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.

REPLY BRIEF OF APPELLANT

Douglas M. Muller (S.C. Bar No. 10277)
Trudy Robertson (S.C. Bar No. 64856)
Paul Lynch (S.C. Bar No. 12833)
Moore & Van Allen PLLC
78 Wentworth Street (29401)
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 - telephone
(843) 579-7099 – facsimile
dougmuller@mvalaw.com
trudyrobertson@mvalaw.com
paullynch@mvalaw.com

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

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I. The Department of Revenue's Brief Emphasizes the Deficiencies and Ambiguities in the Statutes at Issue.

In its Initial Brief, the Respondent South Carolina Department of Revenue (the "Department of Revenue" or "Department") makes a variety of different arguments that are intended to reinforce its position that Appellant Shirley Whitfield ("Mrs. Whitfield") should be denied her right to be heard by the Administrative Law Court ("ALC"). (*See generally* Initial Br. of Resp't at 7-24.) Specifically, the Department of Revenue argues that Mrs. Whitfield failed to follow the "straightforward procedure" that is set forth in the "plain and unambiguous" Revenue Procedures Act ("RPA") and that is purportedly followed by the Department when it is reviewing taxpayers' claims for refunds. (*See id.* at 7-17.) The problem with the Department of Revenue's arguments is that they demonstrate exactly the opposite—*i.e.*, that the RPA is ambiguous and confusing as written, that the Department relies on obscure distinctions when handling tax refund claims, and that the Department fails to give proper notice to the taxpayer when making denials. Among the Department of Revenue's assertions are the following:

- That the Department of Revenue recognizes a difference between the procedure a taxpayer employs when he or she seeks to claim a refund as the result of an overpayment of taxes and the tax refund procedure that the taxpayer uses "after a taxpayer is assessed by the Department for the underpayment of taxes." (*Id.* at 7);
- That there is a difference between the finality of the Department of Revenue's determination when the taxpayer seeks a refund—which is final—when compared to the procedure the Department follows when a proposed assessment is made—which is not final—and the taxpayer then pays the tax and seeks a refund. (*Id.* at 9-11);
- That Mrs. Whitfield's claim for a tax refund was not a "proposed assessment" under the RPA, (*see* Initial Br. of Resp't at 22), even though the Department of Revenue

referred to the denial of her tax refunds in its 2019 final denial letters[1] as made "in reference to *the Notice of Proposed Assessment* . . ." (Exhibit A to Request for Contested Case Hearing at 2-3) (emphasis added);

- That because the Department of Revenue issues so many denial letters, it uses a "standard" form letter that includes the same language in all cases; regardless of the different procedures the Department follows. Furthermore, the Department of Revenue concedes that these letters lack the specific notice language required by S.C. Code §12-60-420(A), but contends that the taxpayer should be able to figure out that his or her failure to timely file a protest will result in the loss of the taxpayer's administrative and judicial remedies. (Initial Br. of Resp't at 5 n.2, 24 n.12; *see also* Exhibits B and D to Respondent's Notice of Motion and Motion to Dismiss);[2]

- That the use of the word "may" in S.C. Code §12-60-450 of the RPA does not refer to a taxpayer's election of remedies to contest the denial of a tax refund but simply to the fact that the taxpayer "can choose to accept the denial." (Initial Br. of Resp't at 8 n.5);

- That the Department of Revenue's 2019 final denial letters did not constitute a "department determination" within the meaning of the RPA, but were instead simply intended to inform Mrs. Whitfield that the Department's denial decisions "were not subject to review"—despite the absence of any language in the letters advising Mrs. Whitfield that such further review was foreclosed. (Initial Br. of Resp't at 16; *see also* Exhibit A to Request for Contested Case Hearing.)

When any taxpayer requests a tax refund from the Department of Revenue, he or she must navigate through the RPA, which—as pointed out in Appellant's Initial Brief—appears to be anything but clear. The unfortunate taxpayer must do so without specific notice language or particular guidance from the Department of Revenue, which internally treats certain types of tax refund claims differently than others and issues so many denials of tax refund claims that it utilizes standard forms that do not provide more specific notice to the taxpayers. This procedure is

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[1] For ease of reference, the February 14, 2018 and August 16, 2018 denial letters regarding Mrs. Whitfield's claims for refunds on her 2012 and 2013 tax returns, respectively, are collectively referred to herein as the "2018 initial denial letters" while the March 27, 2019 denial letters are collectively referred to herein as the "2019 final denial letters."

