

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

HONORABLE PHILIP S. LENSKI, ADMINISTRATIVE LAW JUDGE

RECEIVED

CASE NO. 13-ALJ-17-0244-CC
APPELLATE CASE NO. 2017-000968

APR 28 2017

SC Court of Appeals

Richard Beltram,.....Appellant,

v.

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

MOTION TO DISMISS APPEAL WITH PREJUDICE

Pursuant to Rule 240, SCACR, Respondent South Carolina Department of Revenue requests that the Court dismiss Appellant Richard Beltram's appeal. Appellant is attempting to appeal proposed tax assessments issued by the Respondent and affirmed in part, overruled in part, by the Administrative Law Court. Appellant, however, has neither paid these taxes nor posted a bond for such taxes as required by S.C. Code Ann. § 12-60-3370 (2014). Appellant's appeal should therefore be dismissed based on a lack of appellate jurisdiction.



Nicole M. Wooten (Bar No. 79031)
Counsel for Litigation
Milton G. Kimpson (Bar No. 7917)
General Counsel for Litigation
P.O. Box 12265
Columbia, SC 29211
(803) 898-1826
Attorneys for Respondent

April 28, 2017

Other Counsel of Record:

THE WARD LAW FIRM, P.A.
Ginger D. Goforth, Esq.
P.O. Box 5663
Spartanburg, SC 29304

Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

HONORABLE PHILIP S. LENSKI, ADMINISTRATIVE LAW JUDGE

CASE NO. 13-ALJ-17-0244-CC

APPELLATE CASE NO. 2017-000968

Richard Beltram,.....Appellant,

v.

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

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS APPEAL WITH PREJUDICE**

On April 27, 2017, Respondent South Carolina Department of Revenue filed with this court and served on counsel of record, its Motion to Dismiss Appeal With Prejudice. Respondent submits that due to Appellant's failure to pay the tax or post bond on such tax found to be due by the Administrative Law Court (ALC) prior to his appeal to this Court, such failure divests this Court of appellate jurisdiction and requires dismissal of the instant appeal.

ISSUE

Should this appeal be dismissed because Appellant failed to comply with the requirements of S.C. Code Ann. § 12-60-3370 (2014) by failing to pay the tax or post bond for such tax prior to appealing the matter to the Court of Appeals?

RELEVANT FACTS

On March 17, 2017, the ALC issued its Amended Final Order (Order) giving rise to the issue herein. In the Order, the ALC determined that Appellant is personally liable for the employee withholding taxes and interest owed by Intedge Industries, Inc., for the period of May 1, 2003 through July 1, 2005. (Order attached). On April 18, 2017, Appellant filed his Notice of Appeal with the Court of Appeals. Appellant received notice of the ALC Order on March 20, 2017. (Appellant Notice of Appeal dated April 14, 2017). As of the date of this motion and accompanying memorandum of law, Appellant has not paid the tax or posted a bond for such tax determined to be due by the ALC. See affidavit of Perry T. Mathis, p. 8.

ARGUMENT IN SUPPORT OF DISMISSAL

Because Appellant failed to pay the tax determined to be due by the ALC or post bond for such tax prior to the appeal filed with the South Carolina Court of Appeals (Court) in this matter, this Court lacks appellate jurisdiction. See State v. Brown, 358 S.C. 382, 596 S.E. 2d 39 (2004).

The Administrative Procedures Act (APA) provides for the appeal of an ALC decision:

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 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.

S.C. Code Ann. § 1-23-610(A)(1) (Supp. 2015).

Where an appeal is made of an ALC decision related to taxes, S.C. Code Ann. § 12-60-3370 (2014) provides, in relevant part:

Except as otherwise provided, a taxpayer shall pay, or post a bond for, all taxes, not including penalties or civil fines, determined to be due by the administrative law judge **before appealing the decision to the court of appeals.**

(Emphasis added).

Further, S.C. Code Ann. § 12-60-3380 provides the following:

Appeal of decision to court of appeals.

Except as otherwise provided in this chapter, a party may appeal a decision of the Administrative Law Court to the court of appeals. Appeal of a decision of the Administrative Law Court must be made in accordance with Section 1-23-610(B).

In State v. Brown, the South Carolina Supreme Court concluded that the “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.” State v. Brown, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004) (citing Great Games, Inc. v. S.C. Dep’t of Rev., 339 S.C. 79, 82 at n.5, 529 S.E.2d 6, 7 at n.5 (2000)).¹

It is important to note the nature of the underlying tax assessment in this matter. In its March 17, 2017 Order, the ALC found that Appellant was personally liable for the withholding taxes of Intedge Industries, Inc., because “as the president, majority shareholder, individual with check-writing authority, and individual with control over the corporation[,] he had a duty to ensure

¹ Although not precedent, in an unpublished decision in Anonymous Taxpayer v. S.C. Dep’t of Rev., 2008-UP-124, available at 2008 WL 9837290, this Court, citing to State v. Brown, found that it lacked appellate jurisdiction in the matter because the Appellant failed to pay the tax or post a bond prior to the appeal to the circuit court pursuant to S.C. Code Ann. § 12-60-3370. At the time the taxpayer in Anonymous appealed the ALC decision, such appeals were taken to the circuit court pursuant to then existing sections 12-60-3370 and 1-23-610. In 2006, these sections, in addition to S.C. Code Ann. § 12-60-3380, were amended to provide that appeals from ALC decisions are to the Court of Appeals. See 2006 Act No. 387, § 5, eff. July 1, 2006 (amending 1-23-610); 2006 Act No. 387, § 12, eff. July 1, 2006 (amending 12-60-3370); and 2006 Act No. 387, § 13, eff. July 1, 2006 (amending 12-60-3380). Section 53 of 2006 Act 387 further provides:

This act is intended to provide a uniform procedure for contested cases and appeals from administrative agencies and to the extent that a provision of this act conflicts with an existing statute or regulation, the provisions of this act are controlling.

that withholding taxes were paid to the Department in a timely manner.” (Amended Final Order, p. 11.) S.C. Code Ann. § 12-8-2030 (2014) provides the following:

An amount withheld under this chapter must be held in trust for the state and is a lien against all property, both real and personal, tangible and intangible, of the withholding agent. The lien becomes effective after it has been properly recorded in the county where the withholding agent’s business is located.

S.C. Code Ann. § 12-8-2030 creates a special trust relationship between the withholding agent and the State for amounts withheld from employees. Simply put, withholding taxes are held by withholding agents in trust for the State, and this trust arrangement is created by statute. Such taxes are withheld from employees’ pay and thereafter deposited with the state government. The wages paid by Intedge Industries, Inc., are owed to its employees for services performed. Intedge Industries, Inc., as a withholding agent, is charged by law with the duty of withholding a portion of those wages as taxes. The withholding agents are further charged with the responsibility of retaining these collected monies in trust for the benefit of the state and remitting these sums at specified times to the Department. With regard to their withholding-related duties, therefore, the withholding agents have a fiduciary relationship with the State of South Carolina.

To the extent an employer withholds money from his employees but fails to remit the money so withheld to the Department, that money becomes available to be diverted by the employer for purposes not consistent with its lawful obligations. The failure to remit taxes that have been withheld from employees’ pay for this purpose is particularly egregious as these monies never belonged to Appellant or Intedge Industries, Inc.. See S.C. Code Ann. § 12-8-2030. The General Assembly imposed individual liability on withholding agents and responsible persons in these instances to dissuade the very violations of trust at issue here.

Moreover, the State of South Carolina is particularly prejudiced as a result of the failure of Appellant to remit such withholding taxes to the Department. The subsequent failure of Appellant to pay the tax ordered by the ALC or post sufficient bond prior to filing his notice of appeal further exacerbates such prejudice. The statutory mandate of section 12-60-3370 ensures that these tax monies will be held in trust for the benefit of the citizens of South Carolina pending the outcome of Appellant's appeal.² The posting of a bond also ensures that these tax monies will be available in the event the State ultimately prevails. Here, Appellant has not paid the tax or posted a bond on such tax imposed by the ALC in its Order and presumably, Appellant has diverted the State's money for personal use during the pendency of this matter. Such action harms the State and its citizens. Ostensibly, this is precisely the situation the General Assembly sought to avoid by enacting section 12-60-3370 in 1995.

