



**Mike Kadas**  
Director

# Montana Department of Revenue



**Steve Bullock**  
Governor

## MEMORANDUM

TO: Revenue and Transportation Interim Committee  
FROM: Dan Whyte, Chief Legal Counsel   
DATE: May 24, 2016  
SUBJECT: Department of Revenue Major Case Update

### MONTANA SUPREME COURT

Priceline, et al. (On-Line Travel Companies): The Montana Supreme Court ruled that based upon the plain language of the Lodging Facility Use Tax, the online travel companies are not “owners” or “operators,” as defined in statute, and, therefore, are not required to collect and remit the lodging tax on their fees. The lodging tax is 4%. However, the Court ruled that the online travel companies were, and are, required to collect and remit the 3% Sales Tax on their fees when selling, renting, or leasing accommodations and campgrounds. The Court further ruled that the online travel companies were also required to collect and remit a 4% Sales Tax on their fees related to the rental of vehicles. In ruling on damages owed by the companies, the Court rejected the online travel companies’ argument that damages should be prospective, but limited the online travel companies’ liability for the taxes from the filing of the Complaint, November 8, 2010. On August 28, 2015, the Supreme Court remitted the case back to Judge Seeley in the First Judicial District Court for consideration of the damages claims. The remaining issues to be determined are a calculation of taxes, penalties, and interest, and tort claims such as unjust enrichment, constructive trust, and conversion.

### FEDERAL DISTRICT COURT

LL, Liquor, Inc. v. State of Montana, et al.: During the 2015 Legislative Session, the Legislature passed Senate Bill No. 193, which changed the complicated three-piece commission rates received by the agency liquor stores to a single percentage rate based on sales. The commission rate percentages range from 12.15% commission for stores that purchase more than \$7,000,000 worth of liquor, to 16% for stores that purchase no more than \$250,000 worth of product. It has been reported that this amendment to the commission rates will result in a revenue increase for 90 of the 96 agency liquor stores. One of the remaining six stores, LL Liquor, located in Lolo, Montana, has sued the State arguing that the State breached the contract with LL Liquor, and deprives LL Liquor of its property and

contractual rights without due process of law, a constitutional violation. LL Liquor sought a preliminary injunction to stop implementation of the law, which was denied by the District Court. LL Liquor has appealed this issue to the 9<sup>th</sup> Circuit Court of Appeals. The parties await a decision from the oral argument before the 9<sup>th</sup> Circuit Court on April 6, 2016.

### STATE DISTRICT COURT

Alpine Aviation: Alpine Aviation has been centrally assessed by the Department since it began operating in Montana in the late 1990s. Alpine filed an appeal with the Office of Dispute Resolution, and then with the Montana Tax Appeal Board (MTAB), arguing that it does not meet the definition of a centrally assessed company because it is not a “regularly scheduled airline” as defined in federal law. The Department asked the District Court to determine the meaning of “scheduled airline” and “scheduled air commerce” for Montana property tax purposes. On May 14, 2015, the First Judicial District Court ruled that “regularly scheduled flights” are those flights which follow a pattern, but are not necessarily uniform intervals according to timetables and locations predefined by the carrier, and which fly regardless of whether there are passengers or freight carried. The matter has been appealed to the Montana Supreme Court. Alpine moved for an extension of time until May 27, 2016, in which to file their reply brief.

CHS: The 2014 and 2015 disputes center on the market value of the Laurel Refinery. For the 2014 tax year, the company requested a market value of \$200 million, and the Department valued the refinery at \$848 million. Yellowstone CTAB determined a market value of \$510 million, and CHS and the Department each appealed that decision to the State Tax Appeal Board. Shortly after the parties initiated appeals before the Board and had agreed upon a January 2017 trial date, CHS filed a petition for interlocutory adjudication with the 13<sup>th</sup> Judicial District Court. The District Court dismissed CHS’s petition on May 6, 2016, and CHS has (60) days to appeal that dismissal to the Montana Supreme Court. Respecting the 2015 tax year, the Yellowstone CTAB recently affirmed the Department’s value (\$820 million), and CHS appealed that decision to the State Tax Appeal Board on May 12, 2016.

Hiland Crude, LLC: Hiland filed a declaratory judgment action in the 1<sup>st</sup> Judicial District Court challenging the Department’s classification of Hiland’s property for tax year 2014 as a pipeline carrier and, therefore, subject to central assessment. Trial is set for February 21, 2017. The matter is currently in discovery.

Kohoutek, et al.: Agency liquor store owners seek class certification and challenge the constitutionality of certain statutes. Specifically, agency liquor store owners allege that § 16-2-101(2)(b)(ii)(B), MCA, is unconstitutional because it fails to fully compensate some liquor store owners for the mandatory 8% discount for unbroken case lot sales to licensees required by § 16-2-201, MCA. Plaintiffs filed in the 8<sup>th</sup> Judicial District Court, Cascade County. The Court bifurcated the issues (constitutionality and damages). On May 28, 2015, the Court determined that the statute violated the Plaintiffs’ rights to substantive due process

and to equal protection of the law because the State has continued to use 1994 sales information to reimburse agency liquor stores for the mandatory case lot discounts.

