S199887

In the

SUPREME COURT OF CALIFORNIA

After A Decision By The Court Of Appeal
First Appellate District, Division Two

A133177

Superior Court of the County of Marin CIV 060796
Hon. James R. Ritchie

DANIELLE BOURHIS et al.

Plaintiffs and Appellants

v.

JOHN LORD et al

Defendants and Respondents

OPENING BRIEF ON THE MERITS

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I. ISSUE PRESENTED

Does an invalid appeal filed by a "suspended" corporation get retroactively validated by revival of corporate status after the appeal period has expired?

Plaintiff and Appellant below, BROWN EYED GIRL, INC., a California corporation ("Appellant" or "BEG"), filed its notice of appeal during the time its corporate status was "Suspended" by the Secretary of State for failure to pay taxes and file tax returns. After the time for appealing had expired, and after Defendants and Respondents below had moved to dismiss the appeal, Appellant revived its corporate status. The Court of Appeal denied the motion. (See Order bound at end of the Petition For Hearing). By its citation to two Supreme Court cases it implicitly ruled that the revival validated the prior filing of the notice of appeal, even though in the interim the Judgment had become final by reason of the lack of a proper notice of appeal during the appeal period, and rights of res judicata had vested in Respondents. However, it also cited another Court of Appeal decision questioning the inconsistency between these cases and another Supreme Court case holding that revival did not extend statutes of limitations and leaving "the resolution of this apparent inconsistency to the Supreme Court." That apparent inconsistency between Supreme Court decisions is the issue presented in this matter.

II. STATEMENT OF THE CASE

Appellant BEG is a California Corporation. Judgment was entered against it (and other Appellants not involved herein) on April 5, 2011, and

was served on April 6, 2011. Notice of Appeal from this Judgment by all Appellants was filed on May 26, 2011.[1]

After the Judgment was entered, the trial court entered two Orders awarding costs and attorneys' fees to Respondents. These Orders were both entered and served on August 20, 2011. On September 13, 2011, Appellants filed a Notice of Appeal from those two orders. That appeal is the subject of this appellate action.

At the times Appellant BEG filed both Notices of Appeal, the Secretary of State's records reflected that its corporate status had been "Suspended" since June 1, 2009. Respondents below, JOHN LORD, KATE LORD, and Q-TIP TRUST OF THE LORD JUNE 30, 1988 TRUST (collectively the "Respondents"), moved to dismiss each of the appeals on the ground that BEG lacked the capacity to appeal and the appeal period had expired. According to Appellant BEG, effective December 8, 2011, after the appeal periods had expired, and after the motions were filed, BEG revived its corporate status. On December 29, 2011, the Court of Appeal denied each of the motions, citing *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, and *Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369, without any discussion of these cases.

The Court of Appeal also added "see *ABA Recovery Services, Inc. v. Konold* (1988) 198 Cal.App.3d 720, 725, fn.2." That footnote pointed out the inconsistency between *Rooney's* holding that filing a notice of appeal was a "procedural" step and a prior Supreme Court decision stating that the statute of limitations was substantive.

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[1] That appeal in the Court of Appeal is No. A133136, and is the subject of a Action S199889 pending before this Court as to which hearing has been granted. After filing of the Petitions for Review in this matter and Action S199889, the Court of Appeal granted a motion to consolidate the appeals pending before it.

> Apparently, the Supreme Court in *Rooney* considered the filing of a notice of appeal a "procedural" step which could be retroactively validated by revivor whereas the Supreme Court in *Traub* did not include in its holding those cases where the statute of limitations was raised as a defense. We question why the timely filing of a notice of appeal, which is jurisdictional and cannot be waived, is a procedural act unaffected by a corporation's suspension, while the statute of limitations, which is not jurisdictional and can be waived, is a substantive defense fatal to a suspended corporation's cause of action. However, *we leave the resolution of this apparent inconsistency to the Supreme Court.*

(*ABA Recovery Services, Inc v. Konold* (1988) 198 Cal.App.3d 720, 725, fn.2 (emphasis added)).

By its citation to this footnote, the Court of Appeal below similarly left it to this Court to resolve this apparent inconsistency.

