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BEFORE THE DIRECTOR OF THE DEPARTMENT OF FINANCE

STATE OF IDAHO

STATE OF IDAHO, DEPARTMENT OF FINANCE, CONSUMER FINANCE BUREAU, Complainant, v. WALL & ASSOCIATES, INC., A VIRGINIA CORPORATION, Respondent.	Docket No. 2019-9-10 **DECISION AND ORDER REGARDING COMPLAINANT'S MOTION FOR PRELIMINARY ORDER AND RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

This matter having come before the Hearing Officer on the Motion of Complainant (the Department) for Preliminary Order and the Respondent's Motion for Summary Judgment the following decision is entered.

The complaint filed in this matter concerns the activities of Respondent Wall & Associates, Inc., a Virginia corporation (hereinafter "Wall") which is engaged in the business of negotiating tax liabilities of individuals with state and federal taxing authorities and obtaining settlement or compromised outcomes for such liabilities. This matter arises following the filing of a number of consumer complaints with the Department against Wall dating back to 2011. These complaints alleged that Wall had failed to provide contracted for services concerning tax debt negotiation and resolution services.

Through discovery conducted in this case the Department has identified a number of Idaho consumers which entered into contracts with Wall to provide services advertised as debt counseling or tax relief negotiation, tax debt negotiation and resolution services.

The Department as far back as 2011 had engaged in discussions with Wall about the claimed need for Wall to obtain licensing under the Idaho Collection Agency Act, Idaho Code § 26-2221, et seq. (The Act) as a debt or credit counselor. The Department contended that Wall was engaged in the business of debt or credit counseling, or other debt negotiation services and as such was within the purview of the Act and therefore required to be licensed and regulated under these provisions.

Wall rejected this claim and continued operations.

More recently, in 2018 and 2019, the Department received further complaints regarding the activities of Wall. These complaints by Idaho consumers concerned protests over alleged inadequate results obtained by Wall in the services performed as well as claims that excessive fees were charged.

Evidence submitted by stipulation establishes that Wall contracted with fifty four Idaho consumers over the time period of 2011 through 2020. Stipulated Facts, Exhibit P.

In the pending matter the Department's Complaint contends that Wall is in violation of the Act by failing to be licensed for the activities it performs. The Department seeks an Order requiring Wall to cease and desist from continuing activities in the state until such licensing is obtained. The Department also seeks civil penalties for the multiple alleged violations of conducting business while unlicensed. Additionally the Department contends that fees charged by Wall to consumers exceeded permissible amounts under the Act.

While presented initially by the Department as a Motion for Preliminary Order and by Wall as a Motion for Summary Judgment, this matter is being considered as one which presents cross motions for summary judgment.

Pursuant to I.R.C.P. 56(c) summary judgment may be granted if upon the submission of matters of record it is established that there exists no genuine issue of material fact and what remains is purely a question of law.

The determination of whether a party is entitled to summary judgment is to be based upon the pleadings, depositions and admissions on file, together with the affidavits, if any, submitted by the parties. See, *Olson v. Freeman*, 117 Idaho 706, 791 P.2d 1285 (1990); *Badell v. Beeks*, 115 Idaho 101, 765 P.2d 125 (1988); *Boise Car & Truck v. Waco*, 108 Idaho 780, 702 P.2d 818 (1985); *Mitchell v. Siqueiros,* 99 Idaho 396, 582 P.2d. 1074 (1978). See also, *Ambrose Ex Rel. v. Buhl Joint School District No. 412,* 126 Idaho 581, 887 P.2d. 1088 (Idaho Ct. App. 1994).

Upon a motion for summary judgment, all controverted facts are liberally construed in favor of the non-moving party. *Gregory* v. *Stallings,* 468 P.3d 253, 258 (2020); *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987); *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986). Likewise, all reasonable inferences which can be made from the record shall be made in favor of the party resisting the motion. *Meridian Bowling Lanes, Inc. v. Meridian Athlete Ass'n, Inc.* 105 Idaho 509, 670 P.2d 1294 (1983); *Kline v. Clinton*, 103 Idaho 116, 645 P.2d 350 (1982).

The parties have provided in the presentation of their respective motions extensive materials including the following pleadings and matters of record:

1. Department's Motion for Preliminary Order;

2. Department's Memorandum in Support of Motion for Preliminary Order;

3. Respondent's Memorandum in Support of Motion for Summary Judgment;

4. Respondent's Memorandum in Opposition;

5. Department's Reply Memorandum in Support of Motion for Preliminary Order;

6. Declaration of Counsel in Support of Motion for Preliminary Order and supporting exhibits;

7. Declaration of Counsel in Support of Respondent's Motion for Summary Judgment and supporting exhibits;

8. Declaration of Yates and supporting Exhibits;

9. Declaration of Celia Kinney;

10. Memorandum in Opposition to Respondent's Motion for Summary Judgment;

11. Respondent's Reply Memorandum in Support of Motion for Summary Judgment;

12. Motion to Strike Portions of Yates' Declaration;

13. Response to Motion to Strike; and

14. Stipulated Facts.

Upon review of the pleadings and materials submitted along with oral argument on these motions what is apparent is that this matter is ultimately one of statutory construction and interpretation of the applicable language of the Act.

