



MONTANA STATE TAX APPEAL BOARD

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EXHIBIT 7
DATE 2/17/2011
HB 455

To: House Judiciary

From: Montana State Tax Appeal Board
on behalf of all tax appeal boards
Karen Powell, Chairwoman

February 2011

Please do not hesitate to contact the Board with any questions:

Karen Powell, Chairwoman
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Opposing HB 455 -- "Defining Counsel for Appearances before Administrative Agencies"

The Montana Constitution requires that: *The legislature shall provide independent appeal procedures for taxpayer grievances about appraisals, assessments, equalization, and taxes. The legislature shall include a review procedure at the local government unit level.*" (Article VIII, Section 7).

The State Tax Appeal Board is the mechanism the legislature chose to implement this Constitutional requirement. Key words in the Constitutional language are "independent" and "taxpayer grievances." The Board members act as independent administrative law judges in tax matters, and hold contested case hearings in tax disputes.

This bill, at first blush, appears to be good for a taxpayer by allowing additional "representation" in a contested case before the Board. It is, however, very problematic for taxpayers by failing to set out protections for representation by persons other than attorneys.

- No requirement to keep taxpayers apprised of the case or proceedings
- No protection of taxpayer information (no attorney-client confidentiality)
- No ethical restrictions on representation (conflict of interest, for example)
- No malpractice insurance (even for CPA's or other licensed professionals)

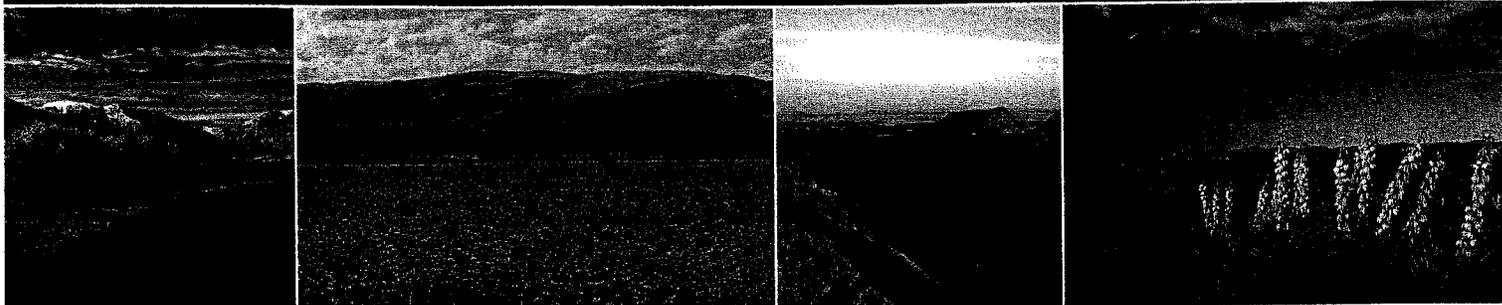
The State Tax Appeal Board is the court of record for tax appeals. Thus, there will be no additional evidence or facts presented later. A district court, in reviewing our decisions, will not hear new facts. Is the representative at the tax appeal board competent to deal with the complex tax matters in addition to the legal procedural issues?

- Evidentiary Rules are complicated. Hearsay prohibited, timeframes strict for evidence.
- Procedural rules are complicated. When can evidence be presented? How do you challenge the qualifications of a witness? How do you question your own witness? What is a person's liability or protections for poorly representing a friend or relative?

There is no prohibition from having a friend, relative or tax preparer **assist** in a taxpayer's case. This happens in many cases. Those parties may come in and testify. They may sit next to a taxpayer and help, write notes, organize material, and assist in many ways. We always encourage this during the hearings, as well as providing materials and support for self-represented taxpayers.

Attached is an article I wrote that was published in the Montana Society of Certified Public Accountants magazine in 2008. (Note that the unauthorized practice of law is now overseen by the Montana Attorney General's office and not the Montana Bar Association.)

Line Items



1st Quarter 2008

- A Guide to Understanding the New Risk Assessment Standards
- Today's World Demands Enhanced Business Reporting
- State Tax Disputes and the Issue of Representation
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- Paperless: Right and Wrong
- Managing the Millennial Generation
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**Your Success.
Our Business.**

**MONTANA SOCIETY OF
CERTIFIED PUBLIC
ACCOUNTANTS**

State Tax Disputes and the Issue of Representation

Karen E. Powell, Chairwoman, Montana Tax Appeal Board

www.stab.mt.gov

The 1972 Montana Constitution mandated an independent appeal process for tax decisions made by state agencies. The legislature subsequently developed a system of county tax appeal boards (to review property tax valuation disputes), as well as a state tax appeal board (for all tax disputes; including reviewing decisions made by the county tax appeal boards). Administrative decisions made by the state tax appeal board may be appealed to the Montana judicial system by timely filing in the appropriate district court. The question has arisen whether a CPA may represent a client, whether the client is an individual, a corporation or other entity, in these tax appeal situations.

