THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Phillip Lenski, Administrative Law Judge

Case No. 2017-000968

Richard Beltram, ... Appellant,

v.

South Carolina Department of Revenue, ...Respondent.

APPELLANT-RESPONDENT'S INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On September 2, 2009, the South Carolina Department of Revenue ("DOR") issued a Proposed Assessment to Responsible Party to Appellant Richard Beltram ("Beltram"). (Proposed Assessment to Responsible Party). On December 1, 2009, Beltram timely filed a protest challenging the DOR's Assessment. (December 1, 2009 protest).

On May 1, 2013 - nearly three and a half years after Beltram's protest was filed – the DOR issued its Department Determination to Beltram, finding him personally liable for certain payroll and sales taxes accrued by Intedge Industries, Inc. ("Intedge"). (May 1, 2013 Department Determination). Beltram timely filed his Request for Contested Case Hearing on May 28, 2013. (Request for Contested Case Hearing).

This matter came before the Administrative Law Court ("ALC") on September 16 and 17, 2014 for a hearing. (Transcript of Hearing).

Some six months following the trial, the ALC issued its Order on March 25, 2015 (March 25, 2015 Order). Beltram timely filed a motion to reconsider. (April 2, 2015 Motion to Reconsider). The DOR also moved the ALC to reconsider the decision. (April 6, 2015 Motion to Reconsider). On May 1, 2015, the ALC issued an Order Vacating Final Order, which stated that the March 25, 2105 Order "is

hereby vacated pending a decision upon the motions filed by the Petitioner and the Respondent." (May 1, 2015 Order Vacating Final Order).

On March 17, 2017, nearly two years later, the ALC issued its Amended Final Order. (March 17, 2017 Amended Final Order). This appeal followed.

FACTS

Beltram was president of Intedge Industries, Inc. from 1983 through the first quarter of 2005. In late 2004, Beltram's uncle, Daniel Beltram, took progressive control of the company, ultimately purchasing the property, facility, and manufacturing equipment on July 1, 2005, after which Richard Beltram had no further control over the company operations. This included any right or ability to access the company post office box for any and all incoming notices or correspondence.

The DOR filed 15 liens against Intedge for filed withholding returns with unpaid withholding taxes, with dates beginning on June 14, 2001 (for taxes due on October 31, 1999) through June 21, 2006 (for taxes due on October 30, 2005). Intedge also failed to file one quarterly sales tax return for the period July through September 2005, which also resulted in the filing of a tax lien against Intedge.

The DOR assessed each of these delinquent taxes against Intedge within the three-year statute of limitations. The DOR never issued levy notices against Intedge's assets or attempted to otherwise collect these unpaid taxes from Intedge. The DOR did not provide notice of these assessments to Beltram, did not seek payment of these assessments from Beltram until September 2, 2009, and has never filed a lien against Beltram.

In July of 2005, Beltram sold the Intedge Industries' building, land, and manufacturing assets to his uncle, Daniel Beltram. This divested Beltram of any control as a responsible party on behalf of Intedge. Daniel Beltram formed a new company, Intedge Manufacturing, and Intedge Industries ceased operations. Beltram lost control as of July 1, 2005, and Daniel Beltram assumed control on that date.

On September 2, 2009, the DOR issued a Proposed Notice to Responsible Party to Beltram. This

notice indicated that the DOR was seeking to hold Beltram personally responsible for Intedge's outstanding withholding and sales taxes, penalties, and interest from the periods spanning September 1999 through December 2005. The DOR did not send any notice of the assessments to Beltram prior to September 2, 2009, or file any liens against him. (Hearing Transcript p. 28). At that time, Beltram had been divested of any interest in Intedge for upwards of four years, and had no access to any business records or other corporate information.