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

extremely ambiguous and hardly the "straightforward procedure" intended by the South Carolina legislature.

II. The Department of Revenue Cannot Make Merits-Based Arguments When It Has Filed a Procedural Motion to Dismiss.

The Department of Revenue concedes early on in its brief that "*because the ALC decided this on a procedural motion, the facts of the alleged claims were not developed or put into the record.*" (Initial Br. of Resp't at 5 n.1) (emphasis added). Despite this concession, the Department of Revenue persists in making factual, merits-based arguments as to why Mrs. Whitfield's claims for tax refunds should be denied. For example:

- The Department of Revenue argues that Mrs. Whitfield did not make any claims for tax refunds in 2012 and 2013—it instead argues she simply requested that the overpayments be carried forward—but it contends paradoxically that any evidence related to the Department's treatment of her 2014 tax refunds "is not before this Court" and cannot be considered. (*Id.* at 5 n.1, 6 n.4);

- The Department of Revenue contests the date of Mrs. Whitfield's 2013 tax returns as filed on August 13, 2018 instead of June 18, 2018 (the date Mrs. Whitfield signed them). If that is correct, it would have taken the Department of Revenue only three days from the mailing of the 2013 tax returns for the Department to issue a denial of the corresponding tax refund claim as its initial letter denying the 2013 tax refund claim is dated August 16, 2018. (Initial Br. of Resp't at 6 n.3; *see also* Exhibits C-D to Respondent's Motion to Dismiss);

- The Department of Revenue advances—and the ALC adopted in its Order—the argument that Mrs. Whitfield "failed to demonstrate any good cause for not protesting the Department's decision within ninety days" and challenges Mrs. Whitfield's failure to "file an Affidavit with the ALC" while conveniently ignoring the fact that the case was in the posture of a motion to dismiss for lack of jurisdiction and that Mrs. Whitfield had alleged in her Request for Contested Case Hearing that the 2018 initial denial letters were received around the same time that her husband passed away. (Initial Br. of Resp't at 22-24; *see also* Request for Contested Case Hearing at 1-2, ¶¶ 1, 7).

The Department of Revenue cannot have it both ways. It cannot place this case in the posture of a motion to dismiss—which was premised merely on a lack of jurisdiction—and simultaneously argue the merits of its case while seeking to preclude countervailing facts regarding

the Department of Revenue's treatment of Mrs. Whitfield's 2014 tax refund. Further, the Department of Revenue cannot claim that Mrs. Whitfield had an obligation to establish facts evidencing good cause when the facts that she alleged in her Request for Contested Case Hearing should have been accepted by the ALC as true.[3] Lastly, the Department of Revenue asked the ALC to forego the filing of prehearing statements by both parties because its Motion to Dismiss was pending, which effectively precluded any further expansion of Mrs. Whitfield's factual arguments. (*See* Email correspondence between Elisabeth Shields of the South Carolina Department of Revenue and Tia Smith of the South Carolina Administrative Law Court dated June 7, 2019 to June 11, 2019 regarding Prehearing Statements deadline held in abeyance at 1.)

III. In the Enforcement of Tax Statutes, the Taxpayer Should Receive the Benefit in Cases of Doubt.

In the Standard of Review portion of its Initial Brief, the Department of Revenue cites to several cases in support of the general proposition that the construction of a statute by the agency charged with its administration will be accorded the most respectful consideration. While it is true that a court may defer to an agency's construction of its own regulation, this deference is not absolute. For example, where "the plain language of the regulation is contrary to the [agency]'s interpretation, the Court will reject its interpretation." *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 415 (2002) (citing *Richland County School Dist. Two v. South Carolina Dept. of Educ.*, 335 S.C. 491, 517 S.E.2d 444 (Ct. App. 1999)). This is because "an administrative construction 'affords no basis for the perpetuation of a patently erroneous

