



## Revenue and Transportation Interim Committee

### 63rd Montana Legislature

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November 6, 2014

TO: Committee Members

FROM: Jaret Coles, Staff Attorney

RE: Administrative Rule Activity

### Department of Revenue

*Proposal and Adoption Notices are available on the Internet at:*

<http://www.revenue.mt.gov/home/rules.aspx>

#### Notice of Proposed Rules:

Income Tax -- Montana Family Education Savings Program Implementing Senate Bill No. 117 (2013) -- General Income Tax Provisions and the Determination of Residency. MAR 42-2-919.

A public hearing was held on November 5, 2014. The public comment period ends on November 12, 2014. The Department proposes to adopt one rule and amend one rule regarding contributions to Montana Family Education Savings Plans in order to implement Senate Bill No. 117.

Additionally, the Department proposes to amend three income tax provisions regarding the determination of residency, the taxation of part-year residents and nonresidents, and who must file returns.

The proposed rules pertaining to Montana Family Education Savings Plans provide that contributions from a state's prepaid tuition plan do not qualify under Montana law. Additionally, a rollover from another state's plan is no longer eligible for a deduction, as Senate Bill No. 117 allows a deduction for direct contributions to another state's plan, and allowing a deduction for rollovers could result in a taxpayer receiving two deductions for the same contributions.

The proposed amendment to ARM 42.15.109 (see Appendix for the full text of the proposed amendment) pertaining to residency provides a list of factors that may be considered to determine residency. The factors include, but are not limited to:

- "(a) an individual's residency status for tax purposes in prior years;
- (b) where an individual votes or is registered to vote (although casting an illegal vote does not establish residency for income tax purposes);
- (c) where an individual holds a valid driver's license;
- (d) an individual's residency status evidenced by hunting or fishing licenses;
- (e) whether a homestead declaration has been filed on a residential dwelling owned by the taxpayer;
- (f) residency status of the individual's spouse and minor children;
- (g) whether an individual claimed residency when applying for admission or financial aid at an educational institution;
- (h) where important and valuable possessions and documents are kept;
- (i) primary address used for important mail;
- (j) jurisdiction from which any professional licenses were issued;
- (k) location of the place of worship where an individual is a member;
- (l) location of any social, fraternal, athletic organizations, clubs, or lodges in which the individual is a member;
- (m) location of the individual bank accounts or any other transactions the individual conducts with financial institutions;
- (n) location where the individual obtains professional services including, but not limited to, lawyers, accountants, dentists, primary care physicians, or other doctors;
- (o) oral or written declarations of residency evidenced by documents including, but not limited to:
  - (i) tax returns;
  - (ii) wills;
  - (iii) automotive insurance;

- (iv) deeds;
- (v) other insurance policies;
- (vi) mortgages;
- (vii) leases; and
- (viii) contracts;
- (p) location where an individual primarily exercises the individual's civil and political rights;
- (q) location of an individual's business(es), profession(s), or occupation(s); and
- (r) any additional fact or circumstances applicable to the specific situation."

The proposed factors utilize the statutory definition of residency in section 15-30-2101(28), MCA, as the statute that is being implemented. This statute provides as follows: "Resident' applies only to natural persons and includes, for the purpose of determining liability to the tax imposed by this chapter with reference to the income of any taxable year, any person domiciled in the state of Montana and any other person who maintains a permanent place of abode within the state even though temporarily absent from the state and who has not established a residence elsewhere." (emphasis added). Additionally, the proposed rule cross-references section 1-1-215, MCA, which provides that "residence can be changed only by the union of act and intent."

*Comment:* Section 2-4-305(6), MCA, provides that "an adoption, amendment, or repeal of a rule is not valid or effective unless it is . . . reasonably necessary to effectuate the purpose of the statute." Moreover, a "statement that merely explains what the rule provides is not a statement of the reasonable necessity for the rule." There is a potential issue regarding whether the reasonable necessity statement for the proposed amendments to ARM 42.15.109 simply explains what the proposed amendments provides, as opposed to stating the principal reasons and the rationale for the proposed amendments. The full text of the statement of reasonable necessity is provided in the appendix.

