9-30-2011

Hart v. Idaho State Tax Com'n Appellant's Reply Brief Dckt. 38756

25

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF IDAHO

PHILIP L. HART, Appellant,	)	Supreme Court No. 38756-2011
vs.	)	
IDAHO STATE TAX COMMISSION and IDAHO BOARD OF TAX APPEALS Respondent.	)	

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REPLY BRIEF OF APPELLANT HART

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Appeal from the District Court of the First Judicial District

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The Honorable John T. Mitchell, Presiding

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ARGUMENT

1. **It was err for the district court to hold that Hart's appeal was not filed until March 31, 2010 and it did not have subject matter jurisdiction.**

The extended review process in this matter has been due to the failure of the Idaho Board of Tax Appeals (IBTA) and State Tax Commission (STC) representatives to examine their records and rules of procedure to correctly identify the date that Hart's appeal to the IBTA and deposit with the STC were filed. The mistake regarding the filing was perpetuated until STC's response to Hart's motion for reconsideration before the district court. Review of the applicable law in force subsequent to the amendment of the statute setting the amount of the required deposit, I.C. § 63-3049 (b), as discussed more fully below reveals that Hart did pay the 20% deposit for both of his appeals on March 30, 2011.

Hopefully any lingering confusion regarding the filing date and the deposit amount will be cleared up by the following discussion.

> IDAPA 36.01.01.051 provides:
> "051. NOTICE OF APPEAL—FILING STC APPEALS (RULE 51).
> Notices of appeal to the Board from Idaho State Tax Commission decisions and any other papers required to be filed with the Board shall be deemed filed upon actual receipt by the clerk of the Board or, if mailed, such papers shall be deemed filed as of the federal post office postmark date."[1]

STC's memorandum in support of its motion to dismiss Hart's appeal to the IBTA represented:

> "...on **March 31, 2010**, Appellant **filed** a Notice of Appeal with the Board of Tax Appeals and sent a copy to the Idaho State Tax Commission. Along with a copy sent to the Tax Commission, the Appellant sent the Commission two checks totaling $9,462.04."[2]

This representation is not supported by the IBTA record which establishes that Hart mailed his Notice of Appeal on March 30, 2010, and that he sent a copy of his Notice of Appeal to the STC

[1] Emphasis added.
[2] R. p. 167. Emphasis added.

with two checks totaling $9,462.04.[3] The federal post office postmark date is clearly legible on the envelope in which the Notice of Appeal was mailed.[4] The IBTA's certified "CONTENTS OF RECORD OF PROCEEDING" that was filed with the district court states:

> "1. Petitioner's Initial Notice of Appeal dated March 30, 2010, received on March 31, 2010."[5]

Hart's memorandum in response to STC's motion to dismiss informed the IBTA that Hart's Notice of Appeal was mailed on March 30, 2010.[6]

The IBTA's "Final Order Dismissing Appeal" held:

> " Notice of appeal was filed by Appellant [Hart] on March 31, 2010."[7]
>
> "...Appellant had until no later than March 30th to file a timely appeal...*Appellant filed the appeal on March 31, 2010.* [8]

Hart filed a motion for reconsideration with the IBTA. The IBTA denied the motion. It chose to only correct its err in conceding that Idaho Constitution Article III Section 7 would apply because last day for Hart's appeal to be filed otherwise would have been January 4, 2010 (the first non-holiday or weekend day following New Year's day) and not January 1, 2010 as it had previously held. The IBTA asserted that it "understands the pertinent law and facts presented,"[9] but nonetheless it continued to ignore the facts, and its own rules, that the date of filing of a Notice of Appeal is the date of its mailing as identified by the federal post office postmark on the envelope.

In response to Hart's appeal to the district court the STC chose to not file an answer. Instead it filed an I.R.C.P. Rule 12 (b) (1) facial challenge to the district court's subject matter

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[3] R. p. 215.
[4] R. p. 216.
[5] R. p. 217. Emphasis added.
[6] R. 118.
[7] R. p. 77.
[8] R. p. 78.
[9] R. p. 67.

jurisdiction. It also filed affidavits of Kristine Gambee, the STC bureau chief, and Shelley Sheridan, an administrative assistant to the STC,[10] but later withdrew them in the face of Hart's objection to their submittal in a 12 (b) (1) facial challenge.

