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IDAHO BOARD OF
TAX APPEALS

2 copies attached

Attorney for the Idaho State Tax Commission

BEFORE THE IDAHO BOARD OF TAX APPEALS

PHILIP L. HART,)
)
 Appellant,) APPEAL NO. 10-B-1289
)
 -vs-) MEMORANDUM IN SUPPORT OF
) MOTION TO DISMISS
 IDAHO STATE TAX COMMISSION,)
)
 Respondent.)
 _____)

I.

STATEMENT OF THE CASE

This matter is the appeal of a redetermination by the Idaho Tax Commission affirming an income tax deficiency assessed against the Appellant for the years 1996 - 2004. A true and correct copy of that decision is attached to the Appellant's Notice of Appeal. The Appellant, by his own admission, received a copy of the Tax Commission's decision on October 2, 2009. A timely appeal of the decision would have had to have been filed with this board or with the District Court and received not later than January 4, 2010. The board's records show that no such appeal was received. It is the Appellant's assertion that his status as a legislator relieves him of having to take the affirmative step of appealing the Tax Commission's decision in a

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS - 1

timely fashion. The Commission does not agree with the Appellant that the Idaho Constitution relieves the Appellant from filing an appeal in a timely fashion.

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APR 15 2010

II.

ISSUES PRESENTED

IDAHO BOARD OF
TAX APPEALS

A. Whether the Board of Tax Appeals has jurisdiction to review this case in the absence of the taxpayer timely perfecting an appeal of the Tax Commission's decision?

B. Whether taxpayer's status as a legislator relieves taxpayer of his obligation to perfect an appeal under Idaho Code § 63-3049?

III.

FACTS

As noted above, the Tax Commission issued a decision in this case on September 30, 2009. Taxpayer admits that he received a copy of this decision on October 2, 2009. On December 31, 2009, the taxpayer wrote a letter to Deputy Attorney General Erick Shaner stating that it was his intention to file an appeal following the close of the legislative session. In that letter, which is attached as an exhibit to the affidavit of Shelley Sheridan, taxpayer acknowledges that his appeal time would run on January 2, 2010, but asserted his belief that his status as a member of the Idaho Legislature relieves him of having to comply with the statute of limitations contained in Idaho Code § 63-3049.

The Appellant did nothing during the legislative session with respect to this appeal. The legislature adjourned on Monday, March 29, 2010. Two days later, on March 31, 2010, Appellant filed a Notice of Appeal with the Board of Tax Appeals and sent a copy to the Idaho State Tax Commission. Along with a copy sent to the Tax Commission, the Appellant sent the Commission two checks totaling \$9,462.04. The Appellant said he would send the remaining

amount by April 9, 2010. On April 13, 2010, the Tax Commission received a check from the Appellant in the amount of \$1,962.36. To date, the Appellant has paid a total of \$11,424.40 to the Tax Commission on his outstanding deficiency.

APR 15 2010

IDAHO BOARD OF
TAX APPEALS

IV.

DISCUSSION

THE BOARD OF TAX APPEALS LACKS JURISDICTION OVER A TAXPAYER'S APPEAL UNLESS THE TAXPAYER STRICTLY COMPLIES WITH IDAHO CODE § 63-3049 WHICH GOVERNS APPEALS FROM THE TAX COMMISSION TO THE BOARD OF TAX APPEALS OR TO THE DISTRICT COURT.

Idaho Code § 63-3811 governs appeals to the Board of Tax Appeals from a final determination of any tax liability. The Code section provides:

Taxpayers may, within the period herein provided and by following the procedures herein required, appeal to the Board of Tax Appeals for a final determination of any tax liability, including those pursuant to Idaho Code §§ 63-501, 63-511, and 63-3049.