> Guidance is initially found under Idaho Code § 73-113 (1) which states as follows:
>
> The language of a statute should be given its plain, usual and ordinary meaning. Where a statute is clear and unambiguous, the expressed intent of the legislature shall be given effect without engaging in statutory construction. The literal words of a statute are the best guide to determining legislative intent.
>
> If the language in the statute is ambiguous, Idaho Code § 73-113 (2) provides:
>
> If a statute is capable of more than one (1) conflicting construction, the reasonableness of the proposed interpretations shall be considered, and the statute must be construed as a

whole. Interpretations which would render the statute a nullity, or which would lead to absurd results, are disfavored.

The Act provides for the licensing and regulation of certain agencies in Idaho as set out in the language of Idaho Code § 26-2223. Under this provision a "Collection agency, debt counselor, credit counselor, or credit repair organization" is required to obtain a license. As indicated "No person shall without complying with the terms of this act and obtaining a license from the director" undertake any of the enumerated acts. The operative issue here is whether Wall's activities fall within the scope of these provisions and therefore require licensing.

Subsection (1) provides:

> (1) Operate as a collection agency, debt counselor, credit counselor, or credit repair organization in this state.

The Department concedes initially, as to subsection (1) that the subject activities of Wall are not within two of the listed categories of collection activities. That is first, debt collection activities and second, credit repair organizations. See Idaho Code § 26-2222(3) and (5). Rather, at issue here is the scope of the third category, that of "debt counselor" or "credit counselor".

As indicated in Idaho Code§ 26-2222(9) "'Debt counselor' or 'credit counselor' means any person engaged in any of the activities enumerated in subsection (7) of Idaho Code § 26-2223.

These activities concern certain conduct which is described as follows:

> (7) Engage or offer to engage in this state in the business of receiving money from debtors for application or payment to or prorating of a debt owed to, any creditor or creditors of such debtor, or engage or offer to engage in this state in the business of providing counseling or other services to debtors in the management of their debts, or contracting with the debtor to effect the adjustment, compromise or discharge of any account, note or other indebtedness of the debtor.

The Department asserts that the actions of Wall fall within the language of the second and third listed activities of this subsection. That is Wall provides "counseling or other services to debtors in the management of their debts" and/or Wall adjusts, compromises or discharges debtors accounts, notes or other indebtedness. These contentions focus upon Wall's activities to compromise

or satisfy the tax liabilities of their clients.

It is noted that the provisions of Idaho Code § 26-2223(7) are listed by way of the disjunctive "or" and therefore to fall within the scope of the language a party need only engage in any one of the enumerated activities not all of the enumerated activities.

Wall in response does not dispute that they provide counseling or services to adjust or compromise a client's liabilities but contend that the subject tax obligations for which Wall performs services, do not fall within the scope of "debt" as found under the subject Idaho Code provisions.

The Act as a whole and in particular the language of the pertinent Idaho Code §§ 26-2222 and 26-2223 do not contain a definition of the terms "debt," "debtor," or "indebtedness." In the language at issue, Idaho Code § 26-2222(9) contains merely a cross-referential definition of "debt counselor" as a person engaged in the activities enumerated in § 26-2223(7).

The parties have presented arguments regarding the definition which should be used for the term "debt" and in particular whether that definition would ultimately encompass tax obligations.

Following the guideline that the language of a statute should be given its plain, usual and ordinary meaning, the initial question which arises in the interpretation of this language is whether the term debt is one which has such a plain and ordinary meaning or is instead ambiguous. As indicated, Idaho Code §73-113 (2) provides:

If a statute is capable of more than one (1) conflicting construction, the reasonableness of the proposed interpretations shall be considered.

In general debts refer to obligations and liabilities to pay another party. Webster's Dictionary and Black's Law Dictionary defines "debt" and in turn debtor" as "1. Something owed, as money, goods, or services. 2. An obligation or liability to pay or render something to

another." *Webster's* II *New College* Dictionary (1995), p. 291. A "debtor" is defined as, "1. One who owes something to another." *Id.* A "debt" is also defined as: "1. Liability on a claim; a specific sum of money due by agreement or otherwise." Black's Law Dictionary, (10th ed.) p. 488. "Debtor" is further defined as: "1. Someone who owes an obligation to another, esp. an obligation to pay money." *Id.* at 490.

Wall advances a number of arguments which they assert preclude the interpretation of the definition of debt to include a tax obligation. This includes distinctions between the nature and enforcement of the obligation and the government based origin of the liability. As examples Wall notes the differences in definitions under federal statutes, See e.g. 15 U.S.C. § 1692a (5) as well as exemption and bankruptcy discharge status. See e.g. 11 U.S.C. § 523 and Idaho Code § 11-607. Also cited are rulings from other jurisdictions which have distinguished tax from debt noting that the characteristics of a tax is one which imposes an enforced contribution which differs from an obligation based upon contract or an agreement between parties. See e.g. *State ex rel. Tillman v. Dist. Court of Tenth Judicial Dist. in & for Fergus County,* 53 P.2d 107 (Mont. 1936); *Scott v. Travelers Indem. Co.,* 384 S.W.2d 38 (Tenn. 1964).