STC's facial challenge memorandum represented to the district court that:

"...on March 31, 2010, Appellant filed a Notice of Appeal with the State Board of Tax Appeals and sent a copy to the Idaho State Tax Commission...[with] two checks totaling $9,462.04.[11]

At oral argument STC's counsel represented to the district court:

"On March 31st, 2010...appellant attempted to file an appeal. The letter came with two checks."[12]

"...what is uncontroverted in this case is...that ***no*** appeal was filed until March 31, 2010."[13]

The district court was probably swayed by the presence of a deputy attorney general who had traveled all the way from Boise to Coeur d'Alene to make arguments in its court and his representation that the facts were 'uncontradicted.' The district court's decision dismissing the appeal adopted these representations and held:

1. "*On March 31, 2010, Hart filed his appeal* with the Idaho Board of Tax Appeals (IBTA) *and submitted the amount of $9,462.04* to the Commission."[14]
2. "Hart failed to timely file his appeal with the IBTA."[15]
3. "The *only* reason the IBTA lacked jurisdiction to hear the appeal from the Commission is because Hart failed to timely file his appeal with the IBTA.[16]
4. "But this Court cannot now hear new evidence to determine if it has jurisdiction."[17]

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[10] Both of these affidavits (R. p. 10-15) were withdrawn pursuant to motion of Hart based upon the motion to dismiss being a 'facial' challenge to subject matter jurisdiction.
[11] R. p. 20. Emphasis added.
[12] Tr. p. 9, l. 14-16. Emphasis added.
[13] T. p. 16, l. 6-8. Emphasis added. It finally chose to acknowledge on February 4, 2011 that it was mailed on March 30, 2010. R. p. 302.
[14] R. p. 234. Emphasis added. Because the district court accepted the deputy attorney general's representation that the facts were uncontradicted and that the date of Hart's filing was March 31, 2010, the date it was *received in the mail*, it forcefully rebuked Hart's counsel for asserting that the correct filing date made Ag Air, Inc. v. Idaho State Tax Commission, 132 Idaho 345, 972 P. 2d 313 (1999) and Smith v. Arizona Citizens Clean Elections Commission, 212 Arizona 407, 132 P. d 1187 (2006) inapplicable.
[15] R. p. 237.
[16] R. p. 240. Emphasis in district court's decision. Compare the belated acknowledgement of the STC on February 4, 2011 that the Notice of Appeal was mailed on March 30, 2010. R. p. 302.

Hart filed a motion for reconsideration of the district court's order. Hart quoted IDAPA 36.01.01.051 to the district court and in bold italics stated:

> "...the Court failed to consider the fact, established by the record from the Idaho Board of Tax Appeals, that Appellant's Notice of Appeal was filed on ***March 30, 2010*** and not March 31, 2010 as claimed by the Board of Tax Appeals. The Board's rules specifically address when an appeal is deemed filed:...Notices of appeal to the Board from Idaho State Tax Commission decisions...if mailed, such papers shall be deemed filed as of the federal post office postmark date."[18]
>
> "... a copy of the envelope that the Notice of Appeal was mailed in to the Board... Reflects a USPS date of March 30, 2010."[19]

Hart addressed, among other points, the following to the district court:

1. The IBTA record is not evidence but rather merely an articulation of the STC's position;[20]
2. A facial review is different than a factual review;
3. Hart requested an evidentiary hearing if the district court was going to undertake a factual review;[21]
4. Identified evidence that Hart would present at an evidentiary hearing;
5. The IBTA record unequivocally establishes its determination of the date Hart filed his Notice of Appeal is not correct;
6. STC continues to misrepresent the filing date as being the date of its receipt of the Notice of Appeal;
7. The twenty percent (20%) deposit was filed with the STC on March 30, 2010;
8. IBTA rules provide for liberal interpretation "to secure just, speedy, and economical determination of all issues presented to the Board;"
9. IBTA never advised Hart his promissory note was not accepted as sufficient other security;

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[17] R. p. 240. As Hart discussed in the opening Brief before this Court and in his memorandum in support of his motion for reconsideration filed with the district court, a facial review only involves a review of the pleadings. On a factual review new facts are established at an evidentiary hearing, such as Hart requested.

[18] R. p. 244. Emphasis in memorandum.

[19] R. p. 245.

[20] *Gracie, LLC v. Idaho State Tax Com'n, 149 Idaho 570, 237 P. 3d 1196 (2010).* R. p. 264-283.

[21] In reviewing a 'factual' challenge to jurisdiction a court determines the jurisdictional issue after an evidentiary hearing that provides the court with a basis to determine 'facts.' see *Anderson v. Gailey, 97 Idaho 813, 555 P. 2d 144 (1976); Owsley v. Idaho Industrial Commission, 141 Idaho 129, 106 P. 3d 455 (2005); Osborn v. United States, 918 F. 2d 724 (8th Cir. 1990); Crawford v. United States, 796 F. 2d 924 (7th Cir 1986); United States ex rel Biddle v. Board of Trustees of Leland Stanford, Jr. University, 147 F. 3d 821 (9th Cir. 1998).*

