

IN THE SUPREME COURT OF THE STATE OF IDAHO

PHILIP L. HART,) Supreme Court No. 38756-2011
)
Appellant,) **RESPONDENT'S BRIEF**
)
vs.)
)
IDAHO STATE TAX COMMISSION and)
IDAHO BOARD OF TAX APPEALS,)
)
Respondents.)

RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District
of the State of Idaho, in and for the County of Kootenai

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District Judge Presiding

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STATEMENT OF THE CASE

NATURE OF THE CASE

This case arises out of an appeal of an individual income tax notice of deficiency determination issued by the Respondent, Idaho State Tax Commission, to Appellant, Phil Hart. The appeal of the Respondent Tax Commission's decision was dismissed by the Idaho Board of Tax Appeals for lack of jurisdiction resulting from Appellant's failure to comply with time and security payment requirements found in Idaho Code § 63-3049. Appellant appealed the Board of Tax Appeals' dismissal to the District Court pursuant to Idaho Code § 63-3812. The District Court dismissed this appeal for lack of subject matter jurisdiction, citing Appellant's failure to comply with the jurisdiction requirements found in Idaho Code § 63-3049. Appellant's apparent position is that he met those requirements when the provisions found in Article III, Section 7 of the Idaho Constitution are taken into consideration and applied. It is the position of the Respondent that the decisions of the District Court and the Idaho Board of Tax Appeals to dismiss Appellant's appeal were correct.

COURSE OF THE PROCEEDINGS

This appeal originated from the request for redetermination of two income tax Notices of Deficiency Determination by Appellant, Phil Hart. The Notices of Deficiency Determination were issued by an auditor of the Idaho State Tax Commission pursuant to Idaho Code § 63-3045(a). The Notices of Deficiency Determination were issued on September 4, 2008. R.p. 129. Appellant sought a redetermination pursuant to Idaho Code § 63-3045(b). A final decision was issued by the Idaho State Tax Commission pursuant to Idaho Code § 63-3045(b)(6) on September 30, 2009. R.p. 137. By his own admission, Appellant received this decision on October 2, 2009. R. p. 186, R. p. 198.

Idaho Code § 63-3049(a) provides that a decision of the Idaho State Tax Commission may be appealed within 91 days after the receipt of notice of the decision. Prior to appealing, Idaho Code § 63-3049(b) requires that 20 percent of the amount asserted to be due and owing to the Tax Commission be paid to the Commission. Taking into account the weekend and the New Year's holiday, this 91-day period expired on January 4, 2010. Appellant's position is that the period for filing an appeal was extended further by operation of Article III, Section 7 of the Idaho Constitution. R.p. 186. Appellant is a member of the legislature serving in the Idaho House of Representatives.

On March 30, 2010, Appellant mailed a document entitled "Notice of Appeal" to the Idaho Board of Tax Appeals and the Idaho State Tax Commission. R.p. 215. Accompanying this "Notice of Appeal" were two checks which totaled less than 20 percent of the amount asserted to be due and owing by the Tax Commission decision.

The Board of Tax Appeals dismissed the appeal for failure to comply with the provisions of Idaho Code § 63-3049. Appellant, pursuant to Idaho Code § 63-3812, appealed this dismissal to the District Court. The District Court, in response to a motion to dismiss filed by Respondent, dismissed the appeal for lack of subject matter jurisdiction resulting from Appellant's failure to comply with the provisions of Idaho Code § 63-3049 in order to invoke the Board of Tax Appeals' jurisdiction. This appeal contests that dismissal.

STATEMENT OF FACTS

As noted above, the Tax Commission issued a decision in this case on September 30, 2009. The amount due in the decision totaled \$53,523. Twenty percent of this total is \$10,704.60. On December 31, 2009, Appellant wrote a letter to Deputy Attorney General Erick Shaner admitting that he received a copy of this decision on October 2, 2009,

acknowledging that his appeal time would run on January 2, 2010, and stating it was his intention to file an appeal following the close of the legislative session. R.p. 127.

