

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

RECEIVED

MAR 27 2014

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

SC Court of Appeals

John Ray and Sherry Ray, Appellants,

v.

South Carolina Department of Revenue, Respondent.

**RESPONDENT'S RETURN TO APPELLANTS' MOTION TO RECALL THE
REMITTUR**

In accordance with Rule 240(e), SCACR, the Respondent, South Carolina Department of Revenue (Department) opposes the Motion to Recall the Remittitur 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. On February 6, 2014, the Department filed its returns opposing the Ray’s motions for certification and reinstatement. On February 12, 2014, the Ray’s filed their replies to the Departments returns.

On March 5, 2014, the Court of Appeals issued its remittitur for this case, remitting the case to the ALC along with a copy of the January 23, 2013 Order denying the Rays second Petition. On March 6, 2014, the Rays sent a letter to the Court of Appeals requesting that the Court withdraw the remittitur. On March 12, 2014, the Court of Appeals requested that the Rays put their request in the form of a motion to be reviewed by the Court. On March 13, 2014, the Rays filed their Motion to Recall the Remittitur.

I. The Court’s Remittitur Was Proper; Therefore the Court Should Deny the Ray’s Motion to Recall the Remittitur.

The Rays argue that because the Court of Appeals had yet to issue a ruling on their petition for reinstatement, the remittitur was issued prematurely. However, because the Ray’s petition for reinstatement was untimely under Rule 260(a), the Court of Appeals properly remitted this case to the ALC.

Rule 221(b) SCACR, provides:

(b) Remittitur. The remittitur shall contain a copy of the judgment of the appellant court, shall be sealed with the seal and signed by the clerk of the court, and unless otherwise ordered by the court shall not be sent to the lower court or administrative tribunal until fifteen (15) days have elapsed (the day of the filing being excluded) since the filing of the opinion, order, judgment, or decree of the court finally disposing of the appeal. If a petition for rehearing is received before the remittitur is sent, the remittitur shall not be sent pending disposition of the petition by the court. Where a petition for rehearing is denied, the Court of Appeals shall not send the remittitur to the lower court or administrative tribunal until the time to petition for a writ of certiorari under Rule 242(c) has expired. If a petition for writ of certiorari is filed, the Court of Appeals shall not send the remittitur until notified that the petition has been denied. If the writ is granted by the Supreme Court, the Court of Appeals shall not send the remittitur.

Furthermore, Rule 260(a) provides:

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).**

(emphasis added).

When a remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter. The only exception to this rule is when the remittitur is sent down my mistake, error or inadvertence of the Court. Wise v. S.C. Dept. of Corrections, 372 S.C. 173, 642 S.E.2d 551 (S.C. 2007). In Wise, the appellant's appeal was dismissed by the Court of Appeals on October 12, 2006.

The Court of Appeals then received the appellant's motion to reinstate on October 27, 2006; however, the appellant failed to provide proof of service. The Court of Appeals then remitted the case on October 30, 2006. The Supreme Court held:

The remittitur in this case was not sent down by mistake, error or inadvertence of the Court of Appeals. Instead, it was correctly sent after fifteen days had elapsed from the date of the order dismissing the appeal without the proper filing of a petition for reinstatement. Id. at 174.

Thus, because the appellants had not filed a proper motion for reinstatement within fifteen days after the order of dismissal, the Court found that the Court of Appeals remittitur was proper.

Similarly, in the present case the Rays Motion for Reinstatement was not properly filed with the Court of Appeals because the motion itself was untimely. When an appeal is dismissed under Rule 260(a) 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 was not timely.

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 was not timely, and thus improper. Accordingly, because the Rays Motion for Reinstatement was improper, the Court of Appeals remittitur was proper, and the Rays Motion to Recall the Remittitur should be denied.

Conclusion

For the foregoing reasons, the Department requests that the Court deny the Ray's Motion to Recall the Remittitur.

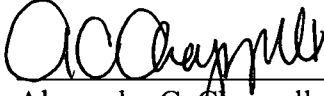


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PROOF OF SERVICE

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 Certification by the Supreme Court 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 Daniel E. Shearouse of the South Carolina Supreme Court this 25th day of March, 2014. The same provided to John & Sherry Ray, PO Box 8535, Greenville, SC 29604, this same day.



Alexandra C. Chappell

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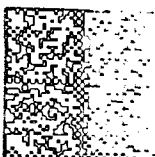


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