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MAY 24 2010

IDAHO BOARD OF  
TAX APPEALS

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BEFORE THE IDAHO BOARD OF TAX APPEALS

PHILIP L. HART,  
Appellant

: APPEAL NO. 10-B-1289

vs.

APPELLANT MR. HART'S  
: MEMORANDUM IN OPPOSITION  
TO MOTION TO DISMISS

IDAHO STATE TAX COMMISSION  
Respondent.

\_\_\_\_\_:

COMES NOW Appellant Philip L. Hart (Mr. Hart), by and through his attorney, and files this Memorandum in Opposition to the Idaho State Tax Commission's (ISTC) Motion to Dismiss.

INTRODUCTION

This memorandum is being submitted following conversations with Board staff that represented that a brief filed before May 24<sup>th</sup> would be timely and despite the fact that a Motion for An Extension of Time was filed earlier today. If the Board grants the Motion for An Extension of Time the right to supplement this memorandum is reserved.

FACTS

Mr. Hart received a copy of the ISTC's decision on October 2, 2009. Because the 91 day time period to file an appeal with this Board would have run on a Saturday the appeal, absent other circumstances, would have been due by January 4, 2010. As a member of the 2010 Idaho State Legislature, Hr. Hart is not liable to any civil process during the session of the legislature, nor during the ten days next before the commencement there. Art. III, Section 7 Idaho Constitution. It is a matter of common knowledge that the Idaho Legislature convened on

January 11, 2010 and the preceding next ten days, because of a national holiday, is December 31, 2009. On December 31, 2009 Mr. Hart advised the ISTC of his appeal of its decisions. The number of days from December 31, 2009 through January 4, 2010 is four.

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The Idaho Legislature adjourned on March 29, 2010. On March 30, 2010, the appeal time began to run again and the four days would extend through April 2, 2010. On March 30, 2010 Mr. Hart sent his Notice of Appeal that was lodged with the Board and received by the ISTC on March 31, 2010. The ISTC also received Mr. Hart's checks and the promise to pay.

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The ISTC accepted the checks of Mr. Hart, his promise to pay, and his check in fulfillment of his promise to pay. In lieu of a cash deposit a taxpayer may deposit any other type of security acceptable to the tax commission. I. C. 63-3049 (b). The ISTC has never advised Mr. Hart that his promise to pay was not acceptable security. ISTC cashed Mr. Hart's check in fulfillment of his promise.

On January 5, 2009 U.S. Code section 7491 was adopted. It changed the ultimate burden of proof in tax appeals from the taxpayer to the revenue service. I.C. section 63-3002 makes Idaho act identical to the provisions of the federal act. I.C. section 63-3004 adopted the federal code as in effect on February 17, 2009.

#### ARGUMENT

The ISTC's argument claims lack of timeliness and failure to post bond. Each prong of the argument will be addressed below:

##### Mr. Hart Perfected His Appeal

##### (a) The appeal was timely filed.

Article III Section 7 of the Idaho Constitution specifically provides that any Idaho State Representative, such as Mr. Hart, "shall not be liable to any civil process during the session of the legislature, nor during the ten days next before the commencement thereof..."

The question presented by Article III is what is "any civil process"? Respondent ISTC has chosen to ignore the adjective "any" and limited its argument to two a combination of two words that it chooses to combine as one word labeling it a noun. It has provided a cite to a copyrighted dictionary of 2002 vintage. Counsel for Appellant Mr. Hart has been unable to locate a copy of that dictionary and further has been unable to locate "civil process" by internet search. Indeed Blacks Law Dictionary, 1968, does not contain "civil process." The ISTC by eliminating "any"

and seeking to combine "civil process" into a noun suggests that it is a limited "word" that only refers to a "summons" or a "subpoena" or a "warrant."