The Court of Appeal orders are reviewable. (Rule 8.500, California Rules of Court, and Advisory Committee Comment on Subdivision (a)(1)). The orders became final thirty (30) days after filing. (Rule 8.264, and Advisory Committee Comment to Rule 8.500, Subdivision (e)). A timely Petition for Review was filed. (Rule 8.500(e), California Rules of Court). This Court granted review on March 21, 2012.

III. BACKGROUND FACTS

Appellant sued its landlord, Respondent Q-TIP TRUST OF THE LORD JUNE 30, 1988 TRUST, and the other Respondents for property damage caused by the flooding of a creek that was not on Respondent's property. Respondents JOHN LORD and KATE LORD were granted non-suits, and the jury rendered a 12-0 verdict for Respondent Q-TIP TRUST

OF THE LORD JUNE 30, 1988 TRUST. Judgment on the operative complaint for all Respondents and against all Appellants was entered on April 5, 2011, and served on April 6, 2011. Notice of Appeal from that Judgment was filed by Appellants on May 26, 2011, and is the subject of Court of Appeal No. A132136 and Supreme Court No. S199889.

After the Judgment was entered, the trial court entered two Orders awarding costs and attorneys' fees to Respondents. These Orders were both entered and served on August 20, 2011. Notice of Appeal from those orders was filed on September 13, 2011, and is the subject of Court of Appeal No. 133177 and this appellate action.

Shortly prior to trial Respondents became aware that BEG's corporate status was "Suspended" for failure to pay corporate taxes for 2007, 2008, and 2009. (See Respondents' Motion to Strike Notice of Appeal and Dismiss Appeal of BEG, filed in the Court of Appeal [hereinafter "Motion to Dismiss"]. Attached as Exhibit 2 to that Motion to Dismiss is Defendants' *Motion In Limine* No. 6 to preclude Brown-Eyed Girl, Inc. from Offering any Evidence at Trial, which was filed in the trial court. See Exhibit A to Exhibit 2, and Exhibit B to Exhibit 2 at pages 75:11-19). BEG had also failed to file income tax returns for those years. (See Exhibit B to Exhibit 2 at page 25:21-24). The default was intentional, as BEG felt there was no rush to file the returns and to pay the State of California the money that was owed because BEG perceived that it was not subject to any penalty for not doing so. (See Exhibit B to Exhibit 2 at pages 25:25-26:6). At the same time it sought to enjoy the benefits and protections of the California court system, funded by other tax payers. Respondents moved the trial court *in limine* to preclude BEG from offering evidence at trial. (Exhibit 2 to Motion to Dismiss).

The trial court allowed BEG an opportunity to cure its default (Exhibit 3 to the Motion to Dismiss), and a few days later, on October 12, 2010, BEG represented to the trial court that it had taken the actions necessary to do so, subject to "bureaucratic steps". (Exhibit 4 to Motion to Dismiss). On that basis it was allowed to proceed to trial.

After the Notices of Appeal were filed, Respondents learned that in fact the "Suspended" status had not been lifted for the trial or for the time thereafter when BEG filed its Notices of Appeal. The Certificate of Status obtained from the Secretary of State listed the status as "FTB Suspended" from June 1, 2009, which means "The domestic entity's powers, rights and privileges were suspended in California by the California Franchise Tax Board for failure to meet franchise tax requirements (e.g., failure to file a return, pay taxes, etc.)." (Exhibit 1 to Motion to Dismiss). Under California law, BEG was not authorized to file or to pursue the appeals.

Respondents moved to dismiss the appeals of BEG. Appellant opposed the Motions to Dismiss arguing that its corporate status was revived on December 8, 2011, which was after the appeal periods had expired and after the motions had been made. The Court of Appeal denied the motions.

