



Revenue and Transportation Interim Committee

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59th Montana Legislature

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December 2, 2005

TO: Revenue and Transportation Committee

FROM: Lee Heiman, Staff Attorney *lee*

RE: Invalidation of Part of Central Assessment Rule

On August 9, 2005, a partial summary judgment was granted that invalidated a part of an administrative rule governing central assessment of property. District Court Judge Jeffrey M. Sherlock ruling in Omimex Canada, Ltd. v. Department of Revenue (No. BDV-2004-288, First Judicial District, Lewis and Clark County) determined that ARM. 42.22.103(3) was invalid.

A validly adopted administrative rule has the same legal effect as a statute. To be valid, the adoption must comply with the Montana Administrative Procedure Act, found in Title 2, chapter 4, MCA. Section 2-4-305(6)(a), MCA, requires that a rule be "consistent and not in conflict with the statute" that is being implemented. The statute that was implemented by ARM. 42.22.103(3) is 15-23-101, MCA:

15-23-101. Properties centrally assessed. The department shall centrally assess each year:

- (1) the railroad transportation property of railroads and railroad car companies operating in more than one county in the state or more than one state;
- (2) property owned by a corporation or other person operating a single and continuous property operated in more than one county or more than one state, including but not limited to telegraph, telephone, microwave, and electric power or transmission lines; natural gas or oil pipelines; canals, ditches, flumes, or like properties and including, if congress passes legislation that allows the state to tax property owned by an agency created by congress to transmit or distribute electrical energy, property constructed, owned, or operated by a public agency created by congress to transmit or distribute electrical energy produced at privately owned generating facilities, not including rural electric cooperatives;
- (3) all property of scheduled airlines;
- (4) the net proceeds of mines, except bentonite mines;
- (5) the gross proceeds of coal mines; and
- (6) property described in subsections (1) and (2) that is subject to the provisions of Title 15, chapter 24, part 12. (*emphas*)

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ARM 42.22.103 reads:

42.22.102 CENTRALLY ASSESSED PROPERTY (1) The department shall centrally assess the interstate and inter-county continuous properties of the following types of companies:

- (a) railroad;
- (b) railroad car;
- (c) microwave;
- (d) telecommunications;
- (e) telephone cooperatives;
- (f) gas;
- (g) electric;
- (h) electric cooperatives;
- (i) ditch;
- (j) canal;
- (k) flume;
- (l) natural gas pipeline;
- (m) oil pipeline; and
- (n) airline.

(2) The property of a centrally assessed company is separated into two categories: operating and non-operating. All operating property will be apportioned to the taxing units as provided in ARM 42.22.121 and 42.22.122.

(3) The department will determine centrally assessed property based on the property's operating characteristics such as but not limited to property use, integration of operations, management, and corporate structure. (emphasis added)

In the order, Judge Sherlock cited Safeway, Inc. v. Montana Petroleum Release Comp. Bd., 281 M 189, for the proposition that administrative rules are "out of harmony" and void with legislative guidelines if they "(1) engraft additional and contradictory requirements on the statute; or (2) if they engraft additional, noncontradictory requirements on the statute which were not envisioned by the legislature". Judge Sherlock then wrote:

Despite DOR's contention, however, it does appear that the administrative rule has impermissibly expanded the statute. The statute specifically states that centrally assessed property consists of "single and continuous property operated in more than one county or more than one state," while the administrative rule includes in the definition property that is not single and continuous. The agency was not granted the authority in the statutes to include additional types of property to be centrally assessed.

On October 27, 2003, District Court Judge Marc G. Buyske, in an order that was brought to Judge Sherlock's attention, ruled in a partial summary judgment in PanCanadian Energy Resources

v. Department of Revenue, (No. DV-02-3223, Twelfth Judicial District, Liberty County) that ARM 42.22.102(3) was valid. Judge Buyske wrote: "The statute [15-23-101(2), MCA] which the rule explicates provides centrally assessed 'property' includes 'but [is] not limited to' a list of property types." He then discussed property not listed in the statute and its ownership. He held that the scope of the rule did not impermissibly expand the statute but reasonably explained what factors will be used to determine property not specifically enumerated in the statute but subject to central assessment.

The invalidity granted by Judge Sherlock raises factual questions on the scope of central assessment by the Department.

A hearing was set for December 12; however, the taxpayer filed a motion to vacate the hearing on the premise that there are summary judgment motions outstanding. The Court granted the taxpayer's motion. The hearing was rescheduled for the middle of September 2006.