State Tax Disputes and the Issue of Representation

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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 or 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

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[1] *See* Section 15-15-101, MCA, *et seq.*

[2] Section 15-1-222(2), MCA. *See also*, section 15-15-103(1), MCA.

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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 cases[3]. 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 MAPA[5] 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?

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[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.

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 attorney. Because a corporation is a separate legal entity, the Court has stated that it cannot represent itself and must use an attorney[7]. Further, the Montana Supreme Court has indicated that a non-lawyer may not represent a corporation in an administrative procedure (such as a hearing before STAB)[8]. 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-lawyer[9].

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 law[10]. A person may be found guilty of contempt of court for practicing law without a license[11].

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.

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[6] Section 15-1-222(2), MCA.

[7] *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).

[8] *See Steele v. MacGregor*, 1998 MT 85, P31, 956 P.2d 1364.

[9] State Bar Ethics Opinion No. 000008.

[10] 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.

[11] Section 37-61-210, MCA, *O'Neil*, 2006 MT 284.