



Mike Kadas
Director


Montana Department of Revenue



Steve Bullock
Governor

MEMORANDUM

To: Mike Kadas, Director

From: Dan Whyte, Deputy Chief Legal Counsel 

Date: May 6, 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. 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. Oral argument took place on September 25, 2013. 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 network in 20 Montana counties where Bresnan delivers three services.

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; CPE cross-appealed on the additives issue. The Department filed its opening brief on April 17, 2014.

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 determination of whether it will be heard on briefs or whether oral argument will be ordered.

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.

Lucas, et al.: This matter is in litigation before the Fourteenth Judicial District Court, Meagher County. It is currently before the Court on the issue of a definition of a class for the class action. Both Lucas and the Department have filed motions for summary judgment based on the applicable statutes.

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 recently 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.

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 has moved the District Court to certify this Order as final pursuant to Rule 54(b), M.R.Civ.P. The Department has opposed the motion. Omimex also seeks to stay the 2012 District Court matter pending the Court's ruling on its motion to certify. The Department will oppose this motion as well, in a response due May 12, 2014.

Phillips 66 (f/k/a ConocoPhillips): Tax years 2010 and 2011 are currently before the District Court on Interlocutory Appeal over the issue of the appeals process and the extent of the appeal from a county tax appeal board to the State Tax Appeal Board. Tax year 2012 is being held in abeyance before STAB. Phillips 66 recently filed a Declaratory Judgment action with the First Judicial District Court for the 2013 tax year and the Department has filed its answer.

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 is considering whether to appeal the District Court's decision.

STATE TAX APPEAL BOARD

AT&T Mobility, LLC: Multiple tax years have been pending at either ODR or STAB awaiting the Supreme Court decision regarding the Department's administrative rules relating to intangible personal property. The Supreme Court decision has been handed down and revised assessments have been issued according to this decision and the Supreme Court's decision in the Gold Creek Cellular matter discussed below.

Blixseth: Mr. Blixseth appealed the Department's audit and assessment in the amount of \$56 million in February 2011. This litigation was stayed during the involuntary bankruptcy but is now being actively litigated. Oral argument on preliminary dispositive motions was held on April 23, and the Department is awaiting decisions on those motions. Litigation will likely continue in this matter. .

Gold Creek Cellular d/b/a Verizon: Multiple tax years have been pending at either ODR or STAB awaiting the Supreme Court decision regarding the Department's administrative rules relating to intangible personal property. With the Supreme Court recently deciding that matter, revised assessments have been issued according to the Supreme Court's decision.

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. Additionally, Mr. Blixseth has filed an action against the Department in the Nevada Bankruptcy Court related to the Yellowstone Club Liquidating Trust's execution on Mr. Blixseth's fee claim against the Department.