



## Revenue and Transportation Interim Committee

### 61st Montana Legislature

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November 19, 2010

TO: Committee Members  
FROM: Jaret Coles, Staff Attorney  
RE: Administrative Rule Activity

### Department of Revenue

*All notices are available on the Internet at:*

*[http://mt.gov/revenue/formsandresources/administrativerules/upcomingevents\\_proposedrulenotices.asp](http://mt.gov/revenue/formsandresources/administrativerules/upcomingevents_proposedrulenotices.asp)*

#### Notice of Proposed Rules:

Contributions to Family Education Savings Program Accounts. MAR 42-2-847. A public hearing was held on October 14, 2010, at 9:30 a.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The Department proposes to amend one existing rule regarding the treatment of contributions to family education savings program accounts. The proposed amendments explain that only a parent or stepparent can claim a deduction for amounts they contribute to an account that is owned by a minor child or stepchild, that a parent or stepparent can reduce adjusted gross income for contributions to accounts that are set up under the Montana Uniform Transfers to Minors Act, and that qualifying rollovers from another state's 529 plan may qualify for a reduction in adjusted gross income subject to the annual \$3,000 statutory limitation. Furthermore, the Department plans on amending the rule further to provide that a parent or stepparent can contribute funds to an account owned by their adult child or adult stepchild, who in turn can designate a grandchild or the parent or stepparent as the beneficiary.

Lodging Facility Use Tax and the Lodging Sales Tax. MAR 42-2-848. A public hearing was held on October 26, 2010, at 1:00 p.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The Department proposes to adopt two new rules, amend ten rules, and repeal one rule regarding lodging facility use taxes and lodging sales taxes. Proposed new rule two provides that a seller's 5% vendor deduction for collecting the 3% lodging sales tax (§ 15-68-510, MCA) will be applied to the 4% lodging facility tax in situations where less than a full payment of the facility tax was received (*i.e.*, an offset). The proposed amendments include new definitions and set forth the procedures that are used by the Department to administer both

the lodging facility use tax and the lodging sales tax. Since both taxes have common elements, the Department merged the rules for both taxes into one set of rules.

Comment: Administratively it makes sense not to give a refund to a business that owes the Department money, but the lodging facility use tax statute does not specifically address the usage of an offset.

It should also be noted that the topic of whether the Department can collect money from online travel reservation companies is a topic that is currently being litigated. The Department's position is that online travel companies are responsible to pay the facilities and sales tax on the travel companies' profit amount, while the travel companies contend that a tax is not charged on their profit. For example, if someone pays \$100 for a room using an online travel company, a 7% tax would yield \$7. However, the online travel company may have a negotiated rate of \$60 with the hotel, which would give the travel company a profit of \$40. As such, if the tax was applied to the \$60 negotiated rate, it would yield a tax of \$4.20.

A key inquiry that will likely be determined by the litigation is whether a "seller", as defined by section 15-68-101, MCA, includes travel companies. The Department's proposed rule (ARM 42.14.101(16)) adopts the statutory definition of "seller". Additionally, the Department's proposed rule states that a "seller" includes an "owner or operator of the facility", which is a term used in section 15-65-101, MCA (*i.e.*, the lodging facility tax). As such, the proposed rule is not directly contrary to the statute on these issues when applied to an owner or operator of a facility. However, travel companies claim that since collection of the lodging facility use tax applies only to "owners or operators" of a facility, they are not liable for collection of the tax. *See* § 15-65-112, MCA. In the event that a court determines that reservation companies are liable for only one tax, a revision of the rules would be necessary.

Rental Vehicle Sales and Use Tax. MAR 42-2-849. A public hearing was held on October 26, 2010, at 3:00 p.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The Department proposes to adopt eleven new rules regarding the 4% rental vehicle sales tax. The proposed new rules set forth the procedures that will be used by the Department to administer the sales tax, including definition of terms used in the rules, registration requirements for sellers (*i.e.*, rental agencies), listing of sellers required to collect the sales tax, requirements for filing a tax return or consolidated returns, audit procedures, and vehicles that are subject to the tax.