A review of Idaho case law reveals that the Idaho Supreme Court has, however, under different circumstances had call in the past to interpret the meaning of "tax" as it related to the term "debt". In the analysis of the two terms and their relation to each other, the Court in the interpretation of a then piece of territorial legislation, was confronted with the question of whether tax is encompassed within the meaning of debt. As determined by the Court:

> It is quite true that there are scarcely any two words in the language that have precisely the same shade of meaning or signification in all their uses or combinations. Much more is this true of these terms. The term "tax" may and does not in every sense or connection comprehend all the shades of meaning conveyed by the word " debt," but the latter may, and often does, in all correctness, include or convey the same idea we wish to express by the former, in at least its' less technical sense, and many times much more.

Haas v. Misner & Lamkin 1 Idaho 170, 174 (1867), 1867 WL 2032.

In the analysis, the Idaho Supreme Court considered authority from other jurisdictions, including California, which had held a tax was not a debt, but rejected that interpretation. The matter at hand in *Haas* concerned the allowed form of payment for debts, coin versus currency, and which conflicting law in that regard controlled. *Haas*, however, was subsequently criticized, without being directly overturned, by the Idaho Supreme Court in the case of *Crutcher v. Sterling* 1 Idaho 306 (1869). Following the ruling in *Haas*, the United States Supreme Court had issued its decision in the case of *Lane County v. Oregon*, 74 U. S. 71 (1868). The United States Supreme Court adopted the logic expressed by the California courts (the same authority rejected by the Idaho court in *Haas*) and in that decision ruled opposite to that of the Idaho Supreme Court in *Haas*. *Crutcher*, while highlighting these contrary views, nonetheless notes that the ruling in *Haas* remained the law of the territory until overruled or superseded. *Crutcher*, 1 Idaho at 309.

Although ruling on a separate piece of then territorial legislation, which is obviously different than the subject provision of the current Idaho Code, the analysis of the court in *Haas* should not be ignored. It is a reasoned examination of the same basic issue as presented here. Is a tax a debt, at that time for purposes establishing what is an acceptable form of payment for a liability; here whether a party within the scope of certain activities, is engaging in acts concerning a debt or on behalf of a debtor. The reasonableness of the historical interpretation of the term debt as including tax is therefore evident. Preference for this already established interpretation can be given.

Tax being a form of debt has also been recognized more recently by the Idaho Supreme Court and the Idaho Court of Appeals as part of language used by the Idaho courts when referencing a tax obligation and characterizing such as a debt. See e.g. *Bills v. State of Idaho*,

Department of Revenue and Taxation, 110 Idaho 113, 714 P.2d 82 (Idaho Ct. App. 1986); See also, *Christian v. Mason*, 219 P.3d 473, 148 Idaho 149 (2009); *Idaho State Tax Com'n v. I R Trucking Trust*, 144 Idaho 20, 156 P.3d 521 (2007); *Swope v. Swope*, 112 Idaho 974, 739 P.2d 273 (1987); *Thomas v. Thomas*, 119 Idaho 709, 809 P.2d 1188 (Idaho Ct App. 1991);

The analysis though does not end there in the consideration of what construction is reasonable. When statutory analysis is undertaken, the tribunal is to ascertain the legislative intent and give effect to that intent. *State v. Beard,* 135 Idaho 641, 646, 22 P.3d 116,121 (Idaho Ct.App. 2001). To ascertain such intent, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history. *Id.*

As further noted, Idaho Code §73-113 (2) provides: the statute must be construed as a whole. Interpretations which would render the statute a nullity, or which would lead to absurd results, are disfavored. Next, the tribunal is to "give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant." *Nelson v. Evans,* 166 Idaho 815,820, 464 P.3d 301, 306 (2020) (quoting *State v. Dunlap,* 155 Idaho 345, 313 P.3d 1, 18(2013)). See also, *State of Idaho* v. *Huckabay,* 48109, 2021 WL 402526, (Idaho Feb. 5, 2021).

Wall has presented extensive arguments regarding statutory interpretation and an examination of legislative intent to support its position that an interpretation of debt as including tax liabilities here would violate rules of statutory construction and is precluded.

Wall asserts that the intent of the statute is in part apparent from subsequent modifications made to the language of Idaho Code § 26-2223, which Wall contends illustrate changes showing restrictive application of the provisions. Further noted is a previous Supreme Court case critical of the broad language of this section. See, *Davis v. Prof. Bus. Services, Inc.*, 109 Idaho 810, 712 P 2d 511 (1985).

An examination of the statutory history in order to ascertain legislative intent, however, reveals the contrary, an expansion of the scope of the statutory provision and the activities enumerated and regulated by the Department.

Prior to 1990 the language of the statute concerned activities involving collection agencies and credit counselors. In 1990 the section had added to it the then new category of "debt counselor". This change expanded the section to regulate both credit and debt counseling. As indicated in the Statement of Purpose of the legislation, "(t)he purpose of the proposal was to create a new category of licensee in the Collection agency law called debt counselor". See, Statement of Purpose RS 24232 S1618, Senate State Affairs Minutes 3/12/1990; see also, Hart Reply Declaration Exhibit 2. These statutory changes are not viewed as ones which illustrate an intent to narrow the scope of the statute's application.

