

2008 COLORADO JUDICIAL DECISIONS  
STATE & LOCAL TAXATION

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**Colorado Supreme Court**

**Tax Administration**

*(Legislative transfers of special funds to the general funds did not violate TABOR)*

In *Barber v. Ritter*, \_\_\_ P.3d \_\_\_, 2008-CO-1105.033 (Colo. 2008) the Supreme Court reversed the Court of Appeals and remanded the case back to the trial court for further review as to some of the cash funds implicated by the decision. The case presented two issues, the standing of taxpayers to challenge legislative action mandating transfers of cash funds to the general fund during the 2001 to 2004 time period and whether such transfers violated TABOR, Article XI, Secs. 3 and 4, of the Colorado Constitution.

There were several co-plaintiffs, each one claiming that funds they are mandated to pay into various state programs such as the real estate licensing program, Colorado Children's Trust Fund, Worker's Comp. Fund and the Severance Tax Fund could not be transferred to the General Fund by the General Assembly without a vote of the people pursuant to TABOR.

The majority of four justices concluded that the plaintiff-taxpayer's had standing, three concurring justices would conclude they did not. Concurring Justice Eid, joined by Coats and Rice, opined that the plaintiffs could not satisfy the second part of the two part standing test, "injury-in fact" because none of the plaintiffs could prove that they had paid any of the funds that were transferred by the legislation.

All of the court's justices agreed that the monies involved in the specific special funds directly involved in the case, decided below by summary judgment, were fees not taxes. Since fees are not implicated by TABOR, only taxes, there was no state constitutional violation by transferring the sums to the General Fund. The case was remanded back to the trial court to determine if any of the transferred funds constituted taxes paid rather than service fees charged under the specific programs.

**Colorado Court of Appeals**

**Income Tax** *(failure to file a bond or request extension of time is jurisdictional.)*  
*Overstreet v. Colorado Dept. of Rev.*, 178 P.2d 1259 (Colo. App. 2007) upheld the trial court's dismissal of an income tax appeal for failure to file the bond required by C.R.S. § 39-21-105. The taxpayer sought to appeal from a denial of claimed subtractions in the calculation of capital gains from the sale of securities during a divorce proceeding. The DOR sought \$265,000 in income taxes and the taxpayer appealed without paying the tax. On appeal, the taxpayer must file a bond pursuant to C.R.S. § 39-21-105(4) within fifteen days of lodging the appeal unless an extension of time is sought or the taxpayer satisfies the indigent standard in the statute. Here, the

taxpayer's counsel did not file a request to extend the time to file the bond but did file a request to waive the requirement. The court declined to waive the requirement and found that the taxpayer had substantial assets and she did not meet the indigent test. The failure to file the bond is jurisdictional divesting the trial court of jurisdiction to hear the appeal. The court refused to deem the request to waive, and subsequent motion to reconsider, to be a motion to extend the time. The court also rejected a due process challenge to the "pay to play" appeal statute based on prior precedent.

### **Sales & Use Tax**

*(Gas well equipment on leased land is not taxable as construction and building materials).* In *Cnty. Com'rs. of RioBlanco v. ExxonMobil*, 192 P.3d 582 (Colo. App. 2008) the court upholds the finding of the trial court that certain tanks, valves, pipe and associated equipment does not constitute construction and building materials. A statutory (as opposed to a Home Rule) county only has statutory authority to collect a use tax on certain specific classes of personal property. The county urged that a well head cite constitutes real property therefore, the equipment used to construct the site constitutes building materials which are subject to use tax. The trial court, supported by the court of appeals, concludes that the equipment is personal property separable from the land and therefore constitutes machinery, not building materials.

*(Theater must pay use tax on licensing fees for use of motion picture film)* In *Cinemark, USA, Inc. v. Seest*, 190 P.3d 793 (Colo. App. 2008) the court held that *City of Boulder v. Leanin' Tree, Inc.*, 72 P.3d 361 (Colo.2003) case did not overrule the holding of *American Multi-Cinema, Inc. v. City of Westminster*, 910 P.2d 64 (Colo.App.1995). Here, like in *American Multi-Cinema*, the taxpayer operates a movie theater and a home rule city levied a use tax on the rental stream the theater paid the movie distributor for the rights to show the movie. In *Leanin' Tree* the Supreme Court held that copy right fees paid by a card manufacturer to artists were not fees paid to acquire personal property, they were fees paid under intellectual property licensing agreements.

