THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2019-001748
Lower Court Docket No. 19-ALJ-17-0121-AP

Shirley Whitfield, Individually and as personal representative of the Estate of William Whitfield .....Appellant,

v.

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case involves a dispute over income tax refunds sought to be recovered by the Appellant, Shirley Whitfield ("Mrs. Whitfield") from the Respondent South Carolina Department of Revenue ("the Department of Revenue"). Mrs. Whitfield is eighty-eight (88) years old and the widow and Personal Representative of the Estate of William Whitfield, who passed away in July of 2018. (Request for Contested Case Hearing at p. 1). As a result of her spouse's declining health and her age, Mrs. Whitfield was delayed in submitting their jointly filed state income tax returns for the tax years 2012, 2013, and 2014. However, Mrs. Whitfield eventually filed income tax returns with the Department of Revenue and made claims for a refund on the following tax returns: the 2012 South Carolina tax return filed on or around August 11, 2017 in the amount of $114,644.00 (Request for Contested Case Hearing at p. 2, ¶ 4; Ex. A to Respondent's Notice of Motion and Motion to Dismiss);[1] the 2013 South Carolina tax return filed on or around June 18, 2018, in the amount of $53,796.00 (Request for Contested Case Hearing at p. 2, ¶5; Ex. C to Respondent's Motion to Dismiss); and, a 2014 South Carolina tax return, also filed on or around June 18, 2018 in the amount of $207,461.00 (Request for Contested Case Hearing at p. 2, ¶ 6).

[1] Respondent's Notice of Motion and Motion to Dismiss is hereinafter referred to as "Respondent's Motion to Dismiss."

On February 14, 2018, Mrs. Whitfield received a notice from the Department of Revenue denying her claim for a refund of $114,644.00 on the 2012 South Carolina tax return. In July of 2018, her husband passed away. Shortly thereafter, Mrs. Whitfield received a notice from the Department of Revenue on August 16, 2018 denying her claim for a refund of $53,796.00 on the 2013 South Carolina tax return. The basis for the Department of Revenue's denial of a tax refund in both instances was that "[t]*he claim was not made within the time required by law as outlined in SC Code Sections 12-54-85(F)(1), 12-54-85 (D)(2)(3) and 12-60-470.*" (Exs. B and D to Respondent's Motion to Dismiss) (emphasis added). The Department of Revenue did not deny Mrs. Whitfield's claim for a tax refund of $207,461.00 on the 2014 South Carolina tax return. (Request for Contested Case Hearing at p. 2, ¶ 7).

As the result of her husband's failing health and ultimately his death in July of 2018, Mrs. Whitfield did not protest or appeal the preliminary decisions to the Department of Revenue until mailing a letter of formal protest on February 27, 2019. On March 27, 2019, the Department of Revenue made final decisions regarding Mrs. Whitfield's claims, ultimately stating that her protests for both 2012 and 2013 were untimely because said protests were not filed within ninety (90) days of the Department of Revenue's initial notices[2] denying her tax refund claims dated February 14, 2018 and August 16, 2018, respectively. In response to these final denials, Mrs. Whitfield timely filed a Request for Contested Case Hearing to the ALC on April 25, 2019.

STANDARD OF REVIEW

Judicial review of a final decision or order by an administrative law judge is an "[a]ppeal . . . by right" under the Administrative Procedures Act ("the APA"). S.C. Code Ann. § 1-23-

[2] In its final decisions, the Department of Revenue referred to its prior notices as "the Notice of Proposed Assessment dated 2/14/2018", "the Notice of Proposed Assessment dated 08/16/2018", and each as a "Notice[s] of Proposed Adjustment" (Ex. A to Request for Contested Case Hearing).

610(A)(1). The standard of review to be applied by the appellate court is governed by statutory provisions set forth in the APA. *See id.* at § 1-23-610(B). Pursuant to S.C. Code Ann. § 1-23-610(B), appellate review of an order by the Administrative Law Court ("the ALC") is generally confined to the record, but "[t]he court of appeals may . . . remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced [by the ALC's decision]." More specifically, the appellate court may reverse an order of the ALC when the administrative law judge's findings, conclusions, or decisions are, *inter alia*:

> (a) in violation of constitutional or statutory provisions;
> . . .
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. at §§ 1-23-610(B)(a), (c)-(f). In reviewing a decision of the ALC, "[t]he court [of appeals] may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact." *Id.* at § 1-23-610(B). However, "[a] question of statutory interpretation is one of law for this Court to decide." *Allen v. S.C. Pub. Emple. Benefit Auth.*, 411 S.C. 611, 616, 769 S.E.2d 666, 669 (2015) (internal citations omitted); *see also CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below.") (citing *City of Rock Hill v. Harris*, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011)). Moreover, "'[t]he question of subject matter jurisdiction is a question of law.'" *Berry v. S.C. Dep't of Health & Envtl. Control*, 402 S.C. 358, 363, 742 S.E.2d 2, 4 (2013) (citation omitted). Accordingly, no deference is owed to the ALC on matters of law and the court of appeals may reverse an order of the ALC when the ALC's conclusions are the product of erroneous statutory or jurisdictional interpretations.