Beltram filed a timely protest on December 1, 2009. Bruce Owens, a DOR Collections Supervisor, received the filed protest. Owens testified that a Responsible Party is deemed to have notice of an original assessment issued to the business. The notice of the assessment starts the ten-year statute of limitations period for both the business and the Responsible Party. (Hearing Transcript pp. 143-144). The law requires the DOR to assess a tax owed by a business within three years of the accrual of the liability. If the assessment is not made within three years, the DOR cannot pursue that liability. (Hearing Transcript pp. 145-146). Owens recalled that at least one collections letter was generated to Intedge Manufacturing, which purchased the Intedge Industries' assets. He also believes that a revenue officer was attempting to work with the new owner Intedge Manufacturing on the tax liabilities. He admitted that the DOR generates automated collection letters, and therefore could not produce copies of any such communications sent to Beltram or Intedge Industries or Intedge Manufacturing. (Hearing Transcript pp. 151-155).

The DOR was required to serve its Department Determination within nine months of receipt of Beltram's properly and timely filed protest as defined by S.C. Code Ann. § 12-60-30(24) and in accordance with S.C. Code Ann. § 12-60-450(E)(3). It did not. Instead, after a brief communication with Beltram in January of 2010 during which Beltram instructed the DOR to discuss the issues with his lawyer – which it never did – the DOR responded on May 1, 2013, **three and one-half years after Beltram timely sent in his protest.** (Hearing Transcript p. 31). Beltram had no right to request a

Contested Case Hearing until receipt of the final DOR determination, as defined by S.C. Code Ann. § 12-60-30(10).

The record is clear and established that the DOR never contacted or notified Beltram about any potential tax liabilities of Intedge until the issuance of the September 2, 2009 Proposed Notice of Assessment, over four years after Beltram left the company in July 2005. Because liens, including tax liens, follow the sale of assets, Beltram determined that the DOR must be pursuing Intedge Manufacturing, which had purchased Intedge Industries' assets. (Hearing Transcript p. 48). This is supported by the fact that Owens testified to some efforts by the DOR to collection from Intedge Manufacturing, although he could not produce documents reflecting these efforts. His testimony shows that Beltram's confidence was well-placed.

During Owens' testimony, he acknowledged that the DOR had a copy of Beltram's protest that it had failed to disclose in discovery 18 months prior. (Hearing Transcript p. 157). Counsel for the DOR denied the same. Owens then described a series of communications with Beltram that had never been disclosed by the DOR in discovery, but which he had in his possession. (Hearing Transcript pp. 157-162). Beltram's counsel moved to dismiss the case against him due to the egregious discovery violation, and also for attorney's fees. The DOR's position was that it "doesn't believe that these documents have any materiality at all." (Hearing Transcript p. 164).

The documents produced by Owens contained materials showing that the DOR knew as early as March of 2007 that Intedge Industries was closed, had been closed since 2005, and that there was a new owner/business in place. (Hearing Transcript p. 175). The documents also showed that DOR Revenue Officer Lori Coggins sent assessments to Intedge Industries anyway in August of 2009. (Hearing Transcript 175-176).

Owens had no explanation as to why the documents were not provided in discovery, or why some were provided to DOR counsel and some were not. (Hearing Transcript p. 194). He further testified that

some of the documents he had retrieved from a file he carried in his car "in case I needed them." (Hearing Transcript pp. 186-187).

Counsel for the DOR even acknowledged that the documents produced by Owens were "internal documents" that would make no sense without Owens' testimony to clarify their meaning. (Hearing Transcript pp. 188-189). And yet, Beltram and his counsel were expected to digest this material and its impact on the case in one evening. DOR counsel also noted that the materials contained sensitive information such a social security numbers and FEIN numbers. (Hearing Transcript p. 190). Apparently, it was not an issue to the DOR that these types of sensitive materials were being casually maintained in an employee's vehicle. According to Owens, the materials comprised, in part, "the automated collection system notes . . . work by the revenue officer to attempt to collect a liability from Intedge Industries or whoever else may hold funds." (Hearing Transcript p. 204). Such documents would have been integral to the discovery process, and it was prejudicial to require Beltram and his counsel to absorb and address them during the process of the trial itself.

