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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

HONORABLE DEBORAH BROOKS DURDEN, ADMINISTRATIVE LAW JUDGE

CASE NO. 19-ALJ-17-0339-CC
APPELLATE CASE NO. 2021-001547

Vimlesh V. Patel and Punita Patel.....Appellants,

v.

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

MOTION TO DISMISS APPEAL WITH PREJUDICE

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


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Vimlesh V. Patel and Punita Patel.....Appellants,

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

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

On January 6, 2022, Respondent South Carolina Department of Revenue filed with this court and served on counsel of record, its Motion to Dismiss Appeal with Prejudice. Respondent submits that due to Appellants’ failure to pay the tax or post bond on such tax found to be due by the Administrative Law Court (ALC) prior to their appeal to this Court, such failure divests this Court of appellate jurisdiction and requires dismissal of the instant appeal.

ISSUE

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

RELEVANT FACTS

On November 23, 2021, the ALC issued its Amended Final Order (Order) giving rise to the issue herein. In the Order, the ALC determined that Appellants are liable for individual income taxes for tax years 2012 through 2016. (Order attached). In accordance with the Order, on December 2, 2021, the Department notified the Appellants of the amount of tax, interest, and penalties as determined by the ALC. On December 23, 2021, Appellants filed their Notice of Appeal with the Court of Appeals. As of the date of this motion and accompanying memorandum of law, Appellants have not paid the tax or posted a bond for such tax determined to be due by the ALC. See affidavit of Brian Smith, p. 8.

ARGUMENT IN SUPPORT OF DISMISSAL

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

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

For judicial review of a final decision of an administrative law judge, a notice of appeal by an aggrieved party must be served and filed with the court of appeals as provided in the South Carolina Appellate Court Rules in civil cases and served on the opposing party and the Administrative Law Court not more than thirty days after the party receives the final decision and order of the administrative law judge. Appeal in these matters is by right.

S.C. Code Ann. § 1-23-610(A)(1) (Supp. 2020).

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

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

(Emphasis added).

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

Appeal of decision to court of appeals.

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

In State v. Brown, the South Carolina Supreme Court concluded that the “failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of ‘appellate’ jurisdiction over the case, but it does not affect the court’s subject matter jurisdiction.” State v. Brown, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004) (citing Great Games, Inc. v. S.C. Dep’t of Rev., 339 S.C. 79, 82 at n.5, 529 S.E.2d 6, 7 at n.5 (2000)).¹ The Supreme Court reiterated that holding in Allison v. W.L. Gore & Associates, stating that questions of compliance with rules, regulations, and statutes governing an appeal are questions of appellate jurisdiction. Allison v. W.L. Gore & Associates, 714 S.E.2d 547, 549, 394 S.C. 185, 188 (2011) (citing In re November 4, 2008 Bluffton Town Council Election, 385 S.C. 632, 686 S.E.2d 683 (2009)). In Allison, the

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

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

Supreme Court held that the failure to appeal a decision from a single Commissioner to the Full Workers Compensation Commission within 14 days, as required by South Carolina Code Ann. § 42-17-50 (Supp.2010), deprived the Commission of appellate jurisdiction.

Section 12-60-3370 explicitly provides that a taxpayer shall pay or post a bond for all taxes determined by the ALC to be due, before appealing the decision to this Court. As our Supreme Court has stated, “a statute should be construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous” Matter of Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995). The requirements of Section 12-60-3370 are clear: the taxes must be paid or bond must be posted before appealing, not after appealing to this Court. The Appellants have neither paid nor posted bond for the taxes determined by the ALC. Accordingly, the Appellants are not in compliance with Section 12-60-3370. To permit the Appellants to now pay the taxes or post bond would render the “before appealing the decision to the court of appeals” language superfluous. Because no statute shall be interpreted in a manner that renders any term in the statute superfluous, the Appellants cannot now pay the tax or post bond, as they have already appealed and the time for filing an appeal has passed. The Appellant’s failure to comply with the requirements of Section 12-60-3370 deprives this Court of appellate jurisdiction and this appeal should be dismissed.

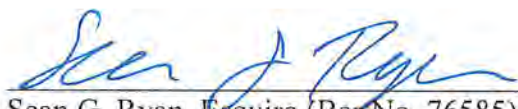
The failure of Appellants to pay the tax ordered by the ALC or post sufficient bond prior to filing their notice of appeal prejudices the Department. The statutory mandate of Section 12-60-3370 ensures that the tax monies owed, as determined by the ALC, will be held in trust for the benefit of the citizens of South Carolina pending the outcome of Appellants’ appeal.² The posting of a bond ensures that these tax monies will be available in the event the State ultimately prevails.