In reviewing the underlying order, the court of appeals must also "determine whether [the lower court] properly applied [its own] APA standard of review." *Lee Cty. Sch. Dist. Bd. of Trs. v. MLD Charter Sch. Acad. Planning Comm.*, 371 S.C. 561, 565, 641 S.E.2d 24, 27 (2007) (citing *Beaufort County Bd. of Educ. v. Lighthouse Charter Sch.*, 335 S.C. 230, 516 S.E.2d 655 (1999)); *see also* S.C. Code Ann. § 1-23-380(4)-(5) (setting forth the standard to be applied by the ALC in reviewing an agency decision). Importantly, "the standards of review established under [S.C. Code Ann. § 1-23-380 and § 1-23-610] are essentially identical." *Reliance Ins. Co. v. Smith*, 327 S.C. 528, 535 n.6, 489 S.E.2d 674, 678 n.6 (Ct. App. 1997).[3] Therefore, the court of appeals must determine whether the ALC adhered to the APA standard of review by providing Appellant with a meaningful opportunity to be heard as to whether errors of law contained within the agency decision prejudiced their substantial rights and by properly reviewing the record to determine whether Respondent's denial of Appellant's claim for a tax refund was made contrary to the statutory provisions of the South Carolina Revenue Procedures Act (the "RPA"). *See, e.g.*, S.C. Code Ann. §§ 1-23-380(5)(c), 1-23-610(B)(d); *see also* S.C. Const. art. I, § 22 ("No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard . . . and he shall have in all such instances the right to judicial review.").

ARGUMENT

I. THE ALC ERRED AS A MATTER OF LAW WHEN IT DETERMINED THAT MRS. WHITFIELD FAILED TO EXHAUST HER ADMINISTRATIVE REMEDIES UNDER THE SOUTH CAROLINA REVENUE PROCEDURES ACT.

[3] While S.C. Code Ann. § 1-23-380 does contain a provision stating that "'[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review,'" the Supreme Court of South Carolina has explained that "[t]his entitlement 'does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law'" and that "[a] court can reverse an agency's decision if, for example, the agency's decision was contrary to constitutional or statutory provisions or otherwise affected by an error of law." *Fullbright v. Spinnaker Resorts, Inc.*, 420 S.C. 265, 278, 802 S.E.2d 794, 801 (2017).

A. The South Carolina Revenue Procedures Act is Poorly Drafted and Ambiguous.

It is a fundamental aspect of the construction of any tax statute that ambiguities are to be resolved in favor of the taxpayer. *See, e.g., Alltel Communs. Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012) ("Generally, a court must apply the rules of statutory interpretation to resolve the ambiguity and discover the intent of the legislature. . . .However, '[i]n the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt.'") (citations omitted). "'[W]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor.'" *Id.* at 321, 731 S.E.2d at 873 (citations omitted). The RPA, S.C. Code Ann. §12-60-10, *et seq.*, emphasizes this precept in S.C. Code Ann. §12-60-20, "Legislative Intent", which provides specifically that: "[i]t is the intent of the General Assembly *to provide the people of this State with a straightforward procedure to determine a dispute with the Department of Revenue* and a dispute concerning property taxes. The South Carolina Revenue Procedures Act must be interpreted and construed in accordance with, and in furtherance of, that intent." (emphasis added). The RPA specifically envisions that its provisions are to be "interpreted and construed" for the benefit of the "people of this State" rather than for the benefit of the agency charged with administering taxes.

Despite this clear legislative intent, the ALC applied the RPA in an erroneous and mechanical fashion to conclude that Appellant's failure to file a written protest within ninety (90) days of the Department of Revenue's initial denial constituted a failure to exhaust her administrative remedies which permanently precluded further review by the ALC; irrespective of whether or not the Department "[r]ightly or wrongly" denied her the right to tax refunds of over

$150,000. (Order at 4.) The ALC further found that such an interpretation was consistent with the legislative intent expressed by S.C. Code §12-60-20 and that it was necessary "to avoid interference with the orderly performance of administrative functions." (*Id.*)

The RPA itself is rife with inconsistencies and ambiguities as to how a taxpayer must seek a refund and exhaust his or her administrative remedies before proceeding to the ALC for review. As just one example, the RPA defines the term "Exhaustion of the taxpayer's prehearing remedy" in S.C. Code Ann. §12-60-30(15) as follows:

> **(15)** "Exhaustion of the taxpayer's prehearing remedy" means that the taxpayer:
>
> **(a)** filed a written protest as required by this chapter;
>
> **(b)** attended the conference with the county board of assessment appeals for the purposes of Subarticle 9, Article 9 of this chapter, or met with the auditor for purposes of Subarticle 13, Article 9 of this chapter; and
>
> **(c)** provided the facts, the law, and other authority supporting the taxpayer's position to:
>
> **(i)**the county board of assessment appeals at its conference for appeals made pursuant to Subarticle 9, Article 9 of this chapter;
>
> **(ii)**the auditor in the taxpayer's protest or claim for refund for appeals made pursuant to Subarticle 13, Article 9 of this chapter; or
>
> **(iii)**the department representative in the protest for regulatory violation matters, and within thirty days after filing the protest for other matters, or the later date agreed to by the department representative. For the purpose of this section, regulatory violation matters are violations of a statute or regulation which controls the conduct of alcoholic beverage licensees, bingo licensees, or coin-operated device licensees. It includes violations which may result in the suspension or revocation of a license, but it does not include taxes or interest on taxes or monetary penalties in Chapter 54 of this title.

Notably, the references to "Article 9 of this chapter" in this definition refer to real and personal property tax assessments. Conspicuously absent from this definition is the disjunctive "or"

between sub-paragraph (a)—which requires that the taxpayer file a "written protest"—and sub-paragraph (b)—which requires a meeting to be conducted between the taxpayer and the county board of assessment or the "auditor".[4] To add further confusion, the conjunctive "and" is used in the definition at the end of sub-paragraph (b) and before sub-paragraph (c) to indicate that compliance with all three (3) sub-paragraphs is required. This definition, read literally, purports to require any taxpayer seeking review of a denial by the Department of Revenue to both file a written protest and meet with the county board of assessment or the auditor before the taxpayer can successfully exhaust his or her prehearing remedies. *Cf. United States v. Field*, 255 U.S. 257, 262 (1921) ("These conditions are expressed conjunctively, and it would be inadmissible, in construing a taxing act, to read them as if prescribed disjunctively."), *superseded on other grounds by statute as recognized in Estate of Kurz v. Commissioner*, 101 T.C. 44 (1993).

Similarly, the tax refund dispute procedures delineated in the RPA—*i.e.*, S.C. Code Ann. §12-60-470, "Taxpayers' refund claim; time for filing; contents"—are not a model of clarity. S.C. Code Ann. §12-60-470(E) states that: "A taxpayer *may* appeal the division's decision by filing a written protest with the department following the procedures provided in Section 12-60-450. For purposes of complying with the provisions of Section 12-60-450, the written denial of any part of a claim for refund is the equivalent of a proposed assessment." (emphasis added). The use of the word "may" indicates that the written protest procedure delineated in S.C. Code Ann. §12-60-450 is elective, not mandatory. *Cf. Rhame v. Charleston Cty. Sch. Dist.*, 412 S.C. 273, 277, 772 S.E.2d 159, 161 (2015) ("While recognizing the right to file a motion for rehearing to an Appellate Panel, we do not construe the '*if* a rehearing is requested' language to mandate the filing of a motion for

[4] Under the RPA, "'auditor' means a county officer or official *who issues an official property tax assessment for personal property.*" S.C. Code Ann. § 12-60-30(6) (emphasis added). Because this matter does not involve a "property tax assessment", both portions of S.C. Code Ann. §12-60-30(15)(b) are equally inapplicable to a claim for an income tax refund.

rehearing. This is consistent with general administrative law.") (emphasis added and citation omitted). Accordingly, if participating in a ninety (90) day protest process is elective and not mandatory, then further review should not be precluded simply because a petitioner did not file her protest within ninety (90) days.

To make matters even more confusing for the taxpayer, S.C. Code Ann. §12-60-470(I) of the RPA provides that: "A taxpayer who requests a contested case hearing as provided in Section 12-60-460 is considered to have elected his remedy and is denied the benefits of this section." S.C. Code Ann. §12-60-460 establishes a procedure by which the taxpayer may proceed to the ALC "[u]pon exhaustion of his prehearing remedy . . ." In effect, there are multiple, poorly defined remedies given to a taxpayer seeking to dispute a tax refund held by the Department, none of which are made clear.

If the legislative intent of the RPA is to create "a straightforward procedure for the taxpayer to determine a dispute with the Department of Revenue," it has failed, and the ambiguities inherent in the RPA should be construed in a manner which does not unfairly penalize a taxpayer seeking ALC review and which does not unfairly reward the Department of Revenue by allowing it to wrongfully retain a taxpayer's income tax refunds based on an overly narrow reading of the RPA.

