

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT  
Ralph King Anderson, III, Judge  
Case No. 2012-212844

RECEIVED

APR 29 2013

SC Court of Appeals

John Ray and Sherry Ray,

Appellants,

v.

S.C. Department of Revenue,

Respondent.

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**THE APPELLANTS' RETURN TO DOR'S MOTION**

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The Appellants hereby Return to the Respondent's Motion to Dismiss, dated April 18, 2013 and received by the undersigned on April 19, 2013. Pursuant to Rule 240(e), SCACR, the Appellants respond as follows.

**Currently Pertinent Timeline**

The primary order under appeal is dated **July 26, 2012**

The secondary Order Denying Petitioner's Motion to Reconsider is dated **August 21, 2012**.

On **August 22, 2012**, the Rays' served their Notice of Appeal upon DOR.

Both sides filed initial briefs and Designations of Matter (Rays: **November 26, 2012**; DOR:

**January 28, 2013**) and both sides have filed Motions for Extensions of Time.

Only now, eight (8) months after appeal perfection, on **April 18, 2013**, transparently asserting "due diligence" and disrespectfully misciting a section of the Rules, DOR moves for dismissal.

## ARGUMENT

### Preface

For any, and certainly all, of the following reasons, the Motion is improper and should be denied. The DOR Motion is not timely submitted and it is not properly before the Court at this late date. It does not comply with the requirements of Rule 240, SCACR, and DOR attempts to evade the requirements and restrictions of this Court and the Rules of Appellate Procedure promulgated by the Supreme Court as to support. Further, DOR's right to so move (if any it ever possessed, which is denied) has been abandoned, released, waived and voluntarily relinquished by DOR's delay, failures to seek clarification, multiple submissions here, and prior filings with this Court. Moreover, DOR now summarily demands relief for which it does not qualify in hopes that this overburdened Court will not detect its flaws and inequities.

### **DOR is disqualified from the relief demanded**

DOR, at this 11<sup>th</sup> hour, lists a cite, with nothing more, in its conclusory demand for dismissal. It is noteworthy, and revealing, that DOR doesn't list, never sought, and did not acquire the "determination" that it proposes this Court create out of whole cloth and impose.

As noted, the primary order was issued **July 26, 2012**. Both its "CONCLUSION" AND "ORDER" sections are bereft of any dollar figure. The tribunal's "determination" was limited to a non-specific, and wholly improper, award of Summary Judgment (cf. Appellants' initial Brief; the DOR Motion, with no prompting, admitted/confirmed a failure to respond to discovery for 45 days and, upon denial of its Summary Judgment, it would be forced to finally disclose).

The subsequent Order Denying Petitioner's Motion to Reconsider, provides only that "the Rays' Motion to Reconsider, Grant Relief and Set Aside Order is **DENIED**". In short, the only rulings issued by the tribunal lack any figure "determined to be due". The DOR Motion fails under the very terms of the statute it cites.

### **DOR concessions**

The April 18, 2013 DOR Motion confirms its own insufficiency. Again, it cites no figure, clearly because none was “determined”. Further, had there actually been such a determination, DOR’s “due diligence” required a Motion within days (Rule 240(b), SCACR) of appeal, not eight (8) months after perfection. Also, DOR alleges no post-Judgment motion or petition for payment or bond before the Administrative Law Court to “determine” the amount of any undertaking which it only now asserts. In short, DOR requested no “fixing” of any bond or amount, nor approval of the tribunal, or this Court, or any court.

### **DOR has failed to meet its burden**

The service of a Notice of Appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. S.C. Code § 18-19-220. In the months since perfection of the August 22, 2012 Notice of Appeal, DOR has claimed no exception to the automatic stay. Now, with the appeal within some eleven (11) days of finalization and within some thirty (30) days of filing the bound Record and final Briefs, DOR has completed its research, recognizes the likely reversal of its award, and transparently seeks to avoid the scrutiny of this Court by grasping at long expired and inapplicable procedural straws.

The true impetus for the DOR motion is that it simply wants to modify the rules to its sole benefit. A state agency engages in unsustainable conduct “by substituting its own [desires] for that of the General Assembly”. *Hampton v. Haley*, Op. 27244, p.2 (April 24, 2013); *Bryson v. State Budget and Control Board*, Op. 27245, p. 2 (April 24, 2013).

### **Inadequacy of Motion**

Aside from mis-citing the Rules of this Court, DOR has failed to adhere to Rule 240, SCACR, in that it offers no memorandum nor citation of applicable authority. Moreover, in the only reported case construing the inapplicable statute advanced by DOR, DOR’s position was

rejected by the Supreme Court. The DOR Motion offers no exception to the general standard of S.C. Code § 18-19-220.