The Appellant did nothing during the legislative session with respect to this appeal. The legislature adjourned on Monday, March 29, 2010. Appellant sent the Commission two checks totaling \$9,462.04 enclosed in a letter titled, "Notice of Appeal to the Board of Tax Appeals," dated March 30, 2010, and promised to pay the remaining amount by April 9, 2010. R.p. 148. This payment was less than 20 percent of the total due under the Tax Commission's decision. As noted in the later District Court decision, Appellant's letter did not contain any of the required information for an appeal. R.p. 348. It did not set forth objections, nor any basis for them, did not state an amount in dispute, and did not reference any Commission decision. On March 31, 2010, Appellant finally filed a Notice of Appeal with the State Board of Tax Appeals and sent a copy to the Idaho State Tax Commission. R.p. 198. A third partial payment of \$1962.36 was enclosed in another letter, dated April 9, 2010 and titled, "Notice of Appeal to the Board of Tax Appeals." R.p. 128. To date, Appellant has paid a total of \$11,424.40 to the Tax Commission on his outstanding deficiency.

On April 15, 2010, the Respondent filed with the Board of Tax Appeals a Motion to Dismiss, R.p. 164-165, Memorandum in Support of Motion to Dismiss, R.p. 166-172, and Affidavits of Kristine Gambée, R.p. 191-193, and Shelley Sheridan, R.p.183-185. On April 19, 2010, Appellant sent a letter to the Board of Tax Appeals acknowledging his failure to remit the required 20 percent deposit on time and offering the partial explanation:

"You will see in my letter of March 30, 2010, I promised to pay the \$1962.36 balance of the deposit by April 9th. It was impossible for me to put together the full amount without the opportunity to be at home during business hours to organize the remaining \$1962.36."

On May 21, 2010, Appellant filed both a Motion for Extension of Time to Respond to Respondent's Motion to Dismiss, R.p. 114-115, and a Memorandum in Opposition to Motion to Dismiss. R.p. 117-123. On May 26, 2010, the Tax Commission filed a reply to Appellant's Memorandum in Opposition to Motion to Dismiss. R.p. 101-113. The State Board of Tax Appeals found Appellant's appeal untimely, both because it was submitted too late and because the 20 percent deposit followed two weeks later than the appeal itself, and on August 24, 2010, issued a Final Order dismissing the appeal. R.p. 77-78

Appellant filed a Motion for Reconsideration to the State Board of Tax Appeals on September 3, 2010, R.p. 71-76. On September 24, 2010, the State Board of Tax Appeals issued an Order Denying Appellant's Motion for Reconsideration. R.p. 67-68.

On October 22, 2010, Appellant filed an appeal from the Idaho Board of Tax Appeals decision in the District Court of the First Judicial District setting forth sixteen issues, including the previous claims, as well as estoppel and due process claims. R.p. 1-7. That court entered a final Judgment of Dismissal on March 17, 2011, leading to this appeal.

ISSUES

- A. Did Appellant Appeal the Tax Commission's Decision in a Timely Fashion?
- B. Does Article III, Section 7 of the Idaho Constitution Extend Appellant's Time for Bringing an Appeal of a Tax Commission Decision?
- C. Did Appellant Pay 20 Percent of His Outstanding Tax Liability as Required by Idaho Code § 63-3049 Prior to Bringing an Appeal in a Timely Fashion?

Tax Commission Requests Costs and Attorney Fees on Appeal

The Tax Commission requests costs and attorney fees on appeal pursuant to Idaho Code § 63-3049 and Idaho Appellate Rules 40 and 41. For the reasons discussed below, the Tax Commission believes it should prevail on appeal.

ARGUMENT

I. THE APPEALS TO THE DISTRICT COURT AND THIS COURT ARE LIMITED BY IDAHO CODE § 63-3812 TO THOSE ISSUES WHICH WERE PROPERLY PRESENTED TO THE IDAHO BOARD OF TAX APPEALS.

Idaho Code § 63-3812 provides that taxpayers may appeal “a decision of the board of tax appeals or a decision on a motion for rehearing.” The scope of the appeal is limited by Idaho Code § 63-3812(c), which provides in relevant part:

(c) Appeals *may be based upon any issue presented by the appellant to the board of tax appeals* and shall be heard and determined by the court without a jury in a trial de novo on the issues in the same manner as though it were an original proceeding in that court. (Emphasis added)

An appellant receives a trial de novo, but this de novo review is only available for issues that were presented to the Board of Tax Appeals.

