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13 **MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY**

14 CHS, INC.,

15 Plaintiff,

16 vs.

17 STATE OF MONTANA,
18 DEPARTMENT OF REVENUE,

19 Defendant.

) Cause No. DV-10-0133
)
)

) Susan P. Watters, District Judge
)
)

) **APPLICATION FOR TEMPORARY**
) **STAY OR ISSUANCE OF A**
) **TEMPORARY RESTRAINING ORDER**
) **WITH RESPECT TO YELLOWSTONE**
) **COUNTY TAX APPEAL BOARD**
) **PROCEEDINGS**
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CHS, Inc., applies to the Honorable District Court to order a stay, or enjoin, for a limited period of time, until further order of court, all proceedings before the Yellowstone County Tax Appeal Board ("YCTAB") in the tax appeal of CHS, Docket No. A-35-09 (A-B).

CHS requests that the Court dispense with a hearing at this time and issue its order on this application and affidavit of Pat Kimmet. The reasons for of this application emanate from the impending YCTAB hearing scheduled on April 21, YCTAB's failure to rule on CHS's motion to stay served on YCTAB on March 12, 2010, and the urgent nature of this motion, all as reflected herein.

A hearing on CHS's tax appeal is scheduled before YCTAB on April 21, 2010, at 2 P.M. There is presently pending before this Court the Department of Revenue's ("DOR") motion to

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1 dismiss. CHS filed its answer brief in opposition to motion to dismiss on April 9, 2010. The Court
2 has scheduled oral argument on the motion for May 4, 2010.
3

4 **Factual Background**

5 CHS has moved the YCTAB to stay its April 21 hearing. DOR has opposed the motion to
6 stay at YCTAB. Copies of CHS's motion to stay YCTAB proceedings and DOR's response in
7 opposition proceedings are attached hereto as exhibits A and B. CHS filed its tax appeal with the
8 YTCAB in order to secure its administrative appeal remedies. Since the DOR is chary of
9 taxpayer's remedies other than the route provided through the tax appeal boards, it behooves the
10 taxpayer not to abandon administrative remedies, in case the government is successful in blocking
11 the taxpayer's exercise of the alternative remedies under the Montana code, such as § 15-1-406,
12 MCA. CHS's complaint was filed under § 15-1-406, MCA.

13 CHS requested oral argument and an advance ruling by YCTAB on the motion to stay. As
14 of the date hereof, CHS has not been notified that YCTAB has scheduled a hearing on the motion
15 to stay. The April 21 hearing obviously is quickly approaching. Preparation for the hearing
16 requires the testimony of out of town experts and other significant legal and factual preparation.
17 Moreover, proceeding with the YCTAB hearing eviscerates CHS's rights under § 15-1-406, MCA,
18 to present its legal arguments to the District Court, all as appears in the affidavit of Pat Kimmet
19 filed herewith.

20 The taxes at issue have been paid under protest when due. Compare, Complaint, ¶ 9,
21 Answer, ¶ 7.
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Arguments

I. **A Stay Has Become Necessary to Permit CHS the Right to Assert Its Alternative Remedy at Law Under § 15-1-406, MCA.**

CHS filed on January 26, 2010, this tax declaratory judgment action in District Court invoking its rights under § 15-1-406, MCA, and alleging an illegal or improper method or procedure of taxation or assessment, namely that DOR's failure to consider all items of depreciation and obsolescence within the cost approach, and its failures to consider the market data approach and income approach when supplied with relevant, sufficient data, constitute a method or procedure of assessment or imposition of tax adopted or used by the department which is illegal or improper. (Compl., ¶ 25). CHS also asserted claims for failure to equalize and failure to timely assess. Lack of equalization under § 15-9-101, MCA, is often brought as a subsidiary count in these cases because failing to equalize among properties is also an illegal or improper method or procedure of taxation. See § 15-1-406, MCA.

§ 15-1-406, MCA, provides for an alternate, optional legal remedy that taxpayers are entitled to use in tax disputes with DOR. The referenced statute permits taxpayers to bring an action directly against DOR in district court. The complaint by CHS is filed under this statute and alleges (Compl. ¶ 3) that a method or procedure of assessment or imposition of tax adopted or used by the Department of Revenue is illegal or improper or that a tax was illegally or unlawfully imposed or exceeded the taxing authority. These allegations echo the statute, subsection 1 thereof, setting forth legal grievances that are cognizable by district court under § 15-1-406, MCA. More specifically, the allegations of the complaint assert numerous legal deficiencies, errors or omissions with respect to the appraisal approaches used, or omitted from being used, by the Department of Revenue. **Proper application of the methods of appraisal and assessment of property is required before market value may be obtained.**

The only province of the county tax appeal board is to determine valuation of CHS's properties. §15-15-102, MCA. CHS has asked this Court to order DOR to determine the proper

1 assessment or appraisal approaches or methods. § 15-1-406, MCA gives CHS the right to have the
2 District Court make these determinations. *See United States National Bank of Red Lodge v.*
3 *Department of Revenue*, 175 Mont. 205, 573 P.2d 188 (1977), where the Supreme Court held that
4 since all allegations of complaints raised question a to legality of tax imposed, did not put into issue a
5 question of valuation, courts, not tax appeal boards, had original subject matter jurisdiction to hear
6 cases. A foundational step before valuation can be determined is to establish the proper approach
7 to assessment or appraisal.