Accordingly, Respondent respectfully submits this Court lacks appellate jurisdiction in this matter and respectfully requests the appeal be dismissed with prejudice.

Respectfully submitted,



Nicole M. Wooten (Bar No. 73594)
Counsel for Litigation
Milton G. Kimpson (Bar No. 7917)
General Counsel for Litigation
300-A Outlet Pointe Blvd. (29201)
P.O. Box 12265
Columbia, SC 29211-9979
(803) 898-1826
Attorneys for Respondent

² Notably, should Appellant prevail in this matter, the State must issue a refund of the tax paid.

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
HONORABLE PHILIP S. LENSKI, ADMINISTRATIVE LAW JUDGE

CASE NO. 13-ALJ-17-0244-CC

APPELLATE CASE NO. 2017-000968

Richard Beltram,.....Appellant,

v.

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

AFFIDAVIT OF PERRY T. MATHIS

COMES NOW, Perry T. Mathis, being duly sworn, deposes and states:

1. I am employed by the South Carolina Department of Revenue (Department) as a Regional Manager.

2. As Regional Manager, my duties and responsibilities include managing the Department's Field Collections' Midlands Region. As part of my duties with the Department, I have access to the Department's records concerning proposed tax assessments and outstanding tax liabilities.

3. At the request of the Department's Office of General Counsel, I was asked to determine the amount of Appellant's proposed tax assessments based upon the Department's

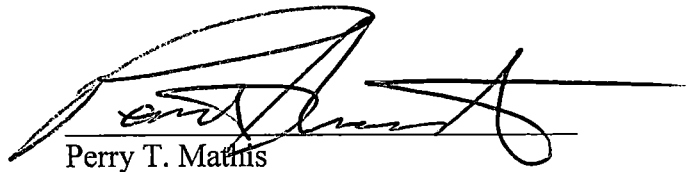
interpretation of the Administrative Law Court's March 17, 2017 Amended Final Order. Those proposed tax assessments are as follows:

Tax Period	Tax Due	Interest*	TOTAL DUE
Sept. 2003	\$4,258.28	\$3,616.89	\$7,875.17
Dec. 2003	\$3,923.79	\$3,238.15	\$7,161.94
Mar. 2004	\$3,528.79	\$2,863.46	\$6,392.25
Jun. 2004	\$2,566.25	\$2,028.19	\$4,594.44
Sept. 2004	\$3,995.31	\$3,080.05	\$7,075.36
Dec. 2004	\$3,753.26	\$2,785.26	\$6,538.52
Mar. 2005	\$4,041.85	\$2,935.08	\$6,976.93
Jun. 2005	\$3,724.96	\$2,608.48	\$6,333.44
PER ORDER	(\$675.00)		(\$675.00)
	\$29,117.49	\$23,155.56	\$52,273.05

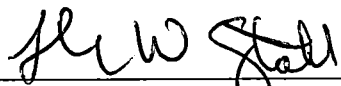
*Interest is accrued through April 30, 2017.

4. At the request of the Department's Office of General Counsel, I was asked to verify the current status of Appellant's proposed tax assessments as outlined above. Such proposed tax assessments remain outstanding in that Appellant has neither paid any of the amounts due nor posted a bond for said amounts.

FURTHER AFFIANT SAYETH NOT.

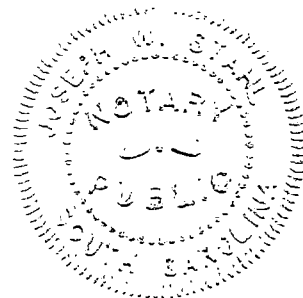

Perry T. Mathis

Sworn to and subscribed before me this 27th
day of April, 2017.



Notary Public for South Carolina
My Commission Expires: _____

My Commission Expires March 31, 2026



**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Richard Beltram,)
)
 Petitioner,)
)
 v.)
)
 South Carolina Department of Revenue,)
)
 Respondent.)
 _____)

Docket No. 13-ALJ-17-0244-CC

AMENDED FINAL ORDER

FILED
MAR 17 2017

SC ADMIN. LAW COURT

APPEARANCES: Petitioner: David B. Greene, Esquire

 Respondent: Nicole M. Wooten, Esquire
 Timothy C. Thompson, Esquire
 Milton G. Kimpson, Esquire

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or court) pursuant to a Request for a Contested Case Hearing filed by the Petitioner Richard Beltram (Petitioner) challenging a final decision by Respondent South Carolina Department of Revenue (Department). In its May 1, 2013 final decision, the Department determined that the Petitioner is personally responsible for the delinquent withholding tax, sales tax, penalties, and interest owed by Intedge Industries, Inc., for the periods of September 1999 through December 2005. After timely notice to the parties, a hearing of this matter was conducted on September 16 and 17, 2014, at the ALC in Columbia, South Carolina.

This court issued a final order on March 25, 2015. On April 2, 2015, the Petitioner filed a Notice of Motion to Reconsider, Alter or Amend. In his motion, the Petitioner requested the following relief: (1) that the employee withholding taxes for the second quarter of 2005 should not be charged to the Petitioner; (2) that the Petitioner should be awarded attorney fees in amount of \$1,875.00; (3) that the Petitioner should not be responsible for interest on the unpaid taxes that accrued after July 2005; and (4) that an alleged scrivener's error found on page 13 and 14 listing

a date of September 2, 1012, be amended to read May 1, 2013, which was the actual date of the Department Determination.

On April 6, 2015, the Department also filed a Motion for Reconsideration to Reconsider, Alter and/or Amend. The Department requested the order be amended to reflect: (1) that the date of the Department's Proposed Notice of Assessment to Responsible Party be amended to reflect a date of September 2, 2009 rather than September 2, 2012; (2) that the Petitioner owes interest from March 2003 to June 2005 in the statutorily mandated amount rather than \$1,287.61 and that he shall be responsible for the full amount of interest owed on the outstanding tax liabilities that will continue to accrue until the Petitioner satisfied the debt; (3) that the Petitioner is responsible for the penalties for failing to timely file returns and remit payment before the time prescribed by law; and (4) that no attorney fees shall be awarded to the Petitioner.¹

FINDINGS OF FACT

Having carefully considered all testimony, exhibits, and arguments presented at the hearing of this case, and taking into account the credibility and accuracy of the evidence, this court makes the following Findings of Fact by a preponderance of the evidence:

1. This court has personal and subject matter jurisdiction. Proper notice of the date, time, place, and nature of the hearing was timely given to all parties.

2. Intedge Industries, Inc. began operating as a family-owned business in 1914 under the name International Edge Tool Company. The business was located in Newark, New Jersey. In 1976, the business formally changed its name to Intedge Industries, Inc. (Intedge) and registered as a New Jersey corporation. In 1988, the company moved its operations from Newark, New Jersey to 1875 Chumley Road, Woodruff, South Carolina. In 1988, the Department issued Intedge a Retail Sales Tax License. Intedge held this license until 2005.

3. The Petitioner held a variety of employment positions with Intedge throughout the years. Specifically, he began as a salesperson, moved to assistant sales manager, and then moved to vice-president of sales. In the mid-1980's, the Petitioner became president and majority shareholder of Intedge. The Petitioner remained in these last two positions until late 2005.

¹ The Amended Final Order replaces this court's March 25, 2015 Final Order. Any issues presented in the parties' motions for reconsideration that are not addressed in this Amended Final Order are denied.

4. As president of Intedge, the Petitioner primarily participated in the sales and marketing functions of Intedge and delegated to other employees responsibilities including accounting, manufacturing, distribution, and operations.

5. While the Petitioner did not participate in the day-to-day operations of the business, his responsibilities and duties within Intedge included the authority to sign checks, the power to hire and fire employees, and the ability to sign contractual obligations on behalf of Intedge. (Hr'g Tr. 58:17 – 59:6). The Petitioner acknowledged he had access to corporate records and majority control of Intedge from 1999 to early 2005. (49:3-15; 59:2-7; 64:5-11). He further acknowledged that he had the authority to resolve any outstanding tax liabilities with the Department on behalf of Intedge during this timeframe. (Hr'g Tr. 66:11-17).

6. Intedge submitted quarterly South Carolina withholding tax returns (Forms WH-1605) on behalf of the corporation for the quarters ending September 1999 through December 2005. Each return was timely filed (except for the withholding return for the period ending September 30, 2005, which Intedge failed to file), and each showed withholding tax due and reflected that such had been duly deposited or paid to the Department.