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Appellant Mr. Hart submits that the word "any" is critical to Article III Section 7 interpretation and further that the words "civil" and "process" are two distinct words with the word "civil" being an adjective and the word "process" being a noun. It is fundamental and universally accepted that statutes must be read to give effect to every word, clause and sentence. *Wright v. Willer*, 111 Idaho 474, 725 P. 2d 179 (1986)

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There is no definition for a noun "civil process" as set forth in the 2010 Merriam-Webster on-line dictionary. The 2010 Merriam-Webster on-line dictionary treats the two words separately. Even if there is a one word noun, "civil procedure" it is beyond dispute that statutes are to be read and obeyed by the people according to their common usage among the great mass of the people who are expected to read and obey them. *City of Lewiston v. Mathewson*, 78 Idaho 374, 354, 303 P.2d 680, 684 (1965). Indeed the *City of Lewiston v. Mathewson* case addresses the construction of a statute that has the adjective "junk" with the noun "dealer." It does not treat the words "junk dealer" as a one word noun. The Court carefully analyses the two words one by one to interpret the meaning of the statute. The respective definitions of the words "civil" as an adjective and "process" as a noun are as follows:

**MLA Style**

"civil." *Merriam-Webster Online Dictionary*. 2010.  
Merriam-Webster Online. 21 May 2010  
<<http://www.merriam-webster.com/dictionary/civil>>

**APA Style**

civil. (2010). In *Merriam-Webster Online Dictionary*.  
Retrieved May 21, 2010, from <http://www.merriam-webster.com/dictionary/civil>

CIVIL

Pronunciation: \ˈsi-vəl\

Function: *adjective*

Etymology: Middle English, from Middle French, from Latin *civilis*, from *civis*

Date: 14th century

**1 a** : of or relating to citizens **b** : of or relating to the state or its citizenry <civil strife>

**2 a** : **CIVILIZED** <civil society> **b** : adequate in courtesy and politeness : **MANNERLY** <a civil question>

**3 a** : of, relating to, or based on civil law **b** : relating to private rights and to remedies sought by action or suit distinct from criminal proceedings **c** : established by law

**4** : of, relating to, or involving the general public, their activities, needs, or ways, or civic affairs as distinguished from special (as military or religious) affairs

1.

Main Entry: **pro·cess**

Pronunciation: \ˈprā-,ses, ˈprō-, -səs\

Function: *noun*

Inflected Form(s): plural **pro·cess·es** \-,se-səz, -sə-, -,sēz\

Etymology: Middle English *proces*, from Anglo-French *procés*, from Latin *processus*, from *procedere*

Date: 14th century

**1 a** : PROGRESS, ADVANCE <in the process of time> **b** : something going on :

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**3 a** : the whole course of proceedings in a legal action **b** : the summons, mandate, or writ used by a court to compel the appearance of the defendant in a legal action or compliance with its orders

The word “any” which the ISTC wishes to ignore is far reaching. As reflected by the Merriam-Webster 2010 on-line edition its scope is all encompassing:

Main Entry: **any**

Pronunciation: \ˈe-nē\

Function: *adjective*

Etymology: Middle English, from Old English *ænig*; akin to Old High German *einag* any, Old English *ān* one — more at ONE

Date: before 12th century

**1** : one or some indiscriminately of whatever kind: **a** : one or another taken at random <ask any man you meet> **b** : EVERY —used to indicate one selected without restriction <any child would know that>

**2** : one, some, or all indiscriminately of whatever quantity: **a** : one or more —used to indicate an undetermined number or amount <have you any money> **b** : ALL —used to indicate a maximum or whole <needs any help he can get> **c** : a or some without reference to quantity or extent <grateful for any favor at all>

**3 a** : unmeasured or unlimited in amount, number, or extent <any quantity you desire> **b** : appreciably large or extended <could not endure it any length of time>

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A common sense construction of Article III section 7, applicable the great mass of the people who are expected to read and understand it, is that it is applicable to "any" <sup>matter</sup> "relating to civil law" that is "relating to private rights" involving the "whole course of proceedings in a legal action" and that its application is "without restriction."

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The ISTC's argument advanced by a deputy attorney general seeking to ignore "any" <sup>and</sup> interpret "civil process" as one word, a noun, and not as distinct words with common and understandable meanings is at best unsupportable. In this matter the deputy has taken an adversarial position that is unsupported by any formal Attorney General Opinion or case law. In challenging the operation of a specific Article of Idaho's Constitution, against a sitting member of the Idaho legislature, one would expect the deputy to take a more thorough and reasoned approach.