[3] As set forth in the Appellant's Initial Brief, the ALC erroneously concluded that Mrs. Whitfield's spouse died in July of 2016. Instead, as the Department of Revenue concedes in its Initial Brief, Mrs. Whitfield's husband passed away in July of 2018, which was a crucial time given that it was in between the first and second initial denial letters sent by the Department of Revenue to Mrs. Whitfield. (*See* Initial Br. of Resp't at 4.)

application of the statute.'" *Richland Cty. Sch. Dist. Two*, 335 S.C. at 498, 517 S.E.2d at 448 (citation omitted). More importantly, however, the Department of Revenue fails to cite to any opinion adopting this general rule with respect to a dispute between the Department and a taxpayer under the RPA. This is crucial because, unlike in other agency statutes, "'in the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt.'" *Alltel Communs. Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012) (quoting *S.C. Nat'l Bank v. S.C. Tax Comm'n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989)). As set forth in her Initial Brief and further supported by the explanations provided by the Department of Revenue in its Initial Brief, the necessity and requirements for protesting the denial of a tax refund claim are ambiguous under the RPA. (*See generally* Initial Br. of Appellant at 5-8; Initial Br. of Resp't at 7-11.)

As is specifically relevant to issues raised in the Department of Revenue's Initial Brief, the Department argues that the RPA is simple and straightforward "[w]hen read in full and in the correct context" and that "it is only complicated by confusing the processes allowed for different types of refund claims." (Initial Br. of Resp't at 7-8.) However, in its own correspondence to Mrs. Whitfield, the Department of Revenue understandably complicated the RPA process by (1) citing to inapplicable statutes in its 2018 initial denial letters and (2) issuing 2019 final denial letters which stated that they were "in reference to the Notice[s] of Proposed Assessment[s]" and later described the 2018 initial denial letters as "Notice[s] of Proposed Adjustment[s]"; thereby confusing the very same terms it contends are so easily distinguishable under the RPA. (Exhibit A to Request for Contested Case Hearing at 2-3.) Furthermore, the Department of Revenue's argument that the RPA "provides a clear and straightforward appeals procedure" spans four pages of its Initial Brief and is anything but straightforward. (*See* Initial Br. of Resp't at 7-11.) The Department of Revenue's Initial Brief also contains inconsistent interpretations of the protest

process. For example, at one point in its Initial Brief, the Department of Revenue argues that "Section 12-60-450 simply has no application to Appellant's case because the Department never issued a proposed assessment in this matter" yet at another point in the same brief it argues that "if a taxpayer wishes to appeal the Department's denial of a refund claim, he or she must follow the appeal procedures set forth in § 12-60-450 . . ." (*Compare id.* at 14 *with id.* at 9.) Despite its own confusion in interpreting and applying the RPA, the Department of Revenue nevertheless contends that the RPA is unambiguous and seeks to penalize Mrs. Whitfield for allegedly "mistakenly mix[ing] the appeals process for two different types of refund claims . . ." (*Id.* at 7.) An agency that argues its construction of a statute should be reviewed with deference and "the most respectful consideration" should not be afforded that opportunity when it treats protest procedures inconsistently and provides references to erroneous or inapplicable tax statutes in its denial letters to the taxpayer—which both indicate that there are underlying ambiguities in the tax statutes at issue.

At the very least, the distinctions between the protest processes for proposed assessments and claims for refunds that the Department of Revenue advances are not "absolutely clear as a matter of law." *See, e.g.*, *Alltel Communs. Inc.*, 399 S.C. at 321, 731 S.E.2d at 873 (agreeing with taxpayers' contention that because the court of appeals found that the application of a tax statute was not "absolutely clear as a matter of law", the court of appeals should have construed the statute in the taxpayers' favor). Accordingly, Mrs. Whitfield should receive the benefit of the doubt and be entitled to a merits-based review by the ALC based on her reasonable compliance with the ambiguous terms of the RPA.