Comment: New Rule VI, pertaining to the manner in which a seller files a return, states that a "seller doing business in *multiple locations* may elect to file a combined tax return (Form RVT-C) separately stating each location's gross sales, exemptions, and tax". (emphasis added). The Department's comment states that the rule "allows the seller to combine the revenues and tax for

each separate location that is owned, managed or booked by the seller into one return”. This rule is said to implement section 15-68-502, MCA, which states in relevant part that a “person making retail sales at two or more *places of business* shall file a separate return for each separate place of business”. (emphasis added). The question then is whether the statute allows a seller with multiple locations to file one return. It could be argued that “places of business” refers to the name of the business or a trade name, in which case the Department’s proposed rule would follow legislative intent, or it could be argued that “places of business” refers to locations, in which case the Department’s proposed rule would not follow legislative intent.

It should also be noted that the issue of whether the Department can collect money from online travel reservation companies is a topic that is currently being litigated. Please see the comments to MAR 42-2-848 for an analysis of this issue. A key inquiry that will likely be determined by the litigation is whether a “seller”, as defined by section 15-68-101, MCA, includes travel companies. The Department’s proposed rule (New Rule I) adopts the statutory definition of “seller”. As such, the proposed rule is not directly contrary to the statute. The issue of whether the travel companies are subject to the sales tax will need to be determined in litigation.

Hospital Facility Utilization Fee. MAR 42-2-850. A public hearing was held on November 4, 2010, at 1:00 p.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The public comment period ends on November 19, 2010. The Department proposes to amend one new rule regarding payment of the hospital utilization fee. The proposed amendment simply provides citation to the statute (§ 15-66-102, MCA) for the calculation of the tax.

Liquor License Transfers, Suspension, and Revocation. MAR 42-2-851. A public hearing was held on November 8, 2010, at 1:30 p.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The Department proposes to adopt one new rule and amend five existing rules. The proposals generally implement statutory changes by the 2007 and 2009 Legislatures pertaining to fairground beer and wine licenses that are owned by political subdivisions and the security interest loan standards that are used by the Department. A noninstitutional lender is required to provide detailed information to the Department, including any contract, any purchase agreement, a release of information, a personal statement, and fingerprint cards. The information is collected from noninstitutional lenders in order to determine whether the lender can qualify and meet the requirements to hold an ownership interest in the event of a default. Institutional lenders are allowed to limit the movement of a license, obtain security agreements, and require payments from loan guarantors if a series of conditions are met.

Office of Taxpayer Assistance. MAR 42-2-852. A public hearing was held on November 3, 2010, at 1:30 p.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The Department proposes to adopt three new rules to provide information to taxpayers

regarding the Department's Office of Taxpayer Assistance (OTA). The proposed rules outline the primary functions of the OTA, the procedures that are used, and the various monitoring efforts of the Department. Lastly, the proposed rules distinguish the difference between the OTA and the Office of Dispute Resolution.

Property Tax -- Revised Trend and Depreciation Tables for Valuing Property. MAR 42-2-853. A public hearing was held on November 4, 2010, at 2:30 p.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The Department proposes to amend thirteen rules regarding various tables that are updated on an annual basis through Department rules. The tables generally show how the Department arrives at market value when valuing personal property, including rental equipment, farm machinery and equipment, heavy equipment, seismograph units and allied equipment, oil and gas field machinery and equipment, work-over and service rigs, oil drilling rigs, television cable systems, ski lift equipment, and industrial machinery and equipment. The Department stated that the method and source of information is not being changed. The Department acquires the Producer Price Indexes used for the calculations from the United States Department of Labor, Bureau of Labor Statistics.

Valuation Methods For Commercial Properties. MAR 42-2-854. A public hearing was held on November 17, 2010, at 1:30 p.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The public comment period ends on November 26, 2010. The Department proposes to amend one rule regarding the valuation of commercial property. The proposed amendment states that the International Association of Assessing Officers' (IAAO) standards for choice of method guide the Department's appraisal decisions. However, the Department also stated that it continues to prefer the income method to valuation.