8 If the YCTAB were forced to go forward with its hearing as scheduled on April 21, the
9 effect would be to short circuit the District Court process under § 15-1-406, MCA, that CHS has
10 rightfully invoked under law. In truth, having YCTAB proceed denies CHS its rights under the
11 alternative remedy found in § 15-1-406, MCA. It also requires that CHS expend resources on two
12 simultaneous hearings, risks the chance of conflicting rulings, and squanders taxpayer and
13 government resources.

14 Failing to stay the YCTAB proceedings at least until this Court rules on DOR's pending
15 motion to dismiss would result in superfluous and duplicative efforts by the parties and the
16 tribunals. Going directly to court under § 15-1-406, MCA, has the worthy effect of expediting the
17 process and likely accomplishes a sooner ultimate resolution. The opportunity in statute, § 15-1-
18 406, MCA, to have a more expeditious consideration by district court would be frustrated if
19 taxpayer is required needlessly to simultaneously proceed with litigation on two tracks, one in court
20 and the other before tax appeal boards. Clearly, this is not the result the legislature would have
21 intended by enacting § 15-1-406, MCA.

22 A temporary stay of the YCTAB proceedings will maintain the status quo between the
23 parties until the District Court can rule upon the motion to dismiss. *See State of R.I. Dept. of*
24 *Corrections v. R.I. State Labor Relations Board*, 658 A.2d 509, 510 (1995) (holding that it is not an
25 abuse of discretion for a trial court to issue a stay to maintain the status quo between the parties
26 pending review).

1 Accordingly, CHS moves the Honorable Court to enter an order staying the YCTAB
2 proceedings at least until after the Court rules upon the motion to dismiss and until further order of
3 the court.

4 **II. The District Court Has Jurisdiction to Stay the YCTAB Proceedings.**

5 This Court has the jurisdiction to issue a stay of the YCTAB proceedings under several
6 independent grounds. “For every wrong there is a remedy.” § 1-3-214, MCA.

7 First, pursuant to § 2-4-701, MCA: “A preliminary, procedural, or intermediate agency
8 action or ruling is immediately reviewable if review of the final agency decision would not provide
9 an adequate remedy.” The inaction of YCTAB, an agency of government, under the administrative
10 supervision of the State Tax Appeal Board according to § 15-2-201, MCA, (see letter dated March
11 12, 2010, to Phyllis Brady, Secretary of YCTAB attached as Exhibit C) in failing to stay the
12 proceeding or even rule on the request for a stay is equivalent to an “action”. By failing to order a
13 stay sufficiently in advance of the April 21 hearing date, or to even schedule a hearing on the
14 motion to stay, YCTAB has left CHS in “no-man’s-land”, requiring it to move this Court for relief
15 and throwing the taxpayer into a state of uncertainty with regard to staying the YCTAB appeal. In
16 reality, YCTAB has effectively denied the motion to stay through inaction, since the taxpayer must
17 prepare for the YCTAB appeal hearing if the Court does not now issue a temporary stay.

18 Under § 2-4-702(3), MCA, the Court is authorized to stay this matter. “The agency may
19 grant or the reviewing court may order a stay upon terms that it considers proper, following notice
20 to the affected parties and an opportunity for hearing. A stay may be issued without notice only if
21 the provisions of 27-19-315 through 27-19-317 are met.” CHS notified DOR and the county tax
22 appeal board on April 9, 2010, that if the matters before YCTAB were not stayed on or before April
23 13, CHS would be presenting this motion to the Court. See Notice attached as Exhibit D.

24 Second, under § 15-1-405(1), MCA, the District Court may enter injunctions “where the tax
25 or the part thereof sought to be enjoined is illegal or is not authorized by law.” CHS has alleged in
26 its Complaint, ¶ 10, that “the method or procedure of assessment or imposition of tax adopted or

1 used by the Department of Revenue is illegal or improper and the resulting tax was illegally or
2 unlawfully imposed or exceeded the taxing authority of DOR.” See also Complaint, ¶ 25. CHS’s
3 appeal to YCTAB is part of the tax procedure which may be enjoined under § 15-1-405, MCA,
4 where the tax is illegal or is not authorized by law, as CHS has alleged. “When considering the
5 motion [to dismiss], this Court must construe the complaint in the light most favorable to the
6 plaintiff and all allegations of fact contained therein must be taken as true. *Plouffe v. State*, 2003
7 MT 62, ¶ 8, 314 Mont. 413, 66 P.3d 316 (citations omitted).” (DOR’s Brief in Support of Motion
8 to Dismiss, p. 8).