IV. Mrs. Whitfield was Entitled to an Opportunity to Present Evidence of Good Cause.

In its Initial Brief, Respondent generally avers that the RPA's "good cause" provision contained within S.C. Code Ann. § 12-60-510(A)(2) is inapplicable to Mrs. Whitfield's appeal because that provision only applies to a "proposed assessment." (*See generally* Initial Br. of Resp't at 21-24.) As explained earlier in this Reply, the Department of Revenue's argument that there are different procedures for a tax refund related to a "proposed assessment" and a "claim for refund" clearly articulated under the RPA is not convincing, and the Department of Revenue's labeling of its own denials as related to "Notice[s] of Proposed Assessment[s]" reinforces this point. Furthermore, in one of the few cases citing to S.C. Code Ann. § 12-60-510(A)(2), this Court previously explained that the "good cause" provision would apply where a business failed to timely protest the denial of a request to renew an alcoholic beverage license. *See 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) (stating that "[w]hen a protest is not filed with the Department, the ALC must make a finding of good cause for the failure to protest before it can reverse the Department's decision.") (citing S.C. Code Ann. § 12-60-510(A)(2) (Supp. 2010)). Accordingly, the Department of Revenue's interpretation that S.C. Code Ann. § 12-60-510(A)(2) is solely limited to a "proposed assessment" is at odds with the prior reasoning of this Court.[4]

While the Department of Revenue concedes that S.C. Code Ann. § 12-60-470(E) makes the denial of a claim for refund the equivalent of a proposed assessment for purposes of allowing a taxpayer to protest the Department's denial of a tax refund claim in the same procedural manner as one would protest a proposed assessment, it nevertheless takes the position that the "good cause"

[4] It is persuasive that the ALC has also cited to S.C. Code Ann. § 12-60-510(A)(2) to invoke a good cause exception for the failure to protest the denial of retirement disability benefits. *See Lawson v. South Carolina Budget and Control Board*, 2006 SC ALJ LEXIS 509 (Geathers, J.).

exception to those same protest procedures located in S.C. Code § 12-60-510(A)(2) is inapplicable to the denial of a tax refund claim. (*Compare* Initial Br. of Resp't at 21 *with* 22.) Such a conclusion is not only inconsistent with the intent of the RPA's protest provisions when read as a whole, but also with common rules of statutory construction applied by this Court. *See, e.g., Busby v. State Farm Mut. Auto. Ins. Co.*, 280 S.C. 330, 333, 312 S.E.2d 716, 718 (Ct. App. 1984) ("Where the same word is used more than once in a statute it is presumed to have the same meaning throughout unless a different meaning is necessary to avoid an absurd result.") (citations omitted).

Finally, the Department of Revenue argues that even if the "good cause" provisions of S.C. Code § 12-60-510(A)(2) applied to this matter, Mrs. Whitfield "never demonstrated good cause to the ALC for its [sic] failure to timely protest the Department's denials of her claims for refund." (Initial Br. of Resp't at 22-23.) However, as conceded by the Department of Revenue, the facts "were not developed or put into the record" because "the ALC decided this on a procedural motion . . ." (*Id.* at 5 n.1.) The Rules of Procedure for the Administrative Law Court ("SCALC Rules") do not provide any additional requirements for the filing of a request for a contested case hearing when the petitioner's case involves a potential argument for "good cause". *See, e.g.*, SCALC Rule 11. However, the SCALC Rules do specifically provide that:

> ***The administrative law judge, upon being assigned a contested case, shall review the request for a contested case hearing and determine the procedure appropriate*** to the complexity of the issues presented and the types of proof likely to be introduced ***so that the matter may be fully and fairly presented without unnecessary burden on either the agency or individuals involved*** in the hearing. The administrative law judge may limit the pre-hearing procedures and simplify the pre-hearing exchange of materials ***and otherwise take such reasonable measures so that the burdens of procedure do not unfairly prevent the presentation of the facts.***

Id. at Rule 10 (emphasis added). Other provisions of the SCALC Rules envision that the ALC will give meaningful consideration to the scope of relevant facts that must be developed for each

request for a contested case hearing. For example, SCALC Rule 14 provides that "the administrative law judge assigned to the case, by pre-hearing order, may request each party to prepare and return a Prehearing Statement setting forth with particularity the issues in the contested case." Furthermore, SCALC Rule 21(A) requires that "*[d]iscovery shall be available* as provided under these rules." (emphasis added). To the extent that the ALC intended to place the burden of proof on Mrs. Whitfield to fully demonstrate "good cause", it should have at least provided Mrs. Whitfield with the appropriate notice and opportunity to submit necessary evidence and present relevant facts.

