

FILED _____

AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

PHILIP L. HART,)
)
) *Appellant,*)
)
 vs.)
)
) **IDAHO STATE TAX COMMISSION AND**)
) **IDAHO BOARD OF TAX APPEALS,**)
)
) *Respondent.*)
)

Case No. **CV 2010 9226**

**ORDER DENYING APPELLANT
HART'S MOTION FOR
RECONSIDERATION,
AND ORDER GRANTING IBTA'S
MOTION TO STRIKE**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

The Court has set forth the factual and procedural history of this case in its Memorandum Decision and Order Granting Respondents' Motion to Dismiss, filed December 8, 2010:

On October 22, 2010, [Philip] Hart [(Hart)] filed his Appeal from the Idaho Board of Tax Appeals (IBTA) in the District Court. Hart's preliminary issues on appeal include: applicability of, and compliance with, Article III, Section 7 of the Idaho Constitution; whether the Income Tax Audit Bureau's Notices of Deficiency amounted to an unapportioned direct tax; whether the deficiency notices issued by the federal government are valid evidence of taxes owed to the State of Idaho; and whether there was estoppel or waiver by respondent Idaho Tax Commission (Commission) of the twenty percent deposit requirement resulting from its acceptance of Hart's cash deposit and promise to pay, among other issues. *Id.*, pp. 2-5. On November 1, 2010, the Commission filed its Motion to Dismiss Hart's Appeal, along with the Memorandum in Support of Motion to Dismiss and the Affidavits of Shelley Sheridan and Kristine Gambee. [The Affidavit of Shelley Sheridan, filed November 1, 2010, purports to have five exhibits attached; however, the affidavit as filed with the Court has no attachments. The same affidavit, when filed as part of the agency

record, does have the exhibits referenced therein attached.] On November 18, 2010, Hart filed his “Appellant Hart’s Motion to Strike the Affidavits of Kristine Gambée and Shelley Sheridan Pursuant to IRCP 12(f)” and “Appellant Hart’s Reply to Defendants’ 12(b)(1) Motion to Dismiss.” On November 19, 2010, the Commission/IBTA filed the “Notice of Filing of Agency Record.” On December 2, 2010, the Commission filed its “Response to Appellant Hart’s Reply to Defendants’ 12(b)(1) Motion to Dismiss.” On December 3, 2010, Hart filed his “Motion for I.R.C.P. Rule 11(a)(1) Sanctions.” Oral argument on the Commission’s motion to dismiss was held on December 7, 2010. At the conclusion of that hearing the Court took the matter under advisement. The above pleadings were reviewed by the Court and the Court has considered arguments of counsel at hearing.

Hart’s motion to strike was heard at the December 7, 2010, hearing, and was granted. The information contained in the affidavits of Shelley Sheridan and Kristine Gambée, both filed on November 1, 2010, is stricken. However, the information contained in those affidavits is contained in the Notice of Filing of Agency Record, filed November 19, 2010. Hart’s motion for sanctions was not noticed up for hearing.

December 8, 2010, Memorandum Decision and Order Granting Respondent’s Motion to Dismiss, pp. 1-3. The Court granted respondent IBTA’s motion to dismiss, determining it had no jurisdiction to hear appellant Hart’s appeal. Hart then filed his motion for reconsideration on December 14, 2010, arguing his appeal to the IBTA had been filed on March 30, 2010, as opposed to the March 31, 2010, date claimed by the IBTA. Motion for Reconsideration, p. 1. Hart also argued his 20% appeal bond was proper, but that the requirement of a 20% appeal bond is unconstitutional. *Id.*, p. 2.