B. A Reasonable and Fair Interpretation of the RPA Requires Reversal of the ALC's Decision.

As noted above, in the case of a claim for a tax refund under S.C. Code Ann. §12-60-470(E) of the RPA, a taxpayer "may" elect to pursue the written protest process with the Department set forth in S.C. Code Ann. §12-60-450. S.C. Code Ann. §12-60-470(I) appears to allow a taxpayer to proceed to file a contested case with the ALC under S.C. Code Ann. §12-60-460, provided that the taxpayer is then "denied the benefits of this section." In general, S.C. Code Ann. §12-60-470 does not specify any written protest process itself, other than incorporating the election of a written

protest remedy under S.C. Code Ann. §12-60-450, although it purports to require that a taxpayer only file a contested case with the ALC "[u]pon exhaustion of his prehearing remedy." S.C. Code Ann. §12-60-470(F).

In the two (2) initial notices issued by the Department of Revenue in 2018, Mrs. Whitfield's claims for tax refunds were denied based on the Department's assertion that her tax refund **claims** were untimely under S.C. Code Ann. §§ 12-54-85(F)(1), 12-54-85(D)(2)(3) and S.C. Code Ann. §12-60-470. (Exs. B and D to Respondent's Motion to Dismiss.) The Department of Revenue's reference to § 12-54-85(D)(2)(3) appears to be in error, as those sections reference overpayments made as the result of changes in taxable income reported to and made by the U.S. Internal Revenue Service. The remaining references to S.C. Code Ann. §§ 12-54-85(F)(1) and S.C. Code §12-60-470—and the interplay between these two code sections—are at the heart of this case.

Specifically, S.C. Code §12-60-470(A) states that: "A taxpayer may seek a refund of a state tax by filing a written claim for refund with the department. *A claim for refund is timely filed if filed within the period specified in Section 12-54-85 even though the time for filing a protest under Section 12-60-450 has expired and no protest was filed.*" (emphasis added). S.C. Code Ann. §12-54-85(F)(1) provides in pertinent part that: "claims for credit or refund must be filed within three years from the time the return was filed, or two years from the date the tax was paid, whichever is later." Mrs. Whitfield timely made a claim for a refund for tax year 2012 and tax year 2013 because the requests were both made "within three years from the time the return was filed" as provided in S.C. Code Ann. § 12-54-85(F)(1). Accordingly, Mrs. Whitfield's tax refund claims were also timely under S.C. Code Ann. § 12-60-470(A), which contains a specific exception for claims that were timely within the meaning of S.C. Code Ann. § 12-54-85(F)(1). Importantly, there is no factual dispute as to the dates that Mrs. Whitfield's returns or claims were filed. Rather, the matter

sub judice only involves the application of statutory law to those undisputed dates. Ultimately, because Mrs. Whitfield's claims for refunds were timely under the plain language of S.C. Code Ann. § 12-54-85(F)(1) and § 12-60-470, the Department's two (2) initial notices issued in 2018—which declared that Mrs. Whitfield's tax refund claims were untimely under these statutes—were both clearly erroneous as a matter of law.

Faced with these declination letters as an elderly person and with an ailing spouse who subsequently died, Mrs. Whitfield did not protest these letters until she retained lawyers to assist her in 2019. Because she did not file her protests within ninety (90) days of receiving the letters, the ALC found that: (1) whether or not the Department was erroneous in these declination notices, Mrs. Whitfield's failure to timely file a protest under S.C. Code Ann. §12-60-450 resulted in her inability to comply with her prehearing remedies and therefore resulted in her failure to exhaust her administrative remedies; and, (2) as such, the ALC lacked jurisdiction to consider the merits of her request for a contested case. (Order at 6.) The ALC further found that it lacked jurisdiction to hear Mrs. Whitfield's appeal because the exception in S.C. Code Ann. §12-60-470(A) only applied to protests of **proposed assessments**—as opposed to protests of tax refund **claims**—and that this section was therefore inapplicable to Mrs. Whitfield's protests because they were filed after ninety (90) days. (Order at 6.)

As explained above, the Act is ambiguous in defining what is required to "exhaust prehearing remedies" when proceeding to dispute a tax refund under S.C. Code Ann. §12-60-470. In this instance, the substance and meaning of S.C. Code Ann. §12-60-470 would be rendered meaningless if the timely failure to protest trumped Mrs. Whitfield's timely claim under S.C. Code Ann. § 12-54-85(F)(1), particularly when § 12-60-470 recites that such a claim is timely "*even though the time for filing a protest under Section 12-60-450 has expired and no protest was filed.*"

(emphasis added). More importantly, the stated legislative intent to provide for a "straightforward procedure" for the people of this State to determine disputes would be turned on its head if the Department of Revenue could make a clearly erroneous and arbitrary interpretation that Mrs. Whitfield's claims for a tax refund were untimely. Under such an interpretation, despite the fact that Mrs. Whitfield's claims for tax refunds were incontrovertibly timely under a plain reading of the relevant statutes and even though, as explained above, the applicable statutes provide that a tax refund claim is timely even if the time for filing a protest has expired and no protest has been filed, the Department of Revenue's erroneous decision could never be reviewed by the ALC because her subsequent protest was untimely.