Idaho Board of Tax Appeals Rule 047.01 (IDAPA 36.01.01.047.01) lists what proper notice of a State Tax Commission Appeal must contain:

047. NOTICE OF APPEAL -- STC APPEALS (RULE 47).

01. Contents STC Appeals. In appeals brought under Section 63-3049, Idaho Code, the notice of appeal shall include: (2-18-05)

a. A copy of the redetermination or final decision by the State Tax Commission appealed from; (2-18-05)

b. The objections of the appellant to the redetermination or final decision; (2-18-05)

c. The basis for said objections; (2-18-05)

d. A statement of the amount in dispute shall be included with the notice of appeal if the amount in dispute is different from the redetermination or deficiency determination decision; and (2-18-05)

e. Proof of compliance with the mandatory deposit requirements as provided in Section 63-3049, Idaho Code, in the form of a receipt from the State Tax Commission. (2-18-05)

Like Idaho Code § 63-3049, Idaho Board of Tax Appeals Rule 047.02 (IDAPA 36.01.01.047.02) requires that these items be filed with the Idaho Board of Tax Appeals within 91 days of

receiving notice of a decision of the Idaho State Tax Commission. Unless the appellant to the Board of Tax Appeals lists the objections to the State Tax Commission's determination, the basis for the objection, and a statement of the amount in dispute, his appeal has not been properly presented to the Board.

Appellant attempts to bootstrap issues which were not before the Board of Tax Appeals, and, therefore, not properly before the District Court, by misinterpreting provisions of Idaho Code § 63-3812. Apparently, it is Appellant's position that since he attempted to file documents with the Board of Tax Appeals raising issues concerning the constitutionality of the Idaho income tax, the District Court may properly review those issues even though the Board could not. In Section 4 of his appeal to the District Court, Appellant lists his "Preliminary Statement of Issues." These issues for appeal are lettered with letters "a" through "p," and most of the issues are constitutional questions implicating both the Idaho and United States Constitutions. Many of the positions taken by Appellant in District Court, and here on appeal, are issues that were never presented to the Board of Tax Appeals. Issues may only be properly presented to the Board and the Board may only consider issues if it has jurisdiction over the matter. As such, pursuant to Idaho Code § 63-3812(c), those issues are not proper subjects of an appeal, even if the court has jurisdiction to hear the appeal.

In filings subsequent to the Board of Tax Appeals dismissing his case, Appellant's arguments vary and have expanded. Appellant has argued that because his tax deficiency was originally on separate dockets, he actually fulfilled the requirements for an appeal of at least one deficiency. R.p. 245. Appellant argued the constitutionality of the 20 percent security requirement. R.p. 245. Appellant argued estoppel because the Tax Commission did not inform him his promise to pay them later was not proper security. R.p. 3. Appellant raised due process

claims involving transcription of Tax Commission meetings, changes in burdens of proof in Idaho law, and lack of live hearings for his appeal to the Board of Tax Appeals. R.p. 4. There remains however, only one issue presented to the Board of Tax Appeals, which is controlling in Appellant's subsequent appeals.

The only "issue presented" to the Board of Tax Appeals by Appellant was whether the requirements of Idaho Code § 63-3049 were met such that jurisdiction existed for the Board of Tax Appeals to consider the merits of his appeal. Before Appellant presented any argument on any issue other than jurisdiction to the Board of Tax Appeals, his case was dismissed for lack of jurisdiction. In the Board's Final Order Dismissing Appeal, issued August 24, 2010, the Board stated, "A question of jurisdiction is fundamental; it cannot be ignored when brought to the court's attention and should be addressed prior to considering the merits of an appeal." *See* Board's Final Order Dismissing Appeal, at R.p. 78. The Board found that Appellant's appeal was not timely filed in accordance with the requirements of Idaho Code § 63-3049 and that he also failed to meet the 20 percent pre-pay requirement set forth in the same section. Additionally, Appellant failed to follow all the requirements for appeal set forth in Board of Tax Appeals Rule 047.01. Appellant's notice letter of March 30, 2010, failed to include any of the required documents or information, and his subsequent Notice of Appeal dated March 31, 2010, still failed to show proof of compliance with the deposit requirements in Idaho Code § 63-3049. Thus, Appellant's appeal to the Board was properly dismissed for lack of jurisdiction, and no issues beyond the jurisdiction question were ever presented to the Board.

Appellant, through his own deliberate or negligent actions, denied the Board of Tax Appeals, the District Court, and this court jurisdiction to review his case by failing to file a timely appeal that complied to the statutory and jurisdictional requirement to pay 20 percent of

the amount in dispute. The District Court's jurisdiction is derivative of the Board's jurisdiction. Thus, Appellant's very conscious act of waiting nearly six months to file an appeal denied not only the Board of Tax Appeals jurisdiction to review this case, but also denied the District Court and now this court jurisdiction to review the substantive arguments in his pleadings.

