

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

MONTGOMERY CONSTRUCTION,)	DOCKET NO.: MT-1998-4
)	
Appellant,)	
)	
-vs-)	FACTUAL BACKGROUND,
)	CONCLUSIONS OF LAW,
THE DEPARTMENT OF TRANSPORTATION))	ORDER and OPPORTUNITY
OF THE STATE OF MONTANA,)	<u>FOR JUDICIAL REVIEW</u>
)	
Respondent.)	

The above-entitled appeal was originally set for hearing on November 2, 1999 in Lewistown, Montana. That hearing was vacated at the request of the taxpayer, Montgomery Construction.

By order dated January 21, 2000, the Board notified the parties that the appeal would be submitted on briefs detailing the legal arguments. The briefing deadline was March 24, 2000.

Upon receipt of simultaneous opening briefs and response briefs from both parties, the Board determined that the record contained insufficient information upon which to reach a decision. The appeal was set for hearing on August 9, 2000 in Helena, Montana.

The above-entitled appeal came on regularly for

hearing on the 9th day of August, 2000, in the City of Helena, Montana, in accordance with an order of the State Tax Appeal Board of the State of Montana (the Board). The notice of the hearing was given as required by law.

The taxpayer, represented by Jon Oldenburg, attorney, and Larry Bowser, office manager, presented testimony in support of the appeal. The Department of Transportation, represented by Nick Roterling, staff attorney; Connie O'Connor, auditor; Robert Turner, bureau chief; and Dennis Sheehy, supervisor of the compliance review and audit section, presented testimony in opposition thereto.

The Board allowed the record to remain open until September 29 for the purpose of receiving post-hearing briefs from both parties.

The Board having fully considered the briefs, testimony, exhibits, and all things and matters presented to it by all parties, finds and concludes that the DOT has satisfactorily demonstrated that the taxpayer has failed to meet its obligation to maintain records adequate to document the claim that at least some of the taxable fuel in question is not taxable.

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AGREED FACTS

1. Montgomery Construction is a Montana business operating its principal place of business at 2255 U.S. Highway 191, at Hilger, Montana. The taxpayer is a licensed special fuel user with license number 01038150.

2. The Department of Transportation (DOT) had previously conducted a fuel audit of the taxpayer's records, which audit was completed on October 17, 1996, for the audit period of July 1993 to June 1996. An audit report was prepared as a result of the audit.

3. The audit resulted in the DOT assessing the sum of \$31,165.97 plus interest due and owing from the taxpayer.

4. The taxpayer had requested an informal telephonic hearing before the administrator of the DOT. Mr. William Salisbury conducted said hearing and entered his Findings of Fact, Conclusions of Law and Informal Hearing Decision, dated June 10, 1998.

5. The taxpayer had also provided to the hearing officer a compilation of the contracts worked, the contract number, the contract value, the days worked and whether the taxpayer felt the job was taxable or not.

6. The DOT compiled a fuel purchase summary

during the field audit.

7. From the additional information provided by the taxpayer, the DOT, through Milo Westburg, audit supervisor, performed an analysis of the additional information, and issued a subsequent report dated February 19, 1998.

8. The taxpayer provided its response to the DOT's February 19, 1998 report.

9. The taxpayer filed an appeal with this Board on July 8, 1998.

10. The DOT filed its answer to the complaint on August 12, 1998.

STATEMENT OF THE ISSUES

1. Did Montgomery keep adequate records to show the use of the subject motor fuels and whether they were subject to tax? 2. Were the projects questioned by the DOT the type of projects in which the motor fuels tax is due and owing?

Section 15-70-321 (1), MCA, provides:

Tax on special fuel and volatile liquids. (1) The department shall, under the provisions of rules issued by it, collect or cause to be collected from the owners or operators of motor vehicles a tax, as provided in subsection (2):

(a) for each gallon of undyed special fuel or other volatile liquid

- petroleum gas, of less than 46 degrees A.P.I (American petroleum institute) gravity test when actually sold or used to provide motor power to operate motor vehicles upon the public roads and highways of this state;
- (b) for each gallon of special fuel or other volatile liquid, except liquid petroleum gas, of less than 46 degrees A.P.I. (American petroleum institute) gravity test when actually sold or used in motor vehicles, motorized equipment, and the internal combustion of any engines, including stationary engines, used in connection with any work performed under any contracts pertaining to the construction, reconstruction, or improvement of any highway or street and their appurtenances awarded by any public agencies, including federal, state, county, municipal, or other political subdivisions;(Emphasis supplied) and
- (c) for each gallon of dyed special fuel delivered into the fuel supply tank of a diesel-powered highway vehicle, regardless of weight, operating upon the public roads and highways of this state.
- (2) The tax imposed . . . is 27 $\frac{3}{4}$ cents per gallon.

