

judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Miller v. Herbert*, 272 Mont. 132, 137, 900 P.2d 273, 276 (1995). In deciding a motion for summary judgment, all reasonable inferences must be drawn in favor of the non-moving party so that if there is any doubt as to the existence of a genuine issue of material fact, that doubt must be resolved in favor of the party opposing summary judgment. *Bailey v. State Farm Mut. Auto. Ins. Co.*, 2013 MT 119, ¶ 30, 370 Mont. 73, 83, 300 P.3d 1149, 1156. In making a determination for summary judgment, the court must consider the entire record. *Jarvenpaa v. Glacier Elec. Co-op., Inc.*, 271 Mont. 477, 898 P. 2d 690 (1995); *Smith v. Barrett*, 242 Mont. 37, 40, 788 P.2d 324, 326 (1990).

DISCUSSION

The facts are not in dispute for this motion, and will be referenced as needed. The question at issue is whether the Hoffmans are barred from appealing the DOR's final audit determination to this Board because they failed to timely appeal the tax liability through the DOR's internal appeal process.

The DOR has developed an administrative appeal process that requires certain steps be taken before a taxpayer may appeal a final audit determination to this Board. As part of the administrative procedure, a taxpayer must timely contest the tax at issue. The administrative procedure to contest a tax liability is governed by both statute and administrative rule. The statutory requirements may be found in the Uniform Dispute Review procedure (§15-1-211, MCA), the Taxpayer Bill of Rights

(§15-1-222, MCA), direct appeal to the state tax appeal board (§15-2-302, MCA), and the Montana administrative procedures act for contested cases (§2-4-601 et. al.). The specific procedure for the DOR's internal appeal process is found in ARM 42.2.510(16), which requires a taxpayer to contest a Notice of Determination to the ODR within 15 days. The DOR deems the failure to refer a disputed matter to the ODR within 15 days as an admission that the debt is owed as stated in the Statement of Account.

In this matter, the DOR sent Taxpayers an audit adjustment letter dated January 29, 2014 along with a first Statement of Account showing additional tax, penalties and interest due and owing for the tax years 2008 through 2012. Ex. A. Department Motion for Summary Judgment (DOR Motion). The January 29th letter triggered the first step in the DOR's administrative appeal process — a 30 day deadline for the Taxpayer to file a Form APLS101F Request for Informal Review. ARM 42.2.510(3). Taxpayers engaged the professional services of Francis P. McGowan, an enrolled agent with TaxResources, Inc. (dba TaxAudit.com) based in Citrus Heights, California. Mr. McGowan responded to the DOR's January 29 letter on behalf of the Hoffmans and requested an extension of time to submit additional documents. Ex. B DOR Motion.

On May 6, 2014, the DOR sent the Hoffmans a letter stating that the DOR had made no changes to the audit adjustments after reviewing the additional

documentation submitted by Mr. McGowan. Ex. C DOR Motion. The DOR also sent a copy of this letter directly to Mr. McGowan.

The May 6 letter set forth the next step in the DOR's administrative appeal process, viz. an appeal with the ODR. This letter also informed the Taxpayers of the 15-day deadline for the Taxpayers to file an appeal with the ODR and enclosed a copy of Form APLS102F Referral to Office of Dispute Resolution. ARM 42.2.510(6). Taxpayers did not file an appeal with ODR until June 11, 2014, twenty-one days after the May 21, 2014 deadline. Ex. D DOR Motion.

On June 13, 2014, DOR filed a Motion to Dismiss Taxpayers' referral to ODR because the appeal was not filed within the 15-day deadline. Ex. 1 at 1-2. On June 30, 2014, Mr. McGowan filed a response with ODR stating the Taxpayers needed more than 15 days to locate additional records. ODR Ex. 4. ODR held a telephonic hearing on September 3, 2014, to decide whether there was reasonable cause, as prescribed by ARM 42.3.105, to excuse the Taxpayers' late filed referral to that office. Mr. McGowan testified "I didn't realize that the second part of the appeals was coming up so quick in 15 days. Generally everything is in 30 and 45 or 90 days and the 15 days [] caught me by surprise." ODR Order at 9-10; Tr. 7. Doug Hoffman testified "I assumed the same information that was coming to me was coming to Frank. So up until now, I'm afraid I wasn't aware that there was a late appeal." ODR Order at 9; Tr. 6. ODR determined that the Taxpayers' did not establish reasonable cause for their untimely referral and therefore affirmed the DOR's assessment of

additional tax, penalties and interest. ODR Order at 11-12. ODR did not review the underlying tax assessment, and the matter was determined to be a final determination that could be appealed. Taxpayers, appearing pro se, appealed the ODR decision to this Board and the matter was accepted as an appeal by this Board. §15-2-302, MCA.