Following these changes, in 2002 the provision was again amended. The origin of the language at issue in this matter comes from those amendments. Those changes modified section (7) of the statute and added the language:

> providing (counseling) or other services to debtors in the management of their debts, and contracting with the debtor to effect the adjustment, compromise or discharge of any account, note or other indebtedness of the debtor.

See, Hart Reply Declaration Exhibit 4.

In 2008 the "and" which qualified the phrase beginning with "contracting" was changed to an "or". Also added was the qualifying phrase "in this state".

Following 2008, the statute now reads as is at issue in this matter:

> (7) Engage or offer to engage in this state in the business of receiving money from debtors for application or payment to or prorating of a debt owed to, any creditor or creditors of such debtor, or engage or offer to engage in this state in the business of providing counseling or other services to debtors in the management of their debts, or contracting with the debtor to effect the adjustment, compromise or discharge of any account, note or other indebtedness of the debtor.

See, Hart Reply Declaration Exhibit 5.

That is as of 1990, the regulation expands to add "debt counselor" to the previous named regulated licensee category of "credit counselor", then in 2002 adding a designation of "other" services to modify the term counseling. Following this is the addition of a descriptive phrase regarding work performed for the debtor. This language while initially phrased in the conjunctive with an "and" was then in 2008 changed to the disjunctive "or" giving an additional expansion to the language scope.

Telling also is additional language in the statement of purpose found in the Senate Journal for 2002 which indicates that the modifications in the language were to "Revise conduct prohibited absent compliance with the provisions of Chapter 22, Title 26." See, Senate Journal 1/16/2002; Hart Reply Declaration Exhibit 4.

The effect of these amendments is interpreted as a continual expansion of the enumerated activities covered and regulated under the provision. The revisions continue in a pattern illustrating an intent to broaden rather than reduce the scope of regulation.

It should be noted that the previous Idaho Supreme Court decision of *Davis* cited by Wall, was issued in 1985, prior to the subject language amendments.

The analysis of the provision and determination of the legislative intent though, is also dependent upon the context of the language of the statute. In this regard Wall asserts that several canons of statutory construction result in the conclusion that the provision must be read as not including tax within the meaning of debt. Under the doctrine of *ejusdum generis* it is argued that the interpretation must be done in a manner which limits the scope of the phrase "other indebtedness of the debtor". This principal of interpretation is explained as that "where general words of a statute follow an enumeration of persons or things, such general words will be

construed as meaning persons or things of a like or similar class or character to those specifically enumerated". See, *Pepple v. Headrick*, 64 Idaho 132, 128 P.2d 757 (1942).

Wall argues that this doctrine, as well as the maxim *noscitur a sociis*, that a word is known by the company it keeps, provides a limit on any interpretation given to the language of the statute. Wall argues that the phrase "other indebtedness of the debtor" is strictly limited to items the same as that preceding the language, that is "account" or "note". Terms which are argued to not include tax liabilities.

Ejusdum generis as a doctrine of construction though is not as conclusive as advanced by Wall. Note should be made that the interpretation of this rule as advanced by Wall is a somewhat narrow reading of the application. As indicated in at least one definition, "the rule, however, does not necessarily require that the general provision be limited in its scope to the identical things specifically named. Nor does it apply when the context manifests a contrary intention." Black's Law Dictionary Revised Fourth Edition (1968).

The case of *In re Winton Lumber Co.*, 57 Idaho 131, 63 P.2d 664 (1936) is instructive:

> the rule (that of ejusdem generis) can be used only as an aid in ascertaining the legislative intent, and not for the purpose of controlling the intention or of confining the operation of a statute within narrower limits than was intended by the lawmakers...;

Further,

> Other rules of construction are equally potent, especially the primary rule which suggests that the intent of the legislature is to be found in the ordinary meaning of the words of the statute. The sense in which general words, or any words, are intended to be used furnishes the rule of interpretation, and that is to be collected from the context; and a narrower or more extended meaning will be given, according as the intention is thus indicated. The doctrine of *ejusdem generis* yields to the rule that an act should be so construed as to carry out the object sought to be accomplished by it, so far as that object can be collected from the language employed.

Id; 57 Idaho at 135-36, 63 P.2d at 668 (1936).

See also, *Alegria v. Idaho First Nat Bank,* 111 Idaho 314, 316, 723 P.2d 858, 860 (1986); (Consideration of the purpose of the legislation rather than using ejusdem generis to determine a more narrow meaning); *Willard v. First Security Bank of Idaho,* 69 Idaho 265, 206 P.2d 770 (1949). The effect of the rule does not limit or restrict the general category to those previous specific terms but things of a like class.

In the examination of intent, also of note here, is that in the subject language of Idaho Code § 26-2223 (7) the "of any account, note or other indebtedness" uses the word "any" as a determiner in the sentence. As such, with the placement before the list of subject nouns, it is being used in the strong rather than weak form in an affirmative manner. This evidences a class which is not limited. The use here indicates all of the potential subject items of the class of indebtedness. This is supported by the further use of the word "other" prior to "indebtedness" in the sentence. In other words "any" modifies "account", "note" and "other indebtedness." This further supports a broad reading of the terms.