This court does not have jurisdiction to review any of the issues Appellant is raising. As set forth above, the only issue this court has jurisdiction to review is the one issue that was presented to the Board of Tax Appeals; whether the Board had jurisdiction under Idaho Code § 63-3049 to hear Appellant's case. Among the issues Appellant brought forth for the District Court and this court to review, he failed to state the one and only issue over which this court has jurisdiction to review; whether he met the requirements of Idaho Code § 63-3049 such that jurisdiction existed for the Board of Tax Appeals to consider the merits of his appeal.

II. IDAHO RULE OF CIVIL PROCEDURE 12(b), BY ITSELF, DOES NOT GOVERN CONSIDERATION OF THIS MOTION TO DISMISS, BUT EVEN IF IT DID, IT WOULD NOT PRECLUDE THE DISTRICT COURT FROM TAKING EVIDENCE ON SUBJECT MATTER JURISDICTION.

Appellant devotes the first section of his argument to what he characterizes as the District Court's applying a factual challenge analysis to the Respondent's Motion to Dismiss for lack of subject matter jurisdiction rather than a facial challenge analysis. By this, Appellant apparently means that this District Court should have considered Respondent's Motion to Dismiss solely under Idaho Rule of Civil Procedure 12(b)(1) and that the District Court cannot consider evidence not in the pleadings when considering a motion to dismiss under Rule 12(b)(1). Appellant is wrong in both of these positions.

First, Idaho Code § 63-3812(a) provides that appeals from the Board of Tax Appeals "shall be taken and perfected in accordance with Rule 84 of the Idaho Rules of Civil Procedure." Rule 84 does not in turn restrict the District Court to the Petition for Judicial Review or the

Notice of Appeal in deciding subject matter jurisdictional issues; Rule 84 instead contemplates the submission of an agency record for deciding issues on appeal without any exception for “jurisdictional” issues. Thus, the District Court could properly consider any agency record provided by the respondent in deciding the jurisdictional issue of perfection of the appeal under Idaho Code § 63-3812 as well as any of Appellant’s filings in the District Court.

Second, even where Rule 12(b)(1) applies to the District Court’s consideration of its own order of the Board of Tax Appeals’ subject matter jurisdiction to consider the merits of Appellant’s claims, as shown below, Rule 12(b)(1) does not prevent the District Court from taking evidence beyond the pleadings when considering a motion to dismiss for lack of subject matter jurisdiction.

Idaho Rule of Civil Procedure 7(b) generally applies to motions. Rule 7(b)(3)(B) generally allows affidavits or other factual materials to be filed in support of motions. Rule 12(b) allows eight enumerated defenses, including lack of jurisdiction over the subject matter, to be raised by motion. The only restriction on reviewing matters outside the pleading in considering 12(b) motions is contained in Rule 12(b) itself. If matters outside the pleadings are considered under Rule 12(b)(6) for failure to state a claim upon which relief may be granted, the 12(b)(6) motion shall be treated as one for summary judgment, and all parties must be given a chance to present materials that could be presented in support of or opposition to a summary judgment motion. There is no such provision for 12(b)(1) or any other 12(b) motions other than 12(b)(6) motions. The clear implication is that the District Court may go beyond the pleadings in considering all 12(b) motions other than 12(b)(6).

This Court has recognized this implication in Owsley v. Idaho Industrial Com’n, 141 Idaho 129, 133, n.1, 106 P.3d 455, 459, n.1 (2005), in which it said that, “Factual challenges [to

subject matter jurisdiction], on the other hand, allow the court to go outside the pleadings without converting the motion into one for summary judgment,” citing Osborn v. United States, 918 F.2d 724, 729, n.6 (8th Cir. 1990); 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1350 (2004). Whether the District Court considered itself to be reviewing a facial or a factual challenge to the Board of Tax Appeals jurisdiction and thus to its own jurisdiction to reach the merits does not matter; the District Court had authority to conduct a “factual” review and consider matters beyond the pleadings to determine whether the Board of Tax Appeals had subject matter jurisdiction to hear Appellant’s appeal from the State Tax Commission’s Notices of Deficiency. As stated in WRIGHT & MILLER § 1350:

When the movant’s purpose is to challenge the substance of the jurisdictional allegations, he may use affidavits and other additional matter to support the motion. Conversely, the pleader may establish the actual existence of subject matter jurisdiction through extra-pleading material. The note below contains citations to a wide array of cases from the four corners of the federal judicial system involving the district court’s broad discretion to consider relevant and competent evidence on a motion to dismiss for lack of subject matter jurisdiction to resolve factual issues. When the motion is directed solely at the sufficiency of the complaint’s jurisdictional allegations, then it is unlikely that affidavits or other materials outside the pleadings will be necessary.

