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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

HONORABLE SHIRLEY C. ROBINSON, ADMINISTRATIVE LAW JUDGE

CASE NO. 14-ALJ-17-0285-CC
Appellant Case No. 2016-001642

Dish DBS Corporation, f/k/a EchoStar, DBS Corp., and Affiliates.....Appellant,

v.

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

Respondent's Response to Appellant's Motion to Consolidate Appeals

Pursuant to Rule 240(e), SCACR, Respondent, South Carolina Department of Revenue (Department), files this response to Appellant Dish DBS Corporation, f/k/a EchoStar, DBS Corp., and Affiliates' (Appellant or Dish DBS) Motion to Consolidate Appeals (Motion). This Court should deny Appellant's Motion for the following reasons: (1) Appellant's Motion requests this Court to consolidate two appeals on the basis of an issue that is not before this Court in either appeal; (2) Appellant's Motion fails to comply with Rule 240(c)(1), SCACR; and (3) Appellant's Motion fails to comply with Rule 240(b), SCACR.

I. Appellant's Motion Requests This Court to Consolidate Two Appeals on the Basis of an Issue That is Not Before This Court in Either Appeal.

A. Appellant has not stated any issues or grounds on appeal.

At the time of this response to Appellant's Motion, Appellant has not filed its Initial Brief in this matter. Further, in its August 8, 2016 Notice of Appeal, Appellant gave general notice

that it “hereby appeals the Amended Final Order of the Honorable Shirley C. Robinson dated July 11, 2016[.]” Appellant does not state any specific grounds or issues on appeal in its notice of appeal. Thus, the Department is unaware of any issue or grounds on appeal in this matter from which this Court could review to determine if any identical issues are also raised in the pending appeal of DIRECTV, Inc. and its Subsidiaries v. South Carolina Department of Revenue, Case No. 14-ALJ-0158-CC (Appellate Case No. 2015-001509).

B. There is no dispute that S.C. Code Ann. § 12-6-2290 is the applicable apportionment method.

In its Motion, Appellant states the following:

The grounds for the motion are that these separate matters involve the identical question regarding the proper apportionment method of satellite television companies for purposes of South Carolina state corporate income tax. . . . Appellant and DIRECTV are challenging Respondent’s interpretation and application of apportionment methodology, which it has taken on a consistent basis in both matters throughout the adjudicative process.

(Appellant’s Motion, p. 1-2.) Importantly, neither DIRECTV nor Dish DBS involved “the identical question regarding the proper apportionment method of satellite television companies for purposes of South Carolina state corporate income tax.” In the Administrative Law Court’s (ALC) amended decision in DIRECTV, the ALC concluded that because DIRECTV is “a service provider, § 12-6-2290 is the applicable statute to apportion DIRECTV’s adjusted net income to South Carolina.” (ALC Amended Order and Decision in DIRECTV, Inc. & Subsidiaries v. S.C. Dep’t of Rev., June 12, 2015, p. 9.) Likewise, in the ALC’s decision in Dish DBS Corporation, f/k/a EchoStar, DBS Corp., and Affiliates v. South Carolina Department of Revenue, the ALC stated that “a service-providing taxpayer [like Dish] is required to use a gross receipts apportionment ratio [pursuant to S.C. Code Ann. § 12-6-2290].” (Dish DBS, Amended Final

Order, July 11, 2016, p. 12). There is simply no dispute between the parties in DIRECTV or Dish DBS regarding whether the gross receipts apportionment method pursuant to S.C. Code Ann. § 12-6-2290 is the applicable apportionment method. In fact, neither DIRECTV nor Dish DBS argued that the Department imposed the incorrect apportionment method in either matter. Rather, the parties in both matters disagree on what receipts should be sourced (i.e., included in the numerator of the gross receipts ratio) to South Carolina pursuant to § 12-6-2295(A)(5).