Thus, while this appeal is pursuant to Idaho Code § 63-3811, it must comply with the provisions of Idaho Code § 63-3049. Idaho Code § 63-3049 provides that an appeal must be filed within 91 days of the receipt of notice of the decision of the Idaho State Tax Commission denying in whole or in part, any protest of the taxpayer. The taxpayer, by his own admission, acknowledges that 91 days expired on Saturday, January 2, 2010, thus the appeal should have been received by the Board of Tax Appeals by Monday, January 4, 2010. Unless the taxpayer complies with Idaho Code §§ 63-3811 and 63-3049, this board lacks jurisdiction.

The Idaho Supreme Court took up the issue of the jurisdiction to review appeals from the Tax Commission in Ag Air, Inc. v. Idaho State Tax Commission, 132 Idaho 345, 972 p.2d 313 (1999). That case involved an appeal of a Tax Commission decision by Ag Air. Although that case involved an appeal from the Tax Commission to the District Court, the rules are the same. Regarding the jurisdictional requirement and the requirements of Idaho Code § 63-3049, the

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APR 15 2010

IDAHO BOARD OF
TAX APPEALS

Court held that the District Court did not acquire jurisdiction over the case until payment had been made to the Tax Commission. In this case, no payment was received within the 91-day time period. No payment whatsoever was received until it was mailed by the taxpayer on March 31, 2010. The entire 20 percent was not received until April 13, 2010. The taxpayer did not appeal in a timely fashion and did not pay 20 percent of the tax due in a timely fashion, and consequently, this board lacks jurisdiction.

TAXPAYER'S STATUS AS A LEGISLATOR DOES NOT RELIEVE HIM FROM THE OBLIGATION TO PERFECT HIS APPEAL AND THIS BOARD DOES NOT ACQUIRE JURISDICTION OVER TAXPAYER'S APPEAL EXCEPT WHEN IT IS PERFECTED IN A TIMELY FASHION.

In his letter of December 31, 2009, the taxpayer sets forth his belief that his status as a legislator allows him to defer the filing of his appeal until after the close of the legislative session. The session closed on March 29, 2010. Taxpayer cites as authority the Idaho Const. art. III, § 7 which provides:

Privileged from arrest. - Senators and representatives in all cases, except for treason, felony, or breach of the peace, shall be privileged from arrest during the session of the legislature, and in going to and returning from the same, and shall not be liable to any civil process during the session of the legislature nor during the 10 days next before the commencement thereof; nor shall a member, for words uttered in debate in either house, be questioned in any other place.

Apparently, it is the taxpayer's belief that the phrase "shall not be liable to any civil process" relieves him from the provisions of Idaho Code § 63-3049 which requires him to file his appeal within 91 days of the date he received his decision. Taxpayer recognizes that the appeal time would have run and that his appeal was due in the office of the Idaho Board of Tax Appeals not later than January 4, 2010. However, it is the taxpayer's contention that because the legislature went into session on January 11, 2010, that he was relieved from having to file his appeal by operation of Art. III, sec. 7.

Not being liable to any civil process does not mean that taxpayer is relieved from the operation of statutes of limitations such as those found in Idaho Code § 63-3049. In answering the taxpayer's contention, it is important first to determine a definition of "civil process."

According to Webster's Dictionary, "civil process" is defined:

civil process *n* : a writ or order of court in a civil action; *esp* : a writ for arrest in a civil proceeding

Merriam-Webster Incorporated, Webster's 3rd New International Dictionary, principal copyright 1961, copyright 2002.

No civil process has been issued by this board or by the Tax Commission which conflicts with Art. III, sec. 7 of the Idaho Constitution. No summons has been issued, no subpoena served. The Tax Commission is not seeking contempt proceedings nor a warrant for civil arrest. Art. III, sec. 7 prohibits these things, but it does not stay the statute of limitations and excuse the Appellant from his obligation to file a timely appeal.

Arizona has a provision in its constitution similar to Art. III, sec. 7. The Arizona provision can be found at Art. IV, part 2, sec. 6 of the Arizona Constitution and provides:

Members of the legislature shall be privileged from arrest in all cases except treason, felony, and breach of the peace, and they shall not be subject to any civil process during the session of the legislature, nor for 15 days next before the commencement of each session.