9 For the authority for the district court under § 15-1-405, MCA, to assert jurisdiction over
10 tax proceedings, in an Order dated May 18, 2009, Judge Todd relied upon § 15-1-405, MCA, to
11 assert jurisdiction of a case involving DOR’s attempt to collect a tax by issuance of a warrant for
12 distraint, where the taxpayer had alleged illegality in imposing and collecting a tax. See *Montana*
13 *Department of Revenue v. Alliant Construction, Inc., et al*, Case No. SL09-006, Order, p. 3,
14 attached hereto as Exhibit E. “. . . [T]he department is the party defendant in any proceeding before
15 a county tax appeal board, the state tax appeal board, or a court of law that seeks to dispute or
16 adjust an action of the department under 15-8-101 arising from the exercise of the department’s
17 duties as prescribed by law or administrative rule.” § 15-8-115, MCA

18 Third, the Honorable District Court has jurisdiction as a matter of pendent jurisdiction.
19 CHS has invoked the jurisdiction of the Court as a matter of statutory right pursuant to § 15-1-406,
20 MCA. As a necessary implication of that jurisdiction, the Court has the authority to enter rulings.
21 Pendent jurisdiction is defined as: “A court’s jurisdiction to hear and determine a claim over which
22 it would not otherwise have jurisdiction, because the claim arises from the same transaction or
23 occurrence as another claim that is properly before the court.” Black’s Law Dictionary, 7th ed, p.
24 856. The tax appeal before YCTAB involves an aspect of the same transaction and occurrence as
25 the matter before this Court. This Court has pendant jurisdiction to stay the county tax appeal
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1 board proceedings until after the Court has first considered the complaint allegations pursuant to its
2 authority under § 15-1-406, MCA.
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4 **III. The Court May Grant this Application Without Further Notice and Hearing.**

5 Under § 2-4-702(3), MCA, the Court may order this stay without additional notice and
6 opportunity for a hearing provided that the movant shows that the provisions of §§ 27-19-315
7 through 27-19-317, MCA, are met.

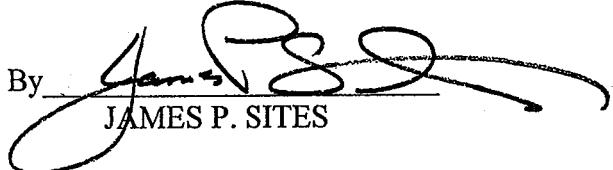
8 In conformity with these sections, CHS has filed an affidavit of Pat Kimmet showing that
9 delay would cause immediate and irreparable injury to the applicant before the adverse party or the
10 party's attorney could be heard in opposition.

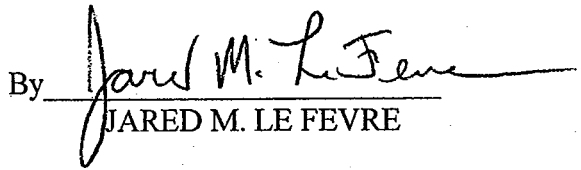
11 Moreover, the undersigned counsel certify that on April 9, 2010, the undersigned sent
12 Notice (Exhibit D hereto) to counsel for DOR, Jeffrey Weldon, a member of YCTAB, and Phyllis
13 Brady, Secretary of YCTAB, notifying them that unless proceedings before the board were stayed
14 by April 13, 2010, one week before the scheduled YCTAB hearing, than CHS would be presenting
15 this urgent application to the District Court for consideration without further notice. Under the
16 circumstances, with the impending hearing before YCTAB and CHS's request for a ruling in
17 advance of the hearing having gone unanswered by the board, we submit CHS has met its burden to
18 have the requested order to avoid immediate and irreparable injury to its rights under the law.
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1 **Wherefore, CHS respectfully requests that the Court enter an order which serves to**
2 temporarily stay the county tax appeal board proceedings before the YCTAB at least until the Court
3 has ruled upon the motion to dismiss pending in this matter and until further order of the Court.

4 DATED this 13 day of April, 2010.

6 CROWLEY FLECK PLLP.

7
8 By 
9 JAMES P. SITES

10
11 By 
12 JARED M. LE FEVRE

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15 Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that on the 13 day of April, 2010, I served a true and exact copy of the foregoing document by depositing the same in the U. S. Mail, first-class postage prepaid, addressed to the following:

CA Daw
Brendan Beatty
Department of Revenue
P.O. Box 7701
Helena, MT 59604

Yellowstone County Tax Appeal Board
c/o Phyllis Brady
1140 Sandstone Trail
Billings, MT 59105

Yellowstone County Tax Appeal Board
c/o Jeffrey Weldon, Member
FELT, MARTIN, FRAZIER & WELDON, P.C.
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