Wall also argues that an interpretation of the term "indebtedness" in Idaho Code § 26-2223 (7) cannot be in a broad manner such as to include tax within the meaning, as that would render the preceding language of the section, that which lists "account, note" superfluous. This argument though, fails to address the reverse consequence. That is if "account" and "note" were intended as the sole types of obligations to be included, the later qualifier "other indebtedness" would then be unnecessary. This again presents an indicator of the intent to be of greater inclusion not less in the phrase "other indebtedness."

The statutory framework, however, must be construed as a whole in the interpretation in order to find insight into the underlying intent.

> [s]eparate statutes dealing with the same subject matter should be construed harmoniously, if at all possible, so as to further the legislative intent. *State v. Paul,* 118 Idaho 717, 800 P.2d 113 (Ct.App.1990). This is especially true when the statutes to be

interpreted have been enacted by the same session of the legislature. *State* v. *Casselman,* 69 Idaho 237, 205 P.2d 1131 (1949).

State v. *Maland,* 124 Idaho 537, 540, 861 P.2d 107, 110 (Id. Ct. App. 1993).

An additional argument advanced by Wall, focuses upon the use of the word "indebtedness" or "other indebtedness" in the various subsections of I. C. § 26-2223 and potential inconsistencies if the terms are to include tax within their scope. This concerns language found in subsections (2), (3) and (6) of the statute. These arguments also note the distinction in the enumerated listing found in subsection (7) of the statute with "account, note" compared to "account, bill, claim" found in subsections (2) and (3) of the statute. These distinctions and arguably the underlying intent with the language can be addressed by noting that subsections (2), (3) and (6) concern a number of activities and in those subsections, actions of collection agencies, and not that as addressed in the latter language as found in subsection (7).

The use and phrasing of the word "indebtedness" is not uniform in the statute and its subsections. The word is used in connection with the word "other," also in the phrase "any form of," and simply as "the" indebtedness. While a term appearing in several places in a statutory text should be and generally is read the same way each time it appears, consistent meaning does yield to the convention of applicable language phrasing. Here variations can be interpreted as the result of the distinctions found in expressing the scope of different enumerated activities to be regulated. Wall notes in particular the use of "any form of indebtedness" as in Idaho Code § 26-2223 subsection (6) compared to that of "other indebtedness" of subsection (7). Wall, argues that these differences indicate a more narrow meaning in subsection (7). This again is answered by the use of the word "any" as a modifier to the language.

Consideration of the use of the language to determine intent does to some degree raise questions, in light of corresponding changes made to other statutory provisions within the same

code chapter. As would be expected amendments to Idaho Code § 26-2223 were not made in isolation. Amendments when made in 1990, 2002 and 2008 were also made to Idaho Code § 26-2222, the definitional statute found in this chapter.

Wall's arguments note that the interpretation of the definition of "debt" should be tied to that of "creditor" as used in these statutory sections. Wall argues that the limits by definition of the term "creditor," which includes a reference to "person", thereby excluding a liability to a governmental entity, establishes the scope of the corresponding term "debt". See Idaho Code § 26-2222 (6) and (14). This argument is rejected as not directly illustrative of the intent of the subject language at issue and does not directly limit the scope of the definitions of debt and indebtedness. The limits and modifications of those statutory provisions are not such to directly impact the language of the provision in question. While this carries effect on the potential application of certain parts of Idaho Code § 26-2223 (7) it is not determinative as to the meaning of the terms at issue.

Of more direct concern, however, is the change in the statutory history of the definition of "Debt counselor" found in Idaho Code § 26-2222 (9). It is noted that the cross reference of this subsection, to enumerated activities under Idaho Code § 26-2223, has changed in the course of the various amendments to both Idaho Code § 26-2222 and 2223. Initially this term was defined by activities more narrow than currently expressed. The definition when combined with that of "Credit counselor" in the 2008 amendment (again, the current language version) places the language at issue in this matter within the definition of acts by both a "Debt counselor" and a "Credit counselor". This was not always the configuration of the statutory language.

This can be argued to reflect on the intent of the legislature in the original meaning of the provision and in turn the scope of the subject language under consideration. The nature of the amendment though and the progress of continued expansion of the statutory scope of regulation

address this concern. Further, the current language of the provision (adopted in 2008) clearly expanded the definition section when placing both "Debt counselor" and "Credit counselor" within a combined definition section (Idaho Code § 26-2222 (9)). One which now covers a number of enumerated activities under Idaho Code § 26-2223 previously separated under earlier subsections of the statute. Although the subject language of current subsection (7) was originally listed as that of a "Credit" not "Debt" counselor, this language was subsequently modified in 2008 to place the activities at issue under the definition of, as expressed above, both "Debt counselor" and "Credit counselor". As noted this had an effect of expanding the applicable language, not restricting regulated activities. As expressed in *Gonzalez* v. *Thacker, 148 Idaho 879, 883,* 231 P.3d 524, 528 (2009):

> where an amendment is made it carries with it the presumption that the Legislature intended the statute thus amended to have a meaning different than theretofore accorded it.