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

Here, Appellants have not paid the tax or posted a bond on such tax imposed by the ALC in its Order and presumably, Appellants have diverted the State's money for personal use during the pendency of this matter. Such action harms the State and its citizens. Ostensibly, this is precisely the situation the General Assembly sought to avoid by enacting Section 12-60-3370 in 1995.

It is important for this Court to understand the Appellants' conduct regarding their tax obligations. The Appellants did not timely file their individual income tax returns or pay taxes for tax years 2012 through 2016. To the contrary, the Appellants only filed individual income tax returns once the Department initiated an audit. Moreover, as the Appellants admitted at trial, they have not filed individual income taxes for the years subsequent to the audit. Now, the Appellants seeks to further delay paying the taxes they owe for tax years 2012 through 2016.

Accordingly, because the Appellants have neither paid nor posted bond for the taxes determined by the ALC, they are not in compliance with Section 12-60-3370. Because the Appellants are not in compliance with Section 12-60-3370, Respondent respectfully submits this Court lacks appellate jurisdiction in this matter and respectfully requests the appeal be dismissed with prejudice.



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January 12, 2022

THE STATE OF SOUTH CAROLINA
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APPEAL FROM THE ADMINISTRATIVE LAW COURT

HONORABLE DEBORAH BROOKS DURDEN, ADMINISTRATIVE LAW JUDGE

CASE NO. 19-ALJ-17-0339-CC
APPELLATE CASE NO. 2021-001547

Vimlesh V. Patel and Punita Patel.....Appellants,

v.

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

AFFIDAVIT OF ROBERT KING

COMES NOW, Robert King, being duly sworn, deposes and states:

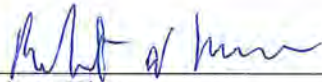
1. I am employed by the South Carolina Department of Revenue (Department) as a Foreign Audit Manager.
2. As part of my duties with the Department, I have access to the Department’s records concerning proposed tax assessments and outstanding tax liabilities.
3. At the request of the Department’s Office of General Counsel, I was asked to determine the amount of Appellant’s proposed tax assessments based upon the Department’s interpretation of the Administrative Law Court’s November 23, 2021 Amended Final Order. Those proposed tax assessments are as follows:

Tax Year	Tax Due	Interest*	TOTAL DUE
2012	\$52,609.00	\$20,535.07	\$73,144.07
2013	\$84,099.00	\$29,520.39	\$113,619.39
2014	\$103,684.00	\$32,255.29	\$135,939.29
2015	\$155,894.00	\$42,294.04	\$198,188.04
2016	\$199,481.00	\$44,176.01	\$243,657.01
	\$595,767.00	\$168,780.80	\$764,547.80

*Interest is accrued through December 23, 2021.


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

FURTHER AFFIANT SAYETH NOT.



 Robert King

Sworn to and subscribed before me this 11
 day of January 2022.



 Notary Public for South Carolina
 My Commission Expires: 8/30/2026

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

CDT, Inc.,

Petitioner,

v.

South Carolina Department of Revenue,

Respondent.

Docket No. 19-ALJ-17-0338-CC

AMENDED FINAL ORDER

Vimlesh V. Patel and Punita Patel,

Petitioners,

v.

South Carolina Department of Revenue,

Respondent.

Docket No. 19-ALJ-17-0339-CC

APPEARANCES: For Petitioner: Scott Talley, Esquire
Steven Buckingham, Esquire
For Respondent: Sean G. Ryan, Esquire

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or Court) following requests by Vimlesh and Punita Patel, and CDT, Inc. (CDT) for a contested case hearing pursuant to S.C. Code Ann. § 12-60-460 (2014). Vimlesh Patel is the sole owner of CDT, an S Corporation. CDT and the Patels are contesting the decision of the South Carolina Department of Revenue (Department or SCDOR) finding that CDT earned more business income than the amounts reported on its corporate income tax returns for tax years 2012 through 2016 (Audit Period). On September 23, 2020, the two contested cases were consolidated because the same issues and evidence are relevant to both cases.