On February 4 and 5, 2016, a bench trial was held addressing the damages phase. Plaintiffs seek damages from 1997 through January 31, 2016. The amount of damages sought including 10% interest is approximately \$24 million. The parties submitted post-trial proposed findings of fact and conclusions of law on April 15, 2016, and are awaiting a decision.

Omimex Canada, Ltd.: At issue is the Department's decision to classify Omimex's Montana property as a pipeline carrier and, therefore, subject to central assessment. The parties have agreed to consolidate the declaratory judgment actions for tax years 2011 and 2012, filed in the 2<sup>nd</sup> Judicial District, Silver Bow County, with the declaratory judgment actions for tax years 2013 and 2014 filed in the First Judicial District, and to transfer venue to the First Judicial District Court, Lewis and Clark County. Judge Reynolds has assumed jurisdiction over all four pending tax years. Trial is scheduled for May 2017. Omimex filed for partial summary judgment on November 5, 2015, in the consolidated 2011-2014 matters. Omimex asks the Court to determine the meaning of "pipeline carrier" and whether Omimex meets that definition making the company subject to central assessment. Omimex has filed for summary judgment on the issue. The issues have been briefed and oral argument was held on May 25, 2016.

Richland Aviation: Richland filed a declaratory judgment action in the 7<sup>th</sup> Judicial District Court, Richland County, challenging the Department's classification of Richland's property for tax year 2015 as subject to central assessment. The matter is currently in discovery. Richland has filed a motion for summary judgment arguing that it is not a "scheduled airline" as that term is used and understood in Montana law. Richland's summary judgment motion is fully briefed, argued, and the parties are awaiting a decision from the District Court.

Solem: The Solems filed a motion for class certification in the 11<sup>th</sup> Judicial District Court, Flathead County, challenging their land value, primarily arguing that the water influence used by the Department leads to improperly inflated values. The District Court recently granted class certification. The class certified is "all lakefront property owners in Neighborhood 800 who have timely paid under protest any portion of their property taxes since the last assessment cycle beginning in 2009." Neighborhood 800 is the Somers/Lakeside area in which the Solem's property is located. Between 2009 and 2015, approximately 200 taxpayers in Neighborhood 800 paid property taxes under protest.

### **MONTANA TAX APPEAL BOARD**

Blixseth: The Department is pursuing Tim Blixseth's tax debt. On March 20, 2015, the Department received final judgment against Mr. Blixseth before the Montana Tax Appeal Board on Mr. Blixseth's appeal of the Department's audit and assessment. Mr. Blixseth did not appeal any of the orders issued by the Montana Tax Appeal Board. Consequently, the Department has billed Mr. Blixseth in the approximate amount of \$74.4 million, and will begin

pursuing Mr. Blixseth for collection. Dismissal of the involuntary bankruptcy petition remains on appeal before the United States District Court for the District of Nevada, where the matter is fully briefed. The Department has advised the United States District Court of the MTAB rulings, and the Department awaits a decision.

Plains Pipeline: Plains Pipeline has appealed the Department's centrally assessed valuation of their property located in Montana. Plains Pipeline has also made allegations challenging classification. A weeklong trial before the Board is set for July 24, 2017. The parties are currently engaged in discovery.

Rocky Mountain Pipeline: Rocky Mountain Pipeline has appealed the Department's centrally assessed valuation of their property located in Montana. A weeklong trial before the Board is set for April 24, 2017. The parties are currently engaged in discovery.

### **DOR OFFICE OF DISPUTE RESOLUTION**

NaturEner: NaturEner has filed with the Office of Dispute Resolution three separate appeals of the Department's 2015 assessments. At issue is the Department's valuation of NaturEner's three windfarms; Glacier Wind Energy 1, LLC, Glacier Wind Energy 2, LLC, and Rim Rock Wind Energy, LLC. The matter awaits a schedule for discovery and trial. The parties have agreed to mediation on July 12 and 13, 2016.

VisionNet: In July, VisionNet appealed the Department's 2015 assessment to the Office of Dispute Resolution. Generally, VisionNet alleges the Department's classification of VisionNet is improper. VisionNet also contests its market value assessment as improperly including intangible personal property and use of improper capitalization rates. An initial conference was held with ODR on September 30, 2015. VisionNet has filed a declaratory judgment action before the First Judicial District Court. The Department filed an answer to the complaint on May 18, 2016.

### **SETTLEMENTS**

Phillips 66 Pipeline LLC (Phillips): Phillips, a wholly owned subsidiary of Phillips 66, operates more than 12,000 miles of pipelines in the United States. Phillips transports both raw and finished petroleum products, including crude oil, propane, and refined products. The Department assessed Phillips' property at \$120,014,871 for tax year 2015. Phillips appealed to the Department's Office of Dispute Resolution. The parties have agreed to settle the matter at 90% of the Department's original assessed value, \$108,000,000.

Verizon Wireless: In June, Verizon appealed the Department's 2015 assessment to ODR. Generally, Verizon alleges the 2015 value is too high because the deduction for intangible personal property was not properly computed. Verizon also challenged the Department's methodologies and capitalization rates. The Department's final assessed Montana value was \$239 million. The parties settled the matter with a Montana value of \$220 million.