IV. ARGUMENT

As the Court of Appeal noted in *ABA Recovery Services, Inc. v. Konold* (1988) 198 Cal.App.3d 720, 725, fn.2, there is an apparent inconsistency in the Supreme Court cases as to the effect given a revival of corporate powers. The background of this issue is as follows:

A. BEG's Notices Of Appeal While Its Corporate Status Was Suspended Are A Nullity

Revenue & Taxation Code § 23301 was enacted to deprive recalcitrant tax payers like BEG from holding onto their money while they enjoy state services paid by others. It provides:

> Except for the purposes of filing an application for exempt status or amending the articles of incorporation as necessary either to perfect that application or to set forth a new name, the corporate powers, rights and privileges of a domestic taxpayer may be suspended, and the exercise of corporate powers, rights and privileges of a foreign taxpayer in this state may be forfeited, if any of the following conditions occur::
>
> (a) If any tax, penalty, or interest, or any portion thereof, that is due and payable under Chapter 4 (commencing with Section 19001) of Part 10.2, or under this part, either at the time the return is required to be filed or on or before the 15th day of the ninth month following the close of the taxable year, is not paid on or before 6 p.m. on the last day of the 12th month after the close of the taxable year.
>
> (b) If any tax, penalty, or interest, or any portion thereof, due and payable under Chapter 4 (commencing with Section 19001) of Part 10.2, or under this part, upon notice and demand from the Franchise Tax Board, is not paid on or before 6 p.m. on the last day of the 11th month following the due date of the tax.
>
> (c) If any liability, or any portion thereof, which is due and payable under Article 7 (commencing with Section 19131) of Chapter 4 of Part 10.2, is not paid on or before 6 p.m. on the last day of the 11th month following the date that the tax liability is due and payable.

(See also, Revenue & Taxation Code §§23301.5 and 23302).

The purpose of this section is to encourage the payment of taxes. (*Cadle Company v. World Wide Hospitality Furniture, Inc.* (2006) 144 Cal. App. 4th 504, 512). Cases uniformly hold that pursuant to this section a "Suspended" domestic corporation cannot prosecute or defend actions in court. (*Domato v. Slevin* (1989) 214 Cal.App.3d 668, 672; *Gar-Lo, Inc. v. Prudential Sav. & Loan Assn.* (1974) 41 Cal.App.3d 242, 244-45).

In addition, the fact of a corporation's suspension can be raised at any time, even right before trial or after appeal. (*Ocean Park etc. Co. v. Pacific Auto P. Co.* (1940) 37 Cal. App. 2d 158; *Reed v. Norman* (1957) 48 Cal. 2d 338, 343; *Cadle Company v. World Wide Hospitality Furniture, Inc.* (2006) 144 Cal. App. 4th 504, 511-12).

Here, Appellant was fully aware of the issue and the consequences because Respondents raised the matter before trial. The trial court gave Appellant an opportunity to cure the default, and Appellant represented it had been cured. On that basis Appellant was allowed to proceed with trial. Thus, Appellant was on actual notice of the need to maintain BEG's status in good standing. It failed to do so.

The cases hold that a suspended corporation cannot appeal from an adverse judgment, and if it does its appeal should be dismissed. In *Boyle v. Lakeview Creamery Co.* (1937) 9 Cal.2d 16, the Supreme Court dismissed an appeal of a suspended corporation, saying:

> The statute expressly deprives the corporation of all 'corporate powers, rights and privileges,' subject to one exception, which is specifically set forth, the right to amend the articles to change the name. As the court declared in *Ransome-Crummey Co. v. Superior Court, supra*, 188 Cal. 393, 397, 205 P. 446, 448: 'During the time its taxes were unpaid, petitioner was shorn of all rights save those expressly reserved by the statutes.' The conclusion which we are forced to draw is that the appellant corporation has lost the right to defend the suit in question, and since it has no right to defend, it has no right to appeal from an adverse decision.

(*Id.* at 20).

This ruling was followed, and the appeal dismissed, in *Ocean Park Bath House & Amusement Company v. Pacific Auto Park Co.* (1940) 37 Cal.

App. 2d 158; and *Gar-Lo, Inc. v. Prudential Sav. & Loan Assn.* (1974) 41 Cal.App.3d 242, 245 ("Taking an appeal from an adverse judgment of the superior court is one of the privileges which the law denies to a domestic corporation suspended under section 23301"); and the principal was repeated in *Reed v. Norman* (1957) 48 Cal. 2d 338, 343.