7. Despite these representations made by Intedge in its filed returns, Intedge failed to pay over or deposit all the withholding taxes that it had shown and reported on its withholding returns for the above referenced periods. The Department subsequently issued Proposed Notices of Assessment, which Intedge did not protest.² Based upon Intedge's failure to protest, the Department issued final assessments for these unpaid withholding taxes, ultimately resulting in the filing of tax liens for each period.³ The assessments were properly made by the Department within three years of the day the tax was due without penalty. These withholding taxes, penalties, and interest remain unpaid. Except for the filing liens, the Department never issued levy notices against Intedge's assets or took any other steps against Intedge to collect the unpaid taxes. As for the Petitioner, no tax liens were ever filed against him. The Department filed fifteen (15) liens

² As required under the applicable statutes, Intedge filed withholding tax returns for the periods at issue. Although Intedge represented to the Department that it had deposited the withholding taxes due to the Department, it did not appropriately deposit the withheld taxes. Further, although Intedge reported the withholding taxes for its employees on the WH-1605, these taxes were not paid or deposited. As such, pursuant to S.C. Code Ann. § 12-54-85 (2014), the Department assessed these delinquent withholding taxes, penalties, and interest for the periods at issue against Intedge.

³ See attached Exhibit "A" establishing the lien dates and amounts regarding Intedge's outstanding tax liability for the periods of September 1999 through December 2005. The tax, interest, and penalties referenced on Exhibit "A" are accrued through April 30, 2013 (the date listed on the Department Determination).

against Intedge, with dates beginning on June 14, 2001 (for taxes due on October 31, 1999) and going through June 21, 2006 (for taxes due on October 30, 2005).

8. In addition to the delinquent withholding taxes, Intedge failed to file its quarterly sales tax return (Form ST-3) for the period July through September 2005. After Intedge failed to protest the Proposed Notice of Assessment for the delinquent sales tax, the Department issued a final assessment. This assessment (including penalties and interest) ultimately resulted in the filing of a tax lien. As of the date of this order, the sales tax, penalty, and interest have not been paid and no return has been filed.⁴

9. In 1999 and 2000, Intedge employed a bookkeeper who had the ability to sign checks on behalf of Intedge using a stamp of the Petitioner's signature. The bookkeeper was removed from her position after she was discovered to have embezzled funds. The Petitioner was her supervisor at the time, and his duties and responsibilities as President of Intedge included verifying that Intedge's accounts were properly reconciled. (Hr'g Tr. 60:9-24).

10. In 2000, the Petitioner hired Terry Lawing as an independent contractor to prepare the payroll and quarterly withholding and sales tax returns, among other duties. Mr. Lawing was hired by the Petitioner and reported directly to him. As part of his duties for Intedge, Mr. Lawing prepared payroll, ran the checks, and pre-printed the tax payment checks to be included with the withholding and sales tax returns filed with the Department. Mr. Lawing had authorization from the Petitioner to sign the tax returns of Intedge, but Mr. Lawing did not have authorization to sign checks on behalf of Intedge. That duty was withheld by the Petitioner. Mr. Lawing left the prepared documents in a desk at Intedge's office, and the officer manager would retrieve the documents. Mr. Lawing presumed the documents were given to the Petitioner as the Petitioner maintained check writing authority for Intedge. (Hr'g Tr. 132:20 – 133:9).

11. In 2002, the Petitioner and Mr. Lawing met with Revenue Officers at the Department. On behalf of Intedge, the Petitioner requested to pay the delinquent withholding taxes due at that time under the Department's Amnesty Program. Payment of the delinquent taxes under this program would have permitted Intedge to pay the delinquent taxes without any penalty and pay half of the interest that had accrued since the due date of the returns. However, despite the

⁴ See Exhibit "A" for sales tax, interest, and penalty amounts due and owing because of Intedge's failure to file the sales tax return for the period July – September 2005.

Petitioner's assertion that Intedge would pay the delinquent taxes, Intedge failed to remit the total amount due as required under the program.

12. Intedge ended its business arrangement with Mr. Lawing in October of 2005. During the time Mr. Lawing was employed as a contractor with Intedge, his primary job duties and the prescribed procedures for carrying them out did not change, except for emailing prepared reports to an employee of Intedge. (Hr'g Tr. 135:12-23).

13. Beginning in 2004, the Petitioner began the process of selling Intedge to his uncle, Daniel Beltram. In July, 2005, the building housing the company along with the land surrounding the building and all manufacturing assets were sold to Daniel Beltram.⁵ The court finds that the Petitioner lost control over Intedge in July 2005, upon the sale of the building housing the company and all manufacturing assets. On October 1, 2005, the official sale of Intedge to Daniel Beltram was finalized, and the Petitioner signed a Contractor Agreement to receive \$10,000 per month to work as a consultant for the new company. Upon completion of the sale, Daniel Beltram formed a new company called Intedge Manufacturing, Inc., and at that point, Intedge Industries, Inc. ceased operations. Intedge Manufacturing, Inc. continues to operate at the Woodruff, South Carolina location. The Petitioner did not participate in the wind up the corporate affairs of Intedge. (Hr'g Tr. 79:22). Specifically, the Petitioner did not file Articles of Dissolution with the South Carolina Secretary of State's office notifying it of the entity's dissolution; he did not notify the Department of the sale of Intedge to Daniel Beltram; he did not notify the Department of the Petitioner's change of address regarding Intedge Industries; and he did not request a certificate of compliance from the Department prior to his sale of Intedge to his uncle. Furthermore, he did not properly wind-up the corporate affairs of Intedge. Intedge instead was administratively dissolved by the Secretary of State on January 16, 2009. (Hr'g Tr. 79:19 – 80:1-9, 81:9 – 83:1-11, 205:20-207:3). Despite the October 1, 2005 contractor agreement, this court finds that the Petitioner no longer had direct and immediate control of Intedge or its successor after July 2, 1005, and that Daniel Beltram assumed control of the business on that date.

14. Lori Coggins (Ms. Coggins) was employed by the Department as a Revenue Officer from May 2009 through March 2010. As part of her duties with the Department, Ms.

⁵ The Petitioner contends that he was merely a "figurehead" president of Intedge beginning in December of 2004, however, after review all the evidence in this matter, this court finds otherwise. The property the Petitioner sold to his uncle consisted of eleven (11) acres, along with all improvements. It sold for \$725,000 on July 14, 2005.

Coggins issued Proposed Notices of Assessment for Responsible Parties. During her employment with the Department, Ms. Coggins was assigned to begin collection procedures regarding Intedge's outstanding tax liabilities. As part of her job duties, Ms. Coggins made numerous attempts to contact the Petitioner to discuss Intedge's outstanding tax liabilities. Specifically, Ms. Coggins attempted to contact the Petitioner via phone, and she made personal field visits to the Petitioner's home and Intedge's physical business location. Ms. Coggins left her business card on each personal field visit. The Petitioner did not respond to any of Ms. Coggins' attempts to contact him. (Hr'g Tr. 114:19 19 – 115:10).

15. As part of her employment with the Department, Ms. Coggins issued a Proposed Notice of Assessment for Responsible Party to the Petitioner on September 2, 2009, in an attempt to collect the outstanding taxes owed by Intedge. Specifically, the Proposed Notice of Assessment informed the Petitioner that he was being held responsible for Intedge's outstanding sales and withholding taxes, penalties and interest for the periods of September 1999 through December 2005. The Department's Proposed Notice of Assessment was issued based upon the Petitioner's position as president and majority shareholder of Intedge.

16. On December 1, 2009, the Petitioner filed a timely protest contesting his personal liability for the withholding and sales tax assessments, penalties, and interest issued to Intedge. In his protest, the Petitioner asserts that the liability for the delinquent amounts rests solely with Intedge Manufacturing, Inc., and his uncle, Daniel Beltram. He further asserts that the Department's attempt to hold him liable for the outstanding taxes is beyond the applicable statute of limitations.

17. Upon filing the timely protest, the Petitioner contacted Bruce Owens, a Collections Supervisor for the Department's Greenville, South Carolina office. Mr. Owens has been employed at the Department for approximately twenty-eight (28) years.