Income Tax -- Filing Requirements for Pass-Through Entities With More Than 100 Partners -- Senate Bill No. 179 (2013). MAR 42-2-920. A public hearing was held on November 5, 2014. The public comment period ends on November 12, 2014. The Department proposes to adopt one rule regarding electronic filing for certain partnerships in order to implement Senate Bill No. 179. The proposed rule provides that the 100-partner threshold is met if there are more than 100 partners on any one day over the course of the year. Additionally, a partnership is permitted to request a waiver of the electronic filing requirement.

Liquor Administration -- Liquor Licenses and Permits, Fees, and the Regulation of Licensees. MAR 42-2-921. A public hearing was held on November 5, 2014. The public comment period ends on November 14, 2014. The Department proposes to adopt one rule, amend 21 rules, and repeal two rules. The proposed adoption provides the procedure for a seasonal license holder (*i.e.*, dude ranch, resort, park hotel, tourist facility, or similar business) to request permission from the Department to close for a period greater than 90 days' duration. The proposed amendments generally strike outdated language, increase administration fees, set hours for on-premises consumption of alcohol, define transfer of ownership requirements, provide for progressive penalties, provide alteration of premises requirements, and insert definitions. The proposed repeals eliminate outdated language.

Property Tax -- Montana Reappraisal Plan. MAR 42-2-922. A public hearing will be held on November 12, 2014, at 1:00 p.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The public comment period ends on November 20, 2014. The Department proposes to amend seven rules and repeal seven rules regarding the Montana reappraisal plan. The proposed amendments set forth the names and publication dates of the manuals the Department's appraisers use for residential, commercial, industrial, agricultural land, and forest land. In general, the proposed amendments change dates from the 2008 reappraisal cycle to the 2015 reappraisal cycle and the proposed repeals delete rules that were applicable to the 2008 reappraisal cycle.

Property Tax -- Trend Tables for Valuing Personal Property. MAR 42-2-923. A public hearing will be held on November 12, 2014, at 9:00 a.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The public comment period ends on November 20, 2014. The Department proposes to amend 13 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, locally assessed cable television systems, ski lift equipment, and industrial machinery and equipment.

Property Tax -- Valuation and Classification of Real Property. MAR 42-2-924. A public hearing will be held on November 12, 2014, at 10:30 a.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The public comment period ends on November 20, 2014. The Department proposes to adopt three rules, amend 31 rules, and repeal three rules regarding valuation and classification of real property. The proposed new rules pertain to agricultural appraisal and would, among other things, adopt a 10-year Olympic average of prices, define a capitalization rate of 6.4%, and provide a process for certain parcels to be valued as agricultural land. The proposed amendments pertain to a variety of property tax subjects, including property

tax exemptions for tribal property, implementation of a Montana Supreme Court decision regarding agricultural land in a filed and platted subdivision, updating of dates for the 2015 reappraisal cycle, further refinement of what constitutes new construction, the determination of taxable value for newly taxable property, valuation of land without a soil survey, the criteria for agricultural land valuation for land less than 160 acres, and forest land classification for certain land that is reduced to less than 15 acres based on eminent domain. The proposed repeals eliminate outdated language.

Note: Staff is in the process of performing legal review on MAR 42-2-924. If there is a legal concern, it will be presented in a supplemental rule review memorandum.

Property Tax -- Value Before Reappraisal for Agricultural Land. MAR 42-2-925. A public hearing will be held on December 2, 2014, at 10:00 a.m. in the Third Floor Reception Area Conference Room, Mitchell Building, Helena. The public comment period ends on December 9, 2014. The Department proposes to adopt one rule to clarify the circumstances when a calculated value before reappraisal (VBR) is necessary for the 2015 reappraisal.