(12,233-word footnote with 698 case citations omitted.) Accordingly, under Rule 12(b)(1), the District Court could properly consider matters beyond the pleadings in deciding the Motion to Dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction.

III. NEITHER DUE PROCESS NOR THE IDAHO RULES OF CIVIL PROCEDURE REQUIRE THE COURT TO HOLD HEARINGS ON MOTIONS, LET ALONE MOTIONS TO RECONSIDER.

Idaho Rule of Civil Procedure 7(b)(4) provides that the District Court “may” hold a hearing on any motion. The Civil Rules do not require a hearing, and the Court may decide motions on the papers.

Neither does the due process clause require an oral argument or hearing on issues of law,

or that the client be present for argument of a motion. *See: In Interest of Baby Doe*, 130 Idaho 47, 50-52, 936 P.2d 690, 693-695 (Ct.App. 1997) (father did not have due process right to be present for evidentiary hearing when he was represented by counsel and his deposition was available); *Frost v. Diocese of San Bernardino Educ. and Welfare Corp. for ben. of St. Catherine of Alexandria*, 302 Fed.Appx. 729, 730, 2008 WL 5136612, 2 (9th Cir. 2008) (“Finally, Frost argues unpersuasively that the district court violated his due process rights by denying oral argument on the motions to dismiss. We have long held that ‘[t]he opportunity to be heard orally on questions of law is not an inherent element of procedural due process, even where substantial questions of law are involved.’ *Dredge Corp. v. Penny*, 338 F.2d 456, 462 n. 14 (9th Cir. 1964). The denial of oral argument here was not improper.”)

IV. APPELLANT FAILED TO TIMELY FILE HIS APPEAL WITH THE IDAHO BOARD OF TAX APPEALS, THEREBY DENYING THE BOARD AND THE COURTS JURISDICTION TO REVIEW THE TAX COMMISSION’S DECISION.

Idaho Code § 63-3811 governs appeals to the Board of Tax Appeals from a final determination of any tax liability. Idaho Code § 63-3811 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 the appeal was pursuant to Idaho Code § 63-3811, it must comply with the provisions of Idaho Code § 63-3049. Idaho Code § 63-3049 governs the review of Tax Commission decisions by the courts and by the Board of Tax Appeals. 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. Appellant, 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.

This court took up the issue of 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. Regarding the jurisdictional requirement and the requirements of Idaho Code § 63-3049, the Court held that the District Court did not acquire jurisdiction over the case until payment had been made to the Tax Commission. Failure to comply with the requirements of Idaho Code § 63-3049 denies subsequent judicial review, because appellate review is a statutory right, not a constitutional entitlement, and is not required by due process. Tarbox v. Tax Commission of the State of Idaho, 107 Idaho 957, 961 695 P.2d 342, 346 (1985). In that case, the Appellants challenged the validity of the surety bond requirement as violating their due process rights by denying them access to procedural remedies. The court however, noted that the Appellants were given the opportunity for review, but failed to take advantage of it, stating:

“Thus to the extent that they may be without a further remedy, it stems from their inability or unwillingness to comply with the jurisdictional requirements of I.C. § 63-3049(b).”

Id. at 960. Thus, the requirements of the Code are jurisdictional, and the failure of Appellant to comply with Idaho Code § 63-3049 denied both the Board of Tax Appeals and the courts jurisdiction over his case.

It is worth noting that the Supreme Court in Ag Air held that the District Court had no authority to modify the statutory requirements of Idaho Code § 63-3049. *Id.* at 961. The same reasoning would apply to this court when reviewing this case, and denies this Court the authority to modify the requirements of Idaho Code § 63-3049.