After notice to the parties, this Court held a hearing in the matter on May 25, 2021, at the ALC in Columbia, South Carolina. The parties appeared and were represented by counsel at the hearing. On October 28, 2021, a Final Order was issued. On November 2, 2021, SCDOR filed a Motion to Reconsider, Alter, or Amend the Final Order. On November 10, 2021, CDT filed a Motion to Alter/Amend the Final Order. The motions are



granted and the October 28, 2021 Final Order is hereby vacated. This Amended Final Order substituted in its place.

STIPULATIONS OF FACT

On March 15, 2021, the parties executed a Joint Stipulation stipulating to the following facts:

1. There are only two issues in dispute in these matters:
 - a. The amount of income generated by Petitioner CDT, Inc.; and
 - b. The amount of tax, interest, and penalties, if any, that the CDT, Inc., income causes for the Petitioners Vimlesh V. Patel and Punita Patel.
2. The Petitioners Vimlesh V. Patel and Punita Patel have income from sources other than CDT, Inc. for the Audit Period. The amount of income the Petitioners Vimlesh V. Patel and Punita Patel earned from other sources is not in dispute. Furthermore, the expenses of the Petitioners Vimlesh V. Patel and Punita Patel are not in dispute. Because these issues are not in dispute the parties stipulate that such will not be argued at the hearing.
3. Once the Court determines the amount of income generated for Petitioner, CDT, Inc., the Department can then calculate the specific amount of tax and interest and penalties, if any, for the Petitioners Vimlesh V. Patel and Punita Patel.

In addition, at the hearing the parties agreed that there is no dispute as to CDT's deductions and expenses, and that the only issue in dispute is the amount of the gross receipts of the business.

ISSUE

What were the gross receipts of CDT, Inc. for tax years 2012 through 2016?

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and taking into consideration the burden of proof and the credibility of the witnesses, I make the following findings of fact by a preponderance of the evidence:

During the Audit Period, CDT was a tobacco wholesaler, which supplied tobacco products, soft drinks, and snacks to local convenience stores for resale. The business is located at 3801 Calhoun Memorial Highway, Suite C in Easley, South Carolina. CDT is an S Corporation and therefore its income is not taxed at the corporate level, rather, that income flows through to

the shareholders and is taxed at the shareholder level. CDT is solely owned and controlled by Vimlesh Patel (Patel). Therefore, the income of CDT flows through to Mr. Patel, where it is to be included on his South Carolina individual income tax returns (filed jointly with his wife Punita Patel) and subject to tax. While CDT's income is not taxed, it is still liable for corporate license fees.

CDT has a history as a noncompliant taxpayer. The corporate tax returns at issue for the Audit Period in this case were filed on February 16, 2018, after the corporate income audit was underway. As of the date of the hearing, CDT had not filed its returns for the subsequent years (2017-2020). Patel testified that he was waiting to see the outcome of this litigation before filing those returns. In addition, CDT provided little in the way of corporate financial records to the Department in response to the auditor's request at the outset of the audit process. Some records were, however, provided to the Department during the appeals process at the Department in 2018 and 2019 and further records were provided in response to discovery requests in this litigation following an order of this Court compelling discovery. Patel testified that he did not provide documents to the Department previously because they already had all the records that he could provide. His tax resolution specialist, Zarek Lehl testified that a comprehensive set of sales invoices for the years 2015 and 2016 were produced to the Department during the audit appeal process at the Department in 2019 and were also used in his analysis to determine CDT's gross income for those years. However, a review of those documents, introduced into evidence at the hearing by CDT as Petitioner's Exhibit 6, reveals that these invoices reflect amounts **paid by** CDT for goods sold, not accounts **payable to** CDT reflecting income to the business.

Prior to the audit at issue in this matter, the Department conducted a tobacco audit of CDT to determine if excise taxes on tobacco products had been properly paid. During that audit the Department obtained monthly purchase reports reflecting the amount of tobacco CDT purchased from its suppliers. In conducting the audit now before this Court, the Department utilized these monthly purchase reports to determine the amount of tobacco purchased during the Audit Period. In addition, the Department summoned CDT's bank records directly from CDT's bank.