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

Property Tax -- Implementing a Montana Supreme Court Decision Pertaining to Centrally Assessed Property. MAR 42-2-910. Adopted September 18, 2014. A public hearing was held on July 8, 2014, and public comment and testimony was received. The Department amended two rules regarding the valuation of intangible personal property. The amendments strike the Department's definitions of "goodwill" and "intangible personal property" based on the Montana Supreme Court's decision in *Gold Creek Cellular of Mont. v. State*, 2013 MT 273, 372 Mont. 71, 310 P.3d 533. In *Gold Creek Cellular*, the Court held that the Department may not define goodwill in a way that precludes a taxpayer from proposing an alternative methodology or from providing further information. Additionally, the Court held that the Department's definition of intangible personal property was contradictory to section 15-6-218, MCA, regarding the two requirements of intangible personal property.

The amendment also expands the definition of "book depreciation" to include depreciation that is reported on independently audited financial statements (the current rule utilizes depreciation reported to the regulatory agency), as well as other reliable and recognized sources. Depreciation was not directly addressed in *Gold Creek Cellular*.

Housekeeping -- Revision of the Names Corporation License Tax and Corporation Income Tax -- Senate Bill No. 361 (2013). MAR 42-2-911. Adopted September 18, 2014. A public hearing was held and no public comments or testimony were received. The Department amended eight rules

by changing the name of the "corporation license tax" to the "corporate income tax" and the name of the "corporation income tax" to the "alternative corporate income tax". The rule changes were necessary because Senate Bill No. 361 made the same name changes.

Income Tax -- Montana Elderly Homeowner/Renter Tax Credit Calculation. MAR 42-2-912.

Adopted October 9, 2014. A public hearing was held and no public comments or testimony were received. The Department amended one rule regarding the computation of the elderly homeowner/renter tax credit. The rule increases the amount of rent that can be claimed for living in a health care facility, long-term care facility, or a residential care facility from \$20 a day to \$30 a day when an adequate breakdown between "rent" and "amenities" is not provided. Pursuant to the reasonable necessity statement, the amount was originally set in 1993, and based on projections for inflation, the rent limit would need to be \$30.10 per day in 2015 to have a similar amount of purchasing power as the limit of \$20 per day had in 1993.

Income Tax -- Tax Credits Regarding Energy Conservation Installation and Other Housekeeping

Rules. MAR 42-2-913. Adopted October 23, 2014. A public hearing was held and no public comments or testimony were received. The Department amended four rules regarding tax credits for energy conservation, temporary emergency lodging, and health insurance claims. Three of the amendments were housekeeping in nature. Additionally, one of the rules provides that the tax credit for installing doors and windows is limited to the additional cost expended in the interest of energy conservation (*i.e.*, the cost of exceeding current building codes).

Housekeeping -- Revision of the Name of the One-Stop Business Licensing Program to the eStop

Program. MAR 42-2-914. Adopted October 23, 2014. A public hearing was held and no public comments or testimony were received. The Board of Review (through the Department of Revenue) amended three rules that change the name of the "one-stop licensing program" to the "eStop program". Pursuant to the reasonable necessity statement, the name change was based on the program providing online services for licensees to acquire and maintain certain state licenses.

Liquor Administration -- Liquor Vendors. MAR 42-2-915. Adopted November 6, 2014. A public

hearing was held and no public comments or testimony were received. The Department amended eight rules and repealed five rules regarding liquor vendors (the person or entity that sells liquor to the Department). The amendments generally restructure the rules by incorporating language from the repeals into the existing rules. Additionally, the Department increased the annual vendor representative fee from \$25 to \$50 and the annual vendor permit fee from a \$100 flat fee to a progressive fee schedule based on the volume of liquor cases sold, with a maximum fee of \$400.

Income Tax -- Unlocking State Lands Tax Credit -- House Bill No. 444 (2013). MAR 42-2-916.

