

NEWSLETTER OF THE COLORADO BAR ASSOCIATION TAX SECTION

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Reminder: Attorneys may obtain CLE credit for authoring published articles. To request CLE credit use Colorado Supreme Court Board of Continuing Legal and Judicial Education Form 6, which is available at: <http://www.coloradosupremecourt.com/pdfs/cle/form6.pdf>. Anyone interested in publishing an article in this newsletter can contact Hank Vanderhage of Holland & Hart LLP at 303-295-8027 or hsvanderhage@hollandhart.com.

COLORADO BAR ASSOCIATION TAX SECTION TOPICAL LUNCHEONS

Date	Speaker(s)	Topic	Location
May 13, 2009	Peter Rose	Tax Incentives for Renewable Energy Projects	Warwick Hotel, 12:00 PM
June 10, 2009	Norman Wright (Taxation); Shelly Merritt (Trust and Estates); Catherine Hance (Real Estate); TBD (Business Law)	Annual Legislative Update	Warwick Hotel, 12:00 PM

NOTICE OF PRO BONO OPPORTUNITY

VOLUNTEER AT THE U.S. TAX COURT DOCKET CALL NEXT DATES: JUNE 22, 2009; NOVEMBER 2, 2009.

The United States Tax Court will hold Denver sessions on June 22, 2009, at 9:30 a.m. and November 2, 2009, at 9:30 a.m. Tax attorneys are invited to volunteer their assistance for a few hours on these dates. Attorneys interested in helping *Pro Se* taxpayers with docketed U.S. Tax Court cases can appear at 9:30 a.m. in Room C502 of the Byron G. Rogers U.S. Courthouse, 1929 Stout Street, Denver, CO 80294. Program guidelines are available on the internet at www.cobar.org. Anyone wishing to volunteer should contact Stuart S. Sargent of Stuart S. Sargent LLC, at 303-771-1148 or stuart@sargenttaxlaw.com for more information.

TAX SECTION EXECUTIVE COUNCIL NEWS

Nominations for Officers and Members

At the February 26, 2009 meeting of the Executive Council of the CBA Section of Taxation, Rachel James, Stuart Sargent, and Steven Weiser were appointed as the Nominating Committee for the next slate of Executive Council officers and members. The Nominating Committee has formally proposed that the following individuals be appointed as officers and members of the Executive Council:

President - Rachel James (Davis Graham & Stubbs LLP)
Vice President - Steven Weiser (Levin & Weiser, LLC)
Secretary - Stuart Sargent (Stuart Sargent LLC)
Treasurer - Andrew Elliot (Brownstein Hyatt Farber Schreck LLP)
Council Member - Andrew Kroll (Buchanan & Stouffer)
Council Member - Hank Vanderhage (Holland & Hart LLP)
Council Member - Peter Rose (Davis Graham & Stubbs LLP)
Council Member - Rob Gunning (Silverstein & Pomerantz)
Council Member - Jeremy Wysocki (Krendl Krendl Sachnoff & Way P.C.)
Council Member - Damian Laurey (Davis Graham & Stubbs LLP)

Section members may propose alternative nominative slates. Such slates must be accompanied by a petition signed by 25 section members and provided to Neil Pomerantz by May 15, 2009.

New Liaison to the CBA Board of Governors

At the April 23, 2009 Executive Council meeting, Andrew Elliot agreed to serve as the liaison to the CBA Board of Governors.

FEATURED ARTICLE

C.R.C.P. 106(a)(4) Appeals and Colorado Tax Statutes: Due Process Before Imposition of a Penalty. ©David A. Sprepace, P.C.¹

I. INTRODUCTION

The Colorado Court of Appeals recently held that procedural due process applies to a penalty provision of the Colorado tax statutes, even when not specifically required by the statute (Hellas Construction, Inc. v. Rio Blanco County, Case No. 07CA1114). On May 17, 2006, Rio Blanco County assessed the Colorado special mobile machinery (“SMM”) specific ownership tax pursuant to C.R.S. §42-3-107(15), and levied eight 200% administrative penalties against Hellas Construction, Inc. The Rio Blanco County District Court dismissed Hellas’s C.R.C.P.

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106(a)(4) appeal, opining that “imposition of the penalty is not a quasi-judicial action,” and further that “the taxation scheme set forth in §42-3-107 is ministerial in nature rather than quasi-judicial.”

Although the SMM tax is subject to several exceptions, the tax and penalty generally apply to heavy equipment (Class F property) that enters Colorado and is operated in Colorado. Colo. Rev. Stat. §42-3-107(15). In order to assist in the SMM tax collection, the legislature amended C.R.S. §42-3-107(17)(e)(II) in 2005 to include a penalty of 200% of the tax for violation of the SMM tax statute, which penalty is retained by the county assessing the tax. The amended statute specifically provides that the high standard of C.R.C.P. 106(a)(4) is the only method to appeal imposition of the 200% penalty. C.R.C.P. 106(a)(4) is designated in several other Colorado tax-related statutes and in the municipal codes of Manitou Springs, Carbondale, and Commerce City, Colorado, as the only method for appealing certain decisions.

II. COLORADO RULES OF CIVIL PROCEDURE RULE 106(a)(4)

Rule 106(a)(4), C.R.C.P. provides, in pertinent part:

“...In the following cases relief may be obtained in the district court by appropriate action under the practice prescribed in the Colorado Rules of Civil Procedure: ...