According to Owens, the file was transferred from collections to legal no later than November 2, 2011. (Hearing Transcript p. 185). There it sat with no action until the issuance of the Departmental Determination on May 1, 2013. There is no explanation or excuse for this dilatory conduct by a state agency, and its blatant disregard of the specific rules governing its procedures.

Beltram promptly filed his hearing request within the same month. A hearing was held nearly a year and half later. Six months following the trial, the ALC issued its Order on March 25, 2015 (March 25, 2015 Order). Beltram timely filed a motion to reconsider. (April 2, 2015 Motion to Reconsider). The DOR also moved the ALC to reconsider the decision. (April 6, 2015 Motion to Reconsider).

Rule 29, S.C. R. Admin. Law Ct., requires a ruling on such motions within 30 days after it is filed. Instead, on May 1, 2015, the ALC issued an Order Vacating Final Order, which stated that the March 25, 2015 Order "is hereby vacated pending a decision upon the motions filed by the Petitioner

and the Respondent." (May 1, 2015 Order Vacating Final Order).

The case again sat for two years, through no fault of Beltram, until the ALC issued its Amended Final Order on March 17, 2017. Beltram timely and promptly appealed the Amended Final Order.

ARGUMENTS

I. S.C. Code Ann. § 12-60-3370 does not mandate dismissal of Beltram's appeal and the Court of Appeals has authority to hear and decide the issues raised in Beltram's appeal.

The South Carolina Appellate Court Rules are clear regarding the requirements for filing a notice of appeal from an administrative tribunal. Rule 203(b)(6) and (d)(2), SCACR. The Appellate Court Rules further state that the only time period that cannot be enlarged or diminished by order of the Court of Appeals is the time for filing and serving the Notice of Appeal. Rule 263(b), SCRCP. Beltram has fully complied with these requirements.

Because the deadline for a Notice of Appeal is not subject to extension, Beltram acted promptly in filing the Notice of Appeal to preserve his rights. The statute cited by the DOR, while providing that payment or bond should be filed prior to filing the Notice of Appeal, does not have a corresponding provision that the appeal must be dismissed if the payment is made after, and not before, the filing of the Notice of Appeal. The DOR has cited general law stating that failure of a party to comply with procedural requirements for perfecting an appeal "may" deprive the appellate court of jurisdiction. There is no specific law governing Beltram's situation, and certainly no South Carolina case requiring the dismissal of his case with prejudice. In short, the statute cannot override the specific rules of the South Carolina Court of Appeals. Under those rules, an appeal is perfected by timely filing and service of the Notice of Appeal. There is no question that Beltram has done so.

Beltram does not dispute that he did not pay either the amounts due under the Amended Final Order or post a bond. However, he had no way to ascertain the actual amounts owed under the Amended

Final Order, and raised this issue directly with the Court of Appeals in response to the DOR's Motion to Dismiss Appeal. Beltram was prepared to meet the requirements of the deposit/bond statute, but did not have sufficient information to enable him to make said deposit.

The Court of Appeals reviewed Beltram's plea and agreed, denying the DOR's Motion to Dismiss and remanding the issue of the amount of the ALC's award back to the ALC. (Court of Appeals Order, July 13, 2017). The ALC required briefing of the issue, further signifying the difficulty that Beltram had determining what amount he may need to deposit pending appeal. Both parties fully briefed this issue with initial and reply briefs. The ALC filed its Order on Remand to Pay or Post Bond on January 12, 2018. (ALC Order, January 12, 2018). Beltram thereafter deposited the amounts required with DOR pursuant to the terms of the Order.

