

BEFORE THE MONTANA TAX APPEAL BOARD

TIMOTHY L. BLIXSETH,)	
)	
Appellant,)	Docket No. IT-2011-2
-vs-)	
)	
DEPARTMENT OF REVENUE)	ORDER
OF THE STATE OF MONTANA,)	ON MOTION FOR PARTIAL
)	SUMMARY JUDGMENT
Respondent.)	ON COUNTS 3 AND 9

The Montana Department of Revenue (DOR) has moved for Partial summary judgment under Rule 56, Montana R.Civ.Pro., on Counts 3 and 9 of the original Complaint filed by taxpayer Timothy Blixseth on February 10, 2011. Counts 3 and 9 of the Complaint are the only issues remaining before this Board.

Mr. Blixseth has not responded to the DOR's motion.

Summary Judgment Standard

Rule 56(c)(3) of the Montana Rules of Civil Procedure states "The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." The moving party has the burden of showing that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 250 (1986); *Wiser v. State, Dep't of Commerce*, 2006 MT 20, 331 Mont. 28, 129 P.3d 133. When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial. M. R. Civ. P. 56(e)(2); See *Nelson v. Nelson*, 2005 MT 263 ¶18, 329 Mont. 85, 122 P.3d 1169 (2005) citing *Tucker v. Trotter Treadmills, Inc.*, 239 Mont. 233, 235, 779 P.2d 524, 525 (1989). If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party. M. R. Civ. P. 56(e)(2).

Background

The DOR seeks summary judgment of the only issues remaining before this Board — whether the DOR correctly determined that the Taxpayer omitted various items of pass-through income from his 2004 Montana individual income tax return.

Count 3 of Taxpayer's Complaint challenges the DOR's Audit Issue No. 3 which determined that the Taxpayer erroneously omitted the following items of pass-through income from his 2004 Montana Individual Income Tax Form 2 Schedule III:

- \$2,474,499 from Blixseth Family Investments;
- \$1,031,280 from Yellowstone Homebuilders, LLC;
- \$105,588 from Go Build, Inc.;
- \$1,607 from Thumb Development; and
- \$10,098 from Yellowstone Mountain Club 1099 Nominee.

(Compl. Ex. A).

Count 3 of the Taxpayer's Complaint also asserts that "neither the Taxpayer, nor the DOR, have access to all of the appropriate records and documents necessary to determine whether there was any unreported pass-through income in 2004."

Compl. ¶28. However, "[w]ithout conceding the issue, the Taxpayer acknowledges that it is possible his accountants may have inadvertently omitted certain items of pass-through income from his 2004 income tax return." Compl. ¶29.

Count 9 of Taxpayer's Complaint is a general averment that the DOR assessed pass-through income from the Yellowstone Mountain Club, LLC, Yellowstone Development, LLC, Blixseth Group, Inc., or other business entities without first reviewing the necessary documents to make accurate assessments at the entity level, thus violating the requirements of Section 15-30-3314, MCA. Count 9 asserts "the DOR seeks to assess additional tax on alleged income from pass-through entities without examining the entity or the records required for a full and fair assessment of the tax." Compl. ¶51.

The crux of Taxpayer's argument in Counts 3 and 9 is that the DOR failed to review all the documents and records necessary to make an accurate determination regarding the omitted items of pass-through income.

In its motion, the DOR argues that it has waited over two and a half years for the Taxpayer to produce records relating to the various partnership entities that

generated the pass-through income. Discovery in this matter closed on September 2, 2014 and Taxpayer failed to produce any documents refuting the DOR's pass-through adjustments associated with Counts 3 and 9. The record contains no evidence reliably establishing that the pass-through income was properly omitted from the 2004 Montana return.

We agree with the DOR that the Taxpayer's assertion in his Complaint that someone, somewhere, may have documents that support different adjustments than those determined by the DOR's auditor, is not the same as providing documentation to substantiate a different adjustment. We find that this and other assertions by the Taxpayer are not sufficient to demonstrate that a genuine issue of material fact exists.

In his Complaint, the Taxpayer alleges that "uncooperative third-parties including Edra Blixseth, and the trustee of her bankruptcy estate, among others, hold the documentary evidence requested. Compl. ¶28. This allegation in the pleadings is not sufficient to raise a genuine issue of material fact. We agree with the DOR that Blixseth bears the burden to support his claims and substantiate his omissions, irrespective of whether the documents may exist outside his possession or control. §26-1-401, MCA; *Cook v. Commr.*, T.C. Memo 1991-590 (T.C. 1991).

It is the Taxpayer's obligation to preserve supporting documentation. *Leahy v. Dep't of Revenue, State of Mont.*, 266 Mont. 94, 879 P.2d 653 (1994); *Evans v. Commr.*, T.C. Memo 2010-199 (T.C. 2010). A taxpayer's inability to produce his records does not relieve him of the burden to substantiate the items claimed in his return. *Albrecht*

v. Albrecht, 2002 MT 227, 311 Mont. 412, 56 P.3d 339; *Leahy v. Dep't of Revenue, State of Mont.*, 266 Mont. 94, 879 P.2d 653 (1994); *Cook v. Commr.*, T.C. Memo 1991-590 (T.C. 1991).

Montana taxpayers must report all income earned on their Montana individual income tax return unless it is otherwise excepted as a deduction from Montana adjusted gross income. §15-30-2110, M.C.A. The DOR's auditor determined that none of the omitted pass-through income qualified as an exemption or deduction from gross income for nonresidents under Montana law. Compl. Ex. A. The DOR submitted copies of Taxpayer's jointly filed 2004 federal and state income tax returns along with three K-1s showing distributed pass-through income attributable to Taxpayer and his ex-wife that was omitted from the Taxpayer's 2004 state return. MDOR Ex. 140-144.

Taxpayer has failed to provide any evidence to demonstrate why the pass-through income should not be included in his 2004 Montana return. In fact, Taxpayer failed to respond to the present motion and in his Complaint admits that some items of pass-through income may have been inadvertently omitted from his 2004 Montana return. Taxpayer has also failed to present any evidence regarding the application of Section 15-30-3314, M.C.A. It is the Taxpayer's burden to substantiate the grounds on which some, or all, of the pass-through income was properly omitted. We find that the Taxpayer has failed to meet his burden under M. R. Civ. P. 56(e)(2) to bring forth any evidence to defeat the DOR's motion.

We find that the DOR has satisfactorily established that there is no genuine dispute as to any material fact. It is uncontroverted that the Taxpayer omitted certain items of pass through income from his 2004 Montana Form 2 Schedule III and therefore the DOR is entitled to judgment as a matter of law on Counts 3 and 9 of the Complaint.

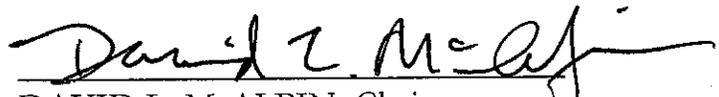
Order

IT IS THEREFORE ORDERED by the Montana Tax Appeal Board that the DOR's Motion for Partial summary judgment on Counts 3 and 9 is hereby granted.

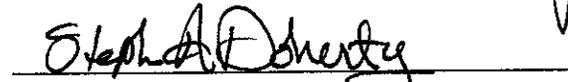
DATED this 20th day of March 2015.

(SEAL)

BY ORDER OF THE
MONTANA TAX APPEAL BOARD



DAVID L. McALPIN, Chair



STEVE DOHERTY, Member

NOTICE: This is the Final Order that will be issued by the Board in this Docket. You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of March 2015, a true and correct copy of the foregoing has been served on the parties hereto by the method indicated below and addressed as follows:

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