C. The issues in the appeals of DIRECTV and Dish DBS are not identical.

In its Motion, Appellant also asserts, as support for its Motion to consolidate the appeals, that the underlying final agency decision in both appeals are identical: “the Department Determinations for each matter . . . which serve as the basis for each appeal, make virtually identical conclusions and rely on virtually identical case law and authority.” (Appellant’s Motion, p. 2). The Department Determination is the final agency decision of the Department, and a taxpayer can challenge such decision by requesting a contested case hearing before the ALC. Once a request has been made with the ALC, parties to such action can *then* commence discovery. See ALC Rule 21 and Rules 26-37, SCRCP. The Department Determination is based upon the best available facts known to the Department at the time of issuance and may not reveal all the circumstances surrounding an issue before the Department.

Notably, counsel for Dish DBS attended the ALC’s hearing in DIRECTV, and the ALC’s Final Order and Decision was issued on May 12, 2015, approximately 4 months prior to the ALC’s hearing in Dish DBS.¹ Based upon the hearing and the ALC’s decision in DIRECTV,

¹The ALC issued its Final Order and Decision in the DIRECTV matter on May 12, 2015. Subsequently, DIRECTV filed a motion for reconsideration, and the ALC issued an Amended Final Order and Decision on June 12, 2015. While the ALC modified some language from the

Dish DBS presented a different a case before the ALC in September of 2015. For example, and most notable, DIRECTV “presented evidence that its income-producing activities in South Carolina could be identified using four ‘value drivers.’” (DIRECTV Amended Order, June 12, 2015, p. 10.) Because the applicable statute, § 12-6-2295(A)(5), uses the language of “income-producing activity” rather than “value drivers,” the ALC found that DIRECTV failed to meet its burden of proof in that matter because “DIRECTV did not sufficiently explain the effect of its value drivers on the production of income in this State. Id. at 11. Further, the ALC in DIRECTV noted that while some of “its evidence did reflect that its advertising probably produced some income, the evidence did not reflect what portion of DIRECTV’s cost was either attributable to South Carolina customers or may have influenced South Carolina customers to subscribed to DIRECTV.” Id. In sum, the ALC found that DIRECTV simply did not meet its burden of proof in that matter:

DIRECTV did not present sufficient evidence to determine its income-producing activities or to quantify how much income-producing activity occurred in any applicable state. Furthermore, DIRECTV put no value on its subscriptions or the value perceived by its customers. DIRECTV simply did not provide sufficient information on how to apportion its subscription receipts between states in which it believes income-producing activities occur.

Id.

In contrast, the ALC in Dish DBS specifically concluded that it “agree[s] with . . . the Department’s description of Petitioner’s income-producing activity Petitioner’s income-producing activity is the delivery of Petitioner’s signal into the subscriber’s home and onto the subscriber’s television.” (Dish DBS, p. 21.) While the ALC in Dish DBS did address Dish

initial Final Order and Decision, the ALC did not make any substantive changes to its legal analysis.

DBS' lack of evidence in the context of advertising, the ALC found that because Dish DBS presented no evidence as to how any advertising effected its South Carolina revenue, the ALC declined to include advertising in its analysis of income-producing activity. Id. at 22.

Secondly, in the hearing before the ALC, DIRECTV did not argue that South Carolina is a cost-of-performance state when apportioning income of a service-provider taxpayer that operates in more than one jurisdiction.² In contrast, Dish DBS's position throughout the hearing before the ALC was that South Carolina adheres to a "pro rata costs of performance method for sourcing income of a multi-state taxpayer." Dish DBS, p. 11. Ultimately, the ALC in Dish DBS concluded that "South Carolina is not a pro rata costs of performance state," and this issue was neither raised nor addressed by the ALC in DIRECTV. Order at 14. Thus, the resulting ALC decision in Dish DBS is distinguishable from the ALC decision in DIRECTV.

Finally, the issues on appeal in DIRECTV include burden of proof, sourcing of receipts to South Carolina, and the imposition of substantial understatement penalties. As noted above, it is unknown at this time what grounds on appeal Dish DBS intends to pursue in this matter. Further, while both DIRECTV and Dish DBS operate in the satellite television industry, the facts surrounding each company and how they produce their income vary, as evidenced by the transcripts and the ALC's Findings of Fact in the respective Orders.