10. On April 5, 2010, the IBTA gave Hart an additional 14 days to perfect his appeal;
11. On April 9, 2010, in satisfaction of his note Hart mailed what he believed at the time was the final payment on the appropriate deposit amount;[22]
12. If STC and IBTA were asserting in good faith that Hart had not perfected his appeal they were in violation of I.C. § 63-4007 by not returning the deposit to Hart;
13. The appeal was taken from two separate docket number decisions; and
14. STC's counsel's letter of April 14, 2010 confirmed the receipt of all the payments totaling $11,424.40. The letter also represented that copies of the receipts for the deposit payments were being sent to Hart.[23]

In order to place a spotlight on the disputed factual issues before the district court, Hart served Requests for Admission on the STC. The following are representative of the Requests for Admission that Hart served on STC. [24]

1. Please admit that the Board of Tax Appeal's record filed with the District Court in this matter contains a copy of the "Notice of Appeal to the Board of Tax Appeals", dated March 30, 2010.
2. Please admit that the "Notice of Appeal to the Board of Tax Appeals" filed with the District Court was "received" by the Board of Tax Appeals on March 31, 2010.
3. Please admit that the Board of Tax Appeal's record filed with the District Court in this matter contains a copy of the envelope received by the Board of Tax Appeals in which the Notice of Appeal was mailed.
4. Please admit that the envelope in which the Notice of Appeal to the Board of Tax Appeals was mailed reflects that it was mailed by certified mail deposited with the federal post office on March 30, 2010.
5. Please admit that the envelope in which the Notice of Appeal was sent to the Board of Tax Appeals referenced in Request for Admission number 4 contained, with the Notice of Appeal, two checks in the respective sums of $7,862.04 and $1,600.00.
6. Please admit that the two checks in the respective sums of $7,862.04 and $1,600.00 referenced in Request for Admission number 5 were cashed.
7. Please admit that the Board of Tax Appeal's record filed with the District Court in this matter contains a copy of a letter dated April 9, 2010 from Philip L. Hart that was received by the Board of Tax Appeals on April 12, 2010.

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[22] As it turns out Hart filed a deposit far in excess of 20% of the claimed deficiency. This is discussed below.

[23] R. p. 189. This point is highlighted because the district court's decision denying the motion for reconsideration the district court asserts, on at least five (5) instances in the course of two (2) pages in the decision, that a major reason for its decision is Hart's failure to provide a receipt for the deposits and Hart's failure to provide proof of compliance with deposit requirements.

[24]

8. Please admit that the Board of Tax Appeal's record filed with the District Court in this matter contains a copy of the envelope received by the Board of Tax Appeals in which the letter referenced in Request for Admission number 7 was contained.
9. Please admit that the envelope, referenced in Request for Admission number 8, in which the letter referenced in Request for Admission number 7 was mailed reflects that it was mailed by depositing it with the federal post office on April 9, 2010.
10. Please admit that the Board of Tax Appeal's record filed with the District Court in this matter contains a copy of a check from Philip L. Hart dated April 9, 2010 in the sum of $1,962.36 that was contained in the envelope referenced in Request for Admission number 9.
11. Please admit that neither the Board of Tax Appeals nor the State Tax Commission have ever returned the $11,424.40 to Mr. Hart.
12. Please admit that the Board of Tax Appeal's record filed with the District Court in this matter contains a copy of the April 14, 2010 letter from Deputy Attorney General William A. von Tagen confirming receipt of all three checks.
13. Please admit that the Idaho Administrative Code of the Board of Tax Appeals at IDAPA 36.01.051 provides:
Notices of appeal to the Board from Idaho State Tax Commission decisions and any other papers required to be filed with the Board shall be deemed filed upon actual receipt by the clerk of the Board or, if mailed, such papers shall be deemed filed as of the federal post office postmark date. Postage meters do not designate the mailing date. (2-18-05)"
18. Please admit that Idaho Code section 63-3049, in part, provides: "(b) Before a taxpayer may seek review by the district court or the board of tax appeals, the taxpayer shall secure the payment of the tax or deficiency as assessed by depositing cash with the tax commission in an amount equal to twenty percent (20%) of the amount asserted. In lieu of the cash deposit, the taxpayer may deposit any other type of security acceptable to the tax commission."
19. Please admit the Board of Tax Appeal's record filed with the District Court in this matter contains a copy of the April 5, 2010 letter from Susan Renfro, Director and Clerk to the Board (State Tax Commission).
20. Please admit that the letter referenced in Request for Admission number 19 did not advise Mr. Hart that his promise to pay did not constitute other type of security.
21. Please admit that based upon the rule of the Board of Tax Appeal Mr. Hart's appeal was "filled" on March 30, 2010 when it was placed in the possession of the federal post office post mark dated March 30, 2010.