Sonia Braje testified at the hearing. Braje is the SCDOR auditor who conducted the audit, examining CDT's banking records and the information obtained in the tobacco audit. However, the July 2019 decision letter that was issued to CDT based

upon her work in the audit increased CDT's tax burden by \$3 million over the estimates and calculations in her working papers. This was accomplished in part by reducing the cost of goods sold dramatically from what was reflected in the banking and tobacco records. Braje testified that she believed her working papers included fairly accurate numbers for cost of goods sold. The Department offered no explanation for issuing an initial decision letter reflecting a tax burden so fundamentally at odds with the information in the audit working papers other than Braje's testimony that she was suspicious that not all of the business' receipts were flowing into the bank account. Subsequently, the Department has adopted the cost of goods sold figures reflected in the banking and tobacco records. The cost of goods sold figures now recognized by the Department are not in dispute between the parties. I find that the July 31, 2019 Department Determination is not supported by the facts of this case or the documents the Department admits it had complete access to at the time the decision was issued.

The Department bases its estimate of gross revenue on three months of tobacco sales invoice data from March, April, and May of 2012. These are the only business records reflecting sales data that Petitioners have provided to the Department and it was the only evidence of income presented at the hearing available to substantiate the bank account numbers. The Department used that data to calculate a markup margin for sales for those three months as 13%, 19% and 23% respectively. It then estimated the total sales revenue by applying the 23% multiplier to the cost of goods sold for tobacco products in all months in the 60-month period. The Department's position at the time of the hearing is based upon estimating gross receipts utilizing a 19% markup over the cost of goods sold for tobacco products and a 14.05% markup for other products. CDT has refused to provide any other business records that would directly reflect the prices charged to its customers for tobacco products, the amounts billed to customers, or amounts collected from customers. CDT did not provide the Department with any sales records related to tobacco other than the three months from 2012. Nor did CDT provide any other documentation (such as customer price sheets) reflecting the pricing of the tobacco products that it sells. CDT provided six months of sales records for non-tobacco related products that it sells, which reflect a markup margin of 14.05% for non-tobacco products. SCDOR used those records to arrive at the 14.05% markup it used to estimate non-tobacco

sales revenue. CDT did not provide the Department or this Court with any profit and loss statements or comprehensive records showing its income or expenses, such as customer invoices, W-2's or 1099's related to the employees of CDT. The Department argues that because the taxpayer has refused to provide business records, other than the deposits to the bank account, to demonstrate its income or profit margin on the cost of goods sold, an inference is created that the records would not support CDT's position that all of the business income was deposited into the bank account.

Patel testified that some sales records from 2012-2013 were lost in a computer crash and that he supplied everything that he understood SCDOR sought, except records that he knew they already had in their possession. Patel testified that the 19% markup figure for tobacco products used by the Department is higher than he has ever realized. He estimates his markup on tobacco products to be six to eight percent. He did not, however, give any explanation as to why his markup on tobacco products for the three months of records that he produced would have been exceptional, nor provide records of any type to support this assertion. Furthermore, he provided no credible explanation for his failure to produce such business records from 2014-2016. Patel admitted that CDT sends out two invoices with each shipment to its customers. One invoice stays with the customer and the other invoice comes back to CDT with payment and is scanned to create an electronic record. Mr. Patel admitted that he did not provide those sales invoices to the Department, claiming the Department did not want such invoices. Patel's assertion that the Department did not seek the sales invoices is contradicted by the Department's Motion to Compel, which was ruled upon by this Court on August 26, 2020, ordering that Petitioners provide such records.

In assessing Patel's credibility, the Court also notes that Petitioners are seemingly disavowing the state and federal tax returns they filed for CDT for each of the years in the Audit Period. The income and expenses reported on those returns are inconsistent with the income and expenses CDT now claims this Court should find. Most notably, for 2015, the banking records would show a loss of almost \$500,000, but the business reported income of \$170,000 on the federal income tax return. Patel could not explain where the amounts of income and expenses reported on those returns originated, nor why those amounts are not accurate. The only explanation he offered was, "[t]hat wasn't me. That was my accountant." There is no evidence Petitioners have filed amended returns with the Department or the Internal Revenue Service

(IRS) reflecting the amount of income CDT now asserts it earned. The lack of consistency between the tax returns and the bank account records casts significant doubt on Patel's testimony that the bank account reflects all income and payments made by the business and that all income was deposited into that account. I do not find his testimony that all cash received was deposited into the First Citizens bank account to be credible. Likewise, I do not find credible his assertion that the markups CDT charges its customers have never been more than six to eight percent. That testimony inexplicably contradicts the only documentary evidence CDT made available showing actual markups of 13%, 19% and 23% during three months in 2012.