18. Mr. Owens testified concerning the process the Department undertakes when determining if an individual is responsible for the outstanding tax liabilities of a business entity. The initial notice of proposed assessment regarding an outstanding tax liability is given to the corporation or other business entity. If the tax liability remains unpaid, the Department may utilize several different collection tools to collect the debt from the corporation. The Department may issue levy notices against company assets, or the Department might take steps to revoke the company's business license (Hr'g Tr. 142). Mr. Owens testified that "[i]t is the company's liability

in the front end and that's who we would be working with attempting to get something resolved." (Hr'g Tr. 142). Mr. Owens testified that if the company is not paying the taxes even after the Department has worked with the company, then the Department will "start looking at the individual." (Hr'g Tr. At 142). In this situation, the Department would assert responsible party status against an individual principal for the outstanding tax liability of a business entity. Based upon the Petitioner's position, duties, and authority within Intedge, the Department determined that the Petitioner was the responsible party for Intedge's outstanding tax liabilities.

19. Mr. Owens also testified concerning the statute "that relates to 10 year enforcement once a liability is assessed. We would look at that as our outside deadline for actually taking action to collect money for...a specific period." (Tr. 143). He further testified that the Department would use the same start date of the ten (10) year period that it used for the company, if it was collecting from a responsible party. (Tr. At 144, lines 1-8).

20. Mr. Owens explained that "a proposed assessment would be the first notice we're indicating that there appears to be a liability and we're putting that issue out there. After that, then there's an actual notice of assessment that follows that where now we're proceeding to say, okay, now pay us the money." (Hr'g Tr. At 145).⁶

21. Mr. Owens testified that the "most proper thing is to pursue the corporation before quickly moving on to the responsible party." The Proposed Assessment to the company serves notice to the responsible party of the unpaid debt.

22. Though he had no personal interactions with Intedge to collect the unpaid taxes between 2005 and 2009, Mr. Owens testified without objection concerning the contents of internal agency computer notes, which revealed that the Department had made a few efforts to collect from Intedge. Mr. Owens testified that he saw a Departmental note from a Revenue Officer indicating that an Intedge representative, Larry Flynn, called the Department on July 20, 2005, to discuss possible penalty waivers. There was also another note indicating that Intedge was no longer honoring its 2002 payment agreement. There was also a note from March 2007, stating that Intedge had closed or sold its business. A 2008 Department note referenced that Intedge's bank account at First National Bank was closed on October 19, 2005. Mr. Owens testified that the last thing he knew about the Petitioner's tax file was that it went to the Department's attorney on

⁶ See S.C. Code Ann. § 12-60-30(23), which defines a "Proposed assessment" as "the first written notice sent or given to the taxpayer stating that a division within the department has concluded that a tax is due."

November 2, 2011. Regarding the computer notes he referenced at the hearing, he testified that he had provided those to the Department attorneys a few days earlier, and that he had brought some other things in his car in case he might need them for the hearing.

23. After the Petitioner filed a timely protest to the Proposed Notice of Assessment for Responsible Party, dated September 2, 2009, the Department did not issue a final determination until almost three (3) and a half years later, on May 1, 2013.⁷ The Department Determination Letter concluded the Petitioner was personally and individually liable for unpaid employment withholding taxes and payroll taxes incurred by Intedg from September 1999 through December 2005.

24. The Department did not serve the Petitioner with its Department Determination within nine (9) months of receiving the Petitioner's protest, on December 1, 2009. *See* S.C. Code Ann. §12-60-450(E)(3). The Department Determination, issued May 1, 2013, occurred approximately forty-one (41) months after the Petitioner protested, and thirty-two (32) months beyond the time required under the statute.

25. During the testimony of Mr. Owens, the Department and the Petitioner became aware that Mr. Owens possessed documents the Petitioner previously sought in discovery but that the Department had not produced. Mr. Owens testified he had no knowledge of the Petitioner's discovery request, and the Petitioner did not file a Motion to Compel Discovery, prior to the hearing. Though the Department may have received some of the requested documents just prior to the hearing, this court finds that the Department, though it may have been negligent in not producing the requested computer records, did not act in bad faith, and error that may have resulted was cured when the documents were provided to the Petitioner. Likewise, this court allowed the Petitioner additional time to study the records, and determine whether they would be helpful to his case. This court denied the Petitioner's Motion to Dismiss, and determined that the appropriate remedy in this case was to recess the hearing and reconvene the following day, to allow the Petitioner and his counsel an opportunity to review the documents.⁸

⁷ *See* S.C. Code Ann. § 12-60-30(24), which defines "Protest" as "a written appeal of a proposed assessment or a division decision made in accordance with this chapter." Section 12-60-450(E)(3) mandates that the Department "must issue the determination on a proposed assessment not later than nine months after the date the written protest or claim as filed with the department by the taxpayer. Upon failure of the department to timely issue the determination, the taxpayer may request a contested case hearing before the Administrative Law Court for a determination of the tax controversy."

⁸ One document the Petitioner objected to not receiving during discovery was his own protest and associated documents, which he had submitted to the Department. The Petitioner had sufficient time to review his own protest

26. This court also finds that, though the tax periods at issue range from late 1999 to December 2005, the Department never personally contacted or notified the Petitioner until it issued the Proposed Notice of Assessment to him on September 2, 2009, which was a little over four (4) years after the Petitioner left the company in July 2005.

27. This court finds, additionally, that as of this date, all the above-listed withholding taxes, penalties, and interest remain unpaid. This court also finds that the first three (3) tax liens (see footnote 5) filed against Intedge⁹ have expired, since they were filed over ten (10) years ago.¹⁰, all before May 1, 2013, which was the date of the Department Determination in this matter. This court also finds that the first three (3) tax liens have expired. Additionally, the last three (3) tax liens were for unpaid taxes during tax periods that occurred after the Petitioner was no longer a responsible party.¹¹The remaining tax liens were incurred during the Petitioner's tenure as the responsible party and amounted to \$27,935.38, according to this court's calculations.¹²

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, this court concludes the following as a matter of law:

1. The Administrative Law Court has jurisdiction over this matter pursuant to S.C. Code Ann. § 1-23-600 (Supp. 2013), S.C. Code Ann. § 12-60-450(E)(3), S.C. Code Ann. § 12-60-30(1) ("The Administrative Law Court holds the contested case hearings.").

2. Generally, the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof. *See Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 133, 530 S.E.2d 643, 651 (Ct. App. 2000) (citing 2 Am.Jur.2d *Administrative Law* § 360 (1994)). Here, The Petitioner requested a contested case hearing, and therefore has the burden of proof to show that the Department's proposed assessment was incorrect.

materials during the recess. Additionally, as the Department pointed out in the hearing, it never took the position that the Petitioner did not timely file a protest.

⁹ Which this court calculates at \$11,482.15.

¹⁰ The Petitioner has not offered evidence or attempted to argue that all the tax liens have expired.

¹¹ Which this court calculates at \$6,454.35.

¹² Though there may be a need for the Department to alter these calculations, based on a more thorough review of the taxes due for these dates.

3. The applicable standard of proof in this contested case hearing is by a preponderance of the evidence. *Anonymous v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 375, 496 S.E.2d 17, 19 (1998) (holding the standard of proof in “administrative hearings is generally a preponderance of the evidence”).

4. The weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. *See S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co.*, 308 S.C. 216, 222, 417 S.e.2d 586, 589 (1992). Furthermore, a trial judge who observes a witness is in the best position to judge the witness' demeanor and veracity and to evaluate the credibility of his testimony. *See e.g., Woodall v. Woodall*, 322 S.C. 7, 10, 471 S.E.2d 154 91996); *Wallace v. Milliken & Co.*, 300 S.C. 553, 556, 389 S.E.2d 448, 450 (Ct. App. 1990). In presiding over this contested case, this court serves as the finder of fact and makes a *de novo* determination regarding the matters at issue. *Reliance Ins. Co. v. Smith*, 327 S.C. 528, 534, 489 S.E.2d 674, 677 (Ct. App. 1997); *see also* S.C. Code Ann. § 1-23-600(B)(Supp. 2013).