(4) Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law:

(I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

Rule 106(a)(4), C.R.C.P. authorizes judicial review of the actions of any administrative agency officials “exercising judicial or quasi-judicial functions” when there is no alternative remedy otherwise provided by law. *Baldaf v. Roberts*, 37 P.3d 483, 484 (Colo. App 2001). Quasi-judicial action is generally characterized by a local or state law requiring that notice be given and a hearing be conducted before an action is taken, and directing that the action results from the application of prescribed criteria to the individual facts of the case. *See Gilpin County Board of Equalization v. Russell*, 941 P.2d 257 (Colo. 1997); *see also Van Pelt v. State Board for Community Colleges & Occupational Education*, 195 Colo. 316, 577 P.2d 765 (1978).

Further, review of such quasi-judicial actions is limited to a determination, based on the evidence in the record before the defendant body or officer, whether the administrative tribunal has exceeded its jurisdiction or abused its discretion. Rule 106(a)(4)(I), C.R.C.P.; *Widder v. Durango School Dist. No. 9 R*, 85 P.3d 518 (Colo. 2004); *see also City and County of Denver v. Fey Concert Co.*, 960 P.2d 657, 666-67 (Colo. 1998). “Abuse of discretion” means that the decision under review is not reasonably supported by any competent evidence in the record. *Widder*, *supra*, at 526; *Van Sickle v. Boyes*, 797 P.2d 1267, 1272 (Colo. 1990).

III. DUE PROCESS AND THE PENALTY PROVISION

Hellas asserted that the actions of Rio Blanco County in levying the penalties were arbitrary, capricious, an abuse of discretion, improper, illegal, and a violation of Hellas's right to due process. Hellas further argued that Rio Blanco County acted in a quasi-judicial manner by assessing the tax and imposing the penalty, asserting that the Colorado legislature intended such county action to be quasi-judicial because it selected C.R.C.P. 106(a)(4) as the sole remedy for disputes concerning the SMM penalty. Contrary to the decision of the Rio Blanco District Court, therefore, the county's quasi-judicial action must protect Hellas's due process rights. Hellas also argued that the actions of Rio Blanco County were not ministerial, as decided by the District Court, because there was significant property at stake, and the facts surrounding the imposition were undetermined.

Hellas also argued that Rio Blanco County's deputy abused his discretion by ignoring due process, which embodies "adequate advance notice and an opportunity to be heard prior to state action resulting in deprivation of a significant property interest." *Mountain States Telephone and Telegraph Company v. CDLE*, 520 P.2d 586, 588 (Colo. 1974). If significant property is at stake, due process requires a pre-deprivation hearing before a neutral arbiter after timely and adequate notice, which allows a respondent to retain counsel and be heard, resulting in a stated decision resting on the legal issues and evidence presented. *See Goldberg v. Kelly*, 397 U.S. 254 at 266-71 (1970).

Hellas also argued that no record existed on which to base a District Court decision. For a record to exist, there must be a hearing from which the record is created, and the record must contain evidence introduced by both parties. To the contrary, whatever record existed, Hellas argued, contained only the notes and notices of the Rio Blanco County Sheriff's deputy.

Rio Blanco County essentially argued that its actions were not quasi-judicial in nature, in determining whether a violation of §42-3-107(17)(e)(II), C.R.S., relying on *Gilpin County Board of Equalization v. Russell*, 941 P.2d 257 (Colo. 1997). If the actions were not quasi-judicial, Rio Blanco reasoned, there was no right a procedural due process, notice, and a hearing.

The Colorado Court of Appeals agreed that the actions of Rio Blanco County were quasi-judicial because they involved a determination adversely affecting property rights and a decision that was reached by applying preexisting legal standards. Although the taxing scheme was established by Colorado statute, it was up to Rio Blanco County to make determinations regarding specific facts of ownership, operation, and other factors. The Court of Appeals disagreed with the District Court's determination that due process does not require notice and a hearing unless a state or local law requires it, and held that due process rights to notice and hearing are constitutionally-derived and not based on specific state or local laws. It further held that the District Court abused its discretion by relying on incompetent evidence in a one-sided record, and remanded the case with instructions to refund the penalty amount.

IV. CONCLUSION

As determined by the Colorado Court of Appeals, procedural due process applies to Colorado tax and penalty statutes if the agent must make factual and legal conclusions, even if the statute does not specifically mention due process. Collection may be challenged if notice and

a hearing are not provided because the act of imposing a penalty under certain circumstances is quasi-judicial in nature. By extension, therefore, the *Goldberg* elements concerning due process must also be met: the hearing must be conducted before an impartial decision maker, and must include timely and adequate notice, opportunity for the target of the administrative action to present his arguments, the ability to retain counsel by the target, a decision resting on the legal issues and evidence presented at the hearing, and a statement of the reasons upon which the decision was based. *Goldberg, supra*, at 266-271.

**CURRENT OFFICERS AND COMMITTEE MEMBERS OF THE
COLORADO BAR ASSOCIATION TAX SECTION**

Council Officers

President	Neil Pomerantz
Vice-President	Eric Zinn
Treasurer	Stuart Sargent
Secretary	Steven Weiser

Section Committees and Chairs

<u>Education Committee</u>	Stuart Sargent
A. CLE	Gary Abrams
B. Topical Lunches	Peter Rose/Tracy Villecco
C. Pro Bono	Stuart Sargent

<u>Legislative Committee</u>	
A. Federal	Adam Cohen
B. State	Michael Valdez

<u>Publications Committee</u>	Rachel James
A. Newsletter	Hank Vanderhage/Rob Keyser
B. Tax Tips	Adam Cohen/Steven Weiser
C. Website	Steven Weiser

<u>Agency Positions Committee</u>	Neil Pomerantz
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<u>Interprofessional Committee</u>	Eric Zinn
A. IRS Liaison	Adam Cohen
B. ABA Report	Adam Cohen
C. Section Liaisons	
Business:	Alan Sparkman
Trusts & Estates:	Andrew Kroll
Real Estate:	Andrew Elliott

<u>CBA Staff Liaison</u>	Amy Sreenen
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