Adopted October 23, 2014. A public hearing was held and no public comments or testimony were received. The Department adopted three rules regarding the unlocking state lands \$500

refundable tax credit. The new rules provide guidance on the documentation that is required in order to claim the credit. Additionally, the rules address the manner in which the credit is allocated to partners and shareholders of an S corporation.

Tax Administration -- Electronic Service of Levies and Writs -- House Bill No. 66 (2013). MAR 42-2-917. Adopted November 6, 2014. A public hearing was held and no public comments or testimony were received. The Department adopted four rules in order to implement House Bill No. 66, which pertained to the electronic service of levies and writs. The rules generally adopt definitions, define the actions that a process server must undertake in order to electronically submit levies, and define the process that the department will use to submit levies, writs, or garnishments to financial institutions and employers.

Property Tax -- Property Classification and Property Tax Assistance Programs. MAR 42-2-918. Adopted November 6, 2014. A public hearing was held and no public comments or testimony were received. The Department amended three rules regarding the property tax assistance program (PTAP) and the extended property tax assistance program (EPTAP). The PTAP amendment provides that the 7-month occupancy requirement does not apply when a qualified applicant is living in a nursing home or long-term care facility. Additionally, the EPTAP amendments provides general guidance on how eligibility determinations are made.

## **Department of Transportation**

*Proposal and Adoption Notices are available on the Internet:*

The Department of Transportation does not maintain an administrative rules website, but notices can be found on the Secretary of State's website at <http://www.mtrules.org/>. Under the Montana Administrative Register heading, type the number "18" in the "Search by Notice No." box and click on the "Go" icon.

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

Highway Right-of-Way Encroachment Permits. MAR 18-151. No public hearing is contemplated, and the public comment period ends November 6, 2014. The Department of Transportation proposes to adopt two rules, amend three rules, and repeal six rules. The first proposed new rule establishes the general requirements that must be followed by a permit holder when constructing or upgrading an encroachment. The second proposed rule clarifies that a permit holder must hold the Department of Transportation harmless for damage or injury that may result from the presence of the encroachment. The proposed amendments generally define

the application process for encroachment permits and provide limitations for encroachments on a controlled access and noncontrolled access highways. The proposed repeals were identified by the Department of Transportation as archaic and no longer in use.

Montana Environmental Policy Act -- Categorical Exclusion. MAR 18-152. No public hearing is contemplated, and the public comment period ends November 20, 2014. The Department of Transportation proposes to amend one rule pertaining to the type of actions that do not individually, collectively, or cumulatively require the preparation of an environment assessment or an environmental impact statement unless the action involves certain extraordinary circumstances. The Department of Transportation's reasonable necessity statement states that the "amendments are necessary because the department's rules on categorical exclusions must mirror the federal rules that accompany federal funding for the state of Montana road construction programs. The federal rules were amended on June 20, 2014, and October 6, 2014, in response to the federal Moving Ahead for Progress in the 21st Century Act (MAP-21), P.L. 112-141. MAP-21 funds national surface transportation programs, including road construction and other transportation projects in Montana. The department must update its administrative rules to be consistent with the federal regulations found at 23 CFR 771.117."

**Notice of Adopted Rules:**

Board of Aeronautics Grant and Loan Program. MAR 18-150. Adopted October 9, 2014. No public comments or testimony were received. The Department of Transportation amended three rules pertaining to the Board of Aeronautics grant and loan program, which generally provides money to local governments and state agencies for aeronautical purposes, including airport improvement. *See* section [67-1-307, MCA](#). The amendments generally define how applications are made, when applications are due, and how applications are accepted or rejected. Additionally, based in part on an audit recommendation, successful applicants are required to submit a "close-out report" after completion of work.