By way of illustration, the ALC in *Lawson* noted that "[t]he basic question presented by this case is whether Petitioner should be excused from his failure to exhaust his administrative remedies . . . and allowed to proceed with a challenge to the merits of the decision to discontinue his disability retirement benefits . . ." 2006 SC ALJ LEXIS 509 at * 5. Although *Lawson* involved a dispute over disability retirement benefits under the RPA, the ALC cited to S.C. Code Ann. § 12-60-510(A)(2) and invoked a "good cause" standard and reasoned that the "exhaustion doctrine is not an inflexible, jurisdictional rule, but is 'discretionary in nature,' such that 'situations can exist where failure to exhaust administrative remedies may be excused.'" *Id.* at *6-7 (quoting *Andrews Bearing Corp. v. Brady*, 261 S.C. 533, 536, 201 S.E.2d 241, 243 (1973)).[5] Despite the limited scope of the question before the ALC in *Lawson*, the ALC conducted a contested hearing in which the court "considered all testimony, exhibits, and arguments presented at the hearing of

[5] In its Initial Brief, the Department of Revenue contends that the "appeals procedure set forth in the RPA trumps" the Supreme Court's decisions in *Andrews* and similar cases. (Initial Br. of Resp't at 20 n.11.) However, the Department of Revenue fails to cite to any opinion adopting that view. While not controlling on this Court, the ALC's reliance on *Andrews* in *Lawson* persuasively indicates that—despite the Department of Revenue's contention to the contrary—the principle that there are exceptions to the exhaustion doctrine was not abrogated by the enactment of the RPA. *See Lawson*, 2006 SC ALJ LEXIS 509 at *6-7.

this matter, [] taking into account the credibility and accuracy of the evidence", and made "Findings of Fact by a preponderance of the evidence[] . . ." *Id.* at *1-5. Ultimately, the ALC found in *Lawson* that the petitioner had demonstrated good cause arising out of his "inability to adequately handle his affairs" caused in part by "family difficulties." *Id.* at *8.

In contrast to *Lawson*, the ALC in this matter did not conduct any hearing, it granted the Department of Revenue's request to hold prehearing statements in abeyance merely one day after it received the request, and it did not otherwise order that discovery relevant to "good cause" be conducted. Instead, the ALC issued an Order placing the burden of demonstrating "good cause" on Mrs. Whitfield in response to a motion to dismiss while effectively preventing her from presenting evidence relevant to her "good cause" argument. To compound matters, the ALC erroneously concluded that Mrs. Whitfield's husband passed away two years before his actual passing.

V. The Department of Revenue's Admitted Failure to Follow S.C. Code Ann. § 12-60-420(A) is Not Only Relevant to Good Cause but is Also Relevant to Whether Protesting the 2018 Initial Denial Letters Within Ninety Days was Mandatory.

In its Initial Brief, the Department of Revenue concedes that "[a]s the Department receives many claims for refunds and, in turn, issues many denial letters on the same basis as the Department's denials in this case, the Department's denial letters for refund claims are standard forms and include the same language in all cases." (Initial Br. of Resp't at 5 n.2.) The Department of Revenue further acknowledges that two of the statutory sections it cited in denying Mrs. Whitfield's refund claims were inapplicable to her claims.[6] (*See id.* at 5 n.2.) Despite its use of

[6] Confusingly, while the Department of Revenue concedes that two of the sections it cited in its 2018 initial denial letters "do not directly apply to the Appellant's case" in the same sentence that it admits that "§ 12-60-470 do[es] apply", it argues elsewhere in its brief that "the 'protest' language of § 12-60-470(A) does not apply to Appellant's situation." (*Compare* Initial Br. of Resp't at 5 n.2 *with* 14.)