The IBTA responded to Hart’s motion for reconsideration on December 20, 2010, and filed a Motion to Strike and Objection to Hart’s Request for Production, and memorandum in support thereof, on January 10, 2011. On January 24, 2011, Hart filed his Reply to Respondents’ Response to Motion for Reconsideration and an Affidavit of Phil Hart in Support of Motion for Reconsideration. The IBTA filed a Supplemental Response to Appellant’s Motion for Reconsideration on February 7, 2011. And, on February 15, 2011, Hart filed his Supplemental Reply to Respondents’ Supplemental

Response on Appellant's Motion for Reconsideration and his Reply to Respondents' Motion to Strike and Objection to Appellant's Request for Production.

On December 16, 2010, Hart noticed his motion for reconsideration for a hearing and oral argument scheduled for March 16, 2011. On March 8, 2011, eight days before that scheduled hearing, Hart filed an "Amended Notice of Hearing" purporting to unilaterally reschedule that hearing on Hart's motion for reconsideration to May 31, 2011. By order of the Court filed March 11, 2011, this Court required oral argument as originally scheduled on March 16, 2011. March 11, 2011, Order Regarding March 16, 2011, Hearing.

At the March 16, 2011, oral argument, this Court first heard argument by Hart's counsel, on Hart's "Motion for Reconsideration of Order Requiring Hearing to be Held on March 16, 2011." Hart filed that motion on March 14, 2011, along with an "Affidavit of Starr Kelso in Support of Motion for Reconsideration of Order Requiring Hearing to be Held on March 16, 2011." At the conclusion of oral argument on that motion on March 14, 2011, the Court denied Hart's "Motion for Reconsideration of Order Requiring Hearing to be Held on March 16, 2011."

The Court then heard argument on Hart's Motion for Reconsideration filed December 14, 2010, and the IBTA's Motion to Strike. At the conclusion of oral argument on those motions, the Court took those motions under advisement.

II. STANDARD OF REVIEW.

A trial court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so. *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d

100 (Ct.App. 2006).

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III. ANALYSIS.

A. Hart's Motion for Reconsideration.

1. Introduction.

In his various filings, Hart makes varying arguments. Hart raises the issue of a 20% appeal bond being unconstitutional only once, in his motion for reconsideration filed December 14, 2010. Motion for Reconsideration Pursuant to I.R.C.P. 11(a)(2)(B), p. 2. In that motion Hart also argues he filed his Notice of Appeal with the IBTA on March 30, 2010, not March 31, 2010, as was claimed by the IBTA and found by this Court. *Id.*, p. 1. And, Hart argues he properly paid the 20% appeal bond by “deposit[ing] another type of security acceptable to the tax commission”. *Id.*, p. 2. Finally, with regard to the 20% appeal bond issue, Hart argues, “..since there were two matters appealed from[, Hart] at least complied with the full deposit of one of the matters appealed from.” *Id.* The IBTA responded by reiterating its previous arguments, made in relation to its Motion to Dismiss, filed November 1, 2010. Response to Appellant's Motion for Reconsideration, p. 1. Essentially, the IBTA argued this Court was without jurisdiction to hear Hart's appeal because of his failure to file a notice of appeal within 91 days as contemplated in Idaho Code § 63-3049. See Memorandum Decision and Order Granting Respondent's Motion to Dismiss, p. 5. And, to clarify, although Hart's Article III Section 7 argument was never directly dealt with by either the IBTA or this Court, both the IBTA and this Court recognized that, even if Hart's argument for the tolling of the deadline within which he was to file his appeal was proper, his appeal was nonetheless untimely. *Id.*, p. 7.

2. This Court's Standard of Review Regarding the Motion to Dismiss.

Hart alleges this Court utilized an incorrect standard of review in its ruling on the Commission's motion to dismiss. Reply to Respondents' Response to Motion for Reconsideration, p. 3 *et seq.* It is Hart's contention that this Court conducted a facial review, rather than a factual one, in relying on matters outside the pleadings. *Id.*, p. 3. Hart states, "[u]tilization of a 'factual' determination on a IRCP Rule 12(b)(1) 'facial' challenge to jurisdictional [sic] is error." Reply to Respondents' Response to Motion for Reconsideration, p. 4. Hart goes on to argue this Court should have held an evidentiary hearing on the jurisdiction issue and it is Hart's position that it was "unforeseeable" that the Court:

...would preclude Mr. Hart from presenting evidence, at a trial or hearing before the Court proceeded with any factual determination let alone a determination of jurisdiction based upon a "factual" standard [sic] It was unforeseeable that the Court would identify the correct standard ("facial") but then apply an incorrect ("factual") standard.