Section 15-70-323, MCA, provides:

Special fuel user's records. (1)
Every special fuel user and every person importing, manufacturing, refining, dealing in, transporting, or storing special fuel in this state shall keep records, receipts, and invoices and other pertinent papers

that the department may require and shall produce them for the inspection of the department at any time during the business hours of the day.

ARM 18.10.324 provides guidelines for record keeping requirements relating to special fuels tax:

TRIP AND FUEL CONSUMPTION RECORDS.

(1) Every special fuel user subject to 15-70-302, MCA, must maintain a record of all trips made by each vehicle in connection with the special fuels used. Operating records must detail the date and points of beginning and ending of each one way trip; proper designation of highways of operation, total miles traveled; purchase of special fuel into vehicles showing quantity, date and location received during each trip. The average miles per gallon (ampg) of each vehicle must also be determined. All operating information must be compiled separately for each vehicle during the calendar month.

(2) Supporting documents, such as bills of lading, time sheets, driver's trip logs, manifests, weight or scale tickets, odometer readings, and revenue records, must be retained for audit purposes.

(3) Every special fuel user subject to 15-70-302, MCA, operating a vehicle equipped with an apparatus which permits the consumption of special fuel must maintain a record, including invoices of all special fuel used and placed into the special fuel supply tank of each vehicle.

TAXPAYER'S CONTENTIONS

The taxpayer (hereinafter Montgomery), as part of its normal business operations, crushes, stockpiles, and occasionally spreads and lays gravel for public and private entities. In these operations, Montgomery uses special fuel that is taxable as defined in Section 15-70-301, MCA. Special fuel is those combustible gases and liquids commonly referred to as diesel fuel.

Montgomery disputes the DOT contention that it kept inadequate business records needed to complete reports required by the DOT for its fuel tax. From the DOT hearing examiner's findings of fact, the DOT found that there were: "(1) incomplete dispersal records; (b) no beginning and ending inventory on refunds claimed; and (c) no mileage records or odometer readings."

Montgomery tracks all fuel purchases, dyed and not dyed. It also tracks the amount of fuel used on each job, the machinery used on each job, and the hours of the machinery used on a daily basis. The drivers of the company keep track of the amount of on-road highway miles they drive in connection with each job. By taking the total fuel, the gross fuel usage on each job, the hours, the figures for the fuel used on-highway, and comparing the same, the company records show how much taxed fuel is used.

Larry Bowser, the office manager, keeps the records as he was instructed by the Department of Revenue as a result of a prior audit.

A major factor in the dispute that led to the subject assessment is that the DOT finds Montgomery's record keeping system to be "less than fair." (Connie O'Connor testimony, State Tax Appeal Board hearing, August 9, 2000). The DOT has assumed that Montgomery does not have the records to support its position. This is especially true regarding the fuel purchase invoices. Since the invoice does not state whether the fuel was for taxable or non-taxable uses, the DOT simply assumed that it was used for taxable purposes.

Montgomery asserts that it can, and did, account for the purchases on a job by job basis. Montgomery knows whether the job itself was for a taxable or a non-taxable use of fuel. Montgomery keeps track of the taxable uses of fuel and from that can determine what amounts are non-taxable uses.

Montgomery contends that the DOT should develop standardized forms containing the desired record keeping requirements for all of the fuel reporting. If it had done so, the confusion existing in this matter would not be present.

A second area of dispute is whether many of the jobs and fuel usage have occurred on taxable or non-taxable projects. The jobs and usage in question concern gravel crushing jobs that were performed by Montgomery for various county governments. The DOT has incorrectly assumed that all of these jobs and usages are taxable. Montgomery contends that neither the DOT nor this Board can make the assumption that all of the gravel crushed by Montgomery was used on public roads and highways. Rather, gravel is often used for buildings, parking areas, and other uses by the counties. When bids for the crushing jobs are bid and awarded, Montgomery has no idea as to what use the gravel may be put by the county. It is customary in the industry for the bid specifications to indicate whether the job will be taxable or non-taxable. The taxable jobs are labeled as such by Montgomery, the requisite records are kept, and the fuel taxes are accounted for and paid. The amount of these taxes are very important and relevant to the bid amount submitted by Montgomery as they directly affect any profit Montgomery may make on the job.

