BEFORE THE STATE TAX APPEAL BOARD

OF THE STATE OF MONTANA

CHOICEPOINT, INC.,	)	
	)	DOCKET NO.: CT-2010-4
	)	
Appellant,	)	
	)	
v.	)	
	)	
	)	
	)	
	)	
THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,	)	ORDER
	)	
	)	
Respondent.	)	

The Department of Revenue (DOR) has moved for summary judgment in this matter. The matter has been fully briefed, and it is proper for the Board to rule on the motion.

DISCUSSION

Summary judgment is proper only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Rule 56 (c), M.R.Civ. P. In this instance, there is no issue of material fact, and thus the Board must determine whether the moving party is entitled to judgment as a matter of law.

The facts are not in dispute for this motion, and will be referenced as needed. The question at issue is whether Choicepoint is barred from appealing its tax liability to this Board when it failed to timely appeal the tax liability through the DOR internal

appeal process.

The DOR developed an administrative procedure which requires certain steps be taken before a taxpayer may appeal a tax liability to the state tax appeal 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 (Title 2, chapter 4, part 6 generally). The specific procedure for the Department's internal appeal process is found in ARM 42.2.510, which requires a taxpayer to contest a statement of account within 30 days of receipt, and deems the failure to respond as an admission that the debt is owed as stated in the statement of account.

In this matter, the Taxpayer received a letter from the DOR with an additional assessment due and owing. Letter to John Burke, dated June 10, 2010, Exh. A, DOR Motion for Summary Judgment. The letter set forth the procedural requirements for appeal, including the 30 day deadline, and the information relating to the appeal process. The Taxpayer failed to respond to the June letter within 30 days.

The Department subsequently sent a demand letter for payment, entitled final determination. Final Determination, August 25, 2010, Exh. 1, Choicepoint Brief in Opposition to MSJ. At that time, the Taxpayer filed for Department review. Aug 10, 2010 letter to Clarke, DOR Exh. D, DOR MSJ. The matter moved to the Office of Dispute Resolution (ODR) in the Department of Revenue. ODR determined that the Taxpayer had failed to timely appeal the tax owed. ODR did not review the underlying tax assessment, and the matter was determined to be a final determination which could be appealed to the State Tax Appeal Board.

Choicepoint appealed to this Board and the matter was accepted as an appeal by this Board. The DOR has now filed a motion for judgment as a matter of law, due to the failure of the Taxpayer to exhaust the administrative remedies within the DOR by failing to contest the assessment of additional tax due and owing set out in the June 10, 2010 letter.

The DOR notes that a taxpayer's ability to appeal an assessment or action taken by the DOR is extinguished upon the expiration of the 30 day deadline set out in administrative rule. We agree. There is no dispute that the Assessment notified Choicepoint of its obligation to object within 30 days, and cited to statute and rule. Choicepoint received the Assessment, and there is no disagreement that it missed the 30 day deadline set out in the June 10, 2010 letter.

The Taxpayer argues that it timely appealed to this Board from the final decision of the DOR, sent on August 25, and that the DOR procedure may not deny the Taxpayer's statutory and Constitutional right to an independent review of tax assessments.

By statute, a taxpayer may appeal to this Board within 30 days of a final determination from the Department. Section 15-2-302, MCA. While the taxpayer argues that it has a statutory and Constitutional right to appeal a tax determination, the Taxpayer fails to acknowledge that it does not have an unlimited period of time in which to do so. Rather, those rights to appeal are governed by the requirement that the Taxpayer "timely file" an appeal "after exhausting their administrative remedies." Section 15-1-222(9), MCA (Taxpayer Bill of Rights.) In this instance, the Taxpayer has failed to do so, and is thus barred from appealing its tax liability for the tax years in question.

The Taxpayer argues that the DOR's internal procedural rules cannot bar Choicepoint's right to appeal. 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. Further, the Montana Supreme Court cases contradict the Taxpayer's argument. 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.

Merely because the Taxpayer has a right to an independent review does not allow for an unfettered time frame to access that review. While it is clear that the taxpayer likely intended to appeal, there is no evidence of a timely appeal.

