BEFORE THE MONTANA TAX APPEAL BOARD

TIMOTHY L. BLIXSETH, Appellant, -vs- DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, Respondent.	)	Docket No. IT-2011-2 ORDER on MOTION for SUMMARY JUDGMENT ON COUNT 1

The Montana Department of Revenue (DOR) presents this motion for Summary Judgment under Rule 56, Montana R.Civ.Pro. on Count I of the Taxpayer's February 10, 2011 Complaint, asking this Board to find that the funds dispersed to taxpayer Timothy Blixseth from a Credit Suisse loan to the Yellowstone Mountain Club (YMC) were Montana source income.

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).

The DOR primarily relies on collateral estoppel, or issue preclusion, to establish that there are no material issues of fact to be resolved on Complaint Count I because the issues described in the complaint have already been litigated in full and

finally adjudicated by another court of competent jurisdiction in a bankruptcy proceeding. *See In re Yellowstone Mountain Club, LLC.*, 436 B.R. 598, 644 (2010).

Mr. Blixseth filed a timely *pro se* response to the Department's Motion for Summary Judgment on Complaint Count I. The essence of his answer is that the Bankruptcy court opinion is in error, will soon be overturned, and should not, therefore, be relied upon. Mr. Blixseth then presented his factual arguments asserting that the transfer at issue was a loan and not taxable. He further argues that the Bankruptcy Court decision is barred by the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), from being a final decision.

There are three specific issues that must be addressed. First, we will look to the collateral estoppel matter, followed by whether funds are income, and finally whether such income, if it exists, might be taxed in Montana.

Collateral Estoppel

We start with the issue of collateral estoppel and whether prior litigation bars the Taxpayer from litigating the facts in this matter.

The test for collateral estoppel was recently stated by the Montana Supreme Court in *Baltrusch v. Baltrusch,* 2006 MT 51, ¶ 15, 331 Mont. 281, 130 P.3d 1267. "Collateral estoppel, or issue preclusion, bars the reopening of an issue that has been litigated and determined in a prior suit." The rule serves "to conserve judicial resources, relieve parties of the expense and vexation of multiple lawsuits, and foster reliance on adjudication by preventing inconsistent decisions." *Brilz v. Metro Gen. Ins. Co,* 2012 MT 184, ¶ 18, 366 Mont. 78, 285 P.3d 494.

The test used by the Montana Supreme Court in *Baltrusch* requires four conditions be met for collateral estoppel to apply:

1. The identical issue raised was previously decided in a prior adjudication;
2. Final judgment on the merits was issued in the prior adjudication;

3. The party against whom collateral estoppel is now asserted was a party or in privity with the party to the prior adjudication; and,
4. The party against whom preclusion is asserted must have been afforded a full and fair opportunity to litigate any issue which may be barred by a finding of collateral estoppel.

The first element requires that the identical issue was raised and resolved in the prior litigation. In defining identical, the Montana Supreme Court said "In substantively considering whether the issues are identical, we do not equate an issue with the elements of action; rather, the bar extends to all questions essential to the judgment and actively determined by a prior valid judgment...." *Baltrusch,* ¶ 25. This has been held to preclude claims that were or could have been litigated in the first action. *Wiser v. Mont. Bd. of Dentistry*, 2011 MT 56, P17, 360 Mont 1, 251 P. 3d 675.

In this case, the bankruptcy court found that a $209 million transfer from the Yellowstone Mountain Club (YMC) to Blixseth's wholly owned corporation, BGI, was not a loan but rather a distribution of corporate assets for which Blixseth was liable to the YMC corporation and its shareholders. *Blixseth v. Kirschner,* 436 B.R. 598, 649 (Bankr. D. Mont. 2010.) The bankruptcy court examined the transaction in detail, taking testimony from witnesses familiar with the loan negotiation, noting the lack of personal liability or contemporaneously-executed promissory notes, the lack of repayment terms, the fact that Blixseth controlled both the lending and borrowing corporations, and the fact that the money was ultimately used for Blixseth's personal expenses. The Court examined the favorable testimony of Blixseth's accountants but found their testimony of little value because of the limited scope of their financial reviews. *Blixseth,* at 647. Finally, the Court concluded that the fund transfers were not loans as there was no evidence of any intent to repay. *Blixseth,* at 649.