This rule was again reaffirmed in *Traub Co. v. Coffee Break Service, Inc.* (1967) 66 Cal.2d 368. While holding that a suspension after a complaint was filed but before rendition of judgment did not render the judgment subject to collateral attack once it became final, the Supreme Court distinguished the facts before it from those in a number of other cases.

> Our holding with respect to the final judgment here attacked is to be distinguished from cases holding that a suspended corporation not shown to have been reinstated lacks the right or capacity to defend an action or to appeal from an adverse decision. [Citing *Boyle, Ocean Park,* and *Reed*].

(*Id.* at 371).

Also important, *Traub* noted that acts by a suspended corporation can create jurisdictional issues:

> *Ransome-Crummey Co. v. Superior Court* (1922) 188 Cal. 393, 397—399, 205 P. 446, dealt with the special jurisdictional problems incident to a motion for new trial, and the court was careful to point out that although the corporation's motion was a nullity because the notice thereof had been given at a time its corporate powers were suspended, the holding to that effect was without prejudice to further proceedings had after reinstatement of the corporation.

(*Id.* at 372).

In *Ransome,* the Supreme Court held that a suspended corporation could not give notice of intent to move for a new trial which was

"necessary to confer jurisdiction on the court to entertain the subsequent proceedings. Such a notice may not be waived, and is not waived, by the voluntary appearance of the adverse party." (*Ransome-Crummey Co. v. Superior Court* (1922) 188 Cal. 393, 398).

Applying these clear authorities to the situation here, BEG had no standing or capacity to file a notice of appeal and its act of doing so was a nullity. Its suspended status deprived it of all corporate powers to prosecute or defend litigation. It could not take advantage of the court system being funded by collection of taxes from others while it failed to pay its taxes and/or file its tax returns.

B. BEG's Reinstatement After The Appeal Period Had Expired Could Not Validate Its Notices of Appeal

Suspended corporations have the ability to be reinstated, but "such reinstatement shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture." (Rev. & Tax. Code, § 23305a). When the suspension results in substantive rights, such as occurs when no valid notice of appeal is filed during the appeal period, reinstatement cannot validate the previously invalid notice of appeal.

Many cases have described the effect of the revival statute by saying that while procedural acts may be validated by revival of corporate powers, substantive defenses that accrued during the period of suspension cannot be defeated by corporate revival. (See, e.g., *Welco Construction, Inc. v. Modulux, Inc.* (1975) 47 Cal.App.3d 69, 73; *ABA Recovery Services, Inc. v. Konold* (1988) 198 Cal.App.3d 720, 724; *Benton v. County of Napa* (1991) 226 Cal.App.3d 1485, 1490). This rule has repeatedly been applied to statutes

of limitations that expired during the period of suspension, resulting in holdings that the statute of limitations is a substantive defense which is not defeated by corporate revival.

In *ABA Recovery Services*, plaintiff corporation filed an action while it was suspended, the statute of limitations period then expired, after which plaintiff revived its status. The court held that the statute of limitations is a substantive defense which accrued by its running during the period of the plaintiff corporation's suspension and thus that defense could not be prejudiced by revival of the suspended corporation. "[W]here a substantive defense accrues during corporate suspension, a corporate revival will not prejudice that defense." (198 Cal.App.3d at 724. Accord: *Sade Shoe Co. v. Oschin & Snyder* (1990) 217 Cal.App.3d 1509, 1513 n.2; *Welco Construction, Inc. v. Modulux, Inc.* (1975) 47 Cal.App.3d 69, 73-74.).

This rule was again reaffirmed very recently in *Friends of Shingle Springs Interchange, Inc. v. County of El Dorado* (Nov. 22, 2011) 200 Cal. App. 4th 1470. There a suspended non-profit corporation filed an action while it was suspended and attempting to comply with revival requirements. It was revived effective two days after a 90 day statute of limitations period expired. A demurrer for lack of legal capacity to sue and on the statute of limitations was sustained. The Court of Appeal affirmed. It held a suspended corporation "lacks standing to sue and statutes of limitations are not tolled." (*Id.* at 1486). "The suit is ineffective because of the suspension, so the statute continues to run." (*Id.* at 1487). "'If the statute runs out prior to revival of a corporation's powers, the corporation's actions will be time barred even if the complaint would otherwise have been timely.'" (*Id.*). Substantial compliance with the revival requirements could not be allowed to defeat the statutes of limitations applicable to the

land use matters there involved which were made purposefully short to achieve certainty and finality.