Id., pp. 6-7. The IBTA has not responded to this argument by Hart.

In its decision on the IBTA's motion to dismiss, this Court wrote:

A motion to dismiss pursuant to I.R.C.P. 12(b)(1), which raises facial challenges to jurisdiction, is reviewed under a standard which mirrors the standard of review used under I.R.C.P. 12(b)(6). *Owsley v. Idaho Industrial Commission*, 141 Idaho 129, 133, 106 P.3d 455, 459 92005), citing *Osborn v. United States*, 918 F.2d 724, 729 n. 6 (8th Cir. 1990). Thus, the Court looks only to the pleadings, and all inferences are viewed in the light most favorable to the non-moving party. *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). "The question is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims." *Id.* On the other hand a factual challenge to jurisdiction will allow the court to go outside the pleadings without converting the motion into one for summary judgment. *Owsley*, 141 Idaho 129, 133, 106 P.3d 455 n. 1. This is a facial challenge to this Court's jurisdiction.

Memorandum Decision and Order Granting Respondents' Motion to Dismiss, p. 3. The Court granted Hart's motion to strike the affidavits of Shelley Sheridan and Kristine Gambee, noting that the information contained therein was also in the agency record filed

on November 19, 2010. Hart never sought to strike the agency record. Importantly, this Court, throughout its decision, never makes reference to any substantive material referred to in the stricken affidavits or the agency record. Contrary to Hart's contention, the Court did in fact limit itself to a review of the pleadings. See Reply to Respondents' Response to Motion for Reconsideration, p. 3. On pages 1-4 of this Court's decision, this Court set forth the factual and procedural history of the case, including citing dates on which pleadings were filed and on which hearings were held. Hart points to no evidence of this Court's utilization of a factual determination of the jurisdictional issue at bar, and he cannot. Nor does Hart cite the Court to any authority whatsoever establishing that consideration of dates on which pleadings were filed amounts to a factual determination under I.R.C.P. 12(b)(1). Hart now argues an evidentiary hearing may be requested by the IBTA, but that at this juncture, Hart's pleading (his Petition for Review) sets forth the undisputed facial jurisdiction. *Id.*, pp. 3-4. Hart can point to no purported evidence of this Court's "factual" review of the challenge to its jurisdiction because the Court never engaged in such a factual inquiry. The Court did, however, determine as a matter of law that Hart's failure to satisfy the limitation of Idaho Code § 63-3049 resulted in this Court's being without jurisdiction to hear the case. Memorandum Decision and Order Granting Respondent's Motion to Dismiss, p. 9. It is precisely this Court's refusal to hear Hart's claim which supports the conclusion that this Court properly determined as a matter of law that it did not have jurisdiction to hear this case; the Court prohibited Hart from presenting substantive evidence regarding his underlying claim.

3. Hart's March 30, 2010, and March 31, 2010, Appeals.

As a preliminary matter, Hart continually references the agency record in his argument that his appeal of the Commission's determination to the IBTA was timely filed on

March 30, 2010. Reply to Respondents' Response to Motion for Reconsideration, pp. 9 *et seq.* Presumably, Hart takes no issue with the Court's referring to the Agency Record in this regard, despite his claim two pages earlier in his brief that the record was improperly considered by the Court, turning a facial challenge to jurisdiction into a factual one. *Id.*, p. 7. Again, as on the motion to dismiss previously heard by the Court, the Court's reference to the record is limited only to the dates on which pleadings were filed.

