

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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SC Court of Appeals

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

John Ray and Sherry Ray, Appellants,

v.

South Carolina Department of Revenue, Respondent.

**RESPONDENT’S RETURN TO APPELLANTS’ MOTION FOR
REINSTATEMENT**

In accordance with Rule 240(e), SCACR, the Respondent, South Carolina Department of Revenue (Department) opposes the Motion for Reinstatement of the Appellants (Rays) and offers the following in return.

Relevant Procedural History

On April 12, 2012, the Department issued the Rays a Department Determination disallowing a tuition tax credit they claimed for 2008. On May 11, 2012, the Rays requested a contested case hearing at the Administrative Law Court (ALC). On July 26, 2012, the ALC granted the Department’s motion for summary judgment and concluded that the Rays were not entitled to the tuition tax credit. On August 21, 2012, the ALC denied the Ray’s Motion to Reconsider, Grant Relief and Set Aside Order

On August 22, 2012, the Rays filed a Notice of Appeal with the Court of Appeals. However, under S.C. Code Ann. § 12-60-3370 (Supp. 2012) the Rays were required to pay or post a bond for the taxes determined to be due by the ALC before appealing the decision to the Court of Appeals. On April 18, 2013, after determining that the Rays did not pay for the taxes determined to be due by the ALC, or post a bond with the Court of Appeals or the ALC, the Department moved for an order dismissing the appeal. On April 26, 2013, the Rays filed their return to the Department's motion for dismissal. On July 12, 2013, the Court of Appeals issued an order holding the Department's motion for dismissal in abeyance and requiring the Rays, within ten (10) days, to provide the court with confirmation that the Rays had either paid the Department the principal amount of the disputed tax, \$850, or that they had posted a bond in that amount pending a resolution of their appeal. The order further stated that failure to comply would result in the dismissal of the Ray's appeal.

On July 18, 2013, the Rays filed a Petition for Rehearing with Suggestion for Rehearing En Banc regarding the July 12, 2013 order. On August 29, 2013, the Department renewed its motion for dismissal on the grounds that the Rays failed to comply with the July 12, 2013 order. On September 9, 2013, the Court of Appeals informed the Rays that it would not consider the Ray's Petition for Rehearing with Suggestion for Rehearing En Banc because the July 12, 2013 order did not have the effect of dismissing or finally deciding the Ray's appeal pursuant to Rule 240(i), SCACR. On September 11, 2013, the Court of Appeals issued an order dismissing the Ray's appeal.

On September 18, 2013, the Rays filed a second Petition for Rehearing with Suggestion for Rehearing En Banc, this time in regards to the September 11, 2013 order

of dismissal. On January 23, 2014, after “careful consideration” of the second Petition, the Court of Appeals denied the Ray’s second Petition.

On January 27, 2014, the Rays simultaneously filed motions with the Supreme Court and the Court of Appeals requesting certification of this case under Rule 204(b), SCACR, and reinstatement of this case under Rule 260(a), SCACR.

I. The Court Should Deny the Ray’s Motion for Reinstatement

The Court should deny the Ray’s Motion for Reinstatement for the following reasons. First, because the Rays failed to comply with §12-60-3370, their appeal was procedurally defective. Accordingly, this Court never had, and still does not have, appellate jurisdiction over this case. Furthermore, the Ray’s motion should be denied because it was not timely under Rule 260. Finally, the Rays motion should be denied because the Rays have not shown the requisite good cause for reinstatement under Rule 260.

A. The Court of Appeals never had appellate jurisdiction over this case.

Under § 12-60-3370, the Rays were required to “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). Because the Rays failed to comply with § 12-60-3370, this Court never had (and still does not have) appellate jurisdiction over this case. Accordingly, because the Court lacked appellate jurisdiction over this case, dismissal of the case was proper.

Under South Carolina statutory law, this Court has appellate jurisdiction¹ over taxpayer appeals from the ALC. See S.C. Code Ann. §§ 12-60-3380 (Supp. 2012) & 1-23-610(A)(1) (Supp. 2012). However, in order to trigger the Court's appellate jurisdiction over an appeal from the ALC, a taxpayer must comply with certain procedural statutes, thus perfecting the taxpayer's appeal.² While procedural statutes should be construed liberally in favor of the right to appeal,³ court rules and **any statutory requirements must be followed** in order to perfect an appeal. Toomer v. Toomer, 137 S.E. 2d 406 (1964). See also, Chem-Nuclear Systems, LLC v. S.C. Bd. of Health and Environmental Control, 648 S.E.2d 601 (S.C. 2007); Ex Parte Capital U-Drive It, Inc., 630 S.E. 2d 464 (S.C. 2006) (Holding that the right of appeal arises from and is controlled by statutory law).

The procedural statute at issue in this case, § 12-60-3370, required that the Rays pay or post a bond for the tax determined to be due by the ALC before appealing the ALC's decision to the Court of Appeals. However, the Rays never paid or posted a bond

¹The Supreme Court has noted the distinction between appellate and subject matter jurisdiction observing that "[s]ubject matter jurisdiction refers to the court's 'power to hear and determine cases of the general class to which the proceedings in question belong.'" Great Games, Inc. v. S.C. Dep't of Revenue, 529 S.E.2d 6, 8 n. 5 (S.C. 2000) (citing Dove v. Gold Kist, Inc., 442 S.E.2d 598 (S.C. 1994)). Furthermore, "[t]he failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of 'appellate' jurisdiction over the case, but it does not affect the court's subject matter jurisdiction." Id.