The rules for representing a client before the State Tax Appeal Board (STAB) are less clear than for providing representation at a county tax appeal board (CTAB). Although there is no clear cut rule prohibiting a CPA from representing a client before the State Board in a property tax or an individual income tax appeal, this article presents some specific reasons it may not be allowed by the Board or it may not be advantageous to a taxpayer. Before reaching a decision on representation, you and your client should carefully consider the consequences, including the possibilities of litigation beyond the Board level and of the potential for the unauthorized practice of law.

Regarding representation for corporations, there is little doubt that a corporation must be represented by an attorney at the State Board, as well as in the courts.

Property Tax Appeals before the County Tax Appeal Boards

There are few restrictions on presentations before the County Tax Appeal Boards. Each Montana county has a three person County Tax Appeal Board, appointed by the County Commissioners, to hear appeals relating to the classification and valuation of property. The 56 county boards are the first level of independent review of a decision of the Department of Revenue. The Boards may only review the classification or the valuation of the property and do not have the authority to adjust the taxes on the property.¹

The County Tax Appeal Boards are in session from July 1 through December 31 but may meet outside that time if granted an extension by STAB. These Boards are "lay boards" and do not act in a formal manner during the hearing process. The Board will set a date to hear the appeal and notify the parties. Generally there are few witnesses. The taxpayer usually represents him or herself in the process. The Department of Revenue typically sends a local appraiser (not an attorney) and seldom calls additional witnesses.

The CTAB hearing may be an appropriate situation for you either to assist a client in his or her representation or to represent the client. The law specifies that the taxpayer has the right to hire a representative of the taxpayer's choice to represent the taxpayer's interests before the department or any tax appeal board.² Thus, it appears that the statutes are clear in allowing a CPA to represent a client in front of a CTAB. In more complicated cases, however, you and your client may want to consider whether your client might be better served by attorney representation. (See *discussion below*.)

Decisions of the CTAB are appealable, within 30 days of the decision, to the State Tax Appeal Board (STAB).

Appealing a CTAB Decision or Other Type of Tax Dispute to the State Tax Appeal Board

The State Tax Appeal Board is the court of record for all tax appeals. Thus, the procedure before STAB is more stringent. The Montana Tax Appeal Board is an administrative body, independent of the Department of Revenue, constitutionally and statutorily authorized to hear and decide legal and factual issues relating to taxation, including property taxation. Generally, there are two distinct tracks for appeals – those of property tax and those of other taxes directly appealed to the Board, such as corporate and individual income tax. The rules governing property tax appeals are set forth in §15-2-301, MCA, *et. seq.* The rules for direct appeals are set forth in §15-2-302, MCA. For more specific information on the

appeals and appeals process, visit the State Tax Appeal Board website at www.stab.mt.gov.

The State Board holds a *de novo* hearing in the majority of its cases³. A hearing *de novo* means that the State Tax Appeal Board will hear the case as if it were being heard for the first time.⁴ As the State Board is the court of record for all tax appeals, the record developed before STAB becomes the record used by any appellate court, including a district court. An appellate court will not hold another hearing in the case and, absent a showing of error by STAB, the court will also not amend or change the record. Instead, the court will review the record and the decision from the State Tax Board and then make a determination in the case.

This fact is critical in deciding whether to retain an attorney for the tax appeal board proceeding. Your client may wish to consider the potential of further litigation, and, as a CPA, you should consider the potential liability relating to the unauthorized practice of law (*discussed further below*).

An accountant, by training, may be fully versed in the specifics of tax policy, interpretation, and other critical areas of tax law. An accountant, however, is not trained in procedural issues relating to litigation such as motions, hearsay, evidentiary challenges, and fully protecting a client by preventing the Department of Revenue from bringing in improper material or issues. It is inappropriate to expect the Board to protect your client in these areas. It is the duty of the client's representative to do so.

There is statutory authority for an informal disposition of a contested case under MAPA⁵ that allows for increased latitude for presentations in a contested case. This procedure, however, is not generally used by the Tax Appeal Board, and may be disadvantageous for a taxpayer.

May a CPA or other non-attorney appear before STAB in a direct appeal involving corporate or individual income tax?

Although the Taxpayer Bill of Rights states that "the taxpayer has the right to hire a representative of the taxpayer's choosing to represent the taxpayer's interest before the department or any tax appeal board",⁶ Montana case law calls that statute into question if the corporate taxpayer's representative is not an attorney licensed in the state of Montana.

The Montana Supreme Court has required a corporation to be represented in court by an attorney⁷. Because a corporation is a separate legal entity, the Court has stated that it cannot represent itself and must use an attorney⁸. Further, the Montana Supreme Court has

2009 Reappraisal Cycle:

A Change in Property Valuation

Almost all real estate in Montana is appraised for purposes of property taxation.¹ Montana has a six year tax appraisal cycle for agricultural, residential, commercial, and forestland property. The next reappraisal will be effective on January 1, 2009. The new valuations may trigger a number of appeals, particularly in high growth areas which are likely to see the highest valuation increases.