The legislature's clear intent to provide a straightforward procedure for taxpayers—as expressed in S.C. Code Ann. §12-60-20—must prevail and require that the ALC reasonably address an erroneous interpretation made by the Department of Revenue particularly where, as here, the taxpayer's administrative remedy could never be addressed based on the ALC's technical and narrow interpretation of the RPA. *See, e.g., Joiner v. Rivas*, 342 S.C. 102, 108, 536 S.E.2d 372, 375 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible."). Accordingly, the ALC's decision should be reversed.

II. THE ALC ERRONEOUSLY DETERMINED THAT IT LACKED JURISDICTION TO HEAR THE CONTESTED CASE ON ITS MERITS.

A. The Exhaustion of Remedies Doctrine is not a Matter of Jurisdiction.

Subject matter jurisdiction refers to a court's constitutional or statutory power to adjudicate a case. *See Johnson v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007) (citation omitted). It is "'the power to hear and determine cases of the general class to which the proceedings in question belong.'" *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (quoting *Bank of Babylon v. Quirk*, 472 A.2d 21, 22 (Conn. 1984)).

The ALC has subject matter jurisdiction in this action pursuant to S.C. Code Ann. § 1-23-310 *et seq*. Furthermore, S.C. Code Ann. §12-60-460 specifically authorizes the Court to hear contested cases arising under the RPA.

The doctrine of exhaustion of administrative remedies is generally considered a rule of "policy, convenience and discretion, rather than one of law, and is not jurisdictional." *Vaught v. Waites*, 300 S.C. 201, 205, 387 S.E.2d 91, 93 (Ct. App. 1989). Under South Carolina law, this rule is discretionary in nature. *See, e.g., Andrews Bearing Corporation v. Brady*, 261 S.C. 533, 201 S.E. 2d 241 (1973). "The adoption of the view that the rule is discretionary in nature is a recognition that situations can exist where failure to exhaust administrative remedies may be excused." *Ex parte Allstate Ins. Co.*, 248 S.C. 550, 567, 151 S.E.2d 849, 855 (1966). Notably, "[a]n abuse of discretion arises where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support." *Tri-County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990). Importantly, the Supreme Court has explained that "the exhaustion of administrative remedies, which this case involves, does not pertain to subject matter jurisdiction." *Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158, 171 n.10, 551 S.E.2d 263, 270 n.10 (2001) (citing *Ward v. State*, 343 S.C. 14, 538 S.E.2d 245 (2000)); *see also Unisys Corp.*, 346 S.C. at 177 n.13, 551 S.E.2d at 273 n.13 ("[C]ontrary to the trial judge's ruling, the required exhaustion of administrative remedies goes to the prematurity of a case and not subject matter jurisdiction. . . . Accordingly, [the] complaint was not properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1).") Because the exhaustion of remedies is not a matter of subject matter jurisdiction, the ALC committed an error of law in dismissing this case based on a lack of jurisdiction.

In *Andrews Bearing Corporation*, the taxpayer asserted that the South Carolina Tax Commission improperly used a higher ratio to value in assessing its personal and real property, in violation, in part, of a state statute. 261 S.C. at 536, 201 S.E.2d at 242. The complaint in *Andrews Bearing Corporation* alleged that the taxpayer had unsuccessfully protested the assessment by the Commission but it did not allege that the taxpayer appealed from the ruling of the Tax Commission to the South Carolina Tax Board of Review pursuant to statutory procedures. *Id.* at 535-536, 201 S.E.2d at 242. The defendant in that matter argued that the complaint was insufficient to state a cause of action because it did not contain an allegation that the taxpayer had exhausted its administrative remedies by appealing to the South Carolina Tax Board of Review and that, as a result, the court was without jurisdiction to hear the matter. *Id.* at 535-536, 201 S.E.2d at 242. The South Carolina Supreme Court disagreed, finding that the failure to exhaust administrative remedies was discretionary, not jurisdictional, and noting that the facts were undisputed and that the issue involved was solely one of law. *Id.* at 536-537, 201 S.E. 2d at 243.

In this contested case, Mrs. Whitfield and the Department of Revenue do not appear to dispute the underlying facts, but instead they dispute the interpretation of the statutes at issue. Thus, this matter involves solely legal issues. Therefore, under the reasoning of *Andrews Bearing Corporation, supra,* the ALC should have exercised jurisdiction to consider these legal issues.

B. The ALC Has Jurisdiction to Hear an Appeal of the Department of Revenue's Final Decision Denying Mrs. Whitfield's Protests as Untimely and Adopting its Initial Decision as a Final Decision Regardless of Whether a Petitioner has Protested an Initial Notice Within Ninety Days.

The RPA provides that "[i]f a division of the department makes a division decision[5] . . . it may send by first class mail or deliver the division decision . . . to the taxpayer." S.C. Code Ann.

[5] A division decision is defined under the RPA as "a decision by a division of the department that affects the rights or obligations of a person for which no specific appeals rights are provided by this act." S.C. Code Ann. § 12-60-30(13).