The Board received the taxpayer's post-hearing brief on October 2, 2000. On the issue of whether or not the taxpayer kept adequate records to show the use of the motor fuels and whether it was subject to tax, Mr. Oldenburg again

stated that Mr. Bowser received his instruction on adequate record keeping from Department of Revenue auditors. To then be told by Department of Transportation auditors that this method is inadequate is "very frustrating." Montgomery asserts that it should be able to rely upon instructions from one state agency in the face of allegations from another state agency that the suggested methods are inadequate. Mr. Oldenburg reiterated the taxpayer's contention that the DOT should establish prescribed forms which demonstrate exactly what sort of information it is looking for regarding the subject taxes.

The primary issue, in Montgomery's view, is the disagreement over what jobs are taxable. The questioned jobs related mostly to gravel crushed and stockpiled. There are multiple uses for crushed gravel. The DOT's assertion that, since one possible use for crushed gravel is for the construction of public roadways, the questioned jobs must all be assumed to be taxable jobs. Exhibit A to the taxpayer's post-hearing brief is a listing of jobs performed during the time period between the third quarter of 1993 through the second quarter of 1996, along with a brief description of the job and the number of gallons of special fuel used. The taxpayer asserts that all of the fuel referenced on Exhibit A is non-taxable due to its

involvement only in crushing and stockpiling gravel and not in the construction of public roadways. The taxpayer argues that the DOT did not prove the jobs were taxable. The only way to tell if all of the material crushed is ultimately used in a taxable manner is to require the counties or other subdivisions to account for every truck load of material; an impossible task.

Montgomery states that most of the contracts into which it enters have a clause describing whether the job is taxable or not. Montgomery should be able to rely on the counties or other entities to specify if the job is taxable or not. "After all, those counties are the ones who know what the ultimate use of the material is to be." (Taxpayer's post-hearing brief, page six.)

Montgomery argues that the DOT assertion that the it should have learned, through a previous audit related to the "Jardine" project, how to track gallons of fuel used to determine its tax liability is irrelevant. The Jardine project involved gravel hauled and actually placed upon a roadway. "The projects here did not improve any public right-of-way, road, highway or street. The county projects here were for crushing and stockpiling only, and there was no placing of the material on a roadway." (Taxpayer's post-hearing brief, page six.)

In summary, Montgomery contends that its records do document beyond the "satisfactory evidence" level, and that it has complied with the laws and regulations regarding record keeping and payment of the special fuels tax. It has performed this accounting function in the manner instructed by the DOT.

DOT'S CONTENTIONS

Montgomery is involved in various construction projects statewide in Montana and, under its special fuel user's permit, would be subject to filing and paying motor fuel taxes.

In the course of performing its duties, the DOT performed an audit of Montgomery for the time period July 1, 1993 to June 30, 1996. As a result of that audit, the DOT believed there were unpaid motor fuels taxes, particularly in the area of special fuels (diesel) and assessed taxes in the amount of \$30,7171.51, together with interest due in the amount of \$11,587.41. The matter has been telephonically heard before a DOT hearing examiner and no substantial change in the audit assessment occurred.

The DOT contends that the majority of the projects upon which Montgomery worked during the audit period

required taxes to be paid in view of the definition of public roads contained in Section 15-70-301 (5), MCA:

Public roads and highways of this state means all streets, roads, highways, and related structures:

- (a) built and maintained with appropriated funds of the United States, the state of Montana, or any political subdivision of the state;
- (b) dedicated to public use;
- (c) acquired by eminent domain; or
- (d) acquired by adverse use by the public, jurisdiction having been assumed by the state or any political subdivision of the state.

Further, ARM 18.10.103 indicates that:

(1) Streets, roads, highways, alleys, county roads, county gravel roads, forest services roads (except forest service development roads) and their related structures are accepted as public roads as defined in 15-70-301, MCA. A public road may be under new construction, reconstruction, relocation, or repair, even though it is not recognized as part of the maintained highway system.

ARM 18.10.104 specifies that the use of special fuel on these public roads requires the payment of tax "when consumed in the operation of a motor vehicle upon public roads or the rights-of-way of which are owned by the state, county, municipality, or other governmental agency regardless of who performs the maintenance thereon."