form denial letters, the Department of Revenue contends that "the argument that Appellant was unaware of the need to protest because the Department failed to quote § 12-60-420(A) is unpersuasive" because "the Department's denial letters informed the Appellant, '[i]f you feel our determination is in error, you may appeal' and '[i]f you choose to appeal, you have 90 days from the date of this letter to submit a protest in writing.'" (*Id.* at 24 n.12.) According to the Department of Revenue's interpretation of its form denial letters, "while perhaps not using the exact language in § 12-60-420(A), the Appellant had more than enough reason to believe that the Department would take action regarding its denials if the Appellant did not protest within ninety days." (*Id.*)

As an initial matter, the Department of Revenue has misunderstood or mischaracterized Mrs. Whitfield's argument regarding the Department's failure to follow its own statutory mandate contained within S.C. Code § 12-60-420(A). The distinction the Department of Revenue appears to miss is that a layperson's understanding that she "may" internally protest an initial agency decision is not the same as a layperson's understanding that if you "choose" not to protest the decision, it will become final such that—according to the Department of Revenue—she will be forever precluded from seeking review by any court of law. As is relevant to this dispute, S.C. Code Ann. § 12-60-420(A) provides that:

> ***The 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.***

(emphasis added). Thus, when denying a taxpayer's claim for a refund, the Department of Revenue "must" (1) "state that . . . the decision will become final" (2) "unless the taxpayer protests" (3) "as provided in Section 12-60-450". (*Id.*) Here, the Department of Revenue merely notified Mrs. Whitfield that she "may" protest the decision and if she chooses to protest, she has 90 days to do so. (*See* Exhibit A to Request for Contested Case Hearing at 2-3.) The Department

of Revenue argues that the word "may" means "that a taxpayer does not have to appeal a Department's denial of a refund claim and the taxpayer can choose to accept the denial." (Initial Br. of Resp't at 8 n.5.) Importantly, however, the Department of Revenue did not provide the required notice regarding the purported consequences of a failure to protest nor did the Department direct Mrs. Whitfield to the statutory provisions of S.C. Code § 12-60-450 which provide guidance as to the content and process of protesting Department of Revenue decisions.[7] Thus, Mrs. Whitfield was never on notice that—according to the Department of Revenue's interpretation—by foregoing internal protest procedures she was effectively choosing to accept the Department's denial as a final and unreviewable decision on the merits of her claim.

The Department of Revenue argues that Mrs. Whitfield "had more than enough reason to believe that the Department would take action regarding its denials if the Appellant did not protest within ninety days." (Initial Br. of Resp't at 24 n.12.) However, to the contrary, the 2018 initial denial letters issued by the Department of Revenue indicated that the review of Mrs. Whitfield's claim could not be completed until it received additional information. For example, the 2018 initial denial letters advised Mrs. Whitfield that "[a]dditional information concerning your account may be required" and explained that "[b]y providing any requested information, the Department can complete a review of your account in an attempt to resolve any discrepancies." (Exhibit A to Request for Contested Case Hearing at 2-3.) Nevertheless, the Department of Revenue argues that it does not need to tell taxpayers that the failure to protest will cause an apparently incomplete decision to become a final decision of the agency as required by S.C. Code Ann. § 12-60-420(A).

[7] By not directing taxpayers to S.C. Code Ann. § 12-60-450—as it is required to do under § 12-60-420(A)—the Department of Revenue fails to provide taxpayers with objectively important information; including, but not limited to, that the Department can grant an extension to file a protest if requested.

Instead, the Department of Revenue expects that Mrs. Whitfield would have "more than enough" reason to believe that the Department "will take action regarding its denials" but elsewhere in its Initial Brief argues that "[h]ad the Appellant not submitted a protest letter, the Department would have never sent her the March 27, 2019 letters or issued any other type of correspondence to the Appellant regarding her 2012 and 2013 tax returns . . ." (Initial Br. of Resp't at 16, 24 n.12.) In other words, the Department of Revenue takes the position that it does not need to warn taxpayers of the alleged consequences of failing to protest, that the taxpayers should expect the Department to take further action if the taxpayers don't protest, but that the Department will never send the taxpayers a department decision or any other correspondence to confirm that it is taking action or that its denial has been adopted as a final agency decision. Such a position runs afoul of the legislative intent of the RPA.

