

JUN 11 2019

Montana Tax Appeal Board

BOYNE USA, INC.,

Appellant,

v.

STATE OF MONTANA,
DEPARTMENT OF REVENUE,

Respondent.

CASE No: SPT-2018-24

**SUMMARY JUDGMENT
FINDINGS OF FACT,
CONCLUSIONS OF LAW, ORDER
AND OPPORTUNITY FOR
JUDICIAL REVIEW**

The Montana Tax Appeal Board (Board) is an independent agency not affiliated with the Montana Department of Revenue (DOR). Under the authority of MCA §15-2-302 this appeal is a direct appeal from the Office of Dispute Resolution’s (ODR) Order Granting Stipulation for Final Agency Decision, issued January 31, 2018. ODR Ex. a.

Subsequently, both Boyne USA, Inc. (Boyne) and the DOR filed separate Motions for Summary Judgment on January 18, 2019. As stated by both parties, they each believe there remains no genuine issue of material fact, and they are each entitled to judgment as a matter of law. Boyne Motion for Summary Judgment and DOR Motion for Summary Judgment.

Boyne requests this Board reject the ODR Order Granting Stipulation for Final Agency Decision finding Boyne responsible for \$685,505.68 in Lodging Facility Use Taxes, Sales Taxes, interest and penalties. Boyne Ex. 5 DOR Final Determination Letter. Boyne asks this Board to find the DOR has exceeded its

BEFORE THE MONTANA TAX APPEAL BOARD

Boone USA, Inc. v. Montana Dept. of Revenue

authority, and order the DOR to reverse its Lodging Facility Use and Sales Tax assessment. Boyne Motion for Summary Judgment.

The DOR, in turn, asks this Board to uphold the ODR Order, and enforce the DOR's tax audit determinations against Boyne. DOR Motion for Summary Judgment.

The Board agrees with the parties that no genuine issues of material fact are in dispute and the issues can be decided as a matter of law. As such, and as reflected in the following opinion, Boyne's Motion for Summary Judgment is granted as to the issue of no-show and cancelation fees, and the DOR's Motion for Summary Judgment is granted as to the Resort Services Fee.

EXHIBIT LIST

The Board admitted the following exhibits submitted by Boyne:

Ex. 1: Affidavit of Barb Rooney, Boyne Senior Vice President of Lodging, Spa and Owner Services, dated January 18, 2019.

Ex. 2: Boyne USA, Inc.'s Responses to Montana Department of Revenue's First Combined Discovery Requests, dated September 17, 2018.

- A. Partial copy of the Department of Revenue's Lodging Tax Guide;
- B. Big Sky Resort reservation receipts (qty 28), "Printed From History Files";
- C. Copy of Boyne's cancelation policy.

Ex. 3: Photocopy of the Big Sky Resort list of amenities, and a screenshot entitled "About the Service Fee – Learn About the Big Sky Resort Service Fee" taken from <http://bigskyresort.com/service-fee>. Both documents consist of a list of amenities offered as part of the RSF.

Ex. 4: Deposition of Barbara Rooney, Boyne Senior Vice President of Lodging, Spa and Owner Services, pages 22-29 and 50-57, taken November 19, 2018.

REVIEWS THE MONTANA TAX APPEAL BOARD

Board Case No. 17-00000000-00000

Ex. 5: DOR Final Determination Letter written by DOR Auditor Joel Baker to Boyne, concerning the outcome of Boyne's informal review request, issued December 21, 2017.

A. Boyne Projected Financial Summary, Working Paper 1.

Ex. 6: Deposition of Mark Schoenfeld, DOR Lead Auditor, pages 22-25, 30-33 and 66-69, taken November 29, 2018.

Ex. 7: Deposition of Joel Baker, DOR Auditor, pages 22-29, 62-69 and 78-81, taken November 29, 2018.

Ex. 8: Affidavit of Courtney Jones, Accounting Manager and Accounting Controller and Vice President at Big Sky Resort, dated March 7, 2019.

Ex. 9: Emails sent between Courtney Jones and Joel Baker marked "No Show Email" (with highlights), with an attachment marked "No Show Customer Receipt" (with highlights), sent September 13, 2016.

The Board admitted the following exhibits submitted by the DOR:

Ex. A: DOR Final Determination Letter written by DOR Auditor Joel Baker to Boyne, concerning the outcome of Boyne's informal review request, issued December 21, 2017.

1. Boyne Projected Financial Summary, Working Paper 1 (summary of the \$685,505.68 assessment);
2. Boyne Working Paper 2 (summary of additional revenues);
3. Audit Adjustment Letter, written by DOR Auditor Joel Baker to Boyne, issued April 12, 2017;
4. Boyne Projected Financial Summary, Working Paper 1;
5. Boyne Working Paper 2;
6. Big Sky of Montana Audit Report, with Appendix 1-6.

Ex. B: Deposition of Barbara Rooney, Boyne Senior Vice President of Lodging, Spa and Owner Services, taken November 19, 2018.

BEFORE THE MONTANA TAX APPEAL BOARD

3200 DN, East Helena, Montana 59617-1000

Ex. C: Document entitled “About the Service Fee – Learn About the Big Sky Resort Service Fee” downloaded from <http://bigskyresort.com/service-fee>. The document consists of a list of amenities offered as part of the resort services fee.

Ex. D: Document entitled “Welcome to Big Sky Resort – Your Payment Method” downloaded from <https://lodging.bigskyresort.com/default/Trip-Planner/Your-Reservation/Check-Out>. The document is a screenshot from the Big Sky Resort online reservation system, taken June 6, 2017.

Ex. E: Deposition of Courtney Jones, Accounting Manager and Accounting Controller and Vice President at Big Sky Resort, taken November 19, 2018.

Ex. F: Document entitled “Welcome to Big Sky Resort – Your Reservation” downloaded from <https://bigskyresort.com/reservations/bigskyresort-huntley/Trip-Planner/Your-Reservation>. The document is a record of the DOR’s mock reservation, initiated September 13, 2016.

Ex. G: Emails sent between Courtney Jones and Joel Baker marked “No Show Email”, with an attachment marked “No Show Customer Receipt”, sent September 13, 2016.

Ex. H: Deposition of Mark Schoenfeld, DOR Lead Auditor, taken November 29, 2018.

Ex. I: Deposition of Joel Baker, DOR Auditor, taken November 29, 2018.

Ex. J: Affidavit of Joel Baker, DOR Auditor, with an attachment marked “No Show Lodging Charges Only”, dated January 16, 2019. The attachment includes handwritten notes from Mr. Baker showing the breakdown of the lodging charge, lodging tax, resort tax and resort services fee.

The Board admitted the following exhibits submitted to the ODR:

Ex. a: Order Granting Stipulation for Final Agency Decision, Office of Dispute Resolution, written by Hearing Examiner Michele Crepeau, issued January 31, 2018.

BEFORE THE MONTANA TAX APPEAL BOARD

State Tax Dept. - Revenue Dept. of Revenue

Ex. b: DOR Final Determination Letter written by DOR Auditor Joel Baker to Boyne, concerning the outcome of Boyne's informal review request, issued December 21, 2017.

1. Boyne Projected Financial Summary, Working Paper 1 (summary of the \$685,505.68 assessment);
2. Boyne Working Paper 2 (summary of additional revenues).

Ex. c: Boyne letter to the ODR concerning filing the Stipulation for Final Agency Decision and proposed order, filed January 30, 2018.

Ex. d: Stipulation for Final Agency Decision, signed by both parties, dated January 29, 2018.

Ex. e: DOR Final Determination Letter written by DOR Auditor Joel Baker to Boyne, concerning the outcome of Boyne's informal review request, issued December 21, 2017.

1. Boyne Projected Financial Summary, Working Paper 1 (summary of the \$685,505.68 assessment);
2. Boyne Working Paper 2 (summary of additional revenues);
3. Boyne Projected Financial Summary, Working Paper 1;
4. Boyne Working Paper 2;
5. Power of Attorney Authorization to Disclose Information, filed by Boyne, dated January 24, 2018;
6. Notice of Referral to the Office of Dispute Resolution, filed by Boyne, dated January 18, 2018;
7. List of the parties, their representatives and the contact information;
8. Boyne email to the ODR concerning filing the Stipulation for Final Agency Decision and proposed order, dated January 30, 2018;
9. Memo from the DOR to the ODR, written by Mark Schoenfeld in response to an email from the ODR requesting information, dated January 24, 2018;
10. Email from the ODR to the DOR requesting information, dated January 19, 2018, and the DOR response, dated January 24, 2018;

BEFORE THE MONTANA TAX APPEAL BOARD

Before the Board, the Montana Dept. of Revenue

11. Email from Boyne to the ODR with a Notice of Appeal and requested confirmation, dated January 18, 2018.

FINDINGS OF FACT

1. Boyne owns and operates the Big Sky Resort located in Big Sky, Montana. Boyne Complaint 1:1.
2. "Big Sky has several lodges for accommodations such as the Huntley Lodge, Shoshone Condominium Hotel, Summit at Big Sky, Village Center and Whitewater Inn (employee housing). Big Sky also functions as property managers for private cabins, homes and condominiums, which make up part of Big Sky lodging revenues." DOR Motion for Summary Judgment 2:2.
3. As an owner/operator of lodging facilities, Boyne charges, collects and remits both the 4% Lodging Facility Use Tax and the 3% Sales Tax for booked and occupied rooms, as required by statute. Boyne Complaint 2:5.
4. Boyne adopted, and adheres to, a tiered cancelation and no-show policy. DOR Ex. D p.1.

"Deposit Policy: A 20% deposit is due at time of booking. 50% of the deposit is refundable if canceled more than 30 days prior to arrival. 50% of the deposit is non-refundable. At 30 days prior to arrival the full amount is due (and will automatically be charged). 30 days within the arrival date the full deposit is non-refundable." Id.

"Cancellation Policy: 50% of the deposit amount is refundable until 30 days prior to arrival. The total balance is due 30 days

REPORT OF THE MONTANA TAX APPEAL BOARD

April 1, 2014, In re: Montana Dept. of Revenue

prior to arrival and will be automatically charged to the Credit Card provided at time of booking.” Id.

5. When a lodging deposit is made through Boyne’s online reservation system the party making the reservation receives a message at check-out concerning tax charges. DOR Ex. F p.2. “Lodging Only – Includes taxes and resort fees.” Id.
6. Boyne does not remit to the DOR a Lodging Facility Use Tax (4%) or Sales Tax (3%) on no-show or cancelled lodging reservations/deposits. DOR Ex. B 32:25 and 33:1-4. “If somebody didn’t show up, they didn’t stay. ... We wouldn’t collect a tax if you don’t stay.” Id.
7. Big Sky Resort offers a list of amenities to all their registered lodging guests. Boyne Ex. 3. The list includes:
 - Complimentary scenic lift rides during the summer season
 - Complimentary ski valet
 - Kids Club located in the Village Center
 - Single ride on the Ramcharger lift during ski season for dining at Everett’s 8800
 - Complimentary boat rentals at Lake Levinsky every Wednesday from 1pm-3pm
 - Fireworks on NY Eve and other Special occasions
 - Resort Bellman shuttle for transport within the Big Sky Community
 - Children’s activities in the Huntley Lodge lobby
 - Ski Patrol Dog demonstrations and s’mores in the winter
 - Warren Miller movie playing weekly in the winter season
 - Movies in the amphitheater nightly

BEFORE THE MONTANA TAX APPEAL BOARD

State of Montana, Dept. of Revenue

- Special events and movies during exceptionally cold days during the winter season
 - Tennis courts
 - Complimentary self-parking
 - Complimentary luggage storage with bell staff on arrival or departure
 - Concierge assisted boarding passes.” Id.
8. Boyne states that all of their guests may use any of the above listed amenities because they have paid a Resort Services Fee (RSF), which is a proportional 7% charge made against every lodging reservation. DOR Motion for Summary Judgment 3:6. The RSF is a separately stated charge listed as “Fees/Gratuities” on the Big Sky reservation system. DOR Ex. F.
9. Boyne’s statement within the “General Terms & Conditions” that constitutes the contract guests enter into when they make an online reservation for lodging states: “The Resort Services fee is 7% on accommodations and supplements private financing to fund the design and improvement to the resort infrastructure, facilities and services.” DOR Ex. D.
10. Although the RSF is charged to all of Boyne’s guests, Barbara Rooney testified that “it may be waived under certain circumstances at the discretion of Boyne.” DOR Ex. B 53:12-15. However, Ms. Rooney was unable to cite to any instance where the RSF was waived. Id. at 55:10-19.
11. Similarly, Courtney Jones testified at her deposition that the RSF is a mandatory charge:
- “Q [DOR]. ... Is it your understanding that customers of Big Sky Resort generally cannot opt out of paying the resort services fee? A [Jones]. Yes.” DOR Ex. E 26:6-9.

REPORT OF THE MONTANA TAX APPEAL BOARD

Case LTA 06-07, *Walker Dept. v. Termon*

12. The money collected for the RSF is deposited into Boyne's general fund. DOR Response to Boyne's Motion for Summary Judgment 12.
13. Boyne does not collect and remit to the DOR the Lodging Facility Use Tax (4%) or Sales Tax (3%) on their RSF. DOR Motion for Summary Judgment 2.
14. The DOR conducted an audit of Boyne's Lodging Facility Use and Sales Tax for the period encompassing June 30, 2011 through March 31, 2016. Boyne Complaint 3:8. The audit was completed by DOR Auditor Joel Baker, and his findings were issued on April 12, 2017. DOR Ex. A:3. The audit concluded Boyne owed the State of Montana Lodging Facility Use Taxes, Sales Taxes, interest and penalties for the entirety of the audit period. Id. The sum total assessed against Boyne was \$652,202.04 (the Final Determination Letter dated December 21, 2017 changed the total to \$685,505.68). Id.
15. Presumably to facilitate ease of administration, the DOR administers the Lodging Facility Use Tax and Sales Tax as one, and refers to them collectively as the "Lodging Tax". DOR Ex. I 22:24-25 and 23:1-24. "My audit is done as one tax and the determinations that I've made will be consistent with the fact that the lodging tax constitutes one tax." Id at 23:21-24.
16. The audit focused on two distinct issues. First, the DOR determined that the money Boyne collected from reservation no-shows and cancellation deposits included Lodging Facility Use and Sales Tax, and as such the tax collected by Boyne must be remitted to the DOR. Complaint 3-4:11. Mr. Baker used a sample no-show receipt, and a mock reservation, to separate the room rate, resort fees and tax amounts collected by Boyne to determine the amount of

BEFORE THE MONTANA TAX APPEAL BOARD

Agenda Item 1.00, Tax and Revenue Dept. of Revenue

taxes it assessed against Boyne for the no-show and cancellation deposits.
DOR Ex. J and DOR Ex. F.

17. Mr. Baker testified that “I haven’t made a determination one way or another on whether or not cancellation fees and no-show deposits are subject to the lodging tax. I made the determination that Boyne has already collected taxes from no-show and canceled reservation[s] in regards to this audit.” DOR Ex. I 58:24-25 and 59:1-4. Instead, the DOR, using the language in the reservation system and by reverse engineering the deposit receipts provided by Boyne, concluded that the deposits forfeited included the 3% Sales Tax and the 4% Lodging Facility Use Tax. Id at 58.

18. Second, the DOR determined the Resort Services Fee, collected by Boyne from every guest, was a taxable amount, and was also owed to the DOR.
Complaint 4:12.

19. Boyne filed a request for an informal audit review through the DOR. Id. at 3:9.

20. The “Final Determination – Montana Lodging Facility Sales and Use Tax Audit”, from Boyne’s requested informal audit review, was issued on December 21, 2017. DOR Ex. A.

21. The letter outlined and reinforced the original audit findings.

“1. You did not remit the lodging taxes on revenues from ‘No-Show’ and cancelled reservations. These charges are subject to the lodging tax. According to the lodging General Terms and Conditions on your website, ‘At 30 days prior to arrival the full amount is due...there will be no refunds for cancellations within 30 days of arrival.’

INFORM THE MONTANA TAX APPEAL BOARD

Boyer USA, Inc. v. Montana Dept. of Revenue

For these 'No-Show' and cancellation revenues, you have collected but not remitted the state lodging taxes pursuant to §15-65-111 and §15-68-102, Montana Code Annotated (MCA). These taxes must be remitted to the State.

2. You did not collect and remit the lodging taxes on the portion of the accommodations charge labeled 'Resort Services Fee'. The resort services fee is included for each lodging guest. The fee is charged whether the guest stays only in their room or if they make use of other amenities offered as part of the lodging accommodation. The fee is an integral part of the lodging stay.

§15-65-111(1), MCA, states, 'there is imposed on the user of a facility a tax at a rate equal to 4% of the accommodation charge collected by the facility.' The sales price is defined in §15-68-101(14)(a), MCA, as 'the total amount of consideration, including cash, credit, property, and services, for which personal property or services are sold, leased or rented.' The resort services fee is both a part of the accommodations charge as well as included in the sales price for the property and services sold or rented. As such, the fee is subject to the Montana lodging taxes." *Id.* at 1:1-2.

22. Due to the five-year statute of limitations the letter did eliminate liability for the June 30, 2011, September 30, 2011 and December 31, 2011 audit periods. *Id.* at 2:3.

23. On January 18, 2018, Boyne paid the DOR assessed taxes under protest. Boyne Complaint 4:14. "... Boyne USA stated the payment was intended only to stop the accrual of penalties and interest and that it was not an admission or waiver of any issue on appeal. The Department accepted the payment under these terms." *Id.*

24. Subsequently, Boyne filed an appeal with the ODR. Boyne Complaint 4:13. On January 30, 2018, the parties filed a Stipulation for Final Agency Decision and proposed order, with the ODR. ODR Ex. d. This advanced the appeal by agreement to the MTAB. *Id.*

BEFORE THE MONTANA TAX APPEAL BOARD

January 2018, In re: Montana Dept. of Revenue

25. On January 31, 2018, Hearing Examiner Michele Crepeau issued an Order Granting Stipulation for Final Agency Decision. ODR Ex. a.
26. Following the ODR Order, on February 26, 2018, Boyne timely filed their Complaint with the Montana Tax Appeal Board. Boyne Complaint.
27. On January 18, 2019, both Boyne and the DOR filed Motions for Summary Judgment, and request for oral argument. Following the parties filing of Response Briefs and Reply Briefs, the Board scheduled oral arguments to be heard on April 23, 2019 at 1:00pm. MTAB Hrg.
28. The oral arguments progressed with both Boyne and the DOR reiterating their initial stances, as conveyed in their briefing. Id.
29. Near the end of Boyne's presentation, Board Member Doherty asked the attorneys for Boyne if they still wished to pursue their Equal Protection claim. MTAB Hrg. 27:24-25. Boyne answered in the affirmative, and proceeded with a new legal theory concerning the equal protection violation claim. Id. at 28:2-21.
30. Boyne's Complaint alleges that the DOR does not require other taxpayers, who are similarly situated to Boyne, to pay taxes on the fees they collect for resort services. Id. "Other taxpayers charge customers for the same amenities that Boyne USA provides through its Resort Services Fee. The Department does not require these taxpayers to collect or remit Lodging Taxes on these charges." Id. In their briefing Boyne again stated that the Equal Protection claim was regarding the treatment of the Resort itself. Boyne Complaint 5:24.

BEFORE THE MONTANA TAX APPEAL BOARD

Item 123, In re: *Montana Dept. of Revenue*

31. During oral argument Boyne no longer alleged that the DOR treated Boyne unequally, but rather that their Equal Protection claim concerned the fairness of the treatment of their lodging customers. *Id.*

32. The DOR requested information, during the deposition of Boyne's Senior Vice President Barbara Rooney, concerning other resorts which may be similarly situated, but taxed differently.

"Q [DOR]. Do you know of other lodging facilities in Montana that charge a resort services fee?

A [Rooney]. Off the top of my head right now, I do not.

Q [DOR]. So as you sit here today, you don't know of any other similarly situated taxpayers, like other resorts, that charge a resort services fee?

A [Rooney]. Oh, I'm sure there are plenty of them but I can't give you a name right off the top of my head right now."

DOR Ex. B 56:3-12.

To whatever extent the following conclusions of law may be construed as findings of fact, they are incorporated accordingly.

CONCLUSIONS OF LAW

To whatever extent the forgoing findings of fact may be construed as conclusions of law, they are incorporated accordingly.

I. Summary Judgment Standard

1. The question of summary judgment rests on a two-prong test. MCA §25-20-56(c)(3). "The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Id.*

BEFORE THE MONTANA TAX APPEAL BOARD

Section 134, Title 17, Montana Code of Annotated Statutes

2. “The moving party has the burden of establishing the absence of a genuine issue of material fact, and entitlement to judgement as a matter of law.”
Smith v. Burlington Northern & Santa Fe Ry., 2008 MT 225, ¶10, 344 Mont. 278, 187 P. 3d 639.

3. “If the moving party satisfies its burden of proof, the non-moving party must provide ‘material and substantial evidence, rather than mere conclusory or speculative statements, to raise a genuine issue of material fact.’” Hiebert v. Cascade County, 2002 MT 233, ¶21, 311 Mont. 471, 56 P.3d 848 (quoting Stuart v. First Sec. Bank, 2000 MT 309, ¶16, 302 Mont. 431, 15 P.3d 1198). The evidence presented must be “... essential to one or more elements of the case... .” Styren Farms, Inc. v. Roos, 2011 MT 299, ¶10, 363 Mont. 41, 265 P. 3d 1230.

4. “When there are cross-motions for summary judgment, a district court must evaluate each party’s motion on its own merits.” Kilby Butte Colony, Inc. v. State Farm Mut. Auto Ins. Co., 2019 MT 246, ¶7, 389 Mont. 48, 403 P.3d 664.
“The fact that both parties have moved for summary judgment does not establish, in and of itself, the absence of genuine issues of material fact.”
Hajenga v. Schwein, 2007 MT 80, ¶18, 336 Mont. 507, 155 P.3d 1241 (quoting Montana Metal Bldgs. v. Shapiro, 283 Mont. 471, 477, 942 P.2d. 694.)
“Consequently, in evaluating cross motions for summary judgment, [this Board] must evaluate each party's motion on its own merits.” Hajenga at ¶19.

II. Tax Calculations

5. It is undisputed that the taxpayer bears the burden of maintaining proper records, and making said records available to the DOR when required.

BEFORE THE MONTANA TAX APPEALS BOARD

Case DVA, In re: *Boyer, Dep. of Revenue*

“RECORDS REQUIRED – AUDIT

(1) Each seller shall maintain records necessary to document gross receipts for the lodging facility sales and use tax. A seller may be required to substantiate gross receipts reported for a particular quarter. For audit purposes, the seller may be required to reconstruct the reported gross receipts from the original lodging facility sales and use tax receipts.

(2) Such records shall include specific documentation of exempt charges.

(3) The seller must notify the user of the 4 percent lodging facility use tax and the 3 percent lodging facility sales tax. The tax shall be separately stated on the receipt, invoice, or other document provided to the user to ensure there is a record of the amount of tax charged.

(4) The records shall be maintained by the seller for a period of five years and shall be subject to audit by the department for that period.” ARM 42.14.206

DOR Auditor Joel Baker used the information made available to him by Boyne in order to calculate the Sales and Lodging Facility Use Taxes.

III. Montana Lodging Facility Use Tax and Sales Tax

6. Two separate taxes sit at the heart of Boyne’s appeal, the Lodging Facility Use Tax (MCA Chapter 65) and the Sales Tax (MCA Chapter 68).
7. In 1987, the Montana Legislature adopted the Lodging Facility Use Tax, MCA §§15-65-101 through 136, imposing on the user a tax at a rate equal to 4% of the accommodation charge, which the Legislature defined as follows: “‘Accommodation charge’ means the fee charged by the owner or operator of a facility for use of the facility for lodging, including bath house facilities, but excluding charges for meals, transportation, entertainment, or any other similar charges.” MCA §15-65-101(1). The Legislature gave the DOR rulemaking authority to “... adopt such rules as may be necessary to implement and administer this part.” MCA §15-65-102.

BOARD OF THE MONTANA TAX APPEAL BOARD

Mont. Code Ann. § 15-68-101 through 15-68-103

8. In 2003, the Montana Legislature adopted a Sales Tax, MCA §§ 15-68-101 through 820, imposing on the user a sales tax of "... (a) 3% on accommodations and campgrounds; (b) 4% on the base rental charge for rental vehicles." MCA §15-68-102. The Legislature gave the DOR rulemaking authority to "... adopt rules providing for the payment of the sales tax and use tax based on a rounding method." MCA §15-68-103(3).
9. The DOR was given direct statutory authority to establish administrative rules to aid in the implementation of the Lodging Facility Use Tax and Sales Tax. "A valid administrative rule must be consistent with the underlying statute, and must be 'reasonably necessary to effectuate the purpose of the statute.'" *Musselshell County v. Yellowstone County*, 2012 MT 292, ¶20, 367 Mont. 350, 291 P. 3d 579 (quoting MCA §2-4-305(6)(a)-(b)).
10. "The courts have uniformly held that administrative regulations are 'out of harmony' with legislative guidelines if they (1) 'engraft additional and contradictory requirements on the statute' or (2) if they engraft additional, noncontradictory requirements on the statute which were not envisioned by the legislature." *Clark Fork Coalition v. Tubbs*, 2016 MT 229, ¶25, 384 Mont. 503, 380 P. 3d 771 (citing *Board of Barbers v. Big Sky College*, 192 Mont. 159, 161, 626 P. 2d 1269, 1270 (1981)).
11. In 2015, the Supreme Court of Montana handed down their decision in *Montana Department of Revenue v. Priceline.com, Inc.* The appeal centered around the issue of whether online travel companies (OTC) were required to collect and remit taxes on the "fees" portion of a hotel booking or car rental transaction. *Mont. Dep't Revenue v. Priceline.com, Inc.*, 2015 MT 241, 380 Mont. 352, 354 P. 3d 631. Both the Lodging Facility Use Tax and the Sales Tax were at issue. *Id.*

12. As part of the opinion the court determined "... the Lodging Facility Use Tax and the Sales Tax are inconsistent and incompatible. The statutes, created sixteen years apart, tax two separate transactions." Priceline at ¶16. As such, the two taxes must be reviewed as separate taxing policies.
13. Following the Priceline decision, the Lodging Facility Use Tax and the Sales Tax will be reviewed as two separate taxes, and applied accordingly.

IV. No Show and Cancellation Fees

14. "If the intent of the Legislature can be determined from the plain meaning of the words used in the statute, the plain meaning controls and the court need go no further nor apply any other means of interpretation." Swanson v. Consumer Direct, 2017 MT 57, ¶16, 387 Mont. 37, 391 P. 3d 79 (quoting Clark Fork Coal v. Tubbs, 2016 MT 229, ¶20, 384 Mont. 503, 380 P. 3d 771 [citing Phelps v. Hillhaven Corp., 231 Mont. 245, 251, 752 P. 2d 737 (1988)]).
15. The Lodging Tax imposes "... on the user of a facility a tax at a rate equal to 4% of the accommodation charge collected by the facility." MCA §15-65-111(1). As defined by statute, "'Accommodation charge' means the fee charged by the owner or operator of a facility for use of the facility for lodging, including bath house facilities, but excluding charges for meals, transportation, entertainment, or any other similar charges." MCA §15-65-101(1). The owner or operator of a facility is charged with collecting the [Lodging] tax from the user, and must report and remit that amount of tax due to the DOR quarterly. MCA §15-65-112.
16. The Legislature has defined a facility to mean "... a building containing individual sleeping rooms or suites, providing overnight lodging facilities for

BOYNE VS THE MONTANA TAX APPEAL BOARD

Case No. 024, Court: Montana Dept. of Revenue

- periods of less than 30 days to the general public for compensation. The term includes a facility represented to the public as a hotel, motel, campground, resort, dormitory, condominium inn, dude ranch, guest ranch, hostel, public lodginghouse, or bed and breakfast facility.” MCA §15-65-101(4)(a).
17. A Sales Tax of 3% is imposed on sales of accommodations and campgrounds. MCA §15-68-102(1)(a). “The sales tax is imposed on the purchaser and must be collected by the seller and paid to the department by the seller. The seller holds all sales taxes collected in trust for the state. The sales tax must be applied to the sales price.” *Id.* at (2).
18. The DOR, using the explicit rule making authority granted to it, defines sales price as “... synonymous with the term ‘accommodation charge’ as defined in 15-65-101, MCA.” ARM 42.14.101(15).
19. Thus, it is the statute’s definition of Accommodation charge – “the fee charged by the owner or operator of a facility *for use of the facility* for lodging” that defines the event that triggers whether or not any Lodging or Sales tax is due. MCA §15-65-101 (emphasis added).
20. The question under consideration concerns whether the no-show and cancellation deposits forfeited include Lodging and Sales Tax collected by Boyne and due to the state.
21. Both Boyne and the DOR agree that Mr. Baker never determined if the forfeited no-show and cancellation deposits are taxable. DOR Ex. I 58:24-25 and 59:1-4.

300005700 MONTANA TAX APPEAL BOARD

Board of Tax Appeals, Montana Dept. of Revenue

22. This Board was not offered convincing evidence that a taxable event occurred. In order for the DOR to assess a tax obligation as due, a taxable event must happen first.
23. Although the defining features of a taxable event are self-evident, the term taxable event is defined in 26 USCS §4963(c). "... [T]he term 'taxable event' means any act (or failure to act) giving rise to liability for tax... ." Id. Though utilized in a different context, the definition is applicable here, to the issues under appeal.
24. The taxable event under consideration is defined by statute. MCA §15-65-101(1). In this instance the taxable event hinges on the term "for the use of the facility for lodging". Id.
25. Without further guidance from the statutory materials we turn to the governing principle of interpretation through the plain meaning of the language. Swanson, *supra*. The dictionary definition of the term "use" is "the act or practice of employing something." merriam-webster.com/dictionary/use (site visited May 7, 2019).
26. Under the current set of facts, the potential guest booking a room for lodging, and consequently canceling or not showing-up for the reservation, does not by the plain language "use" the facility for any purpose. If there is no use, there is no taxable event.
27. "All sales tax and use tax required to be collected and all sales tax and use tax collected by any person under this chapter constitute a debt owed to this state by the person required to collect the sales tax and use tax." MCA §15-68-110(4). "Liability for the payment of the sales tax and use tax is not

MONTANA TAX APPEAL BOARD

1000 East Front Street, Helena, MT 59601

extinguished until the taxes have been paid to the department.” MCA §15-68-501(1).