Withholding

5. An employer paying wages at the rate of eight hundred dollars or more a year to an employee shall withhold income tax for that employee. S.C. Code Ann. § 12-8-520(A) (2014). A person located, doing business, or having gross income in this State and an employer having an employee earning income within this State are subject to South Carolina's withholding laws. S.C. Code Ann. § 12-8-510 (2014). “Employer” means the person for whom an individual performs or performed a service, of whatever nature, as the employee of the person. S.C. Code Ann. § 12-8-10(4) (2014). “Person” means an individual, trust, estate, partnership, receiver, association, company, corporation, or any other entity including the United States, a state, a political subdivision or agency of the United State or any state, and a municipality located in this State. S.C. Code Ann. § 12-8-10(1) (2014).

6. Taxes withheld “must be held in trust for the State and is a lien against all property, both real and personal, tangible and intangible, of the withholding agent.” S.C. Code Ann. § 12-8-2030. “The lien becomes effective after it has been properly recorded in the county where the withholding agent's business is located.” *Id.*

7. A withholding agent is “an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.” S.C. Code Ann. § 12-8-2010(D).

8. If a withholding agent fails to remit the withholding taxes, he or she “is personally and individually liable for the amount of tax not withheld or paid.” S.C. Code Ann. § 12-8-2010(A) (emphasis added).

9. From September 1999 through December 2005, Intedge was an employer and withholding agent subject to South Carolina withholding laws. See S.C. Code Ann. § 12-8-10(2) (“withholding agent” means a person required to withhold income taxes under the provisions of this chapter.”). The Petitioner was also a withholding agent from September 1999 through July 2005 pursuant to section 12-8-2010(D) because as the president, majority shareholder, individual with check-writing authority, and individual with control over the corporation he had a duty to ensure that withholding taxes were paid to the Department in a timely manner. Section 12-8-2010(D); *City of Columbia v. Am. Civil Liberties Union of S.C., Inc.*, 323 S.C. 384, 475 S.E.2d 747 (1996) (holding that if a statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the court has no right to look for or impose another meaning and that the court must apply the statute’s terms according to their literal meaning and may not resort to subtle or forced construction in an attempt to limit or expand the statute’s scope); see also *Rock v. Dep’t of Taxes*, 170 Vt. 1, 742 A.2d 1211 (1999) (adopting the following factors as determinative of whether a corporate officer or employee has a duty to remit withholding taxes: (1) the person’s position within the power structure of the corporation; (2) the authority of the officer or employee as established by the articles of incorporation, bylaws, or employment contract; and (3) whether the person actually exercised control over the finances of the business). In this case, the Petitioner clearly meets at least two of the factors as he was the president and majority shareholder of the corporation, and he possessed authority to bind Intedge under contractual obligations and therefore occupied a position within the power structure of the corporation. Furthermore, although he failed to remit the taxes shown to be due on many of the returns, the Petitioner exercised control over the finances of the corporation by remitting a portion of the taxes due on some of the WH-1605 returns as well as maintaining check writing authority for Intedge. Overall, the Petitioner had control over the corporation’s finances even though he may not have been involved in the day-to-day operations of the business.

10. Accordingly, the court concludes that as a withholding agent for Intedge, the Petitioner is liable for the withholding taxes, interest, and penalties that were not remitted to the Department to the same extent as Intedge. The withholding taxes were timely assessed against the corporation, and Intedge did not protest the assessments.¹³ As an officer of the corporation responsible for such matters, the Petitioner became personally and individually liable for the delinquent taxes because of these assessments.

Statute of Limitations

11. Assessment means “the [D]epartment’s recording the liability of the taxpayer in the office of the [D]epartment, subject to the restrictions in Section 12-60-440.” S.C. Code Ann. § 12-60-30(2). Similarly, proposed assessment means “the first written notice sent or given to the taxpayer stating that a division within the [D]epartment has concluded that a tax is due.” S.C. Code Ann. § 12-60-30(23).

12. Section 12-54-85(A) of the South Carolina Code provides “[e]xcept as otherwise provided in this section, taxes must be determined and assessed within thirty-six months from the date the return or document was filed or due to be filed, whichever is later.” Subsection (G) of section 12-54-85 describes the thirty-six month period as a statute of limitations. The section contains several exceptions to the thirty-six month statute of limitations, including fraud and the taxpayer’s failure to file a return among other exceptions. See S.C. Code Ann. § 12-54-85(A)-(G).

13. Internal Revenue Code (IRC) § 6501(a) requires that a tax assessment, including responsible party assessments, be issued against a taxpayer within three years after the return was filed. However, IRC § 6501 is specifically not made applicable to South Carolina state taxes. S.C. Code Ann. § 12-6-50 provides in pertinent part:

For purposes of this title and all other titles that provide for taxes administered by the department, except as otherwise specifically provided, the following Internal Revenue Code Sections are specifically not adopted by this State:

(16) Sections 2001 through 7655, 7801 through 7871, and 8001 through 9602, except For Sections 6015 and 6701, and except for Sections 6654 and 6655 which are adopted as provided in Section 12-6-3910 and Section 12-54-55. However,

¹³ Because Intedge did not timely protest the assessments regarding the withholding and sales taxes, penalties, and interest, the assessments became final.

Section 6654(d)(1)(D) relating to estimated tax payments for qualified individuals as defined in that item is not adopted.

(emphasis added). Moreover, § 12-6-50 also excludes IRC § 6672, which addresses the liability of third parties for federal withholding tax obligations. Instead, a third party's liability for state withholding taxes is governed by S.C. Code Ann. § 12-8-2010(A). Accordingly, the court concludes that the three year statute of limitations in IRC § 6501(a), is not applicable in this matter.

14. "Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution." Kurscbner v. City of Camden Planning Comm'n., 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." Id.

15. While not binding, there is case law interpreting the interaction between a withholding agent's liability under Section 12-8-2011 and the statute of limitations under Section 12-54-8 that this court finds persuasive. The ALC has previously addressed this issue in *Edwin Rowland v. South Carolina Department of Revenue*, 2008 WL 3863554 (S.C.Admin.Law.Judge.Div., 2008 (J. Geathers)) and *Philip Roddey v. South Carolina Department of Revenue*, Docket No. 14-ALJ-17-0125-CC, July 28, 2014, (J. Robinson). In *Rowland*, the Department sought to hold the taxpayer (owner and sole-shareholder of an S Corporation) personally and individually liable for failing to remit withholding taxes of the business entity. The taxpayer in *Rowland* argued that Section 12-54-85 barred the Department from holding him personally liable because the Department had timely assessed the corporation but had not timely assessed him personally. The court in *Rowland* concluded the statute of limitations did not bar the Department from holding the owner personally liable:

[S]ubsection (D) [of section 12-8-2010] codifies, with respect to withholding taxes, the common law principles of holding corporate principals liable for corporate debts under appropriate circumstances and places those individuals on notice that a tax debt that is timely assessed against a corporation will be considered a debt of those individuals associated with the corporation who are responsible for withholding. The provision does not create any new liability, but simply clarifies existing common law.

Id. at *4. Moreover, the court concluded “[t]he Department’s notices of assessment sent to [the corporation] served as sufficient constructive notice to [the owner] that the corporation was liable for withholding taxes, penalties and interest and that, as a principal [and withholding agent] of the corporation, he would be ultimately liable for this debt.” *Id.* at *5 (basing its decision in part on the Indiana case Ball v. Indiana Department of Revenue, 563 N.E.2d 522 (1990) (discussing the liability of a withholding agent under a substantially similar statutory scheme to hold timely notice of the assessment to the corporation was timely constructive notice to the withholding agent of his personal liability)). Likewise, the ALC in *Roddey* found the ALC’s ruling on the issue in *Rowland* persuasive and applied the same result.