Hart also filed his affidavit establishing among other matters, the filing date and deposit.[25]

The STC filed an objection to protect it from being required to answer the Requests for Admission. It did not object to Hart's affidavit disputing the facts that STC claimed were 'undisputed.' Hart requested an evidentiary hearing and provided the district court with an

[25] R. p. 296-297.

outline the evidence that would be presented at the hearing on the contested issues. Thereafter, apparently because of the Requests for Admission, the STC chose to finally admit (*on February 4, 2011*) that the Notice of Appeal was mailed on March 30, 2010.

> "A notice of appeal was finally mailed to the Board of Tax Appeals, and partial Payment was mailed to the Idaho State Tax Commission on March 30, 2010."[26]

The district court, presented with Hart's affidavit and the first time admission by the STC that the Notice of Appeal was mailed on March 30, 2010 chose to *sua sponte* challenge the March 30, 2010 filing date. It addressed matters that the STC had not raised as concerns. The district court's opinion will be quoted and then followed with by Hart's response:

District Court:

> "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."[27]

Response: That is correct. Under IDAPA 36.01.01.051 the date of filing date is the date that the Notice of Appeal was mailed as documented by the federal post office postmark date. The "Notice of Appeal to the Board of Tax Appeals" filed by Hart reflects the federal post office postmark on it of March 30, 2010.[28]

District Court:

> "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."[29]
>
> "...on March 31, 2010, Hart filed his actual five-page "Notice of Appeal to the Idaho Board of Tax Appeals...It is the March 31, 2010, Notice of Appeal to the Idaho Board of Tax Appeals which sets forth what is actually being appealed...*Thus, as found by the IBTA and this Court, Hart's March 31, 2010, Notice of Appeal, is his appeal.*"[30]

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[26] R. p. 300.
[27] R. p. 347.
[28] R. p. 216.
[29] R. p. 348.
[30] R. p. 348-349. Emphasis added. STC advised the district court that the "Notice of Appeal was mailed on March 30, 2010 and it contained the two checks. R. p. 302. The IBTA never found this.

Response: In order for the district court to find that Hart's appeal was not filed until March 31, 2010, given that IBTA finally admitted to the district court that the date of mailing was March 30, 2011, it had to disregard the March 30, 2010 Notice of Appeal that documented the filing of the deposit with the STC. At no time has the IBTA, the State Tax Commission (STC), or their counsel ever asserted that the March 30, 2010 Notice of Appeal was fatally defective. They have only claimed that the notice was filed on the date of its receipt. The STC has never claimed it was prejudiced or mislead by Hart's March 30, 2010 Notice of Appeal. The IBTA's own rules aren't nearly as technicality oriented as the district court applied them.[31]

The only purpose of serving a notice of appeal is to inform each party whose rights are involved that an appeal has in fact been taken. [32] An appeal will be held *sufficient* even if it may be technically defective without a claim by the respondent that it was prejudice or misled.[33] IDAPA 36.01.01.63 provides that "pleadings will be liberally construed, and *defects that do not affect the substantial rights of the parties will be disregarded.*" The STC's memorandum in support of its motion to dismiss before the IBTA states that "on March 31, 2010, Appellant filed a Notice of Appeal with the Board of Tax Appeals and that a copy of it [containing the deposit] was sent a copy to the Idaho State Tax Commission."[34] At no time did the IBTA or the STC claim that Hart's Notice of Appeal was actually the correspondence fleshing out issues on appeal that was mailed on March 31, 2010. Further the IBTA, the STC's counsel, and the affidavits[35] of Shelley Sheridan and Kristine Gambee, all agree that the Notice of Appeal that documented the

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[31] IDAPA 36.01.01.063. Pleadings will be liberally construed, and defects that do not affect the substantial rights of the parties will be disregarded.
[32] *Mendini v. Milner, 47 Idaho 322, 276 P. 35 (1929) citing Bigler v. Waller, 12 Wall. (U.S.) 142, 20 L.Ed. 260 (1871).*
[33] *Turner v. Purdum, 77 Idaho 130 (1955)*
[34] R. p. 167.
[35] R. p. 183-184; p. 191-192.

two checks and promise filed with the STC was **the** Notice of Appeal, that they claimed was filed on the date they received it.

Despite the IBTA and the STC's clear reference to the Notice of Appeal mailed on March 30, 2011 as the Notice of Appeal, the district court held that the correspondence that was *mailed* on March 31, 2010 (that didn't refer to the two checks and the promise to pay) was *actually* the Notice of Appeal. This finding is totally contrary to the record and the position of IBTA and the STC.[36] Simply there is no evidence in any record that the IBTA ever considered the second and detailed Notice of Appeal, mailed on March 31, 2010, to be Hart's Notice of Appeal for purposes of determining whether it had been timely filed. Hart's second Notice of Appeal mailed on March 31, 2010 was literally nothing more than an amended Notice such as is specifically permitted by IDAPA 36.01.01.063. The district court erred in claiming that it and the IBTA decision refer to the same Notice of Appeal.