In deciding this case, the Court must consider the relevant statutes and apply the limited procedural facts and timeline of this case to those statutes. The essential facts of the case are

uncontroverted. The Idaho State Tax Commission issued a decision on redetermination of Appellant's tax liability as set forth in the Notice of Deficiency Determination on September 30, 2009. Appellant received a copy of that decision on October 2, 2009. Other than a letter to an attorney for the Tax Commission, Appellant took no action until March 30, 2010, when he mailed a "Notice of Appeal" of the September 30, 2009, decision to the Idaho Board of Tax Appeals. This "appeal" however, did not meet the requirements of Idaho Code §§ 63-3811 and 63-3049. Also on March 30, 2010, Appellant mailed a partial payment of \$9,462.04 to the Idaho State Tax Commission, which did not equal 20 percent of the liability and interest set forth in the September 30, 2009 decision. On April 9, 2010, Appellant mailed to the Idaho State Tax Commission a check for \$1,962.36 which was received on Tuesday, April 13, 2010. This check, together with the partial payment made on March 30, 2010, exceeded 20 percent of the tax liability and interest set forth in the decision of September 30, 2009.

In this case, no appeal was filed within the 91-day time period. Appellant's appeal was dated March 31, 2010, and mailed only the day before, six full months after the Tax Commission's final decision. No payment whatsoever was received until it was mailed by Appellant on March 31, 2010. The entire 20 percent was not received until April 13, 2010. Like the Appellants in Tarbox, Appellant has denied himself review by failing to comply with the statutory requirements of appeal. Because Appellant did not perfect an appeal in a timely fashion, the Board of Tax Appeals did not have jurisdiction to take his appeal on its merits. Consequently, the District Court and this court also lack jurisdiction.

V. ARTICLE III SECTION 7 OF THE IDAHO CONSTITUTION DOES NOT EXTEND APPELLANT'S TIME FOR FILING AN APPEAL BEYOND THE 91 DAYS PROVIDED IN IDAHO CODE § 63-3049.

In his letter of December 31, 2009, Appellant set 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. R.p. 127. Appellant cites as authority the Idaho Const. Art. III, Section 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.

Appellant appears to be arguing that his status as a legislator excuses him from the requirement to file a timely appeal. Appellant's argument suggests that his exemption from liability to any civil process is also an extension of the statute of limitations for him to initiate any civil, administrative, or appellate proceeding against another; in this case, an appeal from an administrative decision of the Tax Commission to the Board of Tax Appeals. Appellant 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, Appellant's contention is that because the legislature went into session on January 11, 2010, he was relieved from having to file his appeal by operation of Art. III, Section 7. It appears Appellant's argument is that the statute of limitations is extended during the time that the legislator is serving in session and for ten days prior to the commencement of the session.

Appellant, in effect, argues that under Art. III, Section 7, legislators are excused from initiating their own proceedings within statutes of limitation such as the one contained in Idaho Code § 63-3049. Appellant apparently believes that the phrase "shall not be liable to any civil

process” relieves him from the provisions of Idaho Code § 63-3049 which requires his appeal be filed within 91 days of the date he received his decision. Such reasoning would presumably also apply to a variety of civil cases.¹

Not being liable to any civil process does not mean that Appellant is relieved from the operation of statutes of limitations such as those found in Idaho Code § 63-3049. In answering Appellant’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;² *esp* : a writ for arrest in a civil proceeding

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No civil process has been issued by this court, the District Court, the Board of Tax Appeals, or the Tax Commission which conflicts with Art. III, Sec. 7 of the Idaho Constitution.

¹ Other types of cases may better illustrate the possible ramifications of accepting the Appellant’s argument that Art. III, Sec. 7 tolls statutes of limitation. The last three Idaho legislative sessions have an average duration of 94 days. Adding the ten days prior to each session makes an average of 104 days per year that a legislator is protected from service. Should a statute of limitations be tolled for legislators, as the Appellant argues is proper, the statute of limitations common in many civil actions would increase from four years (1460 days) to 5 years and 3 months (1916 days).