The same rule should apply to the filing of an appeal while suspended. Just as the failure to file a valid complaint prior to the expiration of the statute of limitations creates substantive rights and defenses, so too does the failure to file a valid notice of appeal prior to expiration of the appeal period. Like the statute of limitations, the running of the period for filing an appeal bars the appeal. In fact, it is jurisdictional. Appellate courts have no jurisdiction to entertain appellate review or writ review from an appealable judgment or order from which a timely appeal was not taken. (*Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119; Code of Civil Procedure §906; *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46 ("'If a judgment or order is appealable, an aggrieved party *must* file a *timely* appeal or forever *lose* the opportunity to obtain appellate review.'" (emphasis in original)); *Mauro B. v. Superior Court* (1991) 230 Cal.App.3d 949, 952 (appealable judgment not reviewable by writ after expiration of appeal period)). A reviewing court may not relieve a party from default in failing to file a timely notice of appeal. (Rule 8.60(d), California Rules of Court).

Further, a valid appeal can only be taken by one with standing, and this requirement, too, is jurisdictional and cannot be waived. (*Sabi v. Sterling* (2010) 183 Cal.App.4th 916, 947); *Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 295). A suspended corporation, "shorn of all rights", has no standing to file a notice of appeal. (*Friends of Shingle Springs Interchange, Inc. v. County of El Dorado, supra,* 200 Cal.App.4th at 1486; *ABA Recovery Services, Inc. v. Konold* (1988) 198 Cal.App.3d 720, 724).

Moreover, the failure to file a timely appeal renders the judgment final and binding. (*Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119). The issues decided in an appealable judgment from which no timely appeal is taken are *res judicata*, creating rights and defenses for the prevailing party as of the date the appeal period expired. (*In re Matthew C.* (1993) 6 Cal.4th 386, 393 ("If an order is appealable, however, and no timely appeal is taken there from, the issues determined by the order are res judicata.")). Suspended corporations cannot have the right no other party has to hold the finality of a judgment in limbo, and effectively extend its time to appeal, until it decides to revive its powers. Nor can it have the power to "definalize" a judgment. It is neither fair nor serves the purpose of encouraging corporations to pay their taxes to let defaulting corporation's slide until they are caught and then allow them to wash away all effects of their delinquency without consequence. This result only serves to discourage timely payment of taxes.

Suspension of a corporate party does not toll time limits. It does not toll the statute of limitations, the five year period to bring the case to trial (see *Diverco Constructors, Inc. v. Wilstein* (1970) 4 Cal.App.3d 6, 13-14 (period of suspension was not included in determining the five year period), or the period for appealing. Otherwise, suspension would give a benefit to the corporate party not enjoyed by other litigants. The expiration of these periods creates substantive rights and defenses, not pleas in abatement. Reinstatement cannot extend those periods as that would prejudice rights or defenses that "accrued by reason of the original suspension," in violation of the statute.[2]

[2] In addition, nothing in the statute makes the revival retroactive. (*Ransome-Crummey Co. v. Superior Court, supra*, 188 Cal. at 398) ("The revival is not made retroactive by the statute."). This Court recently

Thus, BEG's invalid attempt at filing the notice of appeal cannot be cured by reviving the corporate status after the appeal period has run. As in *Ransome*, the purported notice of appeal was a nullity. The ineffective notice deprived the Court of Appeal of jurisdiction to consider BEG's appeal. BEG lacked standing and capacity to file the notice, which also removed jurisdiction. And once the period for filing a valid notice expired, the judgment became final and binding, which, like the expiration of the statute of limitations, created rights and defenses for Respondents. In accordance with Revenue & Taxation Code § 23305a, "reinstatement shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture." Reinstatement cannot take away the rights and defenses Respondents accrued by reason of the lack of a timely and proper appeal. Allowing a suspended corporation to cure its default in properly initiating an appeal, when no other party can do so if it fails to file a timely and proper notice of appeal, makes no sense and actually provides suspended corporations with rights others do not enjoy.