The intent of the RPA was to provide a straightforward process for the benefit of the taxpayers of this State. Within the process provided by the RPA is a specific mandate that the Department of Revenue put taxpayers on notice that a failure to internally protest an initial decision of the agency pursuant to S.C. Code 12-60-450 will result in that decision becoming final. The legislature clearly intended that the Department of Revenue would fully and fairly put taxpayers on notice of the purported consequences if they "choose" not to protest an initial decision. While Mrs. Whitfield and the Department of Revenue disagree on whether a protest of the initial decisions within ninety days was the exclusive means to review the merits of the Department's denials, the Department's position regarding the consequences of failing to protest the initial decisions has been clear—in the Department of Revenue's view, the failure to internally protest a denial of a tax refund claim within ninety days renders that decision final, unappealable, and not subject to any good cause exception.

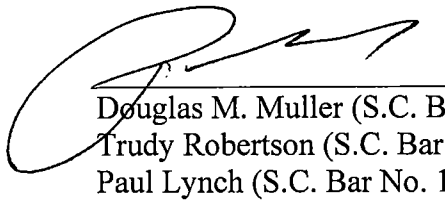
Despite advancing such a harsh interpretation, the Department of Revenue has implicitly conceded that the form denials it sends to all taxpayers fail to follow the legislature's intent by putting taxpayers on notice of these purported consequences of failing to protest. Instead, it merely instructs the taxpayer that it "may" protest; a word which the Department of Revenue contends is actually mandatory and not permissive with respect to perfecting the right to review by the ALC. (*See* Exhibit A to Request for Contested Case Hearing; Initial Brief of Resp't at 8 n.5.) On the other hand, the Department of Revenue implies that the word "must" is permissive when it references the obligations of the Department of Revenue, because the Department of Revenue is not required to state that a failure to protest its initial decision within ninety days will render that decision final in spite of the legislature's directive that the Department of Revenue "must" do so under S.C. Code Ann. § 12-60-420(A). (*See* Initial Br. of Resp't at 24 n.12.)

Mrs. Whitfield respectfully requests that this Court consider the effect of the Department of Revenue's conceded system-wide failure to follow the allegedly "straightforward" process set forth in the RPA on Mrs. Whitfield's obligation to protest the initial decisions or, in the alternative, that this Court remand this matter to the ALC with directions to consider the Department of Revenue's failure as evidence of good cause.

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,



Douglas M. Muller (S.C. Bar No. 10277)
Trudy Robertson (S.C. Bar No. 64856)
Paul Lynch (S.C. Bar No. 12833)
Moore & Van Allen PLLC
78 Wentworth Street (29401)
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 - telephone
(843) 579-7099 – facsimile
dougmuller@mvalaw.com
trudyrobertson@mvalaw.com
paullynch@mvalaw.com

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

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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 **REPLY BRIEF OF APPELLANT** by depositing the same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

Elisabeth W. Shields, Esquire
Counsel for Litigation
Adam J. Neil, Esquire
Managing Counsel for Litigation
South Carolina Department of Revenue
300A Outlet Pointe Blvd. (29210)
P.O. Box 12265
Columbia, SC 29211-9979

Attorneys for Respondent South Carolina Department of Revenue

Douglas M. Muller (S.C. Bar No. 10277)
Trudy Robertson (S.C. Bar No. 64856)
Paul Lynch (S.C. Bar No. 12833)
Moore & Van Allen PLLC
78 Wentworth Street (29401)
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 - telephone
(843) 579-7099 – facsimile
dougmuller@mvalaw.com
trudyrobertson@mvalaw.com
paullynch@mvalaw.com

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

December 30, 2019
Charleston, South Carolina

Moore&VanAllen

Paul M. Lynch
Attorney at Law

T 843 579 7012
F 843 579 8715
paullynch@mvalaw.com

Moore & Van Allen PLLC

78 Wentworth St.
Charleston, SC 29401-1428

Mailing Address:
Post Office Box 22828
Charleston, SC 29413-2828

December 30, 2019

VIA U.S. MAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
P.O. Box 11629
Columbia, South Carolina 29211