²The question of compliance with rules, regulations, and statutes governing an appeal is one of appellate jurisdiction rather than subject matter jurisdiction. Allison v. W.L. Gore & Associates, 714 S.E.2d 547 (S.C. 2011). See e.g., § 1-23-610(A)(1) which requires that an appeal from the ALC "must be served and filed with the court of appeals as provided in the South Carolina Appellate Court Rules in civil cases and served on the opposing party and the [ALC] not more than thirty days after the party receives a final decision and order of the administrative law judge."

³Weiters v. Bon-Secours-St. Francis Xavier Hosp., Inc., 662 S.E.2d 430 (Ct. App. 2008)

for the tax determined to be due by the ALC before (or after) appealing the ALC's decision to the Court of Appeals. As a procedural statute, compliance with § 12-60-3370 was necessary to invoke this Court's appellate jurisdiction. Accordingly, because the Rays failed to comply with § 12-60-3370, this Court's appellate jurisdiction was never triggered.

B. The Rays' motion was untimely under Rule 260.

Rule 260(a) reads as follows:

Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court. A case shall not be reinstated except by leave of the court, upon good cause shown, after notice to all parties. The clerk shall remit the case to the lower court or administrative tribunal in accordance with Rule 221 unless a motion to reinstate the appeal has been actually received by the court within fifteen (15) days of filing of the order of dismissal (the day of filing being excluded).

Thus, under Rule 260(a) when an appeal is dismissed due to noncompliance with the South Carolina Appellate Court Rules, the aggrieved party has fifteen days after the filing date of the order of dismissal to file a motion for reinstatement. In the present situation, this Court issued its order of dismissal on September 11, 2013. Accordingly, the Rays were required to file their motion for reinstatement on or before September 26, 2013.

Instead of filing a motion for reinstatement, the Rays filed their second Petition for Rehearing with Suggestion for Rehearing En Banc. The Rays did not file their Motion for Reinstatement until January 27, 2014. Therefore, unless the fifteen day time

limit imposed by Rule 260(a) was stayed by the filing of the second Petition, the Rays Motion for Reinstatement is not timely.⁴

Under Rule 240, SCACR, the general rule is that time limits imposed by the SCACR “shall not be stayed by the filing of a petition or motion” unless otherwise provided by the SCACR or court order. The Department is unaware of any Rule in the SCACR providing that a petition for rehearing stays the fifteen day time limit under Rule 260(a). Nor is the Department aware of any order from this Court staying the time limits for filing a Motion for Reinstatement in this case. In the absence any such rule or order from this Court, the Rays’ Motion for Reinstatement is not timely and should be denied on that basis.

C. The Rays have not shown “good cause” required by the Rule 260(a).

A Motion for Reinstatement under Rule 260(a) requires that the moving party show “good cause” before this Court can grant reinstatement. Dismissal under Rule 260(a) is administrative, and the good cause required to be shown under Rule 260(a) refers to the moving party’s failure to comply with the SCACR. Accordingly, the moving party must present the Court with good cause *for why it did not comply with the SCACR*. In this case, the Rays must present the Court with good cause for *why they did not comply with this Court’s July 12, 2013 order* requiring them, within ten (10) days, to provide the Court with confirmation that the Rays had either paid the Department the

⁴The filing of a petition for rehearing does stay the sending of a remittitur to the lower court pending the disposition of the petition by the Court under Rule 221(b). However, the tolling of remittitur under this Rule should not impact the time period under Rule 260(a).

principal amount of the disputed tax, \$850, or that they had posted a bond in that amount pending a resolution of their appeal.

The Rays assert two main arguments – neither of which speak to the issue of good cause for noncompliance with the July 12, 2013 order: First, the Department’s Motion to Dismiss was egregiously tardy, and as such, the Department abandoned and/or waived any right to file a motion to dismiss. Second, dismissal of the case at this stage is grossly inequitable. Neither argument is persuasive.⁵ Furthermore, the above arguments – as well as practically every other argument asserted by the Rays in their Motion for Reinstatement – have already been asserted by the Rays in their second Petition for Rehearing. Accordingly, this Court has already considered and ruled upon these arguments when it denied the Ray’s second Petition.

Conclusion

For the foregoing reasons, the Department requests that the Court deny the Ray’s Motion for Reinstatement.



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⁵Despite the nonapplicability of these arguments to the question of good cause under Rule 260(a), the Department maintains that at no time, explicitly or otherwise, did it abandon or waive its right to move for dismissal on jurisdictional or other applicable grounds. The Rays have not provided any legal authority to support this assertion. Furthermore, the Department is unaware of any statute, case law, or Appellate Court Rule supporting actual or constructive waiver by the Department. Furthermore, equitable considerations have no application in this case. The Court’s appellate jurisdiction arises from and is controlled by statutory law. “[Supreme Court] jurisprudence confirms that jurisdictional appealability issues are governed by statute, and not by [other rules.]” Skinner v. Westinghouse Elec. Corp., 668 S.E.2d 795, 797 (S.C. 2008).

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Columbia, South Carolina
February 6, 2014

PROOF OF SERVICE

I, Alexandra C. Chappell, hereby certify that I have caused to be mailed, postage prepaid, a copy of the Respondent's Return to Appellants' Motion for Reinstatement in re: John Ray and Sherry Ray v. South Carolina Department of Revenue, Docket No. 2013 ALJ-17-0221-CC, Appellate Case No. 2012-212844, to the Honorable Jenny Abbott Kitchings, of the South Carolina Court of Appeals, this 6th day of February, 2014. The same provided to John & Sherry Ray, PO Box 8535, Greenville, SC 29604, this same day.



Alexandra C. Chappell

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