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reaffirmed that statutes are to be interpreted as applying prospectively unless there is express language in the statute to the contrary.

> Our decisions have recognized that statutes ordinarily are interpreted as operating prospectively in the absence of a clear indication of a contrary legislative intent. [Citations omitted.] In construing statutes, there is a presumption against retroactive application unless the Legislature plainly has directed otherwise by means of "'express language of retroactivity *or* ... other sources [that] provide a clear and unavoidable implication that the Legislature intended retroactive application.'" [Citations omitted]. Ambiguous statutory language will not suffice to dispel the presumption against retroactivity; rather "'a statute that is ambiguous with respect to retroactive application is construed ... to be unambiguously prospective.'" [Citations omitted].

(*Quarry v. Doe I* (Cal., Mar. 29, 2012, S171382) ___ Cal.4th ___, 2012 WL 1034015) (emphasis in original).

C. *Peacock* And *Rooney* Should Be Clarified

The Supreme Court cases cited by the Court of Appeal in its order did not actually hold that revival after the appeal period validated a prior ineffective notice of appeal. "It is axiomatic that cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10; *Vasquez v. State* (2008) 45 Cal.4th 243, 254). In any event, if that is their import, they should be clarified or changed.

In *Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369, a motion to dismiss an appeal was denied where the suspended corporation demonstrated it had been revived. It is significant that the majority opinion does not state whether the notice of appeal was filed during the suspension, or whether the revival was during the time for filing an appeal (though the dissent indicates the appeal was filed during the suspension). Had it been the *Peacock* Court's intent to establish a rule that revival of corporate status after an appeal period has run retroactively validates an invalid notice of appeal, and to negate the *res judicata* effect of the final judgment, certainly it would have made a point of presenting those facts. The Court only holds that the rule allowing revival to validate procedural actions occurring prior to judgment should ordinarily also be applied to procedural actions occurring after judgment, but again noted the exception for the matter in *Ransome* involving "special jurisdictional problems." (*Id.* at 373-74).

Such a problem exists here since the time period for appeals and the standing requirements for appeals are jurisdictional. Jurisdictional defaults cannot be retroactively cured by reinstatement. Further, the

acknowledged rule prior to judgment is that statutes of limitations which expire during suspension are ***not*** revived. So if the same rule is to be applied with respect to matters occurring after judgment, the appeal period which expires during suspension must also ***not*** be revived.

In *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, as well, the Court does not set out facts which show its intent to rule on the specific situation presented here. There, a motion to dismiss the appeal was denied. However, the chronology of events in the case is not clear, and the Court's entire discussion of the issue is as follow:

> Third, they [respondents on appeal] urged that on June 15, 1971, which was prior to entry of judgment, the corporate powers of defendant Vermont Investment Corporation were suspended under section 23302 of the Revenue and Taxation Code. The corporate powers were revived on June 20, 1972, 20 days after the suspension had been called to defendants' attention by the filing of plaintiffs' brief. The revival of corporate powers validated the procedural steps taken on behalf of the corporation while it was under suspension and permitted it to proceed with the appeal. (*Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369 [105 Cal.Rptr. 29, 503 P.2d 285].)

(*Id.* at 359).

The sole cite to *Peacock* suggests the Court was only affirming the general principle that revival of corporate powers can validate procedural steps taken on appeal during the period of suspension. It does not appear that either party presented the Court with the issue of whether that revival of corporate status after an appeal period had run would retroactively validate an invalid notice of appeal and negate the *res judicata* effect of the

final judgment. The Court certainly does not address or overtly decide that issue.