CDT presented testimony by Zarek Lehl, who performed an analysis of CDT's records. Lehl is employed by Larson Financial and works as a tax resolution specialist. Lehl's analysis purports to compare the bank deposits and records of sales receipts of the business to demonstrate that the bank deposits reasonably reflect the total receipts of the business. However, a review of the documents relied upon by Lehl reveals that the documents he interpreted as sales invoices reflecting accounts receivable to CDT are actually purchase invoices paid by CDT for tobacco products the business purchased from suppliers. Furthermore, Lehl's conclusion as to the amount of taxes owed by CDT demonstrates a misunderstanding of the tax situation at hand. He calculated the tax owed using the corporate income tax rate, which is inapplicable to an S corporation such as CDT. Because of these fundamental errors, I do not find Lehl's testimony or analysis to be credible or useful in resolving this dispute.

This Court's calculations of CDT's income for each of the years of the Audit Period using the Department's percentage markup methodology is represented in the following table:

	2012	2013	2014	2015	2016
Tobacco Purchased ¹	4,161,691	6,592,943	8,145,420	11,939,808	14,255,260
Tobacco Excise Taxes Paid ²	195,137	309,135	455,900	427,646	1,141,702
Tobacco COGS ³	4,356,828	6,902,078	8,601,320	12,367,454	15,396,962
Tobacco Gross Receipts (19% Markup) ⁴	5,184,625	8,213,473	10,235,571	14,717,270	18,322,385
Non-tobacco COGS ⁵	0	7,992	100,735	119,160	384,206
Non-tobacco Gross Receipts (14.05% Markup) ⁶	0	9,115	114,888	135,902	438,187
Total COGS ⁷	4,161,691	6,600,935	8,246,155	12,058,968	14,639,466
Adjusted Gross Income ⁸	1,022,934	1,621,653	2,104,304	2,794,204	4,121,106
Total Operating Expenses ⁹	292,580	405,705	615,873	588,855	1,278,244
Net Income ¹⁰	730,354	1,215,948	1,488,431	2,205,349	2,842,862

¹ Petitioners do not dispute the figures estimated by SCDOR for Tobacco Purchased.

² Petitioners do not dispute the figures estimated by SCDOR for Tobacco Excise Taxes Paid.

³ Tobacco COGS (Cost of Goods Sold) equals Tobacco Purchased plus Tobacco Excise Taxes Paid.

⁴ Tobacco Gross Receipts (19% Markup) equals Tobacco COGS multiplied by 1.19.

⁵ Petitioners do not dispute the figures estimated by SCDOR for Non-tobacco COGS.

⁶ Non-tobacco Gross Receipts (14.05% Markup) equals Non-tobacco COGS multiplied by 1.1405.

⁷ Total COGS equals Tobacco COGS plus Non-tobacco COGS minus Tobacco Excise Taxes Paid.

⁸ Adjusted Gross Income equals Tobacco Gross Receipts (19% Markup) plus Non-tobacco Gross Receipts (14.05% Markup) minus Total COGS.

⁹ Petitioners do not dispute the figures estimated by SCDOR for Total Operating Expenses.

¹⁰ Net Income equals Adjusted Gross Income minus Total Operating Expenses.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude the following as a matter of law:

The Administrative Law Court has jurisdiction over this matter pursuant to S.C. Code Ann. §§ 12-60-430 (2014); 1-23-600 (Supp. 2020). In this contested case, the Court serves as the finder of fact, and conducts a *de novo* review. See Reliance Ins. Co. v. Smith, 327 S.C. 528, 534-35, 489 S.E.2d 674, 677 (Ct. App. 1997). As the trier of fact, the weight and credibility assigned to evidence presented at the hearing is within the province of the Court. See S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992). The standard of proof in this case is a preponderance of the evidence. See Anonymous v. Slate Bd. of Med. Exam'rs, 329 S.C. 371, 375, 496 S.E.2d 17, 19 (1998) (quoting 2 Am.Jur.2d Administrative Law § 363 (1994)) ("[T]he standard of proof in administrative hearings is generally a preponderance of the evidence.").

An S corporation is not subject to tax in South Carolina to the extent it would be exempt from federal corporate income tax. S.C. Code Ann. § 12-6-590 (2014). The income of an S corporation is passed through to its shareholders and each shareholder must include its share of South Carolina S Corporation income on that shareholder's individual income tax return. Id. The provisions of the Internal Revenue Code (IRC) apply to determine an S corporation's gross income, adjusted gross income, and taxable income. Id. Because the income of an S corporation is determined pursuant to the provisions of the IRC, cases addressing the IRC, including cases from the United States Tax Court, while not binding, are applicable and instructive in determining any dispute involving the income of an S corporation.