§ 12-60-420(a). Importantly, the RPA expressly requires that "***[t]he division decision . . . must*** explain the basis for the division decision . . . and ***state that . . . the decision will become final unless the taxpayer protests the division decision*** . . . as provided in Section 12-60-450." *Id.* (emphasis added).[6] Presupposing the Department of Revenue's compliance with § 12-60-450, "[i]f the taxpayer fails to file a protest, the division decision . . . will become final . . ." *Id.* at (b). This process is further reflected in the statutory provisions providing for the elective administrative protest of a division decision or proposed assessment: "[i]f the taxpayer fails to respond or participate in this process with the department, the department may view the appeal as abandoned and make a department determination using information provided in accordance with Section 12-60-30(15)(c)(iii)." S.C. Code Ann. § 12-60-450(D)(2); *see also S.C. Dep't of Revenue v. Club Rio*, 392 S.C. 636, 638 n.2, 709 S.E.2d 690, 692 n.2 (Ct. App. 2011) (citing to S.C. Code Ann. § 12-60-450(D)(2) as outlining procedure after failure to protest). When the Department of Revenue issues its final department decision in response to a taxpayer's failure to participate in the protest process, "[t]he department must issue the department determination not later than one year after the date the written protest *or claim* was filed with the department . . ." S.C. Code Ann. § 12-60-450(E)(3) (emphasis added). Furthermore, the Department of Revenue "*shall make a department decision* using the information provided by the taxpayer in accordance with Section 12-60-30(15)(c)(iii)" and the "*department decision must . . . be sent by first class mail or delivered to the taxpayer* . . . [and] inform the taxpayer . . . of the right to request a contested case hearing . . ." *Id.* at (E)(1), (2)(a), 2(c) (emphasis added). Following this process, "[a] request for a contested case hearing before the Administrative Law Court must be made . . . within thirty days after the date

[6] Significantly, the Department of Revenue's initial decision did not "state that . . . the decision will become final unless the taxpayer protests the division decision." S.C. Code Ann. § 12-60-420(a). Thus, the Department of Revenue's failed to follow its statutory mandate to the prejudice of Mrs. Whitfield's substantial rights, and this failure further lends credence to Mrs. Whitfield's good cause arguments that the ALC refused to hear.

the department's notice was sent by first class mail or deliver to the taxpayer." S.C. Code Ann. § 12-60-450(E)(3); *see also* S.C. Code Ann. § 12-60-470 (F) (explaining that a request for a contested case hearing "must be made within thirty days *after the date the department's determination was sent by first class mail or delivered to the taxpayer*") (emphasis added). In sum, assuming that the Department of Revenue has notified a taxpayer that its failure to file a protest will cause its initial decision to become final, a division decision will be adopted by the department as a final department decision[7] under S.C. Code Ann. § 12-60-420 once a taxpayer fails to protest the decision within ninety (90) days. As a result of the taxpayer's refusal to participate in the ninety (90) day protest process, the department shall issue its department decision pursuant to S.C. Code Ann. § 12-60-450(D)(1)-(E)(3) within one (1) year of the taxpayer's claim for a refund and must mail or deliver its department decision to the taxpayer, after which the taxpayer has thirty (30) days to request a contested case hearing with the ALC.

In this matter, the Department of Revenue failed to comply with S.C. Code Ann. § 12-60-420(a) by notifying Mrs. Whitfield that their initial decision would become final if she did not protest it within ninety (90) days. However, even if they had, the final department decision must still be mailed or delivered to the taxpayer. The only final department decision that the Department of Revenue mailed or delivered to Mrs. Whitfield relating to her claims for a refund after its initial notices were the denials received on March 27, 2019. The March 27, 2019 letters adopted the Department of Revenue's position stated in its initial notices. Accordingly, these were the final decisions upon which Mrs. Whitfield appealed, and the failure to protest the initial decisions within ninety (90) days did not preclude a final department decision from being issued nor did it amount

[7] Under the RPA, a final decision is synonymous with a department decision: "'Department determination' means the final determination within the department from which a taxpayer . . . as applicable, may request a contested case hearing before the Administrative Law Court." S.C. Code Ann. § 12-60-30(10) (emphasis added).

to a failure to exhaust administrative remedies. The result of the administrative process was a final decision that was required to be issued and delivered pursuant to the RPA and Mrs. Whitfield timely appealed that decision to the ALC. Therefore, this Court should reverse the ALC's determination that the failure to file a protest within ninety (90) days forever precluded review of a final agency decision as the ALC's determination was an error of law.

C. The ALC Erred as a Matter of Law by Concluding that it Did Not Have Jurisdiction to Hear Evidence Bearing on Mrs. Whitfield's Claim for Good Cause.