² Appellant also begs the question of whether filing a notice of appeal with the Board of Tax Appeals is a matter in which a civil process can issue. Neither administrative proceedings nor judicial review of administrative proceedings are “civil actions.” Smith v. Washington County, Idaho, 150 Idaho 388, 391, 247 P.3d 615, 618 (2010), cases cited therein. There would be very serious implications to holding that all administrative actions are civil processes from which legislators are immune. For example, if Appellant’s arguments were taken to their logical conclusions, during a legislative session legislators who were livestock operators could ignore administrative orders to quarantine diseased livestock, *see, e.g.*, Idaho Code §§ 25-210, 25-218; legislators who were restaurateurs could ignore administrative orders tagging adulterated food or refusing routine health inspections, *e.g.*, Idaho Code §§ 37-118, 37-122, and 37-133; and legislators who were pharmacists could ignore administrative orders for inspection of their records and/or inventories, *e.g.*, Idaho Code § 54-1727. The public health and safety might well suffer from delay in such administrative actions. In other, non-legislative contexts, some other states have held that administrative pleadings or notices are not civil processes. *E.g.*, Pellegrino Food Products Co., Inc. v. City of Warren, 136 F.Supp.2d 391, 406 (W.D.Pa. 2000) (issuance of letter by zoning official regarding use of parking spaces was not a civil process); Hardison v. Booker, 179 Ga.App. 693, 694, 347 S.E.2d 681, 683 (Ga.App. 1986) (delivery of administrative notice of habitual violator status and revocation of driver’s license is not a civil process). Fortunately, the Court need not reach the issue of whether administrative actions invoke a “civil process” within the meaning of Article III, Sec. 7, because there are other grounds for affirming the District Court’s dismissal of the appeal. But these examples show why the Court should not make broad pronouncements suggesting that some or all administrative actions are civil processes within the meaning of that section.

No summons nor subpoena has been served upon Appellant. Contempt proceedings are not sought, nor a warrant for civil arrest. Art. III, Section 7 prohibits these things, but it does not stay the statute of limitations and excuse Appellant from his obligation to file a timely appeal. It is important to remember that this is a case where Appellant has the responsibility of initiating the proceedings.

Arizona has a provision in its constitution similar to Art. III, Sec. 7. The Arizona provision can be found at Art. IV, part 2, § 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:

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.

132 p.3d at 1190.

In this case, Appellant is seeking to invoke the jurisdiction of the courts and is not defending himself from civil process. It is Appellant who filed this action. In addition, strictly speaking, 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 or a subpoena to testify at trial or deposition, and probably, a summons to answer a complaint. Appellant argues that Art. III, Sec. 7 tolls the statute of limitations for filing an administrative appeal. No case was found in which a court has held that a constitutional provision similar to Art. III, Sec. 7 tolls the statute of limitations for a legislator to file a civil action or to 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.’ ”

Id. at 1193.

Appellant misrepresents the situation in this case when he argues that following statutory requirements for appeal would limit his ability to properly represent his constituents. In a similar manner to the appellant in Smith v. Arizona Citizens Clean Elections Commission, Appellant chose to bring an appeal of the Tax Commission’s original decision. He is not answering the complaint or subpoena of another or facing arrest. Bringing an appeal on time did not involve limiting Phil Hart’s involvement in state governance or require time away from his legislative duties, unless *he* allowed it to. Filing an appeal on time would not prevent him from moving to delay the briefing schedule until after the legislative session.

Regardless of Appellant’s position as a sitting legislator and the corresponding protection from civil process that position holds, he must still follow statutory requirements for appeals from Tax Commission decisions. Because the Appellant failed to follow these requirements, he failed to timely appeal his case, and this court lacks jurisdiction to hear his case.

VI. APPELLANT DID NOT PAY 20 PERCENT OF THE TAX DUE IN A TIMELY FASHION.

As previously noted, the Tax Commission issued a decision in this case on September 30, 2009. Appellant wrote a letter dated December 31, 2009, admitting that he received a copy of this decision on October 2, 2009, and announcing his intention to appeal. R.p. 127. By letter dated March 30, 2010, Appellant sent the Commission two checks totaling \$9,462.04. R.p. 148. A third partial payment of \$1,962.36 was enclosed in another letter dated April 9, 2010. R.p. 128. To date, Appellant has paid a total of \$11,424.40 to the Tax Commission on his outstanding deficiency.

Idaho Code § 63-3049(b) requires that:

Before a taxpayer may seek review by the District Court or the Board of Tax Appeals, the taxpayer shall secure the payment of the tax or deficiency as assessed by depositing cash with the Tax Commission in an amount equal to twenty percent (20%) of the amount asserted. In lieu of the case deposit, the taxpayer may deposit any other type of security acceptable to the Tax Commission.

By his own admission, Appellant did not, “deposit . . . an amount equal to twenty percent” of the liability contested within the prescribed time limits. However, Appellant argues that his notice to the Tax Commission of his intent to appeal and subsequent promise to pay the whole of the required deposit fulfills the requirements of Idaho Code § 63-3049(b). Appellant cites this Code Section and argues that, since the Tax Commission did not object to his subsequent promise to secure the original promise, the Tax Commission acquiesced and has allowed a type of security (a second promise) other than a cash deposit.

