



Montana Legislative Services Division
Legal Services Office

April 20, 2010

Senator Jim E. Peterson
1250 Buffalo Canyon Road
Buffalo, MT 59418-8001

Dear Senator Peterson,

This memo is in response to a question that you raised on February 18, 2010, when I gave a presentation to the Agricultural Land and Forest Land Property Reappraisal Subcommittee.¹ In your question, you generally asked if the District Court in *Lucas v. Montana Dept. of Revenue*, No. DV-10-02 (14th Jud. Dist. 2010), has the ability to establish a class so that a decision would apply to all taxpayers. As part of your question you also inquired as to whether a tax payment would need to be made under protest in order for similarly situated taxpayers to benefit from a potential win by the petitioning taxpayers. My general response was that the court would have discretion to give relief and that by statute, taxpayers could pay taxes under protest for the second half of the year. However, I asked if I could provide you with a more detailed written response. This memo serves as my written response, but it does not comment on the merits of the pending court action.

SUMMARY OF CONCLUSIONS

Two legal remedies were asked for by the petitioning taxpayers in the *Lucas* case, including declaratory relief and a *writ of mandamus*. As far as declaratory relief goes, the District Court has considerable discretion to enter an order that applies to all similarly situated taxpayers, regardless of whether they are a party to the *Lucas* action. However, the Montana Supreme Court has held that paying taxes under protest is generally a prerequisite to recovery. As such, taxpayers who desire to benefit from potential declaratory relief should pay taxes under protest as provided in section 15-1-402, MCA.

As far as the *writ of mandamus* goes, it is only used by courts when there is not a plain, speedy, and adequate remedy in the ordinary course of law. While this is a very tough standard to meet, if the District Court issues a *writ of mandamus* it could apply to all taxpayers, including those who did not pay taxes under protest.

PROCEDURAL BACKGROUND

On or around February 12, 2010, petitioners Charles B. Lucas, Lucas Ranch, Inc., Montana Farm Bureau Federation (MFBF), and the Montana Taxpayers' Association (MTA) filed a petition for declaratory judgment and a *writ of mandate* against the Montana Department of Revenue (Department). The petition alleged that the Department

¹ Your question was raised 2 hours and 53 minutes into the subcommittee meeting.

failed to correctly calculate the phase-in amounts for agricultural properties that resulted in erroneous taxable values for Lucas, Lucas Ranch, and “all similarly situated agricultural landowners in Montana.” (Petition, ¶ 31). As a remedy, the petition requested the court to “immediately reassess the erroneously phased-in taxable values for all agricultural land in the state, and recertify its corrected values to the taxing jurisdictions.” (Petition, ¶ 35). Alternatively, the petition alleged that the Department was violating “the affected taxpayers’ rights under the equal protection clauses of the federal and Montana constitutions, as well as the Department’s statutory and constitutional obligation to equalize taxable values throughout Montana.” (Petition, ¶ 40). As the alternative remedy, the petition requested the court to issue a writ “ordering the Department to carry out its constitutional and statutory obligations . . . for tax year 2009 and the remaining years of the current reappraisal cycle.” (Petition, ¶ 42). The petition did not bring the action forward as a formal class action lawsuit pursuant to section 15-1-407, MCA, and the Montana Rules of Civil Procedure for bringing a class action in Title 25, chapter 20, Rule 23.

On or around March 29, 2010, the Department submitted a responsive answer to the District Court. The Department generally denied most of the allegations in the petition, but it admitted that “it has publicly indicated that it will correct for tax year 2009 the [value before reappraisal (VBR)] for taxpayers that experienced productivity-only changes if those taxpayers filed timely AB-26s, or appeals for tax year 2009 and; that the Department would correct all other affected taxpayers in tax year 2010.” (Answer, ¶ 19). Moreover, the Department alleged that (1) MFBF and MTA do not have standing to assert an action before the court, (2) the action is moot, as the Department has acknowledged that it incorrectly established VBR for properties that experienced a productivity-only change and it is correcting the error for all affected taxpayers, and (3) the parties have failed to exhaust their administrative remedies. (Answer, ¶¶ 48-51).

DECLARATORY JUDGMENTS AND SECTION 15-1-406, MCA

Pursuant to section 15-1-406, MCA, an aggrieved taxpayer may bring a declaratory judgment action in District Court seeking a declaration that (1) an administrative rule or method or procedure of assessment or imposition of tax adopted or used by the department is illegal or improper or (2) a tax authorized by the state or one of its subdivisions was illegally or unlawfully imposed or exceeded the taxing authority of the entity imposing the tax. Generally, the action must be brought within 90 days of the date the notice of the tax due was sent to the taxpayer or within 90 days of the Department’s final decision, and the taxes that are being challenged “*must be paid under protest when due as a condition of continuing the action.*”

Payment of Tax Under Protest Requirement.