Even if the ALC's decision on the applicability of S.C. Code Ann. § 12-60-450 is correct, there is still statutory jurisdiction to hear the claim. As noted earlier, S.C. Code Ann. § 12-60-470(E) provides that: "For purposes of complying with the provisions of Section 12-60-450, the written denial of any part of a claim for refund is the equivalent of a proposed assessment." S.C. Code Ann. § 12-60-510(A)(2) provides further that: "If a taxpayer fails to file a protest with the department within ninety days of the date of the proposed assessment, the taxpayer is in default, and the department must issue an assessment for the taxes. The assessment may be removed by the Administrative Law Court for good cause shown, and the matter may be remanded to the department." As such, S.C. Code Ann. § 12-60-470(E) makes the denial of a tax refund by the Department of Revenue the functional equivalent of a "proposed assessment" and S.C. Code Ann. § 12-60-510(A)(2) gives the Administrative Law Court the ability to consider and remove an assessment "on good cause shown," even if the taxpayer's protest is untimely. *See, e.g., S.C. Dep't of Revenue v. Club Rio*, 392 S.C. at 638 n.2, 709 S.E.2d at 692 n.2 (explaining that the good cause standard of S.C. Code Ann. § 12-60-510(A)(2) would even apply to a denial of a request to renew a liquor license "[w]hen a protest is not filed with the Department . . .").

The ALC clearly had both the power and the jurisdiction to review the merits of Mrs. Whitfield's claims for "good cause shown." However, rather than examining and requesting evidence bearing on the existence of good cause, the ALC 's Order appears to have retroactively and improperly placed the burden on Mrs. Whitfield to fully demonstrate good cause in the procedural posture of opposing the Department's Motion to Dismiss.[8] *See, e.g.*, *Skydive Myrtle Beach v. Horry Cty.*, 426 S.C. 175, 180, 826 S.E.2d 585, 588 (2019) ("At the Rule 12 stage, [] the first decision for the trial court is to decide only whether the pleading states a claim. . . . [A]ny plaintiff is [] entitled to litigate the validity of its original pleading without having to convince the trial court of the merits of its underlying claim."); *Delaney v. First Fin. of Charleston, Inc.*, 426 S.C. 607, 611, 829 S.E.2d 249, 250 (2019) ("The facts are construed in the light most favorable to the nonmoving party, and all well-pled allegations are considered true.") (citing *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005)). Specifically, the ALC stated that, "[w]hile the Court is empathetic with the loss of [Mrs. Whitfield's] husband in July of 2016 [sic][9], [Mrs. Whitfield] has offered no explanation or good cause as to why a written protest was not submitted until February 27, 2019, a year after the Department's denial of the 2012 claim for refund and six months after the Department's denial of the 2013 claim for refund." (Order at 8). Significantly, the ALC never offered Mrs. Whitfield the opportunity to present any evidence, and the sole basis of the Department's Motion to Dismiss was the ALC's lack of jurisdiction to hear the merits of her contested case (Respondent's Motion to Dismiss at p. 5).

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[8] SCALC Rule 68 provides that "[t]he South Carolina Rules of Civil Procedure and the South Carolina Appellate Court Rules, in contested cases and appeals respectively, may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules." The SCALC rules are silent in specifically addressing motions to dismiss, so the appropriate standard of review on the motion to dismiss should be derived from the South Carolina Rules of Civil Procedure.

[9] The Order erroneously states that Mrs. Whitfield's spouse died in July of 2016. Instead, he passed away in July of 2018, in between the first and second initial declination notices sent to Mrs. Whitfield by the Department of Revenue.

S.C. Code §12-60-510(A)(2) provides a statutory basis for the ALC to assume jurisdiction and to consider the merits of Mrs. Whitfield's case. As the South Carolina Supreme Court stated in *Ward*, if there are statutory or case law exceptions to the exhaustion requirement, the issue cannot be one of subject matter jurisdiction. 343 S.C. at 16 n.5, 538 S.E.2d at 246 n.5. Accordingly, the ALC's decision should be reversed.

CONCLUSION

For the foregoing reasons, Mrs. Whitfield requests that the Court reverse the ALC's Order of Dismissal; that the case be remanded to the ALC for a determination of Mrs. Whitfield's request for a contested case on its merits; and that the ALC be instructed to proceed with such review in a manner that is consistent with this Court's ruling.

Respectfully submitted,

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November 18, 2019
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2019-001748
Lower Court Docket No. 19-ALJ-17-0121-AP

Shirley Whitfield, Individually and as personal representative of the Estate of William Whitfield .....Appellant,

v.