There is no exemption from the tax for performing work on public projects unless it is clearly off-road use. (ARM 18.10.202) This rule also specifies that "each special user, except those covered under 15-70-362, MCA, must maintain adequate records of the operations off the public roads, the miles traveled, and the special fuel used to establish that the special fuel user is entitled to the credit for off public road use of such fuel." Unless Montgomery can demonstrate, through adequate records, the existence of off-road usage, the mileage is taxable.

ARM 18.10.234 (2) provides authority for the DOT to determine a special fuel user's tax liability in the absence of adequate records by estimating "the miles traveled, special fuel purchases, and average miles per gallon. These estimates will be based, whenever possible, on records for a portion of the operations of the special fuel user's vehicles consuming special fuels or other available information indicating fuel usage by the vehicles for which reports are being made. In those cases where the records are not adequate to verify the average miles per gallon (ampg) reported and the average cannot be estimated, an ampg specified in (4) will be used."

Montgomery made the erroneous assumption that, since the bid instructions for certain small projects at the

local level did not indicate that all fuel taxes, unless off-road, are assessed and to be paid to the state, the tax was not due. Montgomery has been a licensed special fuel user in Montana for many years and should clearly know by now that the taxes are due on all public works projects.

The DOT has re-examined the situation and has tried to adjust, where applicable, for those projects that were clearly not public works and has given Montgomery off-road use credit.

The DOT's post-hearing brief, received by this Board on September 8, 2000, reiterated its arguments discussed above: The administrative rules require special fuel users to maintain adequate records. The mere failure to maintain adequate records would, in and of itself, be sufficient to support the assessment made by the DOT. The DOT went further and ascertained that the construction projects listed in Exhibit A to its post-hearing brief were ones which the DOT believed, under statute and administrative rules, to be taxable.

The DOT's post-hearing Exhibit A is a document prepared by Connie O'Connor, the DOT auditor who testified on behalf of the DOT at the hearing before this Board. Exhibit A indicates the projects by name, owner of the project, and the gallons used that the DOR believes are taxable:

Montgomery Construction

Prepared by Connie O'Connor
8/18/00

	Project	Gallons	
State	Bear Creek Job	17,000	Taxed
State	Big Spring Job	2,491	Taxed
County	Hill County	4,302	Taxed
State	Malta Job	1,539	Taxed
Trucks	Murray Job PST - Trucks	713	Taxed
State	North Job	29,689	Taxed
City	Park City	1,400	Taxed
County	Park County	2,479	Taxed
County	Stillwater	4,165	Taxed
County	Sweetgrass	1,398	Taxed
County	Sweetgrass Trucks	197	Taxed
County	Zortman Stockpile	235	Taxed
	Use Not Documented	99,656	Taxed
		165,264	

Tax Due Does Not Include Interest	\$ 21,908.70
Unsupported Tax Refunded	\$ 8,808.81
Total Due Does Not Include Interest	\$ 30,717.51

	Project	Gallons	
Private	Arrow Creek	7,565	Not Taxed Per Administrative Hearing
Private	Blue Range	1,848	Not Taxed Per Administrative Hearing
Private	Crazy Mtn Ranch	2,614	Not Taxed Per Administrative Hearing
Private	Deer Field Colony	5,543	Not Taxed
Private	Dremaux	1,175	Not Taxed Per Administrative Hearing
City	Great Falls	15,265	Not Taxed Per Administrative Hearing
Private	Hassler	1,028	Not Taxed Per Administrative Hearing
Private	Hogenson	1,375	Not Taxed Per Administrative Hearing
Private	Kolar	2,104	Not Taxed Per Administrative Hearing
Private	Lehigh Windham	2,404	Not Taxed Per Administrative Hearing
Private	Maiden	2,155	Not Taxed Per Administrative Hearing
Private	Marysville	1,008	Not Taxed Per Administrative Hearing
Private	Plonski	780	Not Taxed Per Administrative Hearing
Private	Royal Teton	3,049	Not Taxed Per Administrative Hearing
Private	RY Log Roads	4,983	Not Taxed Per Administrative Hearing
Private	Sage	1,010	Not Taxed Per Administrative Hearing
Private	Spring Creek	994	Not Taxed Per Administrative Hearing
Private	Tegarn	661	Not Taxed Per Administrative Hearing
Private	Utica Mine Reclamation	950	Not Taxed
City	Wolf Point Landfill	4,862	Not Taxed Per Administrative Hearing
	Unknown Use	42,989	Not Taxed Per Administrative Hearing
		104,362	

Total Gallons Purchased	269,626
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The DOT contends there are a total of 165,264 gallons of fuel used on these projects, and undocumented fuel use that should be taxed because the fuel was not used off-road. In addition to the taxes not paid, there is an unsupported tax refund issue of \$8,808.81. Taken together, the total tax due at the time of assessment in 1997 is \$30,717.51. That amount, including interest, has grown to the amount of \$49,795.85.