This case is fraught with many issues of delay and noncompliance with applicable procedural rules by the DOR, and Beltram in no way desired to circumvent the court rules or refuse to post any payment required by law. Beltram submits that the Court of Appeals has jurisdiction over this appeal because he timely filed a Notice of Appeal under the Appellate Court Rules and the rules governing administrative procedure. The omission of a payment in trust to the DOR does not deprive the Court of Appeals of this jurisdiction, and the Court of Appeals had the authority – and exercised the same by its order of remand - to determine the amount to be paid under the Amended Final Order pending appeal. Beltram complied with the order generated by the ALC on remand, and his appeal must therefore stand.

II. The Administrative Law Court properly ruled that the Department of Revenue is barred from collecting any taxes from Beltram that were secured by tax liens against Intedge and file more than ten years prior to the Department Determination.

The DOR has essentially argued that there is no time limit on its ability to collect on tax liens against Beltram, no matter the date of filing, or whether the liens have ever been filed. The Court of Appeals must reject the statutory gymnastics that the DOR has performed to support this argument, and give the language of the applicable provisions their plain and ordinary meaning, "without resort to subtle

or forced construction to limit or expand the statute's operation." See Sloan v. South Carolina Board of Physical Therapy Examiners, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006).

S.C. Code Ann § 12-8-2030 provides that tax withholding amounts must be held by the taxpayer in trust for the state, and they constitute a lien on the property of the agent for the amount withheld. S.C. Code Ann. § 12-54-120 provides that the tax lien continues for a ten-year period "from the date of filing." Therefore, under the plain language of these statutes, the tax liens filed against Intedge expired after ten years.

The DOR claims that these liens only expired as to Intedge, and that it can still – many years after the fact – file liens against Beltram and start the ten-year period again. **No liens have ever been filed against Beltram.**

Beltram's liability in this tax matter is derived solely from his role in Intedge. (Amended Final Order, p. 14). The ALC determined that notice to the Intedge constituted notice of the assessment to Beltram, personally and individually. The ALC further noted that no statute requires that Beltram, as responsible party, be put on notice by separate assessments. S.C. Code Ann. § 12-54-195 and 12-8-2010. (Amended Final Order, p. 15).

The DOR succeeded below on its argument that Beltram's liability is derivative of Intedge for purposes of the application of the three-year statute of limitations for assessment of the tax. The DOR was allowed to pursue Beltram, even though he had not been personally assessed. Beltram, as the ALC correctly pointed out, **owes not tax separate from that of Intedge.** Under no fair and reasonable construction of the applicable statutes can the DOR be allowed to collect taxes from Beltram secured by liens against Intedge that have expired. To do so would violate public policy.

Further, despite the DOR's urgings, its own witness – Bruce Owens, a DOR official with nearly 30 years of experience – testified at trial as follows:

(1) The DOR has a 10-year enforcement limit for liens, and "would look at that as our outside

deadline for actually taking action to collect money for a specific period.)

(2) If a responsible party is pursued as a tool for collecting the tax lien from a company, the same concurrent 10-year period applies. A: "Of course, in the case of responsible party as it's indicated in the department determination, responsible party, based on their authority and whatnot, has notice of liabilities based on the original assessment issue to the company. Q: Okay. So does the 10 years start then from the assessment of the company for the individual? A: Yes, sir."

(Trial Transcript pp. 143-144).

The September 2, 2009 notice of assessment to responsible party has no impact whatsoever on the ten-year enforcement period. The DOR has egregiously delayed its every effort in this matter. It had the authority to pursue Beltram upon the filing of the liens against Intedge. It chose to wait several years before attempting to do so. It issued the Department Determination nearly **three years** past the statutory mandate, which requires that the DOR issue the Department Determination on a proposed assessment not later than nine months after the taxpayer's written protest. Inexplicably, the DOR suffered no consequences from its flagrant disregard of this mandate. The DOR cannot bootstrap its own delay to add to its time for collection. If Beltram was on constructive notice as a responsible party when the liens were filed as to Intedge, then he likewise is entitled to the same collection period. This is a simple issue that is overly complicated by the DOR's arguments, which should be rejected.

III. The Administrative Law Court properly exercised its discretion to award attorney's fees to Beltram based upon the Department of Revenue's gross violation of discovery.