Hart argues the Commission is not only in error regarding the date on which his appeal was filed, Hart also goes so far as to claim the IBTA misrepresented facts to the Court and continues to "perpetuat[e] their prior misrepresentations to this Court." *Id.*, p. 9, *et seq.* Again, the IBTA does not directly address Hart's contentions in this regard. It is Hart's position that his appeal is deemed filed on the date of mailing as reflected by the postmark, he filed his Notice of Appeal on March 30, 2010, as evidenced by the postmark, and Hart's two checks amounted to "'substantial compliance' promise to pay the amount remaining on the *total* due for 20% of *both* Docket numbers (21551 and 21552)". *Id.*, p. 10. (italics in original). Hart's counsel reiterated this position at oral argument, stating the IBTA's behavior in this matter was "shocking."

In fact, Hart did author a one-page letter to the IBTA entitled "Notice of Appeal to the Board of Tax Appeals" on March 30, 2010; this letter was received by the IBTA on March 31, 2010. This letter discusses only the deposit of the 20% appeal bond, specifically setting forth Hart's inability to pay the full amount and offering to submit an additional check on a later date. The letter closes with the following: "The arguments to be put forth will be in another mailing to the Board of Tax Appeals with a notice to the Tax Commission." Thereafter, on March 31, 2010, Hart filed his actual five-page "Notice of Appeal to the Idaho Board of Tax Appeals"; the Notice of Appeal was received by the IBTA on April 1,

2010. It is the March 31, 2010, Notice of Appeal to the Idaho Board of Tax Appeals which sets forth what is actually being appealed and what supports Hart's contentions.

A Notice of a State Tax Commission Appeal must contain certain items according to the Idaho Administrative Code (IDAPA). IDAPA 36.01.01.047 states:

In appeals brought under Section 63-3049, Idaho Code, the notice of appeal shall include:

- a) A copy of the redetermination or final decision by the State Tax Commission appealed from;
- b) The objections to the appellant to the redetermination or final decision;
- c) The basis for said objections;
- 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
- 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.

IDAPA 36.01.01.47.01. These items must be filed with the IBTA within 91 days after receipt of the decision of the State Tax Commission. IDAPA 36.01.01.047.02. And, as to defective appeals, the Code states:

Upon the filing of any notice of appeal it will be inspected by the Board and if found to be materially defective or not substantially in compliance with the requirements of this chapter the Board may dismiss such appeal or require its amendment. After notice from the Board, the appellant shall have fourteen (14) days to amend and perfect such appeal. Failure to perfect the appeal may result in dismissal of the appeal without further notice.

IDAPA 36.01.01.048.01. Finally, the Code provides the IBTA with the option of holding a separate hearing on the question of jurisdiction "if a notice of appeal fails to set out allegations alleging jurisdiction of the Board." IDAPA 36.01.01.048.02.

Hart's contention that his Notice of Appeal was filed on March 30, 2010, is patently wrong. His letter dated March 30, 2010, in no way complied with the requirements of a State Tax Commission appeal. Simply entitling correspondence as a "Notice of Appeal to the Board of Tax Appeals" does not make it so. No portion of the March 30, 2010, letter

complied with any requirements for an appeal: Hart made no reference to any copy of the Commission decision appealed from; Hart did not set forth any objections he had to the decision; Hart did not set forth the basis for his objections; Hart did not state the amount in dispute; and Hart did not provide proof of compliance with the deposit requirements in the form of a receipt from the Commission. Thus, as found by the IBTA and this Court, Hart's March 31, 2010, Notice of Appeal, is his appeal. And, even in his March 31, 2010, untimely Notice of Appeal, Hart failed to provide the IBTA with a deposit receipt from the Commission.