The bankruptcy courts findings are exactly the points that Blixseth argues should be reconsidered in this action. He does not deny in his response that the court

considered that issue and heard all of the arguments he presented. He simply considers the decision wrong and not to be relied upon. The non-moving party cannot, however, prevail by "simply show[ing] that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Mr. Blixseth has presented no other argument. We find that the first element of the test is met.

The second requirement is that the decision be a final judgment on the merits. The Montana Supreme Court has held that the finality requirement does not require that all appeals must be exhausted before the decision can be relied upon. *Baltrusch*, ¶ 23. In this case, the Bankruptcy Court entered a Second Amended Judgment against Blixseth in favor of the Yellowstone Club trustees. That decision was appealed by Mr. Blixseth but it was recently reviewed and affirmed by a federal district court in Montana. *In re Yellowstone Mountain Club, LLC,* 2014 WL 1369363, at *3; (D. Mont., April 7, 2014). The Bankruptcy Court decision has also been relied upon for collateral estoppel purposes by a federal district court in California. *Kirschner v. Blixseth*, Case No. CV 11-08283 GAF (SPx), decided June 18, 2014.

Mr. Blixseth challenges the bankruptcy court decision on the grounds that *Stern v. Marshall*, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011), limits the bankruptcy court jurisdiction. That claim was also made and rejected in the federal district court decision that affirmed the bankruptcy decision. *In re Yellowstone Mountain Club,* *4. This Board does not see a need to reconsider that holding.

The third requirement is easily answered. It mandates that the party against whom summary judgment is sought was the same person as in the prior litigation being relied upon. Obviously, Mr. Blixseth is the same person in both cases.

Finally, this Board must be satisfied that the party against whom preclusion is asserted had a full and fair opportunity to litigate the issue in the prior litigation. The record here makes clear that the matter was fully argued and briefed in the bankruptcy

action, with nearly two weeks of trial and many submissions and briefs. The thoroughness of the bankruptcy court's decision clearly shows that Blixseth's arguments were examined in detail.

We note that Blixseth has not challenged any of these elements in his answer to the motion for summary judgment and has not alleged any new facts or issues that were not already adjudicated.

We are satisfied that the fact issues Mr. Blixseth wishes to litigate have already been decided and that the Taxpayer was afforded a full and fair opportunity to present his side of the case. We conclude that the elements of collateral estoppel have been met and that no material facts remain to be litigated on the issue.

Funds as Income

The second element in the Summary Judgment test is whether the DOR is entitled to judgment as a matter of law in their claim that the funds constitute Montana source income. The Department argues that the transfer was a misappropriation of funds from the Yellowstone Club, that the transfer had no business purpose, and that BGI was simply a mechanism Blixseth used to perpetrate fraud. Further, the initial $375 million loan between Credit Suisse and the YMC was negotiated in Montana, the corporation receiving the funds was a Montana corporation, the transfer from YMC to BGI was made within Montana, and the property securing the Credit Suisse loan was located in Montana.

Mr. Blixseth responds that the DOR is implicitly acknowledging that the transaction was a loan because it argues that the funds were "leveraged" and uses the terms "pledging" and "collateral." Therefore, he argues, it cannot be income. The terms, however, refer to the Credit Suisse transaction, and there is no challenge that it was not a loan.

We disagree with both parties that we must somehow find the transaction either fraudulent or a distribution. The only issue is whether the funds are income to Mr. Blixseth.