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. Reply Brief of Appellant; and
2. 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,

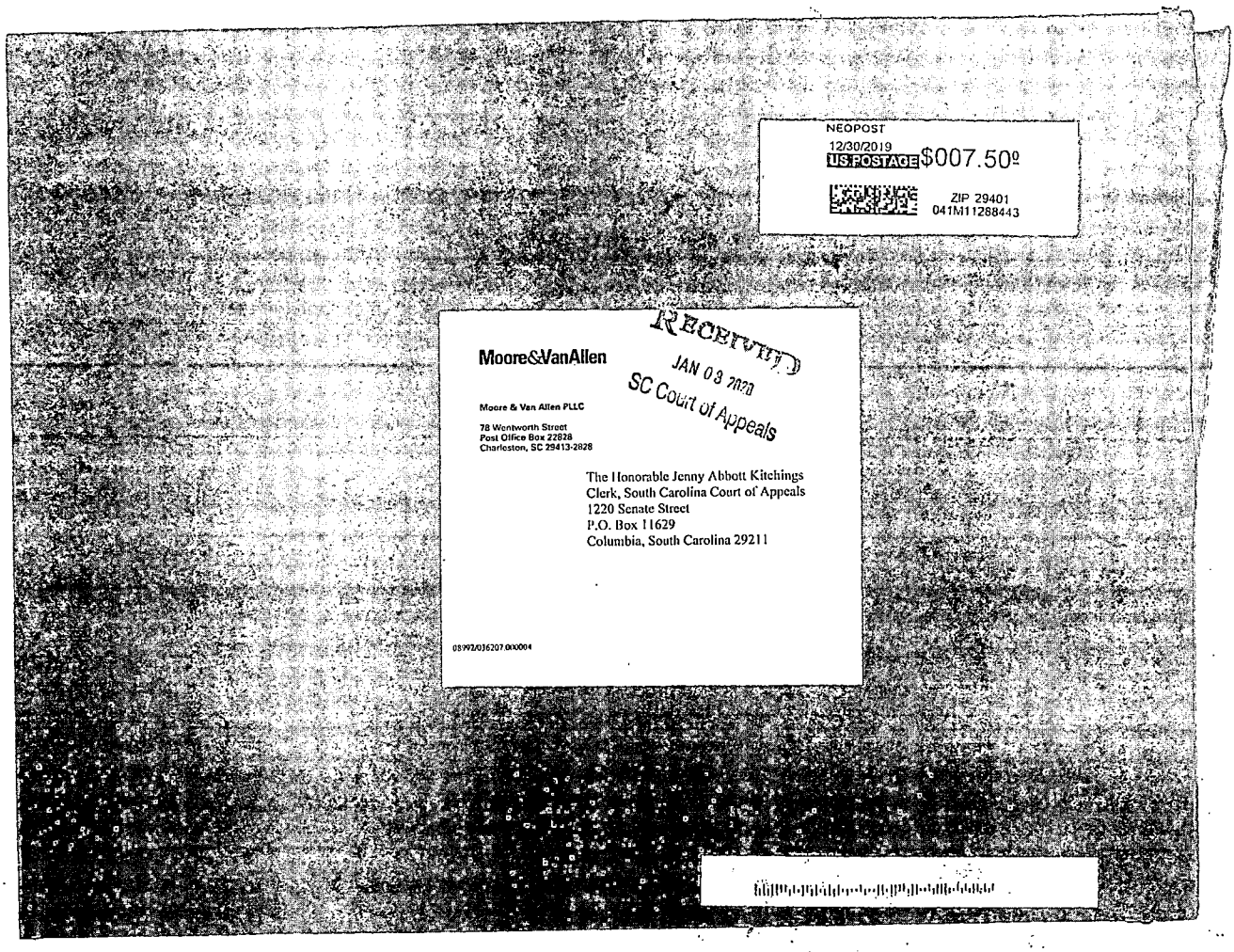
Moore & Van Allen PLLC

Paul M. Lynch

PML/llp

Enclosures: as stated

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



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Moore & Van Allen PLLC
78 Wentworth Street
Post Office Box 22828
Charleston, SC 29413-2828

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