Hart incorrectly argues that his deposit amount was proper at least as to the Docket Number 21551 appeal, and that he substantially complied with the deposit requirements for Docket Number 21552 via a combination of a partial deposit and a promise to pay on a later date. Reply to Respondents' Response to Motion for Reconsideration, p. 5. This argument entirely ignores the requirement of IDAPA 36.01.01.0047.01(e); that is, Hart failed to provide *proof of compliance* with deposit requirements. Hart simply presumed the IBTA would accept partial payment and a purported promise to pay (along with an entirely deficient March 30, 2010, Notice of Appeal) and there is no evidence that Hart ever sought a receipt from the Commission. This cannot be said to amount to substantial compliance.

Hart goes on to assume the IBTA had some obligation to "notify or advise" Hart that his piecemeal noncompliant deposit "was not permissible as a 'type of security acceptable to the tax commission.'" *Id.*, p. 11. This argument evinces Hart's ignoring the language of IDAPA 36.01.01.048.01; where an appeal is materially defective or not in substantial compliance with requirements, the IBTA has the option of dismissing the appeal or of providing an additional 14 days for the appellant to amend and perfect the appeal. Hart's appeal was materially defective and did not substantially comply with either the IDAPA or

the Idaho Code. The IBTA was under no obligation to permit Hart to amend and perfect an untimely filed appeal. Hart is simply wrong when he writes:

Likewise the IBTA disregarded its own IDAPA rules when it ignored Mr. Hart's right to an additional fourteen (14) day period in which to perfect his appeal of Docket number 21552.

Id., p. 15. The additional 14-day period to perfect an appeal *may* be granted by the IBTA at their discretion, but Hart is not *entitled* to this extra time period. Accordingly, Hart is simply wrong in claiming he has a "right" to this additional fourteen days.

Hart's final argument is that his insufficient deposit only applies to one of the two separate appeals he has filed. *Id.*, p. 15, *et seq.* Hart concedes that Commission rules do not contemplate separate case dockets being combined. *Id.*, p. 16. Hart posits:

With regard to the two cases (Docket numbers 21551 and 21552 respectively), because of the true and correct filing date of the appeals from the decision of the State Tax Commission on both cases any order by the IBTA consolidating them for bond amount determination would be, without basis in rule and also prejudicial to Mr. Hart because he obviously filed the separate 20% cash bond in compliance in case Docket 21551.

...

There is no question given the correct filing date of March 30, 2010 and the payment of the first two checks that the appeal, and 20% bond, for case Docket 21551 was properly filed and the IBTA decision clearly erroneous.

Id., p. 17. Hart also requests an evidentiary hearing with regard to whether his promise to pay amounted to "other security" within the meaning of I.C. § 3049. *Id.*, p. 20. What Hart fails to consider is that his appeal (as to both docket numbers) was untimely and does not comply with IDAPA 36.01.01.0047.01(e). Hart had every opportunity to proffer his combination of insufficient deposit amounts and purported promissory note to the Commission and secure a receipt to provide the IBTA. He did not do so. Ultimately, neither appeal by Hart was timely filed and neither appeal contained proof of compliance with the deposit requirement.

4. Constitutionality of the Bond Requirement.

As mentioned briefly, *supra*, Hart argues the bond requirement at issue in this matter is unconstitutional. Motion for Reconsideration, p. 2. Hart does not elaborate on his contention and the IBTA does not address it at all. It is possible that Hart recognized the futility of his argument in later briefing and abandoned it, as *Tarbox v. Tax Commission of the State of Idaho*, 107 Idaho 957, 695 P.2d 342 (1984), is directly on point. In *Tarbox*, the taxpayers filed an appeal with the District Court along with a property bond because they were unable to qualify for a surety bond; because the Tarboxes did not file a proper type of bond, the Commission successfully moved for summary judgment. 107 Idaho 957, 959, 695 P.2d 342, 344. On appeal, the Tarboxes argued a surety bond requirement violated their constitutional right to equal protection and due process. *Id.* The Idaho Supreme Court determined the rational basis test was applicable because the Tarboxes do not fall within a special class and the bond requirement does not infringe upon a fundamental right. 107 Idaho 957, 959-60, 695 P.2d 342, 344-45. The Court quoted a 1876 United States Supreme Court case stating:

...the United States Supreme Court upheld the validity of the “pay first, litigate later” rule on the ground that, “it is essential to the honor and orderly conduct of the government that its taxes should be promptly paid, and drawbacks speedily adjusted...”