The *Cinemark* Court distinguished the circumstances in *Leanin' Tree* from *American Multi-Cinema*. In the movie theater cases, the operators temporarily possessed the film for the express purpose of using it to generate revenue. In the card manufacturing case, the taxpayer only temporarily had possession of the art in order to make a photo that was later used in the manufacturing process. The court did then discuss the "totality of the circumstances" test developed in *Leanin' Tree* and concluded that *Cinemark* did not satisfy the test because the film was the final product desired by the operator-taxpayer.

The court briefly addresses other issues such as whether the transaction is a purchase and whether the taxpayer is a consumer and easily finds the facts meet the ordinance definitions.

### **Property Tax**

*(Valuation method for contaminated income producing properties)* *Microsemi, Corp v. Broomfield Cnty. Brd. of Equal.*, \_\_\_ P.3d \_\_\_, 2008-CO-1215.077 (Colo. App. 2008) involved a challenge to the method chosen by the Board of Assessment Appeals ("BAA") to determine the actual value of an operating industrial facility that had on going remediation costs due to

chemical spills. The taxpayer cited *E.I. DuPont De Nemours & Co. v. Douglas Cnty. Bd. of Equal.*, 75 P.3d 1129, 1131 (Colo. App. 2003) for the proposition that its manufacturing facility should be valued by determining the value as if clean, then subtracting the costs of remediation to determine the net actual value. The taxpayers and the County's experts used divergent methods of appraising the property with the taxpayer's expert opining the value was \$301,067 and the County's expert concluding to \$3,300,000. The BAA used the income approach and used the County's estimate of income produced then subtracted the annualized remediation costs and applied a 10% capitalization rate and found the actual value to be \$2, 803, 352..

The Court of Appeals affirmed the BAA value under the applicable standard of review, *de novo* on the law and arbitrary and capricious for factual determinations. The Court distinguished *E.I. Dupont* on the basis that the Dupont property was no longer an operating facility. Here, the property was still in use and produced income. The BAA's method of appraising the property was a commonly used appraisal technique and there was ample evidence in the record to support its conclusion.

*(Failure to conduct a hearing violates due process and invalidates tax penalty)* The taxpayer invalidated a tax penalty provision under the Specific Ownership Tax in *Hellas Const., Inc. v. Rio Blanco Cnty.*, 192 P.3d 501 (Colo. App. 2008). Hellas was the contractor on a large construction project in Rio Blanco County and leased some large mobile dirt moving equipment from the John Deere Company. Mobile equipment is subject to the Specific Ownership tax under C.R.S. § 42-3-107. This provision applies to certain defined equipment and is in lieu of the personal property tax. The County Sheriff came to the construction site and seized the equipment and assessed \$26,000 in tax and a statutory penalty of \$52,000 pursuant to C.R.S. § 42-3-107(17)(e). The contractor paid the two sums and sought refund of the penalty from the County Treasurer. The Treasurer never acted on the refund request and the taxpayer files a mandamus action in the district court. The district court denied a hearing and ruled against the taxpayer dismissing the complaint.

The court of appeals reversed holding that the taxpayer was entitled to a hearing before the application of the penalty. Denying a hearing was a violation of due process entitling the taxpayer to a full refund of the penalty. The application of a tax penalty is a quasi-judicial act that entitles the affected party to a hearing. The interesting aspect of the case is that the court of appeals remands the matter to the trial court with instruction to issue the refund, not conduct the hearing.

### **Other Taxes**

*(Each tax year raises a separate claim so res judicata does not apply)* In *McLane Western, Inc. v. Dep't. of Revenue*, \_\_\_ P.3d \_\_\_, 2008-CO 1201.105 (Colo. App. 2008) the court reverses the trial court's dismissal of a claim for refund of tobacco taxes due to the *res judicata* effect of *McLane Western, Inc. v. Dep't of Rev.*, 126 P.3d 211 (Colo. App. 2005), *cert denied*. The first *McLane* case involved a claim for refund of tobacco taxes for tax years 1990 through 2001 largely based on the Commerce Clause of the US Constitution. The present case involved tax years 2002 through 2004 and the claim was primarily based on Equal Protection as the alleged tax statutes, C.R.S. § 39-28.5-101 *et seq* were void for vagueness.

The trial court dismissed the case pursuant to the Department's motion to dismiss under Rule 12(b)(5) based on *res judicata*. The Court of Appeals holds that the trial court conducted its analysis by combining the doctrines of claim preclusion and issue preclusion and misapplying tests used in claim preclusion to issue preclusion. The court citing US Supreme Court precedent concludes that claim preclusion does not apply in tax cases because each tax year constitutes a new claim. The court then holds that issue preclusion does not apply because under issue preclusion, you do not bar litigating issues that could have been decided in the prior case, but were not decided. The court finds that in the second case, the taxpayer is relying on a different legal theory than the theory underlying the challenge in the first case.