District Court:

> "...Hart failed to provide *proof of compliance* with deposit requirements...there is no evidence that Hart ever sought a receipt from the Commission."[37]

Response: The district court attempted to support its earlier decision in significant part by asserting that Hart didn't seek a receipt or provide *proof of compliance* of a bond equal to 20% of the *deficiency*. Neither the IBTA, the STC, or their counsel asserted there was *no proof of compliance*. All of STC's correspondence acknowledge the deposits. The IBTA *only* claimed that the total 20% deposit for the appeal of both separate docket numbers was not completely *filed* until April 14, 2010.[38] This IBTA determination of this filing date is incorrect factually and it is erroneous under the 2005 amendment. The Affidavit of STC bureau chief Kristine Gambee,

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[36] The Notice of Appeal, with the 'partial payment' was mailed on March 30, 2010. R. p. 302.
[37] R. p. 349. Emphasis in opinion. The district court points to a lack of "evidence" in what was supposed to be a facial review.
[38] R. p. 78.

in the IBTA record, establishes that the last payment made by Hart was received on April 13, 2010.[39] The IBTA not only disregarded its rule that the date of mailing is the date of filing, but it also entered its finding that Hart's last check the deposit was not filed until a day after it was *received* and four days after it was mailed.

The record is replete with proof of compliance. Hart's letter of April 9, 2010, specifically asked for a receipt for all of his payments.[40] Deputy Attorney General von Tagen's letter of April 14, 2010[41] confirmed the STC's receipt of the payment of three checks in sums of $7,862.04, $1,600.00, and $1,962.36 which total $11,424.40. The IBTA record contains the affidavit of Kristine Gambee, the bureau chief of the STC, that confirms the STC's receipt of these amounts,[42] and the record contains Hart's March 30, 2010 Notice of Appeal, with two checks and his promise, that was received by the STC.[43] The district court erred.

District Court:

> The district court refused to address the fact that Hart had two appeals, of two separate Dockets "because Hart failed to provide *proof of compliance* with deposit requirements."[44]

Response: The response, set forth immediately above, responds to the *proof of compliance* issue that was raised by the district court. Because the district court erroneously determined the filing date of the Notice of Appeal it then erred in not addressing the fact that Hart timely filed the required deposit.

I.C. § 63-3049 (b) requires that a taxpayer secure "payment of the *tax or deficiency*"[45] as assessed by depositing twenty percent (20%) of the amount asserted with the tax commission.

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[39] R. p. 192.
[40] R. p. 128, 188.
[41] R. p. 189.
[42] R. p. 191-192.
[43] R. p. 187.
[44] R. p. 349. Emphasis in opinion of the district court.
[45] Emphasis added.

This section also provides that the deposit may be either "cash" or "any other type of security acceptable to the tax commission." In 2005 the Idaho legislature amended I.C. § 63-3049 (b) by specifically deleting the requirement that 20% of the "tax, penalty and interest" and inserting "amount asserted" in its place.

> (b) Before a taxpayer may seek review by the district court or the board of tax appeals, the taxpayer shall secure the payment of the tax or deficiency as assessed by depositing cash with the tax commission in an amount equal to twenty percent (20%) of the ~~*tax, penalty and interest*~~ **amount asserted**. In lieu of the cash deposit, the taxpayer may deposit any other type of security acceptable to the tax commission.

In construing statutes the Court assumes that when a statute is amended that the legislature intended the statute to have a meaning different from the meaning accorded the statute before the amendment.[46] In the amendment the legislature specifically removed the express language equating the amount of the required deposit to the tax. plus the penalty, plus the interest. In its place it equated the amount of the required deposit to the "amount asserted" which it later defined as the "total amount due, as set forth in the decision of the state tax commission." Had the legislature not gone to the trouble of amending the statute and deleting the specific requirement that the required deposit equal the tax, penalty, and interest it could reasonably be argued that "the amount asserted" was the total of the tax, penalty, and interest. Courts do not presume that the legislature performed an idle act by enacting a meaningless provision.[47] If the legislature didn't intend that the "amount asserted" was something different that the tax, penalty, and interest then it wouldn't have amended the statute. The "Statement of Purpose" even states that this language changes the required deposit from "the tax penalty and interest due."