Acceptable forms of security for purposes of Idaho Code § 63-3049(b) are listed in Tax Commission Administration and Enforcement Rule 600 (IDAPA 35.01.01.600). In summary, Tax Commission Rule 600 states that acceptable security is: a) cash, b) a bond executed by a

security company licensed and authorized to do business in Idaho, c) bearer bonds, d) automatically renewable time certificates of deposit, e) investments certificates or share accounts, or, (f) irrevocable letters of credit. Rule 600 also provides that other security may be accepted by the Tax Commission, but only in cases where the Tax Commission “has previously agreed in writing to accept other security in lieu of cash payment.”

Appellant apparently believes that this security requirement can be met simply by making another promise to provide security at some date later than that required by statute. This stacking of promises does not meet the requirements of the statute nor does it meet the definition for security.

In this case, no payment was received from Appellant within the 91-day time period. The Tax Commission never accepted in writing any other type of security than those listed in Rule 600, and no payment whatsoever was received until it was mailed by Appellant on March 31, 2010, six months after the decision being appealed. The entire 20 percent was not received by the Tax Commission until April 13, 2010, far beyond the 91-day statute of limitations on an appeal from a Tax Commission decision.

In the aforementioned Ag Air, the Supreme Court held that the District Court did not acquire jurisdiction over the case until payment had been made to the Tax Commission. Appellant did not perfect his appeal of the Tax Commission’s original decision in a timely fashion because he did not pay 20 percent of the tax due in a timely fashion, and consequently, this Court lacks jurisdiction.

VII. THE TAX COMMISSION REQUESTS COSTS AND ATTORNEY FEES ON APPEAL.

The Tax Commission requests costs and attorney fees under Idaho Code § 63-3049(d), which states:

Whenever it appears to the court that:

- (1) Proceedings before it have been instituted or maintained by a party primarily for delay; or
 - (2) A party's position in such proceeding is frivolous or groundless; or
 - (3) A party unreasonably failed to pursue available administrative remedies;
- the court, in its discretion, may require the party which did not prevail to pay to the prevailing party costs, expenses and attorney's fees.

For the above reasons, Appellant has failed to properly present his issues on appeal. Appellant's case in front of the Board of Tax Appeals, in District Court, and on appeal here is nothing more than arguments presented by a person trying to stall a determination of tax liability to the State of Idaho.

The Tax Commission decision which Appellant attempts to appeal relates to tax years dating back to 1996, over 15 years ago. The Notices of Deficiency, in this case, were issued in 2008, nearly 4 years ago. The record supports the conclusion that Appellant has successfully engaged in a series of delaying actions before the Idaho State Tax Commission, before the Idaho board of Tax Appeals, and before the District Court. This appeal appears to Respondent to be little more than a continuation of these past tactics. Responding to this appeal has cost the State Tax Commission considerable expense. Given the history of this case and the nature of the arguments raised, it is not an expense the taxpayers of Idaho should be asked to bear. The Tax Commission believes an award of attorney fees is proper and should be entered as a sanction to deter this type of conduct by Appellant and others. Ackerman v. Bonneville County, 140 Idaho 307, 313-314, 92 P.3d 557, 563-564 (Idaho App. 2004).

In the event costs and attorney fees are not awarded under Idaho Code § 63-3049, the Tax Commission requests attorney fees and costs under I.A.R. 40 and 41. Hagy v. State, 137 Idaho 618, 624, 51 P.3d 432, 438 (Idaho App. 2002). The Court in Durrant v. Christensen, 117 Idaho 70, 74-75, 785 P.2d 634, 638-639 (Idaho 1990), indicated that, “[S]uch an award is appropriate when we are left with an abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation.” Citing, Minich v. Gem State Developers, Inc., 99 Idaho 911, 918, 591 P.2d 1078, 1086 (1979) . The Tax Commission believes attorney fees should be awarded for the reasons stated above.

CONCLUSION

For the foregoing reasons, the Tax Commission asks this Court to affirm the District Court’s Order of Dismissal entered March 17, 2010. The Tax Commission also requests costs and attorney fees on appeal as discussed in this Respondent’s Brief.

DATED THIS 31st day of August 2011.

/s/
WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL
IDAHO STATE TAX COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of August 2011, I caused to be served a true and correct copy of the foregoing RESPONDENT'S BRIEF, by the method indicated below and, addressed to each of the following:

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/s/
WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email addresses:

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Dated and certified this 31st day of August 2011.

/s/
WILLIAM A. von TAGEN
DEPUTY ATTORNEY GENERAL