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,

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1. While there are several exemptions for failure to exhaust administrative remedies, none of them are applicable in this instance.

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

It is impracticable, and a poor use of government resources to allow a taxpayer to directly appeal to the Tax Appeal Board prior to completing the administrative review process as required. In reviewing an administrative rule, the state tax appeal board "shall give an administrative rule full effect unless the board finds the rule arbitrary, capricious, or otherwise unlawful." Section 15-2-301, MCA. *See also,* § 2-4-305, MCA. The Supreme Court has also stated that an administrative agency's interpretation of a statute under its domain is presumed to be controlling. *Christenot v. Department of Commerce*, 272 Mont. 396, 398, 901 P.2d 545,548, *citing Norfolk Holdings v. Dept. of Revenue,* 249 Mont. 40-44, 813 P.2d 460, 462 (1991). In fact, the construction of a statute by the agency responsible for its execution should be followed unless there are compelling indications that the construction is wrong. *Christenot,* at 399, 548 *(citing Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367, 381, 89 S. Ct. 1794, 1802, 23 L.Ed.2d 371, 384 (1969)). *See also §15-1-201, MCA (*giving general rulemaking authority to DOR*).*

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.

The Taxpayer questions whether the June 10, 2010 letter can be deemed a final determination for appeal purposes. In determining whether the statement of tax liability sent in the June letter triggers the 30 day internal DOR deadline, we find case law illuminating. For purposes of judicial review, the finality of an agency order depends upon the nature of the order rather than its chronology in relation to the whole of the agency proceedings. A final order need not necessarily be the very last order in an agency proceeding, but rather, the order is final for purposes of judicial review when it imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process. *N. Plains Resource Council v. Bd. of Natural Resources & Conservation*, 181 Mont. 500, 594 P2d 297 (1979).

The Taxpayer also alleges that Mr. Spencer's letter of June 10, 2010 does not comply with the Taxpayer Bill of Rights set forth in §15-1-211(3)(d), MCA. Subsection (3)(d) requires that the notice advise the taxpayer of his or her opportunity to resolve the dispute with the person responsible for the notice and the right to refer the dispute to ODR. The letter at issue, however, specifically provides notice of appeal procedure and a mechanism for filing objections, as well as referencing the sections for the appeal process, the related administrative rules, and the Taxpayer Bill of Rights. There can be no doubt that ChoicePoint was on notice that the company had 30 days to respond, and the DOR provided the relevant law and rules for the appeal process. While not directly relevant to the legal issue at hand, we would also note the letter was the culmination of an extensive period of audit communication between the parties, and not merely the first communication from the DOR to the Taxpayer.

The Taxpayer contends that the 30 day deadline imposed by the DOR requires additional requirements not included in the statutory scheme. We note, however, pursuant to §15-1-211, MCA, the DOR has express authority to develop an internal review procedure. There is little purpose to a review procedure if it does not provide express timelines for action.

The Taxpayer argues that a review by ODR is mandatory during the appeal process. We disagree. Under the Taxpayer's analysis, all matters would be subject to ODR, at any time that a notice is mailed and a taxpayer fails to pay. To construe that all tax notices require management by ODR does not comport with the statutes. Rather, tax notices with no response from a taxpayer are properly referred to enforcement for warrants of distraint or other action. Taxpayers who respond to challenge the assessment of tax are properly channeled to the appeal process.

While it is unfortunate that ChoicePoint missed its opportunity to appeal the tax years at issue, the facts and law require such an outcome. ChoicePoint was notified of the 30 day period for appeal, and no extenuating circumstance exists to waive such a timeframe. There is, of course, the opportunity to appeal a tax methodology and implementation in later tax years.

The Department's motion is granted.

DATED this 9th day of September, 2011.

BY ORDER OF THE

STATE TAX APPEAL BOARD

(S E A L)

/s/_____
KAREN E. POWELL, Chairwoman

/s/_____
DOUGLAS A. KAERCHER, Member

/s/_____
SAMANTHA SANCHEZ, Member

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of September, 2011, a true and correct copy of the foregoing has been served on the parties hereto by depositing a copy thereof in the U.S. Mails, postage prepaid, addressed to the parties as follows:

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