## APPENDIX

42.15.109 RESIDENCY (1) As provided in 15-30-2101, MCA, an individual may be a resident for Montana individual income tax purposes if the individual is domiciled in the state or maintains a permanent place of abode in the state. Section 1-1-215, MCA, sets forth rules for determining residency, and "domiciled" is defined in ARM 42.2.304. Whether an individual is a Montana resident for Montana income tax purposes is determined in light of all facts and circumstances for the tax year in question. Residency in one state is not abandoned until it can be demonstrated by the union of act and Intent that it has been established in another state. An individual's Intent is determined by analyzing objective factors regarding the individual's conduct and declarations. In determining residency, more weight is given to an individual's actions than is given to the individual's subjective declaration of intent.

(2) Some, but not all, of the factors that may be considered when determining residency for Montana income tax purposes are provided below. No one factor will automatically determine residency and the order of appearance in the list below does not indicate a level of importance. Residency does not depend upon any one fact or combination of circumstances, but upon the whole, taken together, and the weight to be given to the various facts and circumstances indicative or presumptive of residency depends upon the unique evidence in each case. Factors that may be considered to determine a residency include, but are not limited to:

- (a) an individual's residency status for tax purposes in prior years;
- (b) where an individual votes or is registered to vote (although casting an illegal vote does not establish residency for income tax purposes);
- (c) where an individual holds a valid driver's license;
- (d) an individual's residency status evidenced by hunting or fishing licenses;
- (e) whether a homestead declaration has been filed on a residential dwelling owned by the taxpayer;
- (f) residency status of the individual's spouse and minor children;
- (g) whether an individual claimed residency when applying for admission or financial aid at an educational institution;
- (h) where important and valuable possessions and documents are kept;
- (i) primary address used for important mail;
- (j) jurisdiction from which any professional licenses were issued;
- (k) location of the place of worship where an individual is a member;
- (l) location of any social, fraternal, athletic organizations, clubs, or lodges in which the individual is a member;

- (m) location of the individual bank accounts or any other transactions the individual conducts with financial institutions;
- (n) location where the individual obtains professional services including, but not limited to, lawyers, accountants, dentists, primary care physicians, or other doctors;
- (o) oral or written declarations of residency evidenced by documents including, but not limited to:
- (i) tax returns;
  - (ii) wills;
  - (iii) automotive insurance;
  - (iv) deeds;
  - (v) other insurance policies;
  - (vi) mortgages;
  - (vii) leases; and
  - (viii) contracts;
- (p) location where an individual primarily exercises the individual's civil and political rights;
- (q) location of an individual's business(es), profession(s), or occupation(s); and
- (r) any additional fact or circumstances applicable to the specific situation.
- (3) In order to make a determination regarding an individual's residency, the department may request information by asking the individual to respond to a residency questionnaire or similar written inquiry. Where appropriate, an individual is expected to be prepared to support the responses with contemporaneously kept records. An item with an unsupported, vague, or non-response will not be considered as supporting the individual's position regarding the individual's state of residence. Failure to respond to the department's inquiries may constitute evidence of residency in Montana.
- (2) and (3) remain the same, but are renumbered (4) and (5).
- (6) An individual who leaves Montana and spends any amount of time in another country does not lose the individual's status as a Montana resident until the individual can demonstrate through actions the intention of establishing citizenship (or similar status) in that country.
- (7) The burden of proving that residency has been established outside of Montana generally falls on the individual. The burden of proving that residency has been established in Montana generally falls on the department.

AUTH: 15-30-2620, MCA

IMP: 15-30-2101, MCA



REASONABLE NECESSITY: The department proposes amending ARM 42.15.109 to incorporate additional information about the various aspects of residency and domicile status as they apply to individual income taxes. The proposed amendments will include a list of some of the factors that may be considered when determining an individual's state of domicile or residency status for income tax purposes. The proposed list of factors in new (2) is intended to be informative and not comprehensive. Additional factors may be considered if the situation warrants. The proposed list is not intended as a checklist or scorecard.

MAR Notice No. 42-2-919

19-10/9/14