




GOVERNOR GREG GIANFORTE
DIRECTOR BRENDAN BEATTY

MEMORANDUM

TO: Revenue Interim Committee

FROM: David R. Stewart, Chief Legal Counsel 

DATE: September 19, 2023

SUBJECT: Department of Revenue Major Case Update

MONTANA SUPREME COURT

Franklin and Janet Tiegs/Baker Produce: The Tiegs, nonresident taxpayers, appealed MTAB's decision to the First Judicial District Court, Lewis & Clark County, with a Petition for Judicial Review challenging the Department and MTAB's determination that their previously reported Montana source losses did not constitute a Montana net operating loss (NOL) and could not be carried forward to offset Montana source income in subsequent years. On September 10, 2021, the District Court reversed MTAB's decision. The Department appealed the District Court decision to the Montana Supreme Court. On September 5th, the Court issued its opinion (2023 MT 168) which overturned the district court decision and reinstated the Department's determination and concluded that the NOL statute (§ 15-30-2119, MCA, repealed effective January 1, 2024) did not amount to extraterritorial taxation for nonresidents but served a proper purpose within the tax framework of determining the measure of the income tax.

William and Ellen Solem: This matter concerns the Department's 2008 mass appraisal of lakefront properties in Flathead County. In 2010, the Solems sued the Department seeking \$450 that they believed they had overpaid in taxes. In 2013, Solems amended their complaint to allege that the Department's method of valuing waterfront footage based on a "flat rate per foot" was improper and illegal. In 2016, the court certified the suit as a class action, consisting of "lakefront property owners in Neighborhood 800" who had paid taxes under protest since the last assessment cycle.

The District Court determined that the Department's mass appraisal methodology and valuation model was unfair and unconstitutional. The District Court awarded Solems damages, attorneys' fees under the private attorney general doctrine, and costs under the insurance exception. The parties stipulated to a final judgment, reserving their appellate rights.

The Department appealed the District Court's orders on January 10, 2023. Solems cross-appealed on January 17, 2023. As of September 1, the matter has been fully briefed and the Department is awaiting the Court's decision.

BlueBird Energy: On May 18, 2023, BlueBird Energy appealed the District Court's ruling that their oil production on three oil wells located in Rosebud County do not qualify for the new well tax incentive tax rate reduction. Bluebird Energy filed its opening brief on July 20, 2023. The Department's response brief is due on September 21, 2023.

STATE DISTRICT COURT

Eagle Bear: On December 2, 2019, Eagle Bear filed a complaint with the Montana Ninth Judicial District Court challenging Montana's lodging facility use tax and sales tax as applied to Eagle Bear's campground, which is located within the Blackfeet Indian Reservation. Eagle Bear asserts that federal law preempts the taxes and that the taxes violate equal protection. Eagle Bear is also suing the Blackfeet Nation in US District Court, Great Falls Division. As a result, the parties stayed the Montana District Court matter pending the outcome of the US District Court matter.

On May 23, 2022, Eagle Bear filed a Chapter 11 bankruptcy petition with the United States Bankruptcy Court, District of Montana. The Department is not currently involved as a party in the bankruptcy matter. There is no additional information on this case currently.

Boardwalk Properties, Inc./Michael Delaney and Ileana Indreland: In June 2021, Boardwalk Properties sued the Department in the Eighteenth Judicial District Court, Gallatin County, challenging the recent statutory amendments to § 16-4-213, MCA, governing resort area all-beverages licenses, specifically that accommodation units may not be located within the boundaries of a quota area in order to qualify toward the required total for the potential issuance of additional resort retail all-beverages licenses (House Bill 705 (2021)). The lawsuit asserts that the amended statute violates both the state and federal constitutions (retrospective legislation, equal protection, due process, and takings). Discovery is currently underway.

Reeds v. MDOR: In July 2023, Tom and Jerry Reed sued the Department in the First Judicial District Court, challenging the residency requirements set forth in § 16-12-203(2)(g), MCA, as applied to them, who are not residents of Montana. The Reeds seek declaratory and injunctive relief under the Montana Constitution, Art. II, Sections 3, 4, 17, as applied to them, claiming that the Department should be enjoined from denying them the opportunity to apply based on their residency status. On September 11, 2023, the District Court denied their motion for a preliminary injunction because the Reeds failed to establish that their "irreparable harm" is likely. The Court noted that the Reeds claims are conditional on the outcome of an action pending at the Department's Office of Dispute Resolution against marijuana licensee Therapeutic Essentials, LLC. The Reeds admit that they invested in, and operate, Therapeutic Essentials' licenses, and the Department asserted that the licensee failed to properly disclose the Reeds and

others and that the licensee unlawfully allowed the Reeds and others to possess the licensee without authorization. The Department filed a motion to dismiss the Reeds' action in District Court that is currently in briefing.