When a taxpayer fails to file a tax return, the Department is authorized to issue that taxpayer a proposed assessment based on the best information available and issue a proposed assessment for the taxes, including penalties and interest. Section 12-60-430. In order to aid in this assessment, the taxpayer is required to keep records or other documents related to his taxes. S.C. Code Ann. § 12-54-210(A) (2014); S.C. Code Ann. Regs. 117-200 - 117-200.1 (2012). As the Eighth Circuit recognized,

[t]he cases are legion which state that the burden of proof is on the taxpayer; that the Commissioner's assessment is *prima facie* or presumptively correct and that such presumption is not overcome by mere book entries, mere

statements in the tax returns, the mere unsupported testimony of the taxpayer, or mathematical calculations involving uncertain facts.

Cleveland Chiropractic College v. Commissioner, 312 F.2d 203, 206 (1963)(internal quotations omitted). Rather, a taxpayer is required to maintain adequate records sufficient to enable the taxing authority to determine the taxpayer's correct tax liability. S.C. Code Ann. § 12-54-210 (2014); Meneguzzo v. Commissioner, 43 T.C. 824, 831-832 (1965); § 1.6001-1(a), Income Tax Regs. A taxpayer's inability to produce records does not relieve the taxpayer of the burden of proof. See Estate of Mason v. Commissioner, 64 T.C. 651 (1975), affd., 566 F.2d 2 (6th Cir. 1977).

In this case, CDT urges the Court to use the total deposits into the business bank account to calculate the revenue of the business. Patel testified that all revenue, including any cash accepted, was deposited into that account and that those deposits reflect the accurate gross revenue of CDT. I conclude that the methodology urged by CDT of using the total deposits into the bank account as the amount of gross revenue is contrary to the evidence before me. Likewise, CDT has not carried its burden of proving that the markup method utilized by the Department is inaccurate. CDT could have provided records showing sales using smaller markup percentages than those used by the Department, but chose not to do so despite admitting that it keeps those records and in defiance of this Court's order compelling discovery responses. The Department's assessment methodology, although based upon assumptions and extrapolated from the data made available, is a reasonable calculation of the likely gross income using the best information available to the Department and this Court. The fact that the Petitioners had control over the business records, and offered no credible explanation for the refusal to produce them, leads this Court to draw the inference that those records would not support the calculations urged by CDT. If a party has relevant evidence within its control which it fails to produce at a hearing, the failure to produce the evidence will give rise to an inference that it is unfavorable to that party. 48A Am.Jur.2d Labor and Labor Relations § 2021.

CDT is in the business of selling goods, therefore its income is realized through sales. The Department utilized the only records Petitioners made available regarding CDT's sales to calculate an average markup margin. The parties are in agreement as to the amount of tobacco and non-tobacco products purchased by CDT. What the parties cannot agree upon is how much CDT received when it sold those goods to its customers. The only sales records

or other documentation in the record regarding the amount CDT charged its customers for tobacco is the three months of sales records from 2012. Absent adequate records, or if the records that are kept do not accurately reflect income, the taxing authority may determine the existence and amount of a taxpayer's income by using any method that clearly reflects income. United States v. Johnson, 319 U.S. 503 (1943); Petzoldt v. Commissioner, 92 T.C. 661, 686-687 (1989). It is proper for the Department to employ an indirect method to calculate income where the method used is reasonable. Holland v. United States, 348 U.S. 121 (1954); Davis v. Commissioner, 239 F.2d 187, 189 (7th Cir. 1956), affg. T.C. Memo 1955-87; Giddio v. Commissioner, 54 T.C. 1530, 1533 (1970). "The reconstruction need only be reasonable in light of all surrounding facts and circumstances." Petzoldt, 92 T.C. at 687; Giddio, 54 T.C. at 1533. The percentage markup method is well recognized as an appropriate means of reconstructing income where a taxpayer's records are incomplete or inaccurate. Cebollero v. Commissioner, T.C. Memo. 1990-618, affd. 967 F.2d 986 (4th Cir. 1992). Bollella v. Commissioner, 374 F.2d 96 (6th Cir. 1967), affg. T.C. Memo. 1965-162; Kurnick v. Commissioner, 232 F.2d 678 (6th Cir. 1956), affg. T.C. Memo. 1955-31; Stone v. Commissioner, 22 T.C. 893, 905-906 (1954). The purchase markup method is considered particularly appropriate in matters where the amount of goods purchased for sale may be readily computed. Frank v. Commissioner, T.C. Memo. 1982-214, 1982 WL 10540 (Tax Court 1982).