16. As noted in the conclusions above, the Petitioner had a duty to remit the withholding and sales taxes and is personally liable under the respective statutes for the amount of taxes not paid. *See* S.C. Code Ann. § 12-8-2010(A). As noted in *Roddey*, a taxpayer’s “statutorily imposed liability contrasts with the equitable doctrine of piercing the corporate veil, which seeks to bypass the well-recognized principal that ‘a corporation is an entity, separate and distinct from its officers and stockholders, and that its debts are not the individual indebtedness of its stockholders.’” *Roddey*, at page 5 (quoting *Hunting v. Elders*, 359 S.C. 217, 223, 597 S.E.2d 803, 806 (Ct. App. 2004)). Generally, a principal will not be held liable for corporate debts; however, the statutory schemes set forth in South Carolina law specifically impose individual liability for withholding and sales taxes on the withholding agent and responsible person.¹⁴

17. Because the Petitioner’s liability is derived from his role in the corporation, notice of the assessment to the corporation constituted notice of assessment to him, personally and individually. The notices of assessment were issued to the corporation as the withholding agent and as the retailer in a timely manner. *See* S.C. Code Ann. § 12-54-85 (“within three years of the date the return was filed or due to the filed”). Section 12-8-2010(D) expands the definition of “withholding agent” to include a corporate officer responsible for withholding taxes. Similarly, Section 12-54-195 expands the liability for the sales tax to the responsible officer. As such, notice

¹⁴ Withholding taxes are held by withholding agents in trust for the State and the failure to remit taxes that have been withheld from employees’ pay for this purpose is particularly egregious. *See* S.C. Code Ann. § 12-8-2030. Similarly, the failure of a responsible person to remit sales taxes that have been collected from purchasers for the very purpose of paying sales taxes to the State is also extreme. The statutory imposition of individual liability on withholding agents and responsible persons in these instances highlights the responsibility imposed upon withholding agents and responsible persons and serves to dissuade those in positions of authority in the corporation from breaching the trust at issue here.

issued to the corporation as a withholding agent is also issued to the corporate officer with responsibility for these matters. Furthermore, under the responsible party provisions of Section 12-8-2010, and by extension, Section 12-54-195, there is no requirement that the corporate officer or other responsible party be put on notice by separate assessments.

18. In this case, as a corporate officer with the duty to remit withholding taxes as well as sales and use taxes, the Petitioner was privy to the notices of assessment issued to Intedge. Under the rationale employed by the Indiana court in *Ball* and adopted in *Roddey* and *Rowland*, the assessments issued to Intedge constituted assessments on the Petitioner as a withholding agent. Any doubt as to the Petitioner's notice regarding the delinquencies is dispelled by his 2002 meeting with the Department. At that meeting the Petitioner represented Intedge and participated in discussions with the Department regarding the existing delinquent taxes. The Petitioner, acting for Intedge in the meeting, expressed a desire to enter the Department's Amnesty program to satisfy the outstanding tax liability. The Petitioner was, or should have been aware of the assessments against Intedge and his personal liability under Section 12-8-2010(A) in the event Intedge failed to remit the taxes.¹⁵ Thus, the Department's timely assessments to Intedge put the Petitioner on constructive notice, as a principal of the corporation and as a withholding agent, both the existence of the tax debt itself and the fact that if the taxes were not remitted he would be personally liable for the debt. Consequently, this court interprets the Department's Responsible Party Proposed Assessment Letter, dated September 2, 2009, as a confirmation, rather than untimely notice, of the Petitioner's liability. Because of the original proposed notice of assessment to the corporation, notice was given to the responsible party and the debt became fixed when Intedge failed to protest the assessment. The Responsible Party Proposed Notice of Assessment provided the responsible party an opportunity to deflect the liability. The outstanding corporate debt itself, however, was established at that point. Thus, because the court concludes that the Petitioner received timely constructive notice, the court further concludes that the statute of limitations under section 12-54-85(A) does not bar the Department from seeking to collect the delinquent taxes from the Petitioner.

¹⁵ Notably, communications documented by the Department's Automated Receivables Management System (ARMS) establish that the Petitioner or his counsel at the time were aware of Intedge's liens as of July 2005. (Hr'g Tr. 173:17-23). As testified to by Mr. Owens, these documented communications in ARMS are consistent with the Department attempting to collect from Intedge Industries before attempting to collect from the Petitioner. (Hr'g Tr. 204:9-25).

Ten Year Lien Expiration Date

19. In applying a statutory provision, “words should be given their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute’s operation.” *Sloan v. S.C. Bd. of Physical Therapy Exam’rs*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006). Section 12-8-2030 provides:

An amount withheld under this chapter must be held in trust for the State and is a lien against all property, both real and personal, tangible and intangible, of the withholding agent. The lien becomes effective after it has been properly recorded in the county where the withholding agent’s business is located.

S.C. Code Ann. § 12-54-120 (2000) further provides:

(A)(1) If a person liable to pay a tax neglects or refuses to pay it after demand, the amount of the tax, including interest, additional tax, addition to tax, or assessable penalty, plus accrued costs, is a lien in favor of the Department of Revenue on all property and rights to property, real or personal, tangible or intangible, belonging to the person.

(2) This lien:

- (a) is referred to as a “tax lien”;
- (b) is effective on the date of the assessment of the tax;
- (c) allows an authorized agent of the department to seize, levy on, and sell the property of the person for the payment of the amount due, with added penalties, interest, and costs of executing on the lien, and to pay the money collected to the department;
- (d) extends to bank deposits, choses in action, and all other property incapable of manual levy or delivery; and
- (e) continues for ten years from the date of filing.

(3) “Demand”, as used in this section, means an assessment by the department.

20. Based on the plain language of Sections 12-8-2030 and 12-54-120, the withholding tax liens set forth on Exhibit 1 for Intedge’s delinquent withholding and sales taxes became effective against the company upon the filing of the liens in Spartanburg County. Although Section 12-8-2030 does not provide a limitations period for such lien, Section 12-54-120 goes on to provide the tax lien continues for a ten year period “from the date of filing.” Therefore, to the extent any liens have been filed longer than ten (10) years at the time of the May 1, 2013 Department Determination, those liens have expired and the associated taxes, interest, penalties, and costs are no longer collectible against the company.

21. The court must next consider whether the ten (10) year lien expiration date applies to the Petitioner, since the Department has not filed any tax liens against the Petitioner in his individual or personal capacity. *See* S.C. Code Ann. § 12-54-120(A)(2)(e). It is uncontroverted that the Department filed several tax liens against Intedge beginning in 2001 through 2006. Both the *Roddey* and *Rowland* decisions addressed only the thirty-six (36) month statute of limitations for assessment of the tax, and not the ten (10) year limitation on tax liens.

Though the Department has successfully argued that the Petitioner's liability as a responsible party for Intedge's tax debt is derivative of Intedge's liability for purposes of the three (3) year statute of limitations, the Department now takes an antithetical position concerning the ten (10) year lien expiration. It argues that any lien filed against the Petitioner at the resolution of this litigation will thus have a collectible life of ten (10) years from the date of filing. The court rejects this logic. The Petitioner owes no tax separate from that of Intedge. Rather, he is personally liable for the taxes owed by Intedge by nature of his position with Intedge. Therefore, once the liens against Intedge expired and the Department was no longer able to collect the taxes secured by such liens, then the Department was also barred from collecting the taxes from the Petitioner. The Department has attempted to argue that it has unlimited time in which to file tax liens against the Petitioner, however, this court rejects that argument. Even Mr. Owens, a Department employee with twenty-eight (28) years of experience, testified that the ten (10) year expiration period begins to run against both the company and the responsible party from the time of the assessment issued to the company (Tr. At 144).

Additionally, the Department's argument lacks merit because, though it had ample opportunity to collect the entire tax liability from Intedge through various means, the Department never undertook any of the measures outlined by Mr. Owens in his testimony. Though the Department argued that it seeks to adhere "to sound public policy by first seeking to collect taxes from the corporation before looking through the corporation to individuals," the Department's lack of efforts to collect the tax liability from Intedge cannot now allow it now to argue it has an unlimited amount of time to collect from the Petitioner. Even after the Department finally filed its Proposed Notice of Assessment against Responsible Party on September 2, 2009, the Department

delayed an additional three (3) years and five (5) months before it issued its final Department Determination, on May 1, 2013.¹⁶

Therefore, under the facts of this case, this court finds that, since the Petitioner's liability as a responsible party for Intedge's tax debt is derivative of Intedge's liability, the expired liens have now also expired regarding the Petitioner. This court rejects the Department's argument that the date of September 2, 2009, has significance. Even at the date of the hearing, the Department had not filed any tax liens against the Petitioner. It was over three (3) years after issuing the Proposed Notice of Assessment to Responsible Party that the Department issued a final agency decision (May 1, 2013), that was thirty-two (32) months late. The statute mandates that "[t]he department must issue the determination on a proposed assessment not later than nine months after the date the written protest or claim was filed with the department by the taxpayer." Though the statute provides a remedy when the department fails to issue its Determination by allowing a taxpayer to file with this court, this court also finds that the Department is foreclosed from arguing that September 2, 2009, is somehow the date that magically stopped the running of the ten (10) year limitation period.