Thus, the Department respectfully submits that if this Court were to grant Appellant's Motion, there are other issues that may need to be resolved in DIRECTV's appeal, and those issues may be effected by the facts and evidence submitted for each hearing. The Department

²Although DIRECTV initially argued that South Carolina uses a "cost of performance method" when taxpayers like DIRECTV file South Carolina income tax returns, the ALC noted that DIRECTV clarified its position to argue that "South Carolina uses a method of apportionment based on the proportion of income-producing activity conducted within the State." DIRECTV, p. 6, fn. 5; see also pp. 17, 21 (finding that DIRECTV's approach uses "value drivers.").

submits that, based upon information and belief, additional issues would also need to be resolved regarding Dish DBS's appeal (to be determined once Appellant's initial brief is filed), and thus the Department respectfully requests this Court to deny Appellant's Motion to Consolidate Appeals.

II. Appellant's Motion Fails to Comply with Rule 240(c)(1), SCACR.

Pursuant to Rule 240, SCACR, a motion filed in the appellate court shall include "a certificate or affidavit of service reflecting the date of service upon all parties." Rule 240(c)(1), SCACR. However, Appellant's Motion does not include a certificate or proof of service reflecting the date of service upon all parties in this matter as the proof of service is not dated. Accordingly, the Department respectfully requests this Court to deny Appellant's Motion pursuant to Rule 240(g), SCACR. Because Appellant failed to comply with Rule 240(c)(1), SCACR, Appellant has abandoned its Motion.

Accordingly, the Department respectfully requests this Court to deny Appellant's Motion to Consolidate Appeals.

III. Appellant's Motion Fails to Comply with Rule 240(b), SCACR.

Pursuant to Rule 240, SCACR, the time limits imposed by the appellate court rules "shall not be stayed by the filing of a motion or petition." Rule 240(b), SCACR. On August 17, 2016, this Court issued an Order granting Appellant's request to file its initial brief on or before October 7, 2016. As of the date and time of this response, the Department has not received Appellant's initial brief or a motion requesting an extension to file its initial brief in this matter. Accordingly, the Department respectfully requests this Court to deny Appellant's Motion

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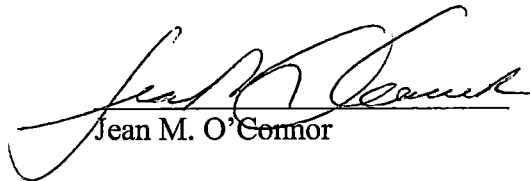
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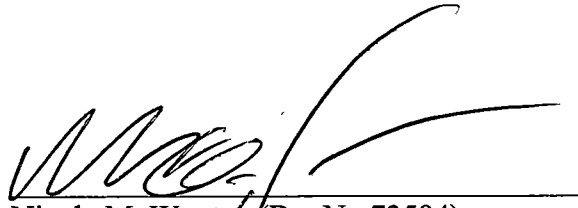
I, Jean M. O'Connor, do hereby certify that I have caused to be mailed postage pre-paid, a copy of the Department's Response to Appellant's Motion to Consolidate Appeals in re: Dish DBS Corporation, f/k/a EchoStar, DBS Corp., and Affiliates v. South Carolina Department of Revenue, Appellant Case No. 2016-001642 to Burnet R. Maybank, Esquire, and James P. Rourke, Esquire, Nexsen Pruet, P.O. Drawer 2426, Columbia SC 29202-2426 this 10th day of October 2016.


Jean M. O'Connor

pursuant to Rule 240(g), SCACR. Because Appellant failed to comply with Rule 208, SCACR and this Court's August 17, 2016 Order, Appellant has abandoned its Motion.

Accordingly, Respondent respectfully requests that this Court deny Appellant's Motion to Consolidate Appeals.

Respectfully submitted,



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October 10, 2016