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Winston & Cashatt

L A W Y E R S

A Professional Service Corporation

*Winston & Cashatt has offices in Spokane, Washington
and Coeur d'Alene, Idaho*

September 3, 2009

Philip Hart
2900 Government Way, #262
Coeur d' Alene, ID 83815

Re: Rules of Decisions Statute of the United States of America

Dear Phil:

You requested this office to provide information concerning the application of the State Laws as Rules of Decision statute of the United States of America (28 USC §1652) to the service of a notice of deficiency (NOD) by the Internal Revenue Service ("IRS") on a state legislator in light of the specific provisions of the Idaho Constitution providing legislative immunity from "civil process" during the time a legislator is in session. Please note that we have intentionally omitted citations to cases discussing this matter. Should you require citations, we will be happy to provide them.

The specific facts provided to us are that you are a state legislator in the state of Idaho. An NOD dated the first week of January was mailed to you and received by in that week. The legislative session commenced January 7 of that year and continued for approximately three months. The NOD identified a tax deficiency that was civil in nature and did not involve any allegation of criminal tax evasion or any crimes under the Internal Revenue Code ("IRC"). In another matter with the IRS, you were issued a document subpoena by an employee of the IRS while attending a one day special session of the Idaho state legislature and once the IRS was advised that the legislature was "in session" a second subpoena was served on you at a time the legislature was not in session.

The State Laws as Rules of Decision statute (28 USC §1652) provides as follows:

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Courtney R. Beaudoin *WA*
Robert P. Beschel
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Christopher S. Crago
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Elizabeth A. Tellessen *WA*
Lawrence H. Vance, Jr. *WA*
Lucinda S. Whaley
Merrivether D. Williams *WA WY*

Ryan D. Yahne *WA CA*

Of Counsel
James P. Connelly

Retired
Leo J. Driscoll
Leo N. Cashatt 1910-1977
Joseph J. Rekofke 1921-1997
Patrick H. Winston 1964-1996

All lawyers admitted in WA. Lawyers admitted in: CA, ID, MI and WY as indicated.

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The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

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The Idaho Constitution at Article III, Section 7, provides as follows:

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PRIVILEGE 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 ten days next before the commencement thereof*; nor shall a member, for words uttered in debate in either house, be questioned in any other place. (emphasis added)

Both federal and state courts have addressed the issue of legislative immunity. The doctrine granting legislative immunity is founded in English Common law and is expressed in the Constitution of the United States (Article I, Section 6). Although not specifically stated in the Constitution, legislative immunity has been extended to immunity from civil process. The rationale for legislative immunity is to protect the electorate and the democratic process from interference while a representative is performing his or her civic duties. In most states where immunity from civil process has been specifically adopted either constitutionally or by statute, courts have held that the immunity is tantamount to a common law right that is substantially inviolate. For example, in *Supreme Court of Virginia v Consumers Union of United States*, the U.S. Supreme Court held that failure to raise a defense of legislative immunity did not necessarily constitute a waiver of the defense. The court reasoned that where both the possibility and validity of an immunity defense were apparent from the beginning and the plaintiff had shown no prejudice as a result of the time of the assertion of the defense, raising of the defense late was timely. Recognition of legislative immunity has long been recognized in the U.S. The court for the territory of Wisconsin addressed the issue in 1849 and noted that judicial immunity has been acknowledged and respected from the inception of the country.

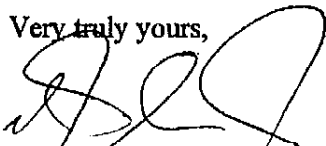
No courts have ruled specifically on the application of legislative immunity with respect to NODs issued by the IRS in connection with a proposed adjustment to income tax. Clearly, the NOD issued to you relates to a proposed adjustment of your taxable income in a "civil" context and not in a "criminal" context. There is no allegation or suggestion of any "treason, felony or breach of the peace" in connection with the NOD sent to you. Therefore, it appears that you are privileged to argue that the issuance of the NOD was ineffective under the legislative immunity provisions of the Idaho Constitution. Moreover, the IRS would not be prejudiced by any such claim because the IRS would still have time following the legislative session in which it could issue a NOD. It is also important to note that the matter is not final because you continue to have the right to pay tax and request a refund. Should the IRS deny your request for refund, you would still be entitled to file suit in federal court (US District Court or Court of Claims) with respect to your refund claim.

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We trust this will assist you with your inquiry. Should you have any further questions, please do not hesitate to contact our office.

Very truly yours,



DONALD J. GARY, JR.

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