The language of the federal tax code defines income as: "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:" and lists 15 types of income such as rents, royalties, etc. 26 U.S.C. § 61. The goal of the section is to be broadly inclusive of all forms of income that come into the taxpayer's possession, regardless of source or the legality of the activity that produced the income. An early Supreme Court case, *Commissioner v. Glenshaw Glass,* 348 U.S. 426 (1955), established that Congress intended by that statutory language to tax all types of income except that which was specifically exempted. The Court broadened the definition of income from the traditional "gain derived from capital, or labor, or both" (*Eisner v. Macomber*, 252 U.S. 189 (1920)) to "instances of (1) undeniable accessions to wealth, (2) clearly realized, and (3) over which the taxpayers have complete dominion." The Congressional intent expressed in the code language, Chief Justice Warren explained, was to use "the full measure of its taxing power." *Glenshaw Glass*, at 430 (internal cites omitted.)

We have undisputed evidence that the funds were dispersed by BGI, which the Bankruptcy court held was an alter ego of Blixseth, for the personal use of Mr. Blixseth, and that Mr. Blixseth, who negotiated the Credit Suisse loan without the knowledge or consent of other YMC shareholders, had language included that allowed him to use the funds for expenses unrelated to the Yellowstone Club, and with no personal liability to Mr. Blixseth. *In re Yellowstone Mountain Club, LLC.,* 436 B.R. 598 (2010). The intended beneficiary of those funds was Mr. Blixseth and he does not deny that he received the benefit of the funds.

We do not need to determine illegality in the transfer or characterize it in terms of corporate structure. Blixseth alone obtained the funds from Credit Suisse and transferred the funds from one corporation he controlled (YMC) to another corporation he controlled (BGI) with no contemporaneous obligation to repay. BGI then spent the money purchasing assets held in Mr. Blixseth's name or satisfying Mr.Blixseth's personal debt obligations. Mr. Blixseth received an accession to his wealth, it was clearly realized in the properties purchased and personal debts repaid, and he had complete dominion over those assets.

The Bankruptcy court has held that the transfer to Blixseth/BGI was not a loan, so the funds received by him are clearly income because there is simply no other way to characterize them. We hold, therefore, that the funds that flowed to Mr. Blixeth are properly categorized as income.

Montana Source Income

The final issue to resolve is whether the income is Montana source income and subject to the taxing authority of Montana. Mr. Blixseth claims it is not. He points out that the Credit Suisse transaction involved the New York and California offices of that bank and that the funds were transferred to YMC from a branch in the Cayman Islands. Further BGI is an Oregon corporation and Mr. Blixseth was a California resident with "no involvement with Montana."

We note that Mr. Blixseth confuses the two loans so as to work in as many non-Montana locations as he can, but it does not obscure the uncontested facts relied on by the DOR that the Credit Suisse transaction was negotiated in Montana, with a Montana corporation (YMC), and used Montana property as security for the loan. The same day, that same Montana corporation transferred the funds to BGI and Blixseth without a contemporaneous agreement for repayment of the funds. All of these transactions have been subject to Montana statutes and regulations when reviewed by federal courts. *See Blixseth v. Glasser*, 2014 U.S. Dist. LEXIS 47863;

Kirschner v. Blixseth, Case No. CV 11-08283 GAF (SPx).

Montana source income is defined in § 15-30-2101 (18), MCA, and § 15-31-403 (2), MCA. Both definitions are broadly inclusive, defining it as "gain attributable to the sale or the transfer of tangible property located in the state, ... or used or held in connection with a trade, business, or occupation carried on in the state. § 15-30-2101 (18) (ii), MCA. A similar definition applies to corporate income under § 15-31-403 (2), MCA. In this case, the transaction that produced the income was a loan to a Montana corporation, secured solely by Montana property.

We find there is ample connection with Montana laws and property to conclude this is Montana source income. We conclude that the DOR is entitled to Summary Judgment on Count I.

DATED this 3rd day of November, 2014.

BY ORDER OF THE
MONTANA TAX APPEAL BOARD

(S E A L)

KAREN E. POWELL, Chairwoman

SAMANTHA SANCHEZ, Member

DAVID L. McALPIN, 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

The undersigned hereby certifies that on this 3rd day of November, 2014, 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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