MONTANA TAX APPEAL BOARD

Bozeman Cottonwood: Town Pump, Inc. challenged the constitutionality of the Department's classification and valuation of a lot it owns which adjacent to a gas station and convenience store on Huffine Lane in Bozeman. Town Pump appealed the Department's classification, use of a commercial land model to value the lot and alleged that the Department unconstitutionally failed to equalize the value of the lot with similarly situated vacant properties in the area. The Department asserted that it achieved equalization by using the same methodology to classify all properties, but Town Pump disagreed with what constitutes "similarly situated properties."

MTAB held its hearing on February 27, 2023 and the parties submitted proposed findings of fact and conclusions of law. On August 16, 2023, MTAB issued a decision confirming the Department's classification and appraisal of the subject property. The parties have until October 16, 2023, to petition the District Court for judicial review of the MTAB decision.

Tillotson/Calame, LLC: In July 2022, two Department personnel handling an informal assessment review received a phone call from a property owner during which he threatened physical violence against the Department's appraiser. The tax issue in the case was whether the Department correctly reclassified certain cabins and small portions of the subject property around the cabins as commercial due to their use as short term vacation rentals. Due to the threat of physical violence, the Department requested law enforcement presence at the July 18, 2023 hearing. MTAB and the Montana Highway Patrol obliged the request, and the hearing took place without incident. MTAB's decision is pending.

FEDERAL DISTRICT COURT

Reed v. MDOR: In July 2023, Tom and Jerry Reed sued the Department in the United State District Court for the District of Montana, Helena Division, challenging the residency requirements set forth in § 16-12-203(2)(g), MCA, as applied to them, who are not residents of Montana. Reeds seek declaratory and injunctive relief and claim that the residency requirements violate the U.S. Constitution's Dormant Commerce Clause, art. I, § 8, cl. 3, and the Fourteenth Amendment Privileges and Immunities Clause, as applied to them, and that the Department should be enjoined from denying them the opportunity to apply based on their residency status. Reeds' motion for preliminary injunction and the Department's motion to dismiss are currently being briefed. The Department raises similar arguments to those asserted in the related case pending the Montana's First Judicial District Court. The Department asserts the Reeds claims are conditional on the outcome of an action pending at the Department's Office of Dispute Resolution against marijuana licensee Therapeutic Essentials, LLC. The

Reeds admit that they invested in an operate Therapeutic Essentials licenses, and the Department asserted that the licensee failed to properly disclose the Reeds and others and that the licensee unlawfully allowed the Reeds and others to possess the licensee without authorization.

BANKRUPTCY COURT

Timothy Blixseth: Mr. Blixseth filed an Adversary Complaint against the Department of Revenue in the United States Bankruptcy Court, District of Nevada, on December 23, 2021. Mr. Blixseth seeks an undisclosed amount of damages against the Department for the filing of an involuntary bankruptcy petition in 2011.

On July 27, 2022, the Bankruptcy Court granted the Department's Motion to Dismiss as to the punitive damages. However, the Bankruptcy Court denied the Department's Motion as to costs, attorneys fees, and proximate damages. The Department filed a Notice of Appeal to the 9th Circuit Bankruptcy Appellate Panel on August 10, 2022. On August 24, 2022, Mr. Blixseth filed a Notice of Cross-Appeal challenging the Bankruptcy Court's dismissal of his claim for punitive damages.

On March 31, 2023, the Department filed its opening Appellate Brief and on May 31, 2023, Mr. Blixseth filed his answering brief. The Department's reply brief is currently due on July 21, 2023. The 9th Circuit has issued a notice that oral arguments will be held in Phoenix, AZ the week of October 16, 2023.

Additionally, on June 1, 2023, Beau Blixseth and George Mack file a Motion to Intervene in the adversary proceeding pending in the United States Bankruptcy Court, District of Nevada.

SETTLEMENTS

PacifiCorp: PacifiCorp appealed the 2023 assessment of \$294,092,020 for its centrally assessed property to the Office of Dispute Resolution. After discussions with PacifiCorp representatives, the Department agreed to a 2023 market value of \$279,387,419; the value was certified to the counties and PacifiCorp dismissed its appeal.