If intent prior to that of 2002 is interpreted as not to include the subject activities within that of a "Debt counselor" this was amended and changed in 2008. As further noted in the House journal notes for the 2008 session House Bill No. 451 was:

> Amending Section 26-2222, to revise and add definitions; Amending Section 26-2223, to provide correct terminology, ... and to make technical corrections; (capitalization omitted).

Of additional note is that the State may use third parties to collect taxes on its behalf. See Idaho Code § 63-119. This statutory provision also requires that any such third party, namely a collection agency, comply with the provisions of Idaho Code chapter 22, Title 26. This would include the provisions of Idaho Code § 26-2223. If indebtedness were to not include tax, meaning the party performing this job is not collecting an obligation within the type of debts recognized within the scope of the Act, then why would the party be required to comply with the licensing mandates and other requirements of the Act? Wall asserts that the provisions of Idaho Code § 26-2223

pertaining to collection agencies, those parties with whom the State may contract to perform such work, would under Idaho Code § 26-2223 subsections (2) and (3) be collecting a "claim," and not "other indebtedness".

Wall notes that the scope of certain bankruptcy provisions would place "tax' within the meaning of "claim" which is defined as any "right to payment". See 11 U.S.C. § 101(5). This argument is not persuasive. While under the bankruptcy code, a "tax" may fall within the meaning of "claim" it is not apparent that the use of the term "claim" in Idaho Code § 26-2223 subsections (2) and (3) was to specifically place the third party collection of taxes on behalf of the State, within the scope of the Act. Subsections (2) and (3) utilize the term "indebtedness" and it is more readily interpreted to include tax within that term rather than "claim".

This is also in line with statutory language found in Title 63 Chapter 30. That of Idaho Code § 63-3050 which reads: "Any tax owed... shall constitute a debt to the state of Idaho." Although not definitional or directly controlling, the language of this statute was in effect at the time of the amendments to the subject provisions of Title 26 and can be taken as a further indicator of the scope intended by the legislature. A third party used by the State to collect a tax is collecting a debt or indebtedness and therefore is required to comply with provisions of the Act.

Wall argues that interpretation of indebtedness to include tax is precluded based upon the language of Idaho Code § 26-2229 regarding fee restrictions for debt counselors. Wall also contends that such an interpretation would prohibit fees from being charged under the language of the statute. Subsection 3(b) of the statue is as follows:

> Debt counselors... shall not charge or accept as a fee for their services more than twenty percent (20%) of the principal amount of the debtor's unsecured debt at the time of contracting for services...

Wall contends that taxes are secured obligations and that the language of Idaho Code § 26-2229 establishes that the Act only applies to unsecured debt. Then by result, a tax, argued to be a form of secured debt, cannot be within the scope of the Act.

Both parties have presented detailed arguments regarding the secured versus unsecured status of taxes and the process by which the obligation is enforced. The status, however, is not determinative of the issue of the scope of debt and indebtedness under Idaho Code § 26-2223. While statutes of the same Chapter should be read in a harmonious manner, the language of Idaho Code § 26-2229 does not indicate an intent to limit the Act solely to unsecured debt. The language of the Act, statutory history materials and case authority, do not establish such a limit on the scope of the Act. The listed exemptions found in Idaho Code § 26-2239 concern enforcement and collection of a number of types of secured debt. The inclusion of these exemptions speaks to the application of the Act to this type of debt. The language of the fee limitation is limited to, as stated, fees charged on unsecured debt. In turn Wall's arguments that these limitations preclude services for taxes, whether secured or unsecured, fails.

Wall next asserts that application of the Act to tax liabilities would also require accountants and other debtor representatives to be licensed. This result is argued to illustrate that the legislative intent was not so broad as to include taxes, based on the claimed absurd results of the extension of licensing requirements to presently unlicensed parties. Wall notes that certified public accountants in Idaho do not register, indicating the Department does not actually enforce the Act as argued in this action and that the intent of the language was not to bring accountants within the purview of the Act. See, e.g., Declaration of Trevor L. Hart In Response, Exhibit 3. Wall argues in turn that the limited scope of exemptions found in Idaho Code § 26-2239 further supports the claim that either the Act does not include tax obligations or represents selective enforcement.

These arguments though are not sufficient to either rise to the level of estoppel or to directly determine the meaning of the statutory language at issue. The activities of an accountant do not automatically fall within the language of the subject statutes nor is the issue of such application, beyond the possible impact in determining legislative intent, one for determination in this action.

The meaning of debt, debtor and indebtedness is interpreted here under the subject Idaho Code § 26-2223 (7) to include tax within the scope of the statutory language.

As discussed above, even though conflicting constructions have been advanced by the Respondent, the alleged disparate meanings do not show, even if an ambiguity exists as asserted, an intent under the language of the statute to limit the scope of the terms "debt," "debtor," and "indebtedness" to exclude a tax liability. This is supported by the showing of a legislative intent to expand the scope of regulated activities under the statute. The context of the language as amended through the years is to include a broader list of covered activities not one narrower. As a result "debt," "debt" and "other indebtedness" is interpreted not to be restrictive but expansive as to what obligation or liability is within the scope of the statutory regulation. This is in accord with context and ordinary usage of the subject language, and compatible with the surrounding statutes into which the provision is integrated. This reading provides that the term may but does not always include a tax. This also does not frustrate an evident statutory purpose in the expansion of regulated activities in this statutory provision.

This is also in conformance with the apparent statutory purpose of protecting consumers by way of requiring registration of parties whose activities fall within the purview of the statute. See, *Davis v. Prof. Bus. Services, Inc.*, 109 Idaho 810, 712 P 2d 511 (1985).

The Department contends that Wall as a result of terminology used in their advertisements to consumers uses the term "debt" in such a manner that Wall should be estopped from now

claiming the term does not include taxes. See, Stipulated Facts, Exhibits A, B, D, E, I, and K. While relevant in showing the activities of Wall as to potential violations of licensing requirements, these activities do not rise to a level where Wall is estopped to assert the non-application of registration requirements.

The result of the above statutory interpretation now raises the question of whether the activities of Wall are within the scope of the statute and in turn require Wall to obtain licensing. The Department argues that the activities of Wall are within the scope of both subsections of Subsection (7) namely the "counseling or other services to debtors in the management of their debts" and the "contracting with..." section. The evidence submitted does not directly support the claims of the Department as to activities which would establish "counseling" in a traditional ordinary meaning.

The record is, however, sufficient to establish actions which illustrate Wall has engaged in activities which are intended on behalf of a debtor to "effect the adjustment, compromise, or discharge..." of its indebtedness. Evidence submitted in this matter by stipulation supports the conclusion that the activities of Wall are within the language of subsection (7) of Idaho Code § 26-2223. See, Stipulated Facts, paragraphs 5-11, Exhibits F-K. Based in part upon the client agreement executed by Wall, Stipulated Facts, Exhibits F, G and H, it is apparent that Wall agrees to act on behalf of the client to at a minimum "compromise" the tax liability of said client, activity clearly within the subject statutory language. See also, Stipulated Facts, Exhibits I-K.

Exemptions from the requirement of obtaining licensing under Idaho Code § 26-2239 have not been established to apply to Wall. No evidence has been submitted which would place Wall within any of the enumerated categories. See Idaho Code § 26-2239; Stipulated Facts, Pages 2-3.

Wall has also presented arguments that federal law preempts application of the Act. Wall notes in particular an Internal Revenue Circular, number 230 pertaining to requirements of 31

CFR Part 10 and regulations regarding appearance and practice before the Department of Treasury and the IRS. Wall presents a conflict preemption argument, contending that the Idaho licensing requirement imposes impermissible restrictions on Wall to negotiate on behalf of clients before the IRS. Wall cites to the case of *Sperry v. Florida*, 373 U.S. 379 (1963) in support of the claim that the Act is therefore superseded.

The Department has presented in its materials a decision rendered by a Minnesota District court which confronted a similar preemption argument. *State of Minnesota V. Wall & Associates* (District Court Fourth Judicial District, County of Hennepin, File No. 27-CV-19-19874, Decision dated 8/1/2019). The analysis by that tribunal is persuasive. The federal regulations do not contain an expression that Congress in those regulations intended to preempt state law. Further, the federal regulations do not preclude supplemental or additional state regulation. Idaho's Act would require Wall to be licensed; this is not a bar to the allowance of Wall to represent clients before the IRS.

Preemption is also noted as being disfavored in the area of traditional state police powers. See e.g. *Medtronic, Inc. v. Lohr,* 518 U.S. 470,485 (1996). The requirements to establish preemption are not met in this case. Idaho has within its police powers the authority to regulate credit and debt counselors, *Hankins v. Spaulding*, 78 Idaho 533, 307 P.2d 222 (1957). The state licensing requirement is not in conflict with the subject federal regulations.

Wall presents multiple arguments related to the provisions of Title 63 Chapter 40, The Idaho Taxpayer Bill of Rights. Initially, in that Chapter, the definition section found in Idaho Code § 63-4001 characterizes tax as that of a "liability" or "obligation" and does not use the word "debt". This does not though, preclude a finding that such liability or obligation is within the meaning of that term. It is also weighed against the previously noted language found in Title 63 Chapter 30, in Idaho Code § 63-3050 which characterizes a tax as constituting a debt.

Wall also argues that the Idaho Taxpayer Bill of Rights prevents or invalidates application of the Act's licensing requirement, as it would prevent Idaho citizens from freely nominating any party of their choice to represent them, in contravention to the protection of the rights expressed in Chapter 40. These arguments regarding the Taxpayer Bill of Rights do not invalidate the interpretation of debt as including a tax. The scope of representation under the Taxpayer Bill of Rights before the State Tax Commission does not automatically entail matters which would require licensing under the Act. It cannot be concluded that enforcement of the Act would preclude or unduly restrict the rights of Idaho taxpayers. Further, registration of certain parties under the Act is not somehow a bar to Idahoans selecting a representative.

Wall also contends that the Department should be estopped from asserting the present claims that Wall is subject to the Act. This defense is rejected as inapplicable as against the Department under these facts. *Hollingsworth v. Thompson*, 478 P 3d. 312 (2020); *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 845, 70 P.3d 669, 683 (2003); The course of events between these parties does not represent grounds sufficient to establish a showing of manifest injustice as required. *See, e.g. City of Sandpoint v. Sandpoint Ind. Hwy. Dist.*, 126 Idaho 145, 151, 879 P.2d 1078, 1084 (1994). Wall's claims of selective enforcement based upon an assertion that other potential parties would be subject to the Act if the registration requirement is extended to Wall, similarly do not reach the level which would warrant application of quasi-estoppel against the Department.

Wall further argues that the Department's action is subject to the statute of limitations found in Idaho Code § 5-218 and 5-224. These limitations do not apply to the actions of the State when acting in its sovereign capacity to enforce a public right. *Young Electric Sign Company v. State ex rel. Winder*, 135 Idaho 804, 25 P.3d 117 (2001).

Next, Wall asserts that the doctrine of *desuetude* precludes application of the Act as a result of a history of non-enforcement by the Department. Although a period of time did elapse between the actions of the Department in 2011 and 2019 it is not apparent that this delay is of a sufficient time period to support a determination that the Department consistently failed to enforce the Act such that it would be determined as void. See Kinney Declaration, Exhibit O-R. Exchanges made between the parties also belie potential claims of inadequate notice and fairness due to selective enforcement, common concerns in the application of the doctrine.

Wall has presented arguments alleging that the Act is unconstitutional. This question is by Idaho Rules of Administrative Procedure 04.11.01.000, Rule 415, outside of the scope of authority of the Hearing Officer.

IT IS HEREBY ORDERED that Wall's Motion for Summary Judgment is hereby denied as to the request to dismiss the Department's claims against Wall.

Further, at this time the Department's Motion for Preliminary Order is hereby granted as to a finding that:

1) That Wall and Associates, Inc. has and is engaging in conduct as a debt counselor without a license in violation of Idaho Code Section 26-2223(1) and (7);
2) That Wall has engaged in fifty-four (54) separate violations from 2011 to 2020;
3) That, pursuant to Idaho Code section 26-2244(1) Wall is ordered to cease and desist all future conduct within the scope of the Idaho Collection Agency Act, Title 26, Chapter 22, Idaho Code and all future violations of the Act unless and until it becomes licensed thereunder;
4) That pursuant to Idaho Rules of Administrative Procedure 04.11.01.000, Rule 564, the parties submit further materials within 14 days of the date of this preliminary order, including

briefing, regarding the penalties and restitution sought by the Department, in the event of a filing of a Motion for Reconsideration of this Preliminary Order, the timeline for such filing shall be extended until the resolution of such Motion for Reconsideration;

5) That this decision and preliminary Order shall at present remain confidential and not open and available to the public.

NOTIFICATION OF RIGHTS

This is a preliminary order of the Hearing Officer. It can and will become final without further action of the Department of Finance unless any party petitions for reconsideration before the Hearing Officer or appeals to the Director for the Department of Finance (or the designee of the Director). Any party may file a motion for reconsideration of this preliminary order with the Hearing Officer within fourteen (14) days of the service date of this order. The Hearing Officer will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. *See* Idaho Code §67-5243(3).

Within fourteen (14) days after (a) the service date of this preliminary order, (b) the service date of the denial of a petition for reconsideration of this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration of this preliminary order, any party may in writing appeal or take exception to any part of the preliminary order and file briefs in support of the party's position on any issue in the proceeding to the Director of the Department of Finance (or the designee of the Director.) Otherwise, this preliminary order will become a final order of the Department of Finance.

If any party appeals or takes exception to this preliminary order, opposing parties shall have twenty-one (21) days to respond to any party's appeal within the Department of Finance. Written briefs in support of or taking exception to the preliminary order shall

be filed with the Director of the Department of Finance (or the designee of the Director). The Director may review the preliminary order on his own motion.

If the Director of the Department of Finance (or his designee) grants a petition to review the preliminary order, the Director (or his designee) will allow all parties an opportunity to file briefs in support of or taking exception to the preliminary order and may schedule oral argument in the matter before issuing a final order. The Director (or his designee) will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties for good cause shown. The Director (or his designee) may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

Pursuant to Idaho Code §§ 67-5270 and 67-5272, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which: (1) the hearing was held, (2) the final agency action was taken, (3) the party seeking review of the order resides, or operates its principal place of business in Idaho, or (4) the real property or personal property that was the subject of the Department's action is located.

This appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. *See* Idaho Code § 67-5273. The fling of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

DATED this 14th day of June, 2021.

By: David V. Nielsen
David V. Nielsen
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of June, 2021, I served a true and correct copy of the foregoing by delivering the same to each of the following party, by the method indicated below, addressed as follows:

Thomas A. Donovan State of Idaho Department of Finance P.O. Box 83720 Boise, ID 83720-0031	☒ U.S. Mail ☐ Hand-Delivered ☐ Overnight mail ☐ Facsimile ☒ E-mail
Mark B. Perry, Trevor L. Hart, Perry Law, P.C. The Henry Rust Building 2627 W. Idaho Street Boise, ID 83702 William Mohrman Morham, Kaardal & Erickson, P.A. 150 South Fifth Street, Suite 3100 Minneapolis, MN 55402	☒ U.S. Mail ☐ Hand-Delivered ☐ Overnight mail ☐ Facsimile ☒ E- Mail ☒ U.S. Mail ☐ Hand-Delivered ☐ Overnight mail ☐ Facsimile ☒ E- Mail