The DOR's current motion asserts that a taxpayer's ability to appeal an assessment or action taken by the DOR is extinguished upon the expiration of the 15-day deadline set out in administrative rule. We agree. There is no dispute that the May 6 letter notified the Hoffmans, and Mr. McGowan, of their obligation to file a referral to ODR within 15 days. There is no disagreement that they received the letter and missed the 15-day referral deadline.

It appears that Taxpayers' representative, who accepted the representation even though he was unfamiliar with Montana's administrative procedures, missed the 15-day deadline and foreclosed the Taxpayers' administrative remedies within DOR. The Board can find no statutory authority by which a reasonable cause exception can be granted to the Taxpayers because of Mr. McGowan's negligence. While there is no explicit statutory guidance for what might constitute reasonable cause to miss the 15-day deadline, the DOR specifically defines forgetfulness or inadvertence on the part of a taxpayer or a taxpayer's agent as examples which do demonstrate neglect and do not constitute reasonable cause for a waiver of assessed penalties. ARM 42.3.105(5).

As stated by this Board in *Choicepoint, Inc., v. Department of Revenue*, 2011 WL 4037972:

We first note that the Taxpayer Bill of Rights, set out in § 15-1-222, MCA, requires that the Taxpayer first exhaust all appropriate administrative remedies before appealing to the State Tax Appeal Board. . . . For example, in *Shoemaker v. Denke*, 2004 MT 11, 319 Mont. 238, 84 P.3d 4, the Court noted in ¶ 31 “By his failure to meet the filing deadline established by the administrative agency, Shoemaker failed to prosecute his claim in the administrative forum, requiring forfeiture of his right to a review of the merits of his claim, and dismissal of his appeal.” The reasoning behind this is to allow an administrative agency to design its own process for internal review. The Montana Supreme Court has quoted the U.S. Supreme Court in stating “[a]bsent constitutional constraints of extremely compelling circumstances¹ the administrative agencies “should be free to fashion their own rules of procedure and to pursue method of inquiry capable of permitting them to discharge their multitudinous duties.” *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* (1978), 435 U.S. 519, 543, 98 S.Ct. 1197, 1211 as cited in *Northern Plains Resource Council v. Board of Natural Resources and Conservation* (1979), 181 Mont. 500, 510, 594 P.2d 297, 303. Thus, it is not for this Board, which is entirely separate from the DOR, to set the DOR internal administrative procedure.

* * *

Because the appeal from the DOR to STAB is from one agency to another, it is a hybrid system between an inter-agency appeal and an appeal to the judicial system. The State Tax Appeal Board is the finder of fact, independent from DOR, and the appeal process is similar to that of the court system. It is proper for this Board, then, to allow and

support the concept that a taxpayer must first attempt to resolve the matter with the agency.

* * *

It does not benefit the taxpayer, the Department, this Board, or the Courts to go through a protracted litigation process when it would be more appropriate to bring information before the agency in a timely manner and allow for a proper review before appeal. In the interest of both judicial economy and agency efficiency, an exhaustion of administrative remedies allows “a governmental entity to make a factual record and to correct its own errors within its specific expertise before a court interferes.” *Bitterroot River Protection Ass'n v. Bitterroot Conservation Dist.*, 2002 MT 66, ¶22, 309 Mont. 207, ¶ 22, 45 P.3d 24, ¶ 22. *See also Shoemaker v. Denke*, 2004 MT 11, ¶ 18, 319 Mont. 238, 84 P.3d 4.

(quoted by this Board in *Qwest v. DOR*, SPT 2008-2, p. 28, decided Nov. 30, 2009) We do not find the administrative rule in this instance to be arbitrary, capricious, or unlawful, and case law and policy support the requirement for the Taxpayer to first contest the tax liability with DOR. *See generally* §15-1-222, MCA.

Without any authority with which to grant relief to the Hoffmans, the Board has no other option to affirm the ODR's decision.

Conclusion

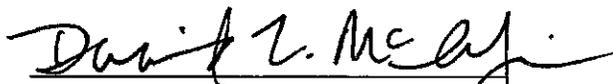
This Board finds that the DOR has satisfactorily established that there is no genuine dispute as to any material fact. It is uncontroverted that Taxpayers missed the 15-day deadline to refer the case to ODR and therefore the DOR is entitled to judgment as a matter of law.

Order

IT IS THEREFORE ORDERED by the Montana Tax Appeal Board that the Taxpayers' appeal be dismissed and the hearing scheduled for April 7, 2014 is hereby cancelled.

DATED this 27th day of March 2015.

BY ORDER OF THE
MONTANA TAX APPEAL BOARD


DAVE L. McALPIN, Chairman

(S E A L)


STEPHEN DOHERTY, Member


VALERIE BALUKAS, Member

NOTICE: 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

I certify that on this 27th day of March, 2015, a true and correct copy of the foregoing Order was served by placing same in the United States Mail, postage prepaid, and addressed as follows:

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