A trial judge has the authority to award attorney's fees as a discovery sanction. Absent an abuse of discretion, discovery sanctions will not be reversed on appeal, and the party appealing the order has the burden of proving that an abuse of discretion occurred. McNair v. Fairfield County, 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008). The ALC is empowered by Rule 21, S.C. R. Admin. Law Ct., which

allows the parties to conduct discovery according to the procedures in the South Carolina Rules of Civil Procedure, including Rule 37, SCRCP, which governs sanctions.

The facts of the DOR's egregious discovery violations are set forth fully above. It is clear from the testimony that DOR did not exercise due diligence in complying with discovery requirements, which resulted in Beltram and his counsel literally evaluating documents on the fly during the trial. The ALC even noted that these violations likely resulted from the DOR's efforts to draw out the case over some eight plus years.

Beltram's counsel submitted specific time and billing information reflecting the expenditure of at least the additional $1,875.00 in unanticipated attorney's fees, not to mention the stress and inconvenience caused by the DOR's delay.

The DOR's only reply was that it "doesn't believe that these documents have any materiality at all." (Hearing Transcript p. 164). The ALC acknowledged that they were material, and plainly found that Beltram would have likely evaluated the matter differently if he had been privy to the materials prior to trial. He never had that opportunity, and it was completely foreclosed by the DOR's failure to disclose the documents.

The DOR acknowledged that the documents produced by Owens were "internal documents" that would make no sense without Owens' testimony to clarify their meaning. Beltram and his counsel had to learn about these internal documents and their meanings from the stand. Further exacerbating the matter was the fact that the documents, which the DOR witness Owens admitted to contain personally identifying sensitive matter, were being carted around in the employee's vehicle. The DOR never inquired about the documents from Owens, even though it had a duty to do so.

The DOR attempts to cast the ALC's award as an unwarranted and unlawful reduction of Beltram's tax liability based on several other statutes that do not directly address the specific issue that the ALC ruled upon. These attempts draw a distinction without a difference (i.e., whether the tax liability

is reduced, or whether the DOR must pay an attorney's fee sanction directly to Beltram), and each must fail.

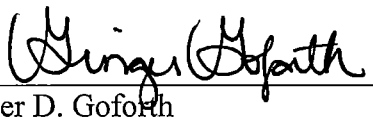
The ALC, as noted above, **has express authority** to issue a discovery abuse sanction, including an award of attorney's fees, governed by an abuse of discretion standard. Beltram submits that record reflects the DOR clearly violated its discovery obligations by delaying production of requested documents for months, only to have a witness on the first day of trial reference their existence. Further, the ALC's award of $675.00 can hardly be cast as unreasonable, given Beltram's submission of actual costs incurred as a result of the DOR's discovery violation of $1,875.00.

CONCLUSION

For the reasons set forth herein, Appellant-Respondent the ALC's rulings on the issues raised by the DOR herein should be upheld.

Respectfully submitted,

THE WARD LAW FIRM, P.A.
Attorneys for Appellant-Respondent Richard Beltram



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May 3, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Phillip Lenski, Administrative Law Judge

Case No. 2017-000968

Richard Beltram, ...
Appellant/Respondent,

v.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Appellant/Respondent Richard Beltram's Initial Brief of Respondent was served upon all parties of record on May 3, 2018 by depositing copies of the same via process service and/or United States mail, postage affixed, to the following address:

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May 3, 2018

The Honorable Jenny Abbott Kitchings
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RE: Richard Beltram v. South Carolina Department of Revenue
Appellate Case No. 2017-000968

Dear Ms. Kitchings:

Enclosed for filing please find an original and one copy of Appellant/Respondent Richard Beltram's Initial Brief of Respondent, along with a certificate of service. Please return a filed copy of the same in the enclosed postage-paid envelope.

Thank you for your consideration,

Sincerely,

Ginger D. Goforth

GDG/

cc: South Carolina Department of Revenue

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