Comment: The Department is responsible for valuing property in a manner consistent with the valuation within the same class. As such, there is no statutory prohibition against using one method over the other. However, the Department did not formally adopt the standards under the requirements of the Montana Administrative Procedures Act (MAPA). Pursuant to section 2-4-307, MCA, in order to adopt a publication by reference an agency must state where a copy of the material may be obtained, and an agency may not adopt later amendments or editions of material adopted. As such, the IAAO standards are not given the force and effect of law.

Property Tax Assistance Programs for Disabled Veterans and Elderly Homeowners. MAR 42-2-855. A public hearing was held on November 17, 2010, at 3:30 p.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The public comment period ends on November 26, 2010. The Department proposes to amend three rules regarding the property tax assistance program, the extended property tax assistance program, and the property tax exemption for qualified disabled veterans. The rules provide that applications need to be received by the Department on or before April 15, but extensions are allowed for the property

tax assistance program and the tax exemption for veterans for certain documented medical issues. Additionally, aggrieved taxpayers who did not receive property tax assistance or the veterans' tax exemption are advised that they can appeal to the State Tax Appeals Board (STAB) within 30 days of receipt of the determination.

Comment: All three of the proposed amendments state that an application needs to be received on or before April 15 of the year the tax rate adjustment is being sought, as opposed to postmarked by April 15. The postmark date is not considered the filing date, and there is no statute that mentions that timely mailing equals timely filing. It is my understanding that the Department is revising the rules to address the postmark issue.

Additionally, two of the proposed rules state that an applicant aggrieved by the Department's determination may appeal the determination to STAB within 30 days, and that in "no case shall an appeal be accepted more than 37 days after the date of the department's determination letter". STAB submitted written comments indicating that it has "sole jurisdiction over tax appeals, and thus, is the proper entity to determine which appeals may qualify for acceptance".

Livestock Reporting, Oil Drilling Rigs Pricing Information, and Class Eight Personal Property Reporting. MAR 42-2-856. A public hearing was held on November 17, 2010, at 2:30 p.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The public comment period ends on November 26, 2010. The Department proposes to adopt one new rule and amend two regarding taxpayer reporting requirements. The proposed new rule clarifies that taxpayers are required to file livestock reporting information by February 15. The proposed amendment pertaining to oil drilling rigs clarifies that the Department seeks replacement cost information from manufactures as opposed to soliciting bids from manufacturers. The proposed amendment pertaining to class eight personal property (*i.e.*, § 15-6-138, MCA property) provides that the Department will require biennial reporting of class eight property starting in tax year 2011 and that statements postmarked after March 15 will not be considered absent demonstrated physical or mental hardships. Pursuant to section 15-8-303, MCA, the Department has discretion to set deadlines for reporting information.

Housekeeping Rules -- Interest to Taxpayers When There is Department Delay, Correction of Statutory Reference for Dependent Exemption, and Conforming Rule to Language Used in New Law. MAR 42-2-857. A public hearing was held on November 18, 2010, at 2:30 p.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The public comment period ends on November 29, 2010. The Department proposes to amend three rules. Two of the proposed rules implement statutory changes to the law (Senate Bill 418 from the 2009 session). Another proposed rule corrects an incorrect statute reference in a rule.

Amendment of Rules Relating to Liquor Vendors. MAR 42-2-858. A public hearing will be held on November 23, 2010, at 1:30 p.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The public comment period ends on December 3, 2010. The Department proposes to amend seven rules regarding liquor administration. The rules primarily address wholesale pricing, inventory management, sample product restrictions, products that will not be accepted by the state liquor warehouse, and the pricing of regular and special products.

### **Notice of Adopted Rules:**

A Montana Appraisal Manual for Residential, Commercial, and Industrial Property. MAR 42-2-839. Adopted September 23, 2010. A public hearing was held on August 25, 2010. No one appeared to testify, and no comments were received. The rules were adopted as proposed.

Remittance of Tax by Employers. MAR 42-2-840. Adopted September 23, 2010. A public hearing was held on September 2, 2010. No one appeared to testify, and no comments were received. The rules were adopted as proposed.

Insure Montana Tax Credit – Clarification on Credit Allocation and Deduction Limitations. MAR 42-2-841. Adopted September 23, 2010. A public hearing was held on September 2, 2010. No one appeared to testify, and no comments were received. The rules were adopted as proposed.