BOARD'S DISCUSSION

There is a sizeable assessment at issue here and the Board is painfully cognizant of the fiscal obligation the taxpayer is facing.

The Board is fairly certain that is reasonable to suspect that at least some of the fuel referenced in Exhibit A of the taxpayer's brief was for off-road, or non taxable, consumption. However, it appears that the dilemma facing the DOT is present in the record before this Board: lack of substantial and credible evidence.

Therefore, the Board finds that the DOT has satisfactorily demonstrated that the taxpayer has failed to meet its obligation to maintain records adequate to document the claim that at least some of the taxable fuel in question is not taxable.

There is no exemption from the subject tax for performing work on public projects unless it is clearly off-road use. (ARM 18.10.202) This rule also specifies that "each special user, except those covered under 15-70-362, MCA, must maintain adequate records of the operations off the public roads, the miles traveled, and the special fuel used to establish that the special fuel user is entitled to the credit for off public road use of such fuel."

The DOT's administrative rules (ARM 18.10.323) provide guidance on how to maintain the required operating records in connection with special fuel used: "Operating records must detail the date and points of beginning and ending of each one way trip; proper designations of highways of operation, total miles traveled; miles traveled in each state; and a complete listing of all purchases of special fuel into vehicles showing quantity, date and location received during each trip. The average miles per gallon (ampg) of each vehicle must also be determined. All operating information must be compiled separately for each vehicle during the calendar month."

ARM 18.10.234 (2) provides authority for the DOT to determine a special fuel user's tax liability in the absence of adequate records by estimating "the miles traveled, special fuel purchases, and average miles per gallon. These

estimates will be based, whenever possible, on records for a portion of the operations of the special fuel user's vehicles consuming special fuels or other available information indicating fuel usage by the vehicles for which reports are being made. In those cases where the records are not adequate to verify the average miles per gallon (ampg) reported and the average cannot be estimated, an ampg specified in (4) will be used." The Board finds that the DOT has estimated the subject tax liability in the present case in accordance with its administrative rules.

In addition, the Board finds it reasonable to expect the taxpayer to ascertain the tax consequences of every job for which it bids. It is not reasonable or prudent business practice to assume there will be no special fuel tax liability if a contract is silent on that issue. The Board wonders how the taxpayer can prudently submit a bid for a job if it is unaware of all of the financial obligations it is undertaking if the bid is awarded to Montgomery.

The appeal of the taxpayer is denied and the decision of the Department of Transportation is affirmed.

CONCLUSIONS OF LAW

1. The State Tax Appeal Board has jurisdiction over this matter. **§15-2-302 MCA.**
2. **§15-70-111, MCA. Judicial review and appeals.**

Any final written determination by the director of the department of transportation under this chapter may be appealed to the state tax appeal board which may, upon the record of a hearing, affirm, modify, or reverse the decision of the department.

3. **ARM 18.10.104** specifies that the use of special fuel on public roads requires the payment of tax "when consumed in the operation of a motor vehicle upon public roads or the rights-of-way of which are owned by the state, county, municipality, or other governmental agency regardless of who performs the maintenance thereon."

4. **ARM 18.10.202** specifies that "each special user, except those covered under 15-70-362, MCA, must maintain adequate records of the operations off the public roads, the miles traveled, and the special fuel used to establish that the special fuel user is entitled to the credit for off public road use of such fuel." (Emphasis supplied.)

5. The appeal of the taxpayer is hereby denied, and the decision of the Department of Transportation is affirmed.

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ORDER

IT IS THEREFORE ORDERED by the State Tax Appeal Board of the State of Montana that the subject taxes are due and properly owing.

Dated this 4th day of October, 2000.

BY ORDER OF THE
STATE TAX APPEAL BOARD

(S E A L)

GREGORY A. THORNQUIST, Chairman

JAN BROWN, Member

JEREANN NELSON, Member

NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4th day of October, 2000, the foregoing Order of the Board was served on the parties hereto by depositing a copy thereof in the U.S. Mails, postage prepaid, addressed to the parties as follows:

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