22. Because the Department is barred from collecting any taxes secured by a lien that was filed more than ten years before the May 1, 2013 Department Determination, the court holds that the following employee withholding taxes owed by Intedge can no longer be collected:

- a. Employee withholding taxes for the third quarter of 1999 for which a lien was properly filed in August of 2001;
- b. Employee withholding taxes for the first quarter of 2001 for which a lien was properly filed in November of 2001; and
- c. Employee withholding taxes for the second quarter of 2001 for which a lien was properly filed in February of 2002.

Sale of Intedge

¹⁶ The Department argues in footnote 3 of its Motion for Reconsideration that the "May 1, 2013 Department Determination should not be used as the date of record to evaluate the existence of valid Intedge tax liens and the consequent exclusion of expired liens for responsible party collection efforts." It argues that this Determination "has no 'tolling' effect on any limitation period." If this court were to take this argument to its logical conclusion, then the Department's failure to file tax liens against the Petitioner as of this date, would mean that the Department has no recourse regarding any of the fifteen (15) tax liens. The Petitioner, however, has not made this argument, either at the hearing, or in the Motion to Reconsider.

23. As a further defense to the assessments, the Petitioner argues that Intedger was sold to Intedger Manufacturing, Inc. in 2005, and any liability for the delinquent taxes, penalties, and interest became the liability of the successor corporation under S.C. Code Ann. § 12-54-124 (Supp. 2003). This section provides:

In the case of the transfer of a majority of the assets of a business, other than cash, whether through sale, gift, devise, inheritance, liquidation, distribution, merger, consolidation, corporate reorganization, lease or otherwise, any tax generated by the business which was due on or before the date of any part of the transfer constitutes a lien against the assets in the hands of a purchaser, or any other transferee, until the taxes are paid. Whether a majority of the assets have been transferred is determined by the fair market value of the assets transferred, and not by the number of assets transferred. The department may not issue a license to continue the business to the transferee until all taxes due the State have been settled and paid and may revoke a license issued to the business in violation of this section.

This section does not apply if the purchaser receives a certificate of compliance from the department stating that all tax returns have been filed and all taxes generated by the business have been paid. The certificate of compliance is valid if it is obtained no more than thirty days before the sale or transfer.

24. Although the court finds that substantially all the corporate assets of Intedger were sold in July 2005,¹⁷ the Petitioner's argument that Intedger Manufacturing, Inc. is solely responsible for the unpaid taxes of Intedger fails. Section 12-54-124 in no way relieves or absolves a business whose assets are transferred to another entity from tax liability for unpaid taxes. Rather, the statute provides that any unpaid taxes generated by the transferring business prior to the transfer constitute a tax lien on the transferred assets in the hands of the purchasing entity. Nowhere does the statute eliminate the liability or obligation of the transferring business, or its responsible persons. This court refuses the Petitioner's invitation to read an additional clause into the statute or imply some

¹⁷ The Petitioner was unable to produce any documentation of the sale of Intedger to Intedger Manufacturing, Inc. The court finds the Petitioner's explanation that these records are unavailable to be questionable. The Petitioner was the President and principal shareholder of Intedger until 2005. During the sale of the business, he was represented by counsel during the sale of the century old family business, and then by another counsel in subsequent litigation regarding the sale of that business. Despite being a party to these two legal processes involving the sale of the business, the Petitioner claimed he was not in possession of nor was he able to obtain a single pertinent document related to the sale of Intedger. However, due to this court's concerns with the Department's delay in pursuing this matter for years after the Petitioner left the company, the court accepts the Petitioner's testimony regarding the sale of Intedger.

protection from tax liability to businesses that transfer their assets to another business without satisfying unpaid tax debt.¹⁸

25. Further, although the Petitioner lost control of Intedge in July 2005, he has put forth no explanation for failing to pay the taxes from September 1999 to early 2005, nor has he argued that such taxes were not originally owed by Intedge. In fact, the Petitioner acknowledged on numerous occasions that he had majority or complete control of Intedge during that timeframe. The tax liabilities of Intedge were established prior to the sale of the business to the Petitioner's uncle. The Petitioner was in control of Intedge during that time, and he is the responsible party for such tax liabilities until his departure in July 2005.

26. However, because the Petitioner lost control of Intedge in July 2005, the court holds that he is not personally liable for any tax liability accruing to Intedge after July 2005. Therefore, the Petitioner is not liable for Intedge's employee withholding taxes for the following periods:

- a. Legal tax lien July 5, 2006 (for taxes of \$4,320 due on October 31, 2005, along with penalties and interest);
- b. Legal tax lien December 14, 2006 (for taxes of \$634.35 due on February 28, 2006, along with penalties and interest); and
- c. Legal tax lien June 21, 2006 (for taxes of \$1,500 due on October 20, 2005, along with penalties and interest).

Sales Tax (July through September 2005)

27. Similarly, as to the responsibility for sales taxes, S.C. Code Ann. § 12-54-195 (2014) provides that a "responsible person" includes any officer, partner, or employee of the taxpayer who has a duty to pay to the department any state or local sales tax due by the taxpayer or use tax required or authorized to be collected by the retailer"

28. Section 12-54-195(B) provides the following with regard to a retailer who adds or collects a state or local sales or use tax, but fails to remit such tax to the Department: "a responsible person may be held liable, individually and personally, for the tax collected but not remitted to the

¹⁸ The court finds the Department's reliance on the indemnification agreement the Petitioner executed with Intedge Manufacturing on October 1, 2005 unpersuasive. That indemnification agreement, a private contractual arrangement between the Petitioner and the successor company, had no effect on the liability imposed under § 12-54-124. It merely gave Intedge Manufacturing a contractual remedy against the Petitioner if Intedge Manufacturing was required to pay Intedge's delinquent taxes.

department, along with penalties and interest from the date the tax was due.” Further, “[t]he tax, penalties, and interest are not collectible from the retailer to the extent the tax, penalties, and interest imposed by this subsection are collected from a responsible person.” *Id.*

29. As a retailer with a valid retail license issued by the Department, Intedge was responsible for filing sales tax returns and paying the appropriate tax it collected from its customers to the Department. The sales taxes were timely assessed against Intedge and as provided by section 12-54-195, the Petitioner, by his role as an officer and majority shareholder of the corporation under a duty to file and remit sales taxes, was a responsible person for purposes of sales tax liability. However, the court holds that the Petitioner no longer held a position of control within Intedge as of July 2005. Because the sales tax return should have been filed in September 2005, two months after the Petitioner lost his position of responsibility within Intedge, the court concludes that the Petitioner is not liable for the sales tax, interest or penalty owed by Intedge.

Due Process

30. The Petitioner further asserts that the Department’s assessment against him personally and individually, and the Department’s actions in attempting to collect such assessment, violated his due process rights. Specifically, the Petitioner argues that his due process rights were violated by the Department based upon the excessive length of time between the assessments filed against Intedge, the issuance of the Proposed Notice of Final Assessment for Responsible Party, and the issuance of the Department Determination. While conceding that the Department failed to issue its determination within nine months, it asserts that, pursuant to S.C. Code Ann. § 12-60-450(E)(3), the Petitioner had the right to request a contested case hearing before the ALC at the expiration of 9 months. Here, the Petitioner failed to request such a hearing after nine months of the Proposed Notice of Assessment being issued. Thus, the Department argues, the Petitioner cannot complain of any perceived unfairness when he had a statutory remedy available to him but chose not to exercise that right. Furthermore, the Department argues that its actions in this case promote sound public policy in that a state agency should pursue remedies against a taxpayer business entity before looking through such entity to individuals.

31. For the Petitioner to receive the process he is due, he must have notice, an opportunity to be heard in a meaningful way, and judicial review. *See Kurschner v. City of Camden Planning Comm’n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (“The fundamental

requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.” (citing S.C. Const. art. 1, § 22; *Stono River Envtl. Protection Ass’n v. S.C. Dep’t of Health and Envtl. Control*, 305 S.C. 90, 406 S.E.2d 340 (1991)). As discussed above, the Petitioner received notice of the taxes owed. Likewise, he received judicial review. However, the court is concerned with the Department’s delay in this matter.