Here, the three months of sales records admitted into evidence reflected monthly average markups of 13.5%, 19%, and 23.5%. It is reasonable to utilize the median markup percentage of 19% to calculate the gross income for the other months of the Audit Period for which no records were provided by Petitioners. The Court finds the case of Webb v. Commissioner, 394 F.2d 366 (5th Cir. 1968), while not binding, shares similarities with the present case and is therefore instructive. In Webb, the United States Court of Appeals for the Fifth Circuit addressed liquor store owners contesting the Commissioner of the IRS' computation of their income using a purchase markup method. Like CDT, the Webbs failed to maintain or provide complete records to the IRS. Id. at 369. The Court noted that Mr. Webb accepted cash and did not deposit all his receipts into his bank account. Id. Moreover, the amount the Webbs reported in gross sales on their tax returns was \$18,000 less than the amount shown in their incomplete records. Id. Because the Webbs failed to maintain

complete records, the IRS determined the Webbs' income using the purchase markup method. The Fifth Circuit recognized that the IRS' determination of taxable income is presumptively correct and the taxpayer has the burden of showing that the assessment is wrong on any proper theory. *Id.* at 372, quoting Bernstein v. C.I.R., 267 F.2d 879, 881 (5th Cir. 1959). The Webb Court held that the purchase markup method was the most reasonable means of computing income because the Webbs' cost of sales each year "were known with certainty." *Id.* at 373. In addressing the Webbs' complaints that the IRS should have used a different method the Court stated, "Arithmetic precision was originally and exclusively in Webb's hands, and he had a statutory duty to provide it. He did not have to add or subtract; rather, he had simply to keep papers and data for others to mathematici[s]e." *Id.* at 373, citing Breland v. United States, 323 F.2d 492 (5th Cir. 1963); Mendelson v. C.I.R., 305 F.2d 519 (7th Cir. 1962). The Webbs then argued that the IRS markup percentage was too high and did not reflect their actual income. In response, the Court stated, "There are X's in the Commissioner's equation, but the formula is reliably correct, and the X's were not filled in by Webb." *Id.* at 376-377. The Court then went on to uphold the determination of the Webbs' income using the percentage markup method. Similarly in this case, CDT failed to maintain or provide full records to the Department despite a statutory duty to maintain records. Section 12-54-210; Regulation 117-200 - 117-200.1. As the Webb court recognized, the purchase markup method is the most reasonable method when cost of sales each year is known with certainty. CDT's cost of sales for each year of the Audit Period are known and the parties agree on what CDT spent on goods purchased to resell to its customers. Accordingly, the purchase markup method is the most reasonable method to use in this case to estimate income.

Civil penalties are applied to every South Carolina tax that requires a return unless otherwise provided. S.C. Code Ann. § 12-54-43 (2014). Such penalties are considered a tax owed to the State. *Id.* Further, "[i]f any tax is not paid when due, interest is due on the unpaid portion from the time the tax was due until paid in its entirety." S.C. Code Ann. § 12-54-25(A) (2014). Penalties are applicable to this matter pursuant to § 12-54-43 which states:

In the case of failure to file a return on or before the date prescribed by law... there must be added to the amount required to be shown as tax on the return, a penalty of five percent of the amount of the tax if the failure is for not more than one month, with an additional five percent for each additional month or

fraction of the month during which the failure continues, not exceeding twenty-five percent in the aggregate.

S.C. Code Ann. § 12-54-43(C)(1) (2014). Additionally, S.C. Code Ann. § 12-54-43(E) (2014) states:

In the case of failure to pay any amount of any tax required to be shown on a return which is not shown, including an assessment within ten days of the date of the notice and demand for payment, there must be added to the amount of tax stated in the notice and demand one-half of one percent of the amount of the tax if the failure is for not more than one month, with an additional one-half of one percent for each additional month or fraction of a month during which the failure continues, not exceeding twenty-five percent in the aggregate.