STATEMENT OF PURPOSE
RS 14441

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[46] *Stewart v. Pacific Hide & Fur Depot, 138 Idaho 509, 512, 65 P. 3d 531, 534 (2003).*
[47] *Sweitzer v. Dean, 118 Idaho 568, 798 P. 2d 27, 31 (1990); Brown v. Caldwell School District No. 132, 127 Idaho 112, 898 P. 2d 43 (1995).*

> "...Also, taxpayers currently deposit 20% of the tax penalty and interest due. This would change to 20% of the amount asserted when the State Tax Commission issues its decision."

The Idaho Income Tax Act, like all tax statutes, must be construed as favorable as possible to the taxpayer and strictly against the taxing authority. [48] The change in the statutory language under such a standard of construction should be interpreted to be something other than and less than the prior deleted, all inclusive, language or tax, penalty and interest. As provided by I.C. § 63-3409 the deposit is intended to "*secure payment of the tax or deficiency as assessed.*" Given the amendment and the expressed purpose of securing payment of the *tax or deficiency* there is no reason to disregard the legislature's changed language and interpret it to mean the same thing as what was expressly deleted. The required deposit should be limited to the tax or deficiency in tax and not to include the addition of penalty and interest. An expansive interpretation to include penalty and interest would make the amendment an idle act of the legislature.

I.C. § 63-3044 defines *deficiency* as " (3) Any amount of <u>tax</u> which is due and unpaid." I.C. § 63-3632 clarifies that "*interest*" is different than a "*deficiency.*" I.C. § 63-3046 clarifies that a "*penalty*" is different than a "*deficiency.*"

There were two Docket Numbers before the STC for it consideration. Docket Number 21551 (for the years 1996, 1997 and 1998) claimed that the amount of *tax*, due and unpaid, for each respective year was as follows: 1996--$2,879; 1997--$8,387; 1998--$2,736. The claimed <u>total</u> *tax* due and unpaid for Docket Number 21551 was $<u>14,002</u>. Docket number 21552 (for the years 1999, 2000, 2001, 2002, 2003 and 2004) claimed that the amount of *tax*, due and unpaid, for each respective year was as follows: 1999--$2,281; 2000—$2,928; 2001--$3,680; 2002--

[48] *Canty v. Idaho State Tax Commission, 138 Idaho 178, 59 P. 3d 983 (2002)*

$2,133; 2003--$1,683; 2004--$2,286. The claimed total *tax* due and unpaid for Docket Number 21552 was $14,991.

The deposit required for Docket Number 21551 equals $2,800. The deposit required for Docket Number 21552 equals $2,998.20. By adding these totals together, the *total required deposit,* for *both* docket appeals, equals the sum of $5,798.20.

Simultaneous with the filing of his Notice of Appeal on March 30, 2010, Hart deposited $9,462.04 with the STC. This deposit was $3,663.84 more than the required deposit for both Docket Numbers.

Despite the fact that there is a difference between a "deficiency" and any claimed "interest" or a "penalty" even if the total of the claimed tax plus the assessed penalty, and interest claimed by STC to be owed by Hart ($53,523[49]) is used to determine the amount of a twenty percent (20%) deposit, he nonetheless deposited more security with the STC for both Docket Numbers than is required.

Hart's compliance with the required deposit for both Docket Numbers, even if it is deposit requirement is liberally interpreted to include the tax, and the penalty and interest despite of the amendment in 2005, is documented in the record for each respective Docket Number.

STC DOCKET NUMBER 21551:

The claimed deficiency, plus penalty and interest, in STC Docket Number 21551 was $28,279.[50] Twenty percent (20%) of this sum equals $5,655.80. On the same day that Hart filed his Notice of Appeal, March 30, 2010, he filed a total deposit sum of $9,462.04. This deposit sum was $3,806.24 more than the highest deposit sum he was required to file in order to appeal Docket Number 21551.

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[49] R. p. 136.
[50] R, o, 136.

STC DOCKET NUMBER 21552:

The deficiency, plus penalty and interest, claimed in STC Docket Number 21552 was $25,244.[51] Twenty percent (20%) of this sum equals $5,048.80. On the same day that he filed the Notice of Appeal, March 30, 2010, Hart deposited cash in the sum of $3,806.24 towards this second Docket Number. This cash deposit was only $1,242.56 less than the twenty percent (20%) due for Docket Number 215522. In addition to the cash deposit Hart, in the same filing letter with the STC and the IBTA, also provided a promissory note[52] whereby he promised to pay the balance in cash by April 9, 2010 as security.

> "Please consider this letter my promise to pay the remaining $1,962.36...By April 9th I can have a check in the mail to your office for the remaining $1,962.36."

Hart's promise to pay was a negotiable instrument. It was an unconditional promise to pay money on April 9, 2010, was payable to the STC at the time it was issued and came into the possession of the STC, was payable at a definite time, and it does not state any other undertaking or instruction by the person promising payment to do any act in addition to the payment of money.[53] Hart's unconditional promise to pay was a note.[54] Hart's promise to pay was issued for value because it was issued as security for an antecedent claim (tax deficiency) against him, whether or not it was actually due.[55]

I.C. § 63-3049 provides, in relevant part, that:

> "In lieu of the cash deposit, the taxpayer may deposit any other type of security acceptable to the tax commission."

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[51] R. p. 136.
[52] R. p. 215.
[53] I.C. § 28-2-104.
[54] I.C. § 28-3-104 (5).
[55] I.C. § 28-3-303 (c).

IDAPA 36.01.01.021 provides, in relevant part, that:

"These rules [of the IBTA] will be liberally construed to secure just, speedy, and economical determination of all issues presented to the Board."

Hart was never notified by the STC it did not accept the promissory note as "other type of security acceptable to it." It is a significant fact that neither the IBTA nor the STC provided any affidavit or offer of proof that the promissory note was not, in fact, accepted as security. Indeed the retention of all of the security deposited by Hart is contrary to any such assertion. I.C. § 63-4007 requires that "payments made by a taxpayer may not be applied to any tax obligation disputed by the taxpayer and such monies shall only be applied in accordance with the taxpayer's directions. Hart's letters accompanying all of the checks specifically state that the payments were made to satisfy the 20% bond requirement. The Deputy Attorney General's letter of April 14, 2010,[56] acknowledges that Hart's checks were sent to comply with the deposit requirement. Subsequently in full satisfaction of his promise to pay, and within his granted 14 day additional time, Hart deposited his check for $1,962.36 with the STC by mail on April 9, 2010.[57] This payment resulted in Hart, once again, depositing more cash security than was required. His total overpayment when combined with the $3,806.24, using a calculation that combined the claimed tax with the accessed penalty and interest, was $719.80 more than the maximum possible deposit required.[58]

District Court:

"...where an appeal is materially defective or not in substantial compliance with requirements, the IBTA has the option of dismissing the appeal or providing an additional 14 days for the appellant to amend and perfect the appeal...The IBTA was under no obligation to permit Hart to amend and perfect an untimely filed

[56] R. p. 189.
[57] R. p. 128.
[58] Similar to Respondents' belated admission that the Notice of Appeal was mailed on March 30, 2010, but much later, the Respondents' now finally in their brief to this Court, admitted that Hart paid **more** than 20%. Respondents' Reply Brief, p. 13.

appeal."[59]

"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."[60]

Response: The district court's erred in asserting that Hart claimed he was entitled to the additional 14 day time. What Hart argued was that the *IBTA had granted him* an "additional 14-day period" to "perfect" his appeal, and that as a result of this grant *he was then* entitled to the 14 additional days. Hart never claimed that the IBTA was required to give him this additional 14-day period. What Hart claimed was *that once the IBTA gave him the additional 14-day period* to perfect his appeal, as documented in IBTA's letter of April 5, 2010,[61] he then had the "right" to the fourteen additional days.

The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean, 234 US. 385, 34 S. Ct 779.* Even if the requirement of a deposit is constitutional,[62] such a requirement was implicitly repealed on February 17, 2009, by the Idaho legislature when it amended Idaho Code § 63-3004. Prior to amending this statute Internal Revenue Code of 1986 was applicable to Idaho income tax issues. However U.S. Code section 7491 which was enacted a little over a month *prior* to the Idaho legislature's amendment of I.C. § 63-3004, on January 5, 2009, *shifted the burden of proof* in tax disputes from the taxpayer to the agency. It provided the taxpayer with the protection of a position of "innocent until proven guilty" in tax matters. The status of the law under the Internal Revenue Code of 1986 used to be "guilty until the

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[59] R. p. 349.
[60] R. p. 350.
[61] R. p. 194-195.
[62] Hart raised as an issue whether or not a 20% bond requirement was constitutional. R. p. 245. Ultimately he was not afforded the opportunity to address this specific issue because the district court maintained the erroneous position that the appeal had not been filed on March 30, 2010. Contrary to the district court's commentary (R. p. 350-351) Hart did not, and does not, "recognize the futility of his argument". Without a grant of the motion for reconsideration and an acceptance that the filing date was March 30, 2010 there was no opportunity to raise that issue because whether or not the 20% deposit was constitutional was moot until the district court acknowledged that the appeals were timely filed.

taxpayer proves his innocence." However, the enactment of this new federal legislation, based upon federal changes in policy towards taxpayers, left Idaho with no basis to require a taxpayer, as a condition of challenging a STC deficiency determination, to deposit any percentage of the deficiency claimed.

District Court:

> " Hart's final argument is that his insufficient deposit only applies to one of the two separate appeals he filed. Hart concedes that the Commission rules do not contemplate separate case dockets being combined."