107 Idaho 957, 960, 695 P.2d 342, 345, quoting *Cheatham v. Norvekl*, 92 U.S. (23 Wall.) 85, 89 (1876). The *Tarbox* Court went on to note the appropriateness of a bond being reliable so that the government can collect on it without delay or interference from other creditors if the taxpayer is found liable for a deficiency assessment. *Id.* As discussed *supra*, Hart’s purported promissory note was never approved as a proper payment by the Commission and the Board is well within its rights to question the reliability of a promise to pay upon which it would collect if and when Hart were found liable for the deficiency assessment. In *Tarbox*, the Supreme Court recognized the bond requirement jurisdictional

prerequisites may be “harsh”, but stated:

...[A]ppellate review is not a constitutional entitlement; rather it is a purely statutory right, the exercise of which is conditioned upon the manner prescribed by statute. Therefore it is not required by due process.

...

Though the prerequisites to institution of an appeal are demanding, they are reasonable in light of the function served by taxes in our society.

“[T]axes are the life-blood of government, and their prompt and certain availability an imperious need,” *Bull v. United States*, 295 U.S. 247, 259, 55 S.Ct. 695, 699, 79 L.Ed. 1421 (1935).

107 Idaho 957, 961, 695 P.2d 342, 346.

The Supreme Court of Idaho found no constitutional infirmity with I.C. § 63-3049(b)'s bond requirement. Hart's contention to the contrary is simply wrong.

B. IBTA's Motion to Strike.

On January 10, 2011, IBTA filed its “Motion to Strike and Objection to Appellant’s Request for Production [actually Request for Admissions, see, Exhibit “A” to Memorandum in Support]”, requesting this Court strike the discovery posed by Hart (Request for Admissions) on January 4, 2011, citing “...I.R.C.P. 84(r) and the fact that the hearing on Appellant’s Motion to Reconsider scheduled for March 16, 2011, is not an evidentiary hearing.” Motion to Strike and Objection to Appellant’s Request for Production, p. 1. On January 10, 2011, IBTA also filed a Memorandum in Support of Motion to Strike and Objection to Appellant’s Request for Production. On February 15, 2011, Hart filed his “Reply to Respondents’ Motion to Motion to Strike and Objection to Appellants Request for Production.” Other than correctly noting that it was a Request for Admission (not a Request for Production) which Hart posed to IBTA, Hart’s only response to IBTA’s motion to strike was to again make Hart’s argument that: “If the Court is going to continue to review the ‘facial’ jurisdictional determination under a ‘factual’ standard there needs to be facts in the ‘new record.’” Reply to Respondents’

Motion to Motion to Strike and Objection to Appellants Request for Production, p. 1.
The Court has discussed that issue above. IBTA's motion to strike must be granted.

IV. CONCLUSION AND ORDER.

For the reasons set forth above, this Court must deny Hart's motion for reconsideration and grant IBTA's motion to strike.

IT IS HEREBY ORDERED Appellant Hart's Motion for Reconsideration is DENIED.

IT IS FURTHER ORDERED Respondent IBTA's Motion to Strike and Objection to Appellant's Request for Production [to Admit] is GRANTED.

IT IS FURTHER ORDERED this Court will sign the Order of Dismissal and Judgment of Dismissal as presented by counsel for IBTA on December 10, 2010.

Entered this 17th day of March, 2011.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of March, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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