This provision is substantively the same as Idaho's except that Arizona extends the privilege for 15 days prior to the session whereas Idaho's extends to only 10 days prior to the session. The Arizona Supreme Court had occasion to interpret this provision in Smith v. Arizona Citizens Clean Elections Commission, 212 Arizona 407, 132 p.3d 1187 (2006). The Arizona court noted that the purpose of the provision was to prevent either a criminal or civil arrest of a legislator that would prevent a legislator from attending the session. After noting the rationale, the court went on to hold:

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS - 5

RECEIVED
APR 15 2010

IDAHO BOARD OF
TAX APPEALS

That rationale does not pertain here. Smith is not defending a suit brought by another. Instead, Smith has invoked the jurisdictions of the courts. On January 24, 2006, for example, Smith filed a petition for review urging this court to accept jurisdiction and reverse the court of appeals memorandum decision, which has affirmed the superior courts judgment that Smith should forfeit his seat in the legislature.

RECEIVED
APR 15 2010

132 p.2d at 1190.

IDAHO BOARD OF
TAX APPEALS

In this case, the taxpayer is seeking to invoke the jurisdiction of this board and is not defending himself from civil process. It is the taxpayer who is filing this action. In addition, civil process means a writ or order of a court in a civil action and, in particular, a writ for arrest in a civil proceeding. If the Tax Commission were seeking to enforce an administrative summons against Representative Hart or attempting to subpoena him in a judicial or administrative proceeding, then Art. III, sec. 7 of the Constitution would be pertinent. However, this is not what is happening. Representative Hart is arguing that Art. III, sec. 7 tolls the statute of limitations. I am aware of no case in which a court has held that a constitutional provision similar to Art. III, sec. 7 tolls the statute of limitations in a civil action or for an appeal from an administrative or judicial action.

It is also worth noting that in the Arizona case, the court noted that appeal times are jurisdictional. The court held on a related matter:

It is well settled that the time for filing an appeal, whether by appeal or by complaint for judicial review following the conclusion of the administrative process is jurisdictional. (Citations omitted.) The Commission has no power to waive it because the failure to timely appeal "deprive[s] th[e] court of jurisdiction to review the [administrative] decision.

132 p.3d at 1193.

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APR 15 2010

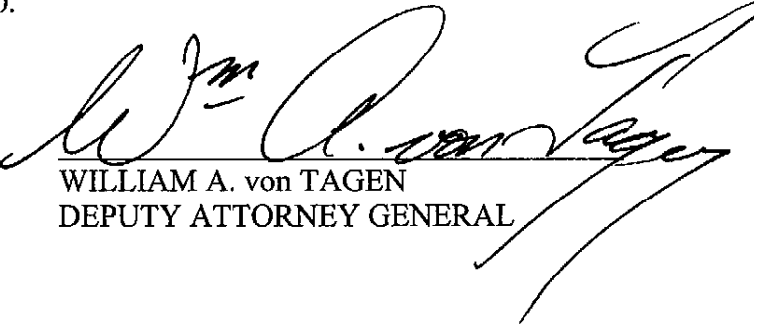
IDAHO BOARD OF
TAX APPEALS

V.

CONCLUSION

The taxpayer, Phil Hart, is seeking to use his status as a legislator to relieve himself of having to comply with the statute of limitations set forth in Idaho Code § 63-3049. Representative Hart has misread Art. III, sec. 7, and in so misreading, has failed to comply with the mandatory provisions of Idaho Code § 63-3049. Consequently, this board is without jurisdiction to hear Representative Hart's appeal. The board has no alternative but to dismiss the appeal of the taxpayer, Phil Hart.

DATED this 15th day of April 2010.



WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 15th day of April 2010, served a copy of the within and foregoing MOTION TO DISMISS by sending the same by United States mail, postage prepaid, in an envelope to:

PHILIP L HART
2900 GOVERNMENT WAY #262
COEUR D'ALENE ID 83815



WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL