



Mike Kadas
Director


Montana Department of Revenue



Steve Bullock
Governor

MEMORANDUM

To: Mike Kadas, Director

From: Dan Whyte, Deputy Chief Legal Counsel 

Date: July 11, 2014

Subject: Department of Revenue Major Case Update

MONTANA SUPREME COURT

AT&T Mobility & Gold Creek Cellular d/b/a Verizon: The validity of the Department's administrative rules relating to intangible personal property was on appeal to the Supreme Court. On September 24, 2013, the Supreme Court determined that the Department was too limited in its application of administrative rules relating to intangible personal property and goodwill. The Department will be repealing the affected rules and a public hearing on the amendments/repeal was held July 8. Revised assessments have been issued in accordance with the decision of the Supreme Court.

Bresnan Communications, LLC: The Department appealed the District Court decision finding that Bresnan owns Class 8 properties subject to local assessment to the Montana Supreme Court. The Supreme Court held in December 2013 that the Department correctly classified Bresnan's property under Class 13 as centrally assessed property because Bresnan operates a single and continuous telecommunications services network in twenty Montana counties. The Court remanded the case back to the District Court. The parties disputed the proper scope of remand, but at a minimum the Department was required to make an additional intangible personal property (IPP) deduction for tax years 2010-2013 as a result of the Gold Creek decision (above). Bresnan filed a motion to amend their complaint on remand, asking for this same relief (IPP, non-operating property) for the 2007-2009 tax years. The Department opposed that motion. Bresnan also filed an appeal with the Supreme Court of the United States, arguing that the State was federally preempted from classifying Bresnan as a telecommunications services company. Proposed ballot initiative I-172 sought to essentially undo the Montana Supreme Court decision and return Bresnan to a locally assessed cable company. The Department entered into settlement negotiations with Charter (current owner of the "Bresnan" assets). The parties settled the matter on June 18. The settlement results in the dismissal of all pending district court actions, a withdrawal of Bresnan's appeal to the Supreme Court of the United States appeal, and an agreement that Charter would not seek to qualify I-172 for the November ballot.

Westmoreland Resources, Inc.: Westmoreland appealed the District Court's decision affirming the Department's interpretation that tribal taxes are not a "tax paid to the federal, state, or local governments" for purposes of deducting taxes paid on production from the contract sales price of coal. The case is fully briefed before the Supreme Court and it is awaiting a decision.

STATE DISTRICT COURT

Alpine Aviation: Alpine filed an appeal with ODR and then with STAB. The issue is whether Alpine Aviation is subject to central assessment. The Department filed a petition for interlocutory adjudication in the First Judicial District Court (Judge Reynolds). The Department has asked the District Court to determine the meaning of "scheduled airline" and "scheduled air commerce" for Montana property tax purposes. Alpine has not yet filed its response.

Barnard: Tim and Mary Barnard have filed a declaratory judgment action seeking an order from the Gallatin County District Court that the Department's purported authority to determine residency for state income tax purposes is unconstitutional. Additionally, they are petitioning the court to declare that they are not residents of Montana and thus do not owe the resident income taxes the Department has assessed against them.

Cloud Peak: Cloud Peak filed a declaratory judgment action in the First Judicial District, disputing the Department's deficiency assessment (issued following an audit) for coal severance, coal gross proceeds, and the resource indemnity trust tax for tax years 2005-2007. The main issue is whether the Department can impute a value to coal sold under non-arm's length contracts, and if so, whether the Department's method for doing so was correct. The Department moved for summary judgment, and oral argument took place October 15, 2013.

The District Court entered its Order on Cross-Motions for Summary Judgment on October 31, 2013. The Court affirmed most of the Department's assessment, including its ability to impute a value to the coal, its ability to assess penalty and interest on an additional assessment, and its ability to assess tax upon the value of additives used to prevent freezing and dust. The Court concluded, however, that the Department's method of calculating market value of coal sold pursuant to non-arm's-length agreements incorrectly utilized as comparable sales arm's length contracts negotiated outside of a reasonable time from the date of the non-arm's length contracts negotiation. It ordered the Department to re-calculate an imputed value by using comparable arm's length contracts negotiated within a reasonable period of time around the negotiation date of the subject contracts. The Department appealed and CPE cross-appealed on an issue related to additives. The Department filed its opening brief on April 17, 2014. Cloud Peak filed its response and brief on cross appeal on June 16. The Department's reply is currently due August 13.

Lucas, et al.: This matter is currently on appeal to the Montana Supreme Court from the 14th Judicial District Court, Meagher County. The district court found in favor of the Department when weighing cross-motions for summary judgment, but declined to address the motion for class certification, motion to dismiss parties, and motion to dismiss writ of mandate based on its conclusion that the judgment rendered the other motions moot.

MCR: MCR filed an action in Toole County seeking attorney fees after obtaining a summary judgment from STAB on an appeal of an oil and gas production tax audit and assessment. The Department filed for summary judgment. The District Court issued its decision on May 6, 2014 which determined that MCR was not entitled to attorney fees because they failed to allege and prove that the Department's conduct was in bad faith. MCR has the option to appeal the District Court's decision to the Supreme Court.

Omimex Canada, Ltd.: Omimex filed a declaratory judgment action in Silver Bow County District Court for tax years 2011 and 2012. The District Court recently granted the Department's motion for partial summary judgment, finding that issue preclusion bars Omimex from relitigating whether it operates a "single and continuous property" for purposes of central assessment. Omimex moved the District Court to certify this Order as final. The Court granted that motion and stayed all litigation for 2011 and 2012 pending a ruling from the Montana Supreme Court on issue preclusion. Omimex filed a declaratory judgment action in the First Judicial District for the 2013 tax year. The Court has not yet set a scheduling conference.

Phillips 66 (f/k/a ConocoPhillips): The parties engaged in mediation for tax years 2010-2013. The parties were able to settle tax years 2010, 2011, and 2012. The State Tax Appeal Board set a hearing for the 2013 tax year for March 10, 2015.

Priceline, et al. (On-Line Travel Companies): The First Judicial District Court recently determined on summary judgment that it is the responsibility of the traveler to pay the lodging taxes and the hotel to collect the taxes. The Court determined that the online travel companies do not have an obligation to collect the taxes. The Department has filed a notice of appeal to the Supreme Court and the opening brief is due August 13, 2014.

Kohoutek et al v. Montana Department of Revenue: Agency liquor store owners are seeking class certification and challenging the constitutionality of certain statutes. Specifically, agency liquor store owners allege that § 16-2-101(2)(b)(ii)(B) is unconstitutional because it fails to fully compensate some liquor store owners for the mandatory 8% discount for unbroken case lot sales to licensees required by § 16-2-201. Plaintiffs filed in in the 8th Judicial District Court, Cascade County. The Court has bifurcated the issues (constitutionality and damages). The Court set a briefing schedule on the constitutional questions and oral argument is set for November 10, 2014.

STATE TAX APPEAL BOARD

AT&T Mobility, LLC: AT&T Mobility, LLC, brought valuation challenges for tax years 2011-2014, contesting among other issues, the Department's intangible personal property deduction. These appeals had been pending at either ODR or STAB awaiting the Supreme Court decision regarding the Department's administrative rules relating to intangible personal property. As discussed above, Supreme Court decision has been handed down and revised assessments have been issued according to this decision. The parties are currently working on identifying the best way to proceed with the appeals.

Blixseth: Mr. Blixseth appealed the Department's audit findings to STAB in n February 2011. The audit found that Mr. Blixseth had an additional liability of \$56 million. This litigation was stayed during the involuntary bankruptcy but is now being actively litigated.

STAB granted judgment in the Department's favor related to its motions for judicial notice and motions for partial summary judgment, while denying Mr. Blixseth's motions for partial and full summary judgment. The Department is conducting discovery, scheduling depositions, and assessing how to address the legal effect of other decisions entered against Mr. Blixseth outside the STAB's jurisdiction. The Department anticipates filing secondary dispositive motions based on the estoppel effect of these decisions prior to the initial hearing dates. Initial hearing dates are set for early November of this year.

Gold Creek Cellular d/b/a Verizon: Verizon brought valuation challenges for tax years 2009-2014, contesting, among other issues, the Department's intangible personal property deduction. Tax year 2009 was stayed before STAB and 2010-2013 were stayed before ODR pending the Montana Supreme Court's decision in the Gold Creek case (above). As a result of the Supreme Court decision, the Department issued revised assessments to Verizon for tax years 2009-2013 that granted a higher deduction for intangible personal property and implemented this higher deduction for 2014. The parties have settled all outstanding years.

BANKRUPTCY

Blixseth: The Department is pursuing Mr. Blixseth's \$56 million tax debt through an involuntary bankruptcy in Nevada. While the bankruptcy court dismissed the involuntary case, the matter is on appeal before the Nevada Federal District Court. Meanwhile, Mr. Blixseth has sought attorney fees before the bankruptcy court in the amount of \$3.2 million. The Court recently granted a stay of the attorney fees issue pending a decision on whether an involuntary bankruptcy is appropriate. The Ninth Circuit Court of Appeals recently denied the cross-petitions for appeal and the appeal has been remanded to the Nevada District Court. The Department expects the district court will order briefing on the appeal shortly. .