S.C. Code Ann. § 12-54-43(E) (2014). Here, CDT admits that it failed to timely file its corporate income tax returns or timely pay its corporate license fees for any of the years in the Audit Period. In its motion to Alter/Amend the October 28 Order, Petitioner requests that the Court eliminate the requirement that it pay any penalty and interest due to the fact the cost of goods sold figures in the Department's determination were erroneous and unsupported. Petitioner does not cite legal authority demonstrating that this Court has the authority to waive the penalties and interest established by statute. Therefore, CDT is liable for failure to file and failure to pay penalties pursuant to §§ 12-54-43(C)(1) and 12-54-43(E) and interest calculated as provided in § 12-54-25(A).

During the Audit Period CDT earned the following net income which flows through to Mr. Patel:

2012	2013	2014	2015	2016
\$730,354	\$1,215,948	\$1,488,431	\$2,205,349	\$2,842,862

Therefore,

- 1) **IT IS ORDERED** that the October 28, 2021 Final Order issued by this Court is vacated and this order substituted therefore;
- 2) **IT IS ALSO ORDERED** that Petitioner CDT is liable for corporate license fees and interest for each of the years of the Audit Period;
- 3) **IT IS ALSO ORDERED** that Petitioners Vimlesh V. Patel and Punita Patel are liable for income taxes on CDT's income as found in this order;

- 4) **IT IS ALSO ORDERED** that Petitioners are liable for failure to file and failure to pay penalties pursuant to §§ 12-54-43(C)(l) and 12-54-43(E);
- 5) **IT IS ALSO ORDERED** that this matter is **REMANDED** to the Department of Revenue to calculate the taxes, penalties, and interest owed by Petitioners as of the date of this order. The Department must provide Petitioners a statement of the amount owed within 15 days from the date of this order. Petitioners may pay the amount owed within 30 days of receipt of the statement without incurring additional penalties or interest; and
- 6) **IT IS FURTHER ORDERED** that Petitioners may, within 15 days of receiving the statement of amounts owed, move this Court for further examination of SCDOR's calculations if there is disagreement.

AND IT IS SO ORDERED.



Deborah Brooks Durden, Judge
S.C. Administrative Law Court

November 23, 2021
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Robin Coleman

Robin E. Coleman
Judicial Aide to Judge Deborah Brooks Durden

November 23, 2021
Columbia, South Carolina



RECEIVED

Jan 12 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

HONORABLE DEBORAH BROOKS DURDEN, ADMINISTRATIVE LAW JUDGE

CASE NO. 19-ALJ-17-0339-CC
APPELLATE CASE NO. 2021-001547

Vimlesh V. Patel and Punita Patel.....Appellants,

v.

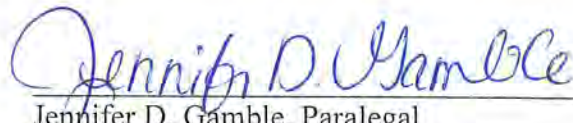
South Carolina Department of Revenue.....Respondent.

PROOF OF SERVICE

I hereby certify that I have served Respondent's Motion to Dismiss Appeal with Prejudice by depositing a copy of it in the United States Mail, postage prepaid, on January 12, 2022, addressed to the Appellants' attorneys of record:

Mr. Scott F. Talley, Esquire
291 South Pine Street
Spartanburg SC 29302

Mr. Steven E. Buckingham, Esquire
16 Wellington Avenue
Greenville SC 29609


Jennifer D. Gamble, Paralegal
South Carolina Department of Revenue

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
OFFICE OF GENERAL COUNSEL

RECEIVED

Jan 12 2022

SC Court of Appeals

300A Outlet Pointe Blvd.
Columbia, SC 29210



Main Line: 803.898.5130
Facsimile: 803-896-0171

January 12, 2022

VIA ELECTRONIC MAIL TO CTAPPFILINGS@SCCOURTS.ORG

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Vimlesh V. Patel and Punita Patel v. South Carolina Department of Revenue
ALC Docket No: 19-ALJ-17-0339-CC
Appellate Case No.: 2021-001547

Dear Ms. Kitchings:

Enclosed please find Respondent's Motion to Dismiss Appeal with Prejudice in regards to the above referenced matter. Additionally, I have enclosed a Proof of Service.

By copy of this letter I am serving all counsel of record with a copy of same.

If you have any questions or need anything further from me please do not hesitate to contact me at 803-898-5375 or Sean.Ryan@dor.sc.gov.

With my regards, I am

Sincerely,

A handwritten signature in blue ink, appearing to read "Sean G. Ryan".

Sean G. Ryan
Senior Counsel, Tax

SGR/jdg
Enclosures

c: Mr. Scott F. Talley, Esquire
Mr. Steven E. Buckingham, Esquire