Response: In the context of Hart's argument that, at the very least, his appeal from Docket Number 21551 could not be dismissed because under any calculation of the deposit required for that Docket Number Hart met the deposit required, this statement is inherently confusing. The district court actually affirms Hart's position. IDAPA 36.01.01.055 provides:

> "...There shall be no consolidation of cases where the rights of any party would be prejudiced by such procedure."

Once the correct filing date of March 30, 2010 is acknowledged, if all of the claimed taxes, penalties, and interest, for both docket numbers are combined and the promissory note is held to not have been actually accepted as security, the only way that the appeal of Docket Number 21551 would still not be in full compliance with appeal requirements would be to require that the total deposit for both appealed dockets must be made before for even one appeal will be permitted. This would be an obvious prejudice to Hart in his appeal of Docket Number 21551, and such a requirement would also violate the ITBA's own administrative rules.

2. **The Idaho Constitution Article III Section 7 issue was never ruled upon by the IBTA the district court.**

Respondents have inserted into their brief an argument against the applicability of Idaho Constitution Article III Section 7 to Hart's appeal to the IBTA. The IBTA did not consider this

issue, it assumed that this constitutional protection applied to Hart.[63] After the IBTA it assumed the constitutional protection applied to Hart it erroneously determined that the date it *received* Hart's appeal was the date of filing. Likewise after the district court erroneously held that Hart filed his appeal on the date it was received by IBTA, and not on the date that it was mailed, it didn't address this constitutional issue because it recognized that it could proceed to do so after it exercised its jurisdiction and conducted a trial *de novo*.[64] It is submitted that this significant constitutional issue is not ripe for determination until after a clear factual record is established, either in an evidentiary hearing or in a trial *de novo*, and the district court renders its decision on the issue. It is submitted that this Court should not consider this issue until after the district court is reversed, this matter is remanded, and the district court determines the issue after a thorough factual record is developed in an evidentiary hearing or by a trial *de novo*.[65]

CONCLUSION

Everyone makes mistakes. Finding that the date of filing of the Notice of Appeal was the *date it received* rather than the *date it was mailed* is a mistake. However, once the mistake was brought to their attention, the IBTA and STC should have taken every avenue available to it to correct the err. The IBTA's failure and the STC's dogged refusal to acknowledge their err was the slip that led to this appeal. Had the filing date been corrected the proper amount of the required deposit and whether such a deposit is constitutional could have been addressed. The district court erred in accepting the receipt date as the filing date, and then by construing the amended Notice of Appeal *mailed* by Hart on March 31, 2010, as the *actual* Notice of Appeal *and* the same one that the IBTA referenced in its decision. The district court's finding that the

[63] R. p. 77.
[64] R. p. 240.
[65] Should the Court determine to review this issue Hart's position is well set forth in his Memorandum in Opposition to Motion Dismiss filed with the IBTA at R. p. 118-121.

IBTA considered Hart's amended notice, *mailed* on March 31, 2010, as the actual Notice of Appeal was err. The IBTA by its acknowledgement that the Notice of Appeal contain Hart's first two checks and promise to pay reveals that it clearly accepted the Notice of Appeal mailed on March 30, 2010, as the Notice of Appeal. Had this err been corrected, after it was brought to the attention of the IBTA this matter would have been able to proceed before the IBTA. It could have focused its attention on the substantive issues raised by Hart by his appeal required. Instead Respondents continued to assert that the date of receipt, not the date of mailing, was the filing date. This is the cornerstone of Hart's request for attorney fees on this appeal. Further it was not until the Respondent's Reply brief was filed with this Court that STC acknowledged that Hart paid more money than he was required to as the deposit.[66] All of the IBTA and district court's errors begin with the determination that the receipt date was the filing date. Once that error occurred and the district court attempted to support its initial decision by holding that both it and the IBTA were in agreement that the actual Notice of Appeal was the one mailed on March 31, 2010 and received on April 1, 2010 any decisions regarding required deposit amounts or constitutional issues were brushed aside and not fully evaluated because the decisions on these issues were dependent on a timely filing of a Notice of Appeal.

The district court decision should be reversed and this matter remanded with directions to conduct an evidentiary hearing if deemed necessary and followed by a trial *de novo.*

DATED this 29 day of September, 2010.

Starr Kelso, Attorney for Appellant Hart

[66] This would appear to be at least a veiled acknowledgment that the statute establishing the required deposit amount was amended in 2005 to eliminate the addition of assessed penalty and interest in the calculation of the 20% deposit.

CERTIFICATE OF SERVICE: I certify that on the 5 day of September, 2011 I served two copies of the foregoing brief by depositing the same in the United States mail, postage prepaid thereon, to:

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