Moreover, the absence of discussion in either of these cases of the proviso in Revenue & Taxation Code § 23305a that "such reinstatement shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture," further suggests the Court did not intend to interpret it. In fact, *Peacock* relies heavily on the logic of *Traub Co. v. Coffee Break Service, Inc.* (1967) 66 Cal.2d 368, which acknowledged the cases holding that a suspended corporation "lacks the right or capacity . . . to appeal from an adverse decision," and also acknowledged a case holding that a statute of limitations which expired during the suspension was not retroactively tolled by reinstatement. (*Traub*, 66 Cal.2d at 371, 372). *Peacock* also quoted with approval a case which relied on *Traub* and acknowledged the statutory proviso by stating: "provided, of course, that in the meantime substantive defenses have not accrued nor third party rights intervened." (*Peacock*, 8 Cal.3d at 372-73). Thus, Respondents respectfully submit that the *Peacock* Court could not have intended to eviscerate the statutory proviso.

Rooney and *Peacock* are discussed in *Welco Construction, Inc. v. Modulux, Inc.* (1975) 47 Cal.App.3d 69. The court noted the distinction between allowing corporate revival to validate procedural steps taken during the corporation's incapacity, and allowing revival to retroactively defeat substantive defenses that have arisen during the incapacity. The filing of a complaint during incapacity could be validated on revival, but the revival could not be given retroactive effect so as to toll the running of the statute of limitations during the incapacity. The statute of limitations was a substantive defense, not a plea in abatement.

The same is true with the expiration of the appeal period. Revival of corporate status might validate the filing of a notice of appeal (a procedural step) if the appeal period is still running, but it cannot retroactively toll the running of the appeal period (a substantive matter). The running of the appeal period is a jurisdictional matter which creates rights and defenses for Respondents that cannot be retroactively taken away.

Appellant BEG could not cure its default this time. Its Notices of Appeal were invalid and should be stricken. Any new Notice of Appeal would not be timely. The failure to file a timely notice of appeal is jurisdictional.

V. CONCLUSION

The Courts of Appeal have questioned why there seems to be a different rule applied to validating an improper notice of appeal filed during corporate suspension than is applied to validating an improper complaint filed during corporate suspension. The answer is there should not be a different rule; neither filing can be validated after the applicable period for filing has expired. Corporate suspension does not toll time periods. The expiration of the time for filing creates rights and defenses that cannot be prejudiced by reviving corporate status. That result is particularly compelled by the failure to revive corporate status prior to expiration of the period for appeal. The failure to file a timely and proper notice of appeal is jurisdictional and cannot be waived. The filing of a notice of appeal by a party without standing or capacity to do so is also jurisdictional. An invalid appeal filed by a suspended corporation cannot get retroactively validated by revival of corporate status after the appeal

period has expired. BEG's failure to pay its taxes rightfully deprives it of the benefits and protections of the court system.

Thus, Respondents respectfully submit that the Court of Appeal order denying the motion to dismiss the appeal of BEG should be reversed.

Dated: April 5, 2012

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Marin County Superior Court Case No. CV-060796
Court of Appeal Case No. A133177; Supreme Court Case No. S199887

PROOF OF SERVICE

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My electronic notification address is service@bhplaw.com and my business address is 135 Main Street, 20th Floor, San Francisco, California 94105. On the date below, I served the following:

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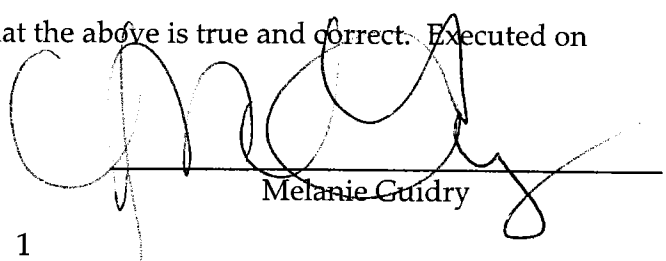
San Francisco, CA 94102

X By placing the document(s) listed above in a sealed envelope and placing the envelope for collection and mailing on the date below following the firm's ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal service on the same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

o By placing the document(s) listed above in a sealed envelope designated for Federal Express overnight delivery and depositing same with fees thereupon prepaid, in a facility regularly maintained by Federal Express, addressed as set forth above.

o By causing personal delivery of the document(s) listed above to the person(s) at the address(es) set forth above.

I declare under penalty of perjury that the above is true and correct. Executed on April 6, 2012, at San Francisco, California.



Melanie Guidry