Methods of Obtaining Gross Value of Natural Gas at the Wellhead. MAR 42-2-844. Adopted October 28, 2010. A public hearing was held on September 20, 2010. Testimony was received from the Montana Petroleum Association and the Northern Montana Oil and Gas Association. The purpose of the rules is to provide guidance for taxpayers to compute the *gross* value of natural gas at the wellhead when it is sold without a contract or when it is not sold as part of an arm's-length contract. The Department made slight modifications to the rules based on public comments.

### **Notice of Proposed Rules Placed Where An Economic Impact Statement Was Requested:**

Telecommunications Services -- Corporate License Taxes. MAR 42-2-845. A public hearing was held on October 6, 2010, at 1 p.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The Department proposes to adopt four new rules with extensive definitions. The proposed rules change the method of calculating gross receipts from the sale of telecommunications services in the state. The Department mentions that the rules are based primarily on a Multistate Tax Commission recommendation concerning the apportionment of income from the sale of telecommunications and ancillary services. The range of services

impacted by the rules is very broad and includes everything from downloading ringtones on a cell phone to coin-operated telephones.

Comment: As proposed, the rules would become effective when the rules are published. As such, corporations may need to make adjustments before the end of their fiscal year.

Adoption of Appraisal Methods and Standards -- Centrally Assessed Property. MAR 42-2-846. A public hearing was held on October 6, 2010, at 3:30 p.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The Department proposes to adopt one new rule and amend three existing rules. The proposed new rule provides that the Department adopts the 2009 WSATA-CCAP (Western States Association of Tax Administrators – Committee on Centrally Assessed Properties) appraisal handbook as the reference and overall appraisal guide and the NCUVS (National Conference of Unit Valuation States) standards. The amended rules provide a definition for “goodwill” and “intangible personal property”. Lastly, the amended rules clarify reporting requirements and the procedure for disputing intangible personal property deductions that are applied automatically by Department rule (*i.e.*, 10% for airlines, 5% for pipelines, etc.).

Comment: Section 15-6-218, MCA, provides that “intangible personal property” is exempt from taxation. The statute provides further that intangible property includes (but is not limited to) “certificates of stock, bonds, promissory notes, licenses, copyrights, patents, trademarks, contracts, software, and franchises” and that intangible personal property “lacks physical existence, including but not limited to goodwill”. The Department’s proposed rule, in turn, provides a definition of “goodwill” for exemption purposes as follows:

42.22.101(10) “Goodwill means booked or accounting goodwill. The booked goodwill must be present on the subject properties’ financial statements, and must have been created through purchase price accounting process as defined by GAAP or other accounting authority.

The Department’s proposed rule provides further that intangible personal property “is not the same as intangible value. Intangible value is the value of an entity as a going concern – its ability to make excess revenues over the normal rate of return. Intangible value is not exempt from property taxation in Montana.”

The term “goodwill” is never defined in Title 15, MCA. However, the Department’s definition is contrary to the federal definition. The Internal Revenue Service has historically defined goodwill as “excess of net earnings over and above a fair return on the net tangible assets”. Rev. Rul. 59-60, 1959-1 C.B. 237.

A potential question for the committee is whether the Legislature intended the taxation of “intangible value” when it may have the meaning of “goodwill”, which is not subject to taxation. However, since the term “goodwill” was never defined in statute, the Department has discretion to adopt a narrower definition than the federal government.

## **Department of Transportation**

### **Notice of Proposed Rules:**

Ethanol-Blended Gasoline -- Housekeeping. MAR 18-129. The Department proposes to amend 12 existing rules relating to ethanol-blended gasoline. No public hearing is contemplated. The proposed rules change "gasohol" to "ethanol-blended gasoline" to implement the name change made in Ch. 100, Laws of 2007.

Licensed Distributors and Users of Special Fuels -- Housekeeping. MAR 18-126. The Department proposes to amend 13 rules and repeal 3 rules relating to the administration of licensed distributors and users of special fuels. No public hearing is contemplated. The proposals relate to administration of special fuel users and distributors to conform rules to legislative changes, some made as long ago as 1993.

### **Notice of Adopted Rules:**

None.

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