In addition, as a part of reappraisal, the Department of Revenue is reviewing productivity standards for agricultural lands for the first time in forty years. The Department anticipates sending productivity reports to all agricultural producers during 2008. It is critical for your clients to review this material, and if there is concern, to contact the Department of Revenue as soon as possible.

In the first half of 2009, probably May or June, the Department of Revenue will send an appraisal notice to agricultural, business, residential and forestland property owners. The appraisal notice is not the same as a tax bill. This distinction is critical because of the statutory timeline for appealing a valuation.

Taxpayers may request an informal review of their valuations from the Department of Revenue by completing an AB-26 Form (Request for an Informal Review). The completed form is submitted to the local appraisal office. This step is not required but may resolve any issues about the valuation.

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indicated that a non-lawyer may not represent a corporation in an administrative procedure (such as a hearing before STAB)⁹. In addition, the State Bar of Montana has issued an ethics opinion that a hearing examiner in a contested case under MAPA "may not ethically permit a corporation to represent itself *pro se* through an unlicensed individual", *i.e.*, a non-lawyer¹⁰.

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Professional Responsibilities and Practical Considerations for a CPA

In addition to the case law noted above, the State Bar is likely to consider your representation of a client before STAB to be the unauthorized practice of law. The hearing before the State Tax Appeal Board may require the calling and questioning of witnesses, including your client. There is little doubt that calling witnesses, preparing questions, and reviewing and objecting to evidence presented can be considered the unauthorized practice of law¹¹. A person may be found guilty of contempt of court for practicing law without a license¹².

Conclusion

Before reaching a decision on representation before either the county or state tax appeal board, you and your client should carefully consider the possibilities of future litigation and the potential claim of the unauthorized practice of law. There is little doubt, however, that a corporation must be represented by an attorney at the State Board, as well as in the courts.

(Footnotes)

- ¹ See Section 15-15-101, MCA, et seq.
- ² Section 15-1-222(2), MCA. See also, section 15-15-103(1), MCA.
- ³ In certain situations, the Board may act as an appellate board and review a case on the record. Section 15-2-201(4), MCA.
- ⁴ See Sections 15-7-102, 15-15-102, MCA.
- ⁵ Section 2-4-604, MCA.
- ⁶ Section 15-1-222(2), MCA.
- ⁷
- ⁸ See e.g. *Audit Serv. Inc. v. Frontier-West Inc.*, 252 Mont. 142, 148, 827 P.2d 1242 (1992); *Continental Realty, Inc. v. Gerry*, 251 Mont. 150, 152 822 P.2d 1083, 1084 (1991); *Weaver v. Law Firm of Graybill, Ostrem, Warner and Crotty*, 246 Mont. 175, 803 P.2d 1089 (1990).
- ⁹ See *Steele v. MacGregor*, 1998 MT 85, P31, 956 P.2d 1364.
- ¹⁰ State Bar Ethics Opinion No. 000008.
- ¹¹ Section 37-61-201, MCA "any person . . . who shall appear in any court of record or . . . other officer appointed to determine any question of law or fact by a court or who shall engage in the business and duties and perform such acts, matters, and things that are usually done or performed by an attorney at law in the practice of his professions . . . shall be deemed practicing law. See also Mont. Supreme Ct. Comm'n on the Unauthorized Practice of Law v. O'Neil, 2006 MT 284, 334 Mont. 311, 147 P.3d 200.
- ¹² Section 37-61-210, MCA, O'Neil, 2006 MT 284.

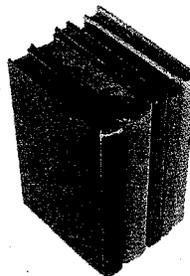
2009 Reappraisal Cycle: A Change in Property Valuation *continued from page 25*

If the results of the informal review are unsatisfactory, the taxpayer or the taxpayer's agent may file a written application for reduction in value¹. The application may be obtained at the local DOR office and must be filed with the Clerk and Recorder. The application must be submitted on or before the first Monday in June or 30 days after receiving either a notice of classification and appraisal or decision by the department from the informal review process, whichever is later².

Filing the application begins the actual appeal process. At that time, the County Tax Appeal Board may set a hearing date. After the hearing, the taxpayer and the Department have the opportunity to appeal the decision to the State Tax Appeal Board, and subsequently for judicial review.

(Footnotes)

- ¹ Section 15-15-102, MCA.
- ² Section 15-15-102, MCA.



Free Resources

The Society has four books about the generational differences available to any interested member:

Managing the Generation Mix
From Urgency to Opportunity

Managing Generation Y
Global Citizens Born in the Late Seventies and Early Eighties

Managing Generation X
How to bring out the best in young talent

It's Okay to be the Boss
The Step-by-Step Guide to Becoming the Manager Your Employees Need

Only one issue is available of each of these books. Be the first to contact Margaret at margaret@mscpa.org to get your copy!