Instead, the only ground for dismissal advanced by DOR is its admitted and established failure to seek clarity and the determination required by the very statute it cites. DOR should not be rewarded or allowed to avoid the review of this Court ensuing from sitting on its own rights for eight (8) months, if any rights it truly had.

### **Delay**

If DOR is minimally genuine in its belief of a right to the relief demanded, which is denied, it has delayed its claim to the point of egregious prejudice to the Appellants. As noted elsewhere, this appeal is now eight (8) months old and only now does DOR bring its unsubstantiated Motion to Dismiss.

The Rules of this Court clearly anticipate that any such demand will be promptly brought early in the process. A motion to dismiss an appeal ... shall ... automatically **stay the time limits for perfecting** the appeal until the motion is decided". Rule 240(b), SCACR (emphasis added). Perfecting the appeal (filing, service and payment of filing fees) is required to be done within thirty (30) days of written notice of the order under appeal.

Therefore, in the absence of an assertion of post-perfection misconduct by the Appellants, DOR was obligated to immediately provide notice of any claim for a right to dismissal. By not doing so, and by engaging in its duties under the established briefing schedule of the Rules, DOR abandoned its right to seek dismissal (if any it had).

### **Failure to preserve**

DOR has failed to preserve its claim for a right to payment or bond. It sought no clarification below. There was no cross-appeal. It sought no remand for determination.

More importantly, DOR drafted, presumably researched, and finalized its own Brief. As no time did DOR raise, by motion or argument in its brief, the issue of payment or bond. At no

time did it petition any Court for stay relief. Only now, as this Appeal reaches its final days and final stages, does DOR note some claim to an August 2012 right.

DOR's right to payment or bond, if any it had, was totally dependent upon the tribunal below. DOR sought no relief there, or here, during any reasonable time frame. Rule 240(b), SCACR. From the file in this Court and by DOR's own admissions, it has failed to preserve and has consequently abandoned its conclusory claim. *State v. Howard*, 384 S.C. 212, 218, 682 S.E.2d 42, 45 (Ct.App. 2009).

### CONCLUSION

As outlined in the Appellant's Brief and in the tribunal record, DOR demands that it be allowed to both summarily prosecute and self-servingly adjudicate to its own benefit, in abject contravention of the Appellants' rights. DOR's motivation is readily apparent, if not overtly admitted. Like its conduct before the tribunal, DOR seeks to avoid any scrutiny of its conduct or an impartial merits review of the Administrative Law Court's inconsistent, misapplication of Rule 56, SCRCR (the order under appeal confirms DOR's refusal of discovery and confirms the absence of statements other than those of DOR counsel in its Motion memorandum). All such conduct is inappropriate. *Constitution of the State of South Carolina*, Article I, §§ 8, 22 & 23; S.C. Code § 1-23-650(B).

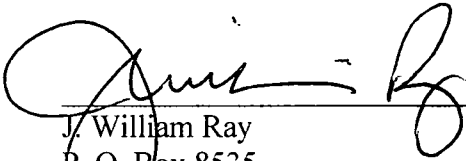
Assuming for argument only that DOR was ever entitled to any undertaking (which remains denied), DOR never sought the required clarity and never noted the claim for bond it now asserts as support for its motion. Therefore, it is egregiously inequitable for DOR to demand approval and reward from this Court for its admitted neglect and abject failures.

Finally, both the text of the present Motion and the directives (Conclusions and/or Order sections) of the orders under appeal are, at best for DOR, inconclusive and serve to create doubt that the statute even applies. Such doubt is fatal to DOR's Motion. It is well established that, regarding the enforcement of tax statutes, like the sole DOR cite, "... the taxpayer should receive

the benefit in cases of doubt." *S.C. Nat'l Bank v. S.C. Tax Comm'n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989).

WHEREFORE, due to DOR's confirmation of its failures to seek order specificity; its failure to request/demand/move/petition for payment or bond (if any right thereto it truly felt it had); and by its neglectful and prejudicial eight month delay, the Appellants respectfully suggest that the DOR Motion to Dismiss is tardy, insufficient, improper for consideration and should be denied.

Respectfully submitted,



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April 26, 2013

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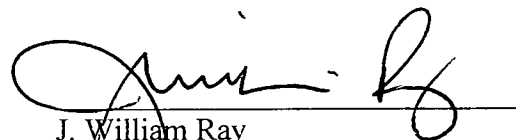
S.C. Department of Revenue,

Respondent.

PROOF OF SERVICE

I do hereby certify that a copy of the Appellants' Return to the DOR Motion to Dismiss in the above captioned case has been duly served on the Respondent by placing the same in an envelope, with adequate prepaid postage affixed thereto, addressed as shown below, and properly depositing such copy of it in the United States Mail on the date below.

Benjamin J. Tripp  
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April 26 2013