so we're kind of one step forward, two steps back around here, which is what I'm sure you can relate with your office thing.

But anyway, I will ---

MR. GOLDSTEIN: I vote we go back to before computers.

THE COURT: Well, I'm not willing to do that. But I do want a computer port in my office so that I can take advantage of all this good technology that we have. But in the meantime, we're having a few growing pains. But I will get an order out very soon.

MR. GOLDSTEIN: Thank you, your Honor.

MR. ANTLEY: Thank you, your Honor.

THE COURT: Thank you.

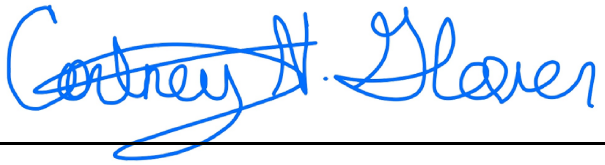
(There being nothing further, the hearing concluded at 10:33 a.m.)

CERTIFICATE

This is to certify that the within hearing consisting of twenty-nine (29) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenowriter with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on October 14, 2024.



Cortney N. Glover, RPR
Court Reporter

Notary Public for South Carolina
My Commission Expires: December 1, 2025

CERTIFICATE OF COUNSEL

I certify this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

April 30, 2025

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