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Also the argument advanced that Mr. Hart is "seeking to invoke the jurisdiction of this board and not defending himself from civil process" is similarly without merit. Mr. Hart without question is defending himself from the overreach of the Idaho State Tax Commission

(b). The deposit requirement was met.

Mr. Hart filed two checks totaling \$9,462.04 and his promise to pay the balance of the twenty percent, \$1,962.36. Mr. Hart's check for the balance was received and cashed by the ISTC. The affidavit of Shelly Sheridan submitted by the ISTC confirms these facts and the memorandum admits these facts. It is not disputed, nor is it even suggested, by ISTC that it, at any time or in any manner contacted Mr. Hart and informed him that his promise to pay was not "security acceptable to the tax commission." Idaho Code section 63-3049 (a). The ISTC by inaction waived any claim that the security was not acceptable to it and it is estopped to claim otherwise at this time. The ISCT is specifically granted by statute the discretion to accept "other type of security" in lieu of a cash deposit. Idaho Code section 63-3049. Whether estoppel exists against the government is tested generally by the same rules as those applicable to private persons. The government should not be permitted to utilize tactics that would not be countenanced between private parties. The government should be an example to its citizens, and by that is meant a good example and not a bad one. *Ware v. Idaho State Tax Commission*, 98 Idaho 477, 567 P. 2d 423 (1977). Equitable estoppel may be applied to prevent assertion of a statute of limitation if an actor's conduct caused the other party to refrain from some action

during the limitation period. *Johnson v. McPhee*, 147 Idaho 455, 210 P. 3d 563 (Id. App. 2009) The ISTC's failure to promptly, or at anytime prior to its present motion, advise Mr. Hart, upon receipt of the checks and the promise to pay on March 31, 2010, that it did accept his promise to pay coupled with its cashing of the payment shortly thereafter clearly prejudices Mr. Hart if its belated argument is accepted. See *Zumwalt v. Stephan et. al.* 113 Idaho 822, 748 P. 2d 406 (Id. App. 1987).

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(c) The twenty percent deposit requirement violates Mr. Hart's constitutional and due process rights.

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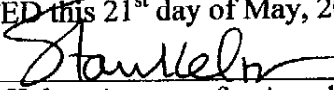
The 14<sup>th</sup> Amendment Section 1 to the United States Constitution specifically provides that "no state shall make or enforce any law which...shall deprive any person of...property, without due process of law." Any citizens right to challenge a state's attempt to take his property, especially a "tax" is protected by the 14<sup>th</sup> Amendment. See *Harper v. Virginia Board of Elections*, 865 S. Ct. 1079, 383 U.S. 663 (1966) The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 34 S. Ct. 779. Tying the right to challenge the state's attempt to deprive a citizen of his property and the opportunity to be heard is an unconstitutional violation of due process of law.

If the requirement of a twenty percent deposit was even arguably constitutional, such a requirement was implicitly repealed in 2009 by the Idaho legislature when it amended Idaho Code section 63-3004 which made the Internal Revenue Code of 1986 in effect on February 17, 2009 applicable for Idaho income tax purposes. U.S. Code section 7491 enacted on January 5, 2009 shifted the burden of proof from the taxpayer to the agency and provided the taxpayer with protection similar to "innocent until proven guilty" whereas the prior status of the law use to be "guilty until the taxpayer proves his innocence." Based upon this statutory change there is not even a "reasonable basis" to require a taxpayer, as a condition of challenging the Tax Commission's actions seeking to take property, to deposit any percentage of the disputed amount. The reasonable and rational approach is to require a "filing fee" just as in District Court or even before the federal Tax Court.

#### CONCLUSION

The Respondent ISTC's motion to dismiss should be denied.

DATED this 21<sup>st</sup> day of May, 2010.

  
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Starr Kelso, Attorney for Appellant Mr. Hart

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CERTIFICATE OF SERVICE: I certify that a copy was mailed to William A. von Tagen attorney for Respondent, postage prepaid, at P.O. Box 36, Boise, Idaho 83722-10 on May 21, 2010 and that a copy was also faxed to him at 208-334-7844 on said date.

  
\_\_\_\_\_  
Starr Kelso