The Montana Supreme Court has analyzed the payment under protest requirement on more than one occasion. In *Jefferson v. Big Horn County*, 235 Mont. 148, 149, 766 P.2d 244, 245 (1988) (*Jefferson I*), Jefferson, a member of the Crow Tribe, commenced an action seeking declaratory relief from the payment of property taxes, but the taxes at issue were delinquent and were not paid under protest. The Supreme Court affirmed the dismissal of the case and held that payment of taxes is a condition precedent in a declaratory judgment action. *Jefferson I*, 235 Mont. at 151, 766 P.2d at 246.

In *Jefferson v. Big Horn County*, 2000 MT 163, 300 Mont. 284, 4 P.3d 26 (*Jefferson II*), Jefferson initiated a class action suit and challenged Big Horn County's authority to impose and collect real property taxes on reservation land owned in fee simple by enrolled tribal members and requested that the District Court permanently enjoin Big Horn County from assessing and collecting taxes on Crow Reservation lands in the county. *Jefferson II*, ¶ 3. This time the District Court ruled in favor of Jefferson and determined that the land at issue was not taxable by the county. *Jefferson II*, ¶ 7. However, the District Court's order limited retrospective relief to those similarly situated taxpayers that made payments under protest. *Id.*

In *RSG Holdings v. Missoula Irrigation District*, 2004 MT 214, 322 Mont. 369, 96 P.3d 1131, the District Court ordered that numerous parties who properly petitioned to be excluded from an irrigation district should be reimbursed for back taxes paid by the parties as of the date of their petitions. The irrigation district appealed, and the Supreme Court reversed, reasoning that tax refunds are a matter of legislative discretion and that absent specific legislative authorization, a court has no power to refund taxes paid without protest. *RSG Holdings*, ¶ 18; *see also* *Petitioners I-549 v. Missoula Irrigation District*, 2005 MT 100, 326 Mont. 527, 111 P.3d 664; *Geil v. Missoula Irrigation District*, 2004 MT 217, 322 Mont. 388, 96 P.3d 1127.

Lastly, it should be noted that the District Court has broad discretion on the remedy that it chooses, including "any other remedy as the court considers appropriate." § 15-1-408, MCA. Nonetheless, based on the language in section 15-1-406, MCA, and relevant case law, similarly situated taxpayers should pay taxes under protest as provided in section 15-1-402, MCA, if they wish to obtain a potential benefit from the *Lucas* case. The statute specifically states that taxes "must be paid under protest." Moreover, the taxpayers who did not pay under protest in *Jefferson I*, *Jefferson II*, and *RSG Holdings* did not obtain retrospective relief.

The Ability of the District Court to Establish a "Class".

As part of your question you asked whether the District Court in *Lucas* has the ability to establish a "class" so that a decision would apply to all taxpayers. Pursuant to the statute, the District Court is required to consolidate all declaratory judgment actions that challenge the same tax, and the decision of the court applies to all *similarly situated taxpayers*. § 15-1-406(2), MCA. Moreover, the decision does not apply to any taxpayers that are part of a class action (the *Lucas* petitioners did not file a formal class action lawsuit). *Id.*

As applied here, the statute does not define what it takes to be a "similarly situated" taxpayer. However, based on a reasonable interpretation of the statute it could be interpreted to mean taxpayers whose agricultural (class three) property had a productivity-only change and for whom the Department incorrectly calculated the value before reappraisal. Moreover, the District Court judge may rule that in order to be a similarly situated taxpayer, a taxpayer had to pay taxes under protest, as explained above.

In short, the District Court has considerable discretion. There is no guarantee what the District Court will do, but taxpayers with productivity-only changes can increase their odds of having a judgment apply to them by paying the second half of taxes under protest.

WRIT OF MANDAMUS AND SECTION 27-26-102, MCA.

Pursuant to section 27-26-102, MCA, a District Court may issue a *writ of mandamus* to any lower tribunal, corporation, board, or person to compel the performance of an act that the law specially enjoins as a duty resulting from an office, trust, or station. The writ is within the discretion of the court, and it is issued in cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. § 27-26-102(2), MCA; *State ex rel. Larsen v. District Court*, 78 Mont. 435, 254 P. 414 (1927).

A *writ of mandamus* can directly compel an agency to follow the law. As such, the District Court has the authority to issue a *writ of mandamus* that applies to all similarly situated taxpayers in the state, regardless of whether they filed an appeal. There is also no direct requirement that similarly situated taxpayers pay taxes under protest. However, in order for the District Court to issue a *writ of mandamus* it must first determine that declaratory relief and the appeal procedures do not provide a plain, speedy, and adequate remedy. As such, the chance of taxpayers recovering under a *writ of mandamus* is less probable.

I hope that I have adequately addressed your question. Please let me know if you have any additional questions or concerns.

Sincerely,

Jaret R. Coles
Legislative Staff Attorney

cc: Revenue and Transportation Interim Committee Members

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