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

PROOF OF SERVICE

This is to certify that I have this day served counsel for the Respondent in the foregoing matter with a copy of the foregoing **INITIAL BRIEF OF APPELLANT** and **DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** by depositing the same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

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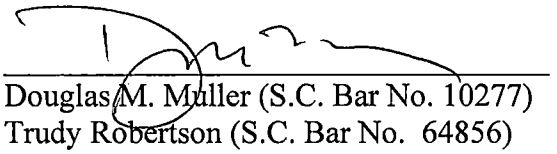

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November 18, 2019

VIA U.S. MAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
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Re: Shirley Whitfield, Individually and as personal representative of the Estate of William Whitfield v. South Carolina Department of Revenue
Appellate Case No.: 2019-001748
Lower Court Docket No.: 19-ALJ-17-0121-AP
MVA File No.: 036207.000004

Dear Ms. Kitchings:

Enclosed for filing, please find an original and one (1) copy of each of the following in the above matter:

1. Initial Brief of Appellant;
2. Appellant's Designation of Matter to be Included in the Record on Appeal; and
3. Proof of Service.

Please return a filed copy of each to this office in the enclosed stamped, self-addressed envelope. By copy of this letter, I am serving all counsel of record with a copy of the same.

Sincerely,

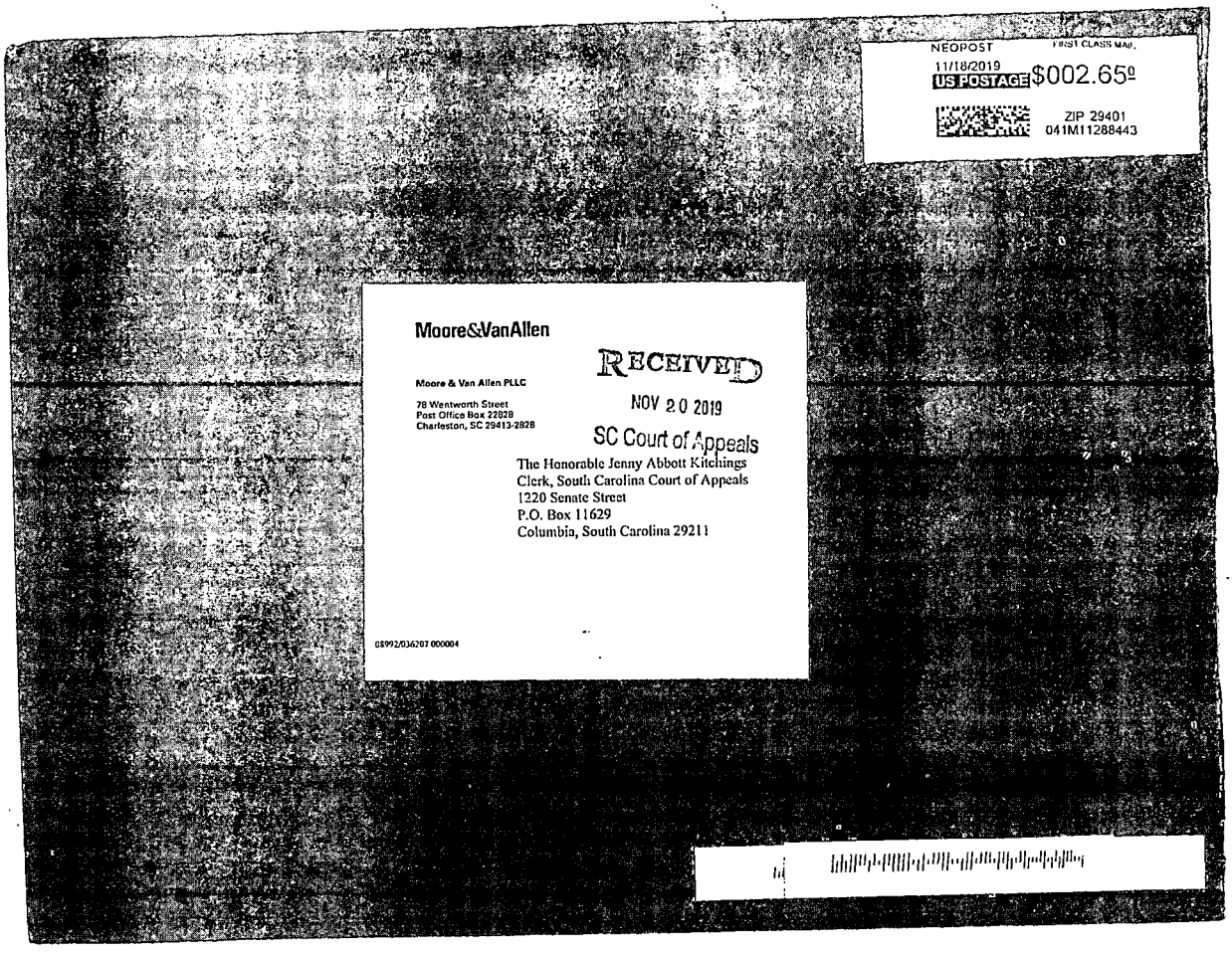
Moore & Van Allen PLLC

Douglas M. Muller

DMM/llp

Enclosures: as stated

cc: Elisabeth W. Shields, Esq.
Adam J. Neil, Esq.



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