32. While the court agrees with the Department’s above enumerated arguments, the Department’s inexplicable multi-year delay in pursuing this matter against the Petitioner is troubling. Aside from filing initial tax liens, the Record is devoid of any evidence that the Department attempted to collect the taxes from Intedge through tax levies, seizures of assets, revocation of its business license, or through any other means. Additionally, the evidence reveals that the Petitioner attempted to address some of the taxes Intedge owed in 2002, and did not follow through. Though this failure to pay the taxes by the Petitioner voided any amnesty agreement Intedge may have had with the Department, it appears that the Department made few if any efforts to collect the taxes from Intedge. Furthermore, after waiting nearly four years to pursue the Petitioner as a Responsible Party for Intedge’s delinquent taxes, the Department waited an additional four more years to issue a Department Determination. During this long delay the Petitioner sold Intedge and relinquished all control of and access to business records.

33. This court does not hold that the Department’s delay completely divested the Petitioner’s right to be heard in a meaningful way. However, this court cannot ignore the long delay in prosecuting this matter, which continued for years after the Petitioner sold the business and lost control of and access to its records. As a remedy, the court accepts the Petitioner’s testimony regarding the sale of the business, and finds that he was no longer in control of Intedge as of July 2005. Furthermore, the court holds that the Petitioner is not responsible for the penalties accruing from the taxes owed by Intedge.

Penalties

34. The Department may waive, dismiss, or reduce penalties unless otherwise specifically prohibited. S.C. Code Ann. § 12-54-160 (2014). The Department has issued S.C. Rev. Proc. Bulletin #08-6 (the “Revenue Procedure”) to provide procedural guidance for the waiver or reduction of penalties pursuant to that statute. The Revenue Procedure provides that the Department may grant a complete waiver of penalties when the “lack of performance required by a taxpayer is due to reasonable cause.” When determining what constitutes “reasonable cause” the

Department examines whether the taxpayer exercised ordinary business care and prudence.” The Department may grant a partial penalty waiver when “significant mitigating factors are present.” The appropriate treatment of a penalty is a question of fact to be considered on a case-by-case basis.

In most cases, failure to file a tax return on or before the due date requires a penalty of up to twenty-five (25) percent of the amount of the tax. S.C. Code Ann. § 12-54-43(D) and (E). Unlike criminal fines, the fundamental purpose of civil penalties is not to punish. *See Plunkett v. Commissioner*, 118 F. 2d 644, 650 (1st Cir. 1941). Civil penalties “are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer’s fraud.” *Helvering v. Mitchell*, 303 U.S. 391, 401 (1938).

Under the unique facts of this case, though the Petitioner has not offered evidence that he exercised ordinary business care and prudence, this court also finds that the Department’s protracted eight (8) year delay in reaching a final determination against the Petitioner in his personal capacity, causes this court to decline to impose any penalties, especially due to the extraordinary amount of interest that has accrued over this inexplicably long delay.

Interest

35. Interest is due on unpaid taxes under the provisions of S.C. Code Ann. § 12-54-25(A) and “is due on the unpaid portion from the time the tax was due until paid in its entirety.” Unlike penalties, in which this court has some discretion, this court finds that there is no statutory authority for the waiver of interest in this case, brought under Chapter 54, Uniform Method of Collection and Enforcement of Taxes Levied and Assessed by South Carolina Department of Revenue.¹⁹ *See Anonymous Taxpayers v. SCDOR*, 01-17-0187-CC (September 4, 2001). Therefore, the Petitioner is responsible for the full amount of interest owed on the applicable outstanding tax liabilities.

Attorney’s Fees and Sanctions

¹⁹ Though the Department may compromise interest during the settlement phase under the provisions of S.C. Code Ann. § 12-4-320(3), there is no statutory authority for the waiver of interest outside of the settlement realm.

36. At the hearing, the Petitioner moved the court for attorney fees. The court finds the Petitioner has provided the court with no statutory authority or case law that would allow it to award attorney's fees in this case.

37. Notwithstanding the issue of attorney's fees, however, there is also an issue concerning the Department's failure to provide requested discovery, which ultimately resulted in a day-long delay for the Petitioner to review the requested material. The Department did not become aware of the existence of the requested documents/records until one of its own employees (Mr. Owens) revealed during his hearing testimony that he had them in his possession, and that he had also provided the Department with them a few days prior. Had the Department interviewed this employee to any degree prior to his testimony, it should have learned of these records and could have used them, ironically, to its own benefit.²⁰ Though this omission was certainly not deliberate, and probably harmed the Department more than the Petitioner, this court concludes that this sanction (a reduction of \$675.00) is appropriate in this case.


ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, **IT IS HEREBY ORDERED** that the Department's Determination holding the Petitioner personally liable for the withholding and sales taxes, penalties, and interest of Intedge Industries, Inc. for the period of September 1999 through December 2005 is partially upheld and partially overturned. The court holds that the Petitioner is personally liable for the employee withholding taxes, penalties and interest owed by Intedge for the period of May 1, 2003, through July 1, 2005. Any taxes, penalties and interest accruing before that period are time-barred. Additionally, any taxes, penalties and interest accruing after the Petitioner was no longer a responsible party (July 1, 2005) are not attributable to the Petitioner and are also barred. Furthermore, the court holds that the Petitioner is not liable for the penalties in this matter due to the Department's eight (8) year delay in pursuing

²⁰ As the Department noted during the hearing, these documents were found and brought to the hearing by Mr. Owens. He testified he retrieved them from the Department's Automated Receivables Management System ("ARMS"). Ultimately, Mr. Owens testified without objection to these documents, which established that the Petitioner and/or his attorneys were aware of tax liens as of July 2005. (Hr'g Tr. 173:17-23). The documents did not help the Petitioner in his case, but it could be argued that the Petitioner may have more actively pursued a settlement in this matter, had these documents been disclosed, as they should have been. Also, this court will speculate that the inordinate delay in this case, caused these documents to be temporarily lost or overlooked.

the Petitioner as a responsible party. **FURTHERMORE**, the Petitioner is required to pay interest that has continued to accrue, on the unpaid portion of the taxes for taxes Intedged incurred from May 1, 2003 through July 1, 2005.

AND IT IS SO ORDERED.



S. PHILLIP LENSKI
Administrative Law Judge

March 17, 2017
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date
served this notice order, in the above entitled action upon all
parties to this cause by depositing a copy hereof,
in the United States mail, postage paid, or in the interagency
mail service addressed to the party(ies) or their attorney(s).

The 17th day of MARCH
BY: [Signature]

FILED

MAR 17 2017

ADMINISTRATIVE LAW COURT

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

HONORABLE PHILIP S. LENSKI, ADMINISTRATIVE LAW JUDGE

RECEIVED

APR 28 2017

SC Court of Appeals

CASE NO. 13-ALJ-17-0244-CC

APPELLATE CASE NO. 2017-000968

Richard Beltram,.....Appellant,

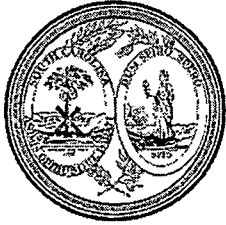
v.

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

PROOF OF SERVICE

I, Jean M. O'Connor, hereby certify that I have caused to be mailed a copy of the South Carolina Department of Revenue's Motion to Dismiss Appeal With Prejudice regarding the above-referenced case, by depositing the same in the United States Mail, postage prepaid, on April 28, 2017, addressed to the attorney of record, Ginger D. Goforth, Esquire, The Ward Law Firm, P.A., P.O. Box 5663, Spartanburg, SC 29304. The same was hand delivered to the Court of Appeals this same date.


Jean M. O'Connor



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE

300A Outlet Pointe Blvd., Columbia, South Carolina 29210
P.O. Box 12265, Columbia, South Carolina 29211-9979

April 28, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED

APR 28 2017

SC Court of Appeals

RE: Richard Beltram v. South Carolina Department of Revenue
Case No. 13-ALJ-17-0244-CC
Appellate Case No. 2017-000968

Dear Ms. Kitchings,

Enclosed for filing are the original and six copies of the Respondent's Motion to Dismiss Appeal With Prejudice. Also enclosed is the Respondent's Memorandum of Law, with attachments, and a Proof of Service.

Sincerely,

OFFICE OF GENERAL COUNSEL

A handwritten signature in cursive script, appearing to read "Nicole M. Wooten".

Nicole M. Wooten
Counsel for Litigation

cc: Ginger D. Goforth, Esq.
Enclosures