28. The DOR relies on the afore stated statutes to justify the collection of taxes associated with the no-show and cancelation deposits forfeited. However, this Board finds that within the statute, and before the statute can apply, a tax must be “...required to be collected...” MCA §15-68-110(4). As there was no “use”, there is no tax “required to be collected”, and as such there is no tax liability on the part of Boyne.

29. Other states have gone beyond the language found in the Montana statutes. For example, Vermont requires a nine percent tax on “... the rent of each occupancy.” 32 VSA §9241(a). “Occupancy’ means the use or possession, *or the right to the use or possession*, of any room or rooms in a ‘hotel’ for any purpose... .” 32 VSA §9202(6) (emphasis added).

30. While the term “use” is not defined within the Montana statutes, the plain language is clear – without an actual use of the facility there is no taxable event, and thus no Lodging or Sales tax is due to the state. The term “*right to the use or possession*” is missing from the Montana statutes. The Montana Legislature’s silence, where other states have taken pains to include such language in their statutes, can only be seen as an intentional act.

V. Resort Service Fee

31. Boyne, for each completed lodging reservation, charges an additional 7% of the room rate for the Resort Services Fee (RSF). DOR Ex. D. As uncontested by Boyne, the audit conducted by the DOR determined Boyne did not collect the Sales Taxes or Lodging Facility Use Taxes on the RSFs during the audit period.

REPORT THE MONTANA TAX APPEAL BOARD

April 17, 2013, Department of Revenue

32. The question before this Board is whether the 4% Lodging Tax and the 3% Sales Tax applies to Boyne's Resort Services Fee.

33. As set forth in MCA §15-65-101(1) "accommodation charge" means the fee charged by the owner or operator of a facility for use of the facility for lodging, including bath house facilities, but excluding charges for meals, transportation, entertainment, or any other similar charges." Boyne argues that the RSF is a charge for transportation and entertainment and thus, by definition, is excluded from the Lodging and Sales Tax.

34. The statutes define the types of facilities contemplated by the Legislature to be taxed. The list embedded within MCA §15-65-101(4)(a) includes a resort. A resort is a unique type of facility. A resort generally offers amenities above and beyond what would be offered at a hotel or motel, such as skiing, hiking and family friendly activities. A guest at a resort facility has expectations for opportunities and services intrinsically within the resort, and available for the use and enjoyment of resort patrons. This Board agrees with the DOR that a resort is a facility as contemplated by the definition of an accommodations charge, and Big Sky is a resort.

35. The DOR has adopted ARM §42.14.202(3) which states:

"Lodging facility sales and use taxes do not apply to separately stated charges which are not an integral part of the use or occupancy of the room or campground space, such as but not limited to:

- (a) telephone;
- (b) Wi-Fi access;
- (c) faxes/copies;
- (d) television;
- (e) food;
- (f) beverage;
- (g) pet charge; or

PROPOSED MONTANA TAX APPEAL BOARD

Montana Code of Regulations, Title 17, Chapter 101, Part 1

(h) personal laundry charges.”

36. ARM 42.14.202(3) sets out a two-part test to determine when a charge or service is not taxable. The ARM states the nontaxable charges must be both separately stated, and cannot be integral to the use or occupancy of the room. *Id.* The language of ARM 42.14.202 remains consistent with the taxing structures of the Sales and Lodging Facility Use Taxes. Instead of creating a conflict with the statutes, the ARM assists with the DOR’s interpretation and implementation efforts.
37. The RSF is a separately stated charge listed as “Fees/Gratuities” on the Big Sky reservation system. DOR Ex. F.
38. This Board must determine if the RSF meets the definition of “integral” in order to be taxed. The RSF is a charge levied against every reservation made at the Big Sky Resort. During the audit period the reservation system did not allow guests to opt-out or negotiate the 7% fee.
39. If a guest does not pay the RSF, “use” of the lodging facility is not allowed by Boyne. A guest cannot take “control” of their accommodations without remitting the RSF charge. The RSF is integral to the lodging in and of itself.
40. While Boyne presented credible evidence that users of their facilities enjoy a diverse and long list of resort amenities not generally available to routine hotel stays, Boyne also states the RSF “... supplements private financing to fund the design and improvement to the resort infrastructure, facilities and services.” DOR Ex. D.

BEFORE THE MONTANA TAX APPEAL BOARD

Boone/MCA, et al. v. Montana Dept. of Revenue

41. Fees for infrastructure support are not within the types of services listed as exclusions from the statutory definition of ‘accommodations charge’. MCA §15-65-101(1).
42. This Board concludes that the RSFs are not excluded from the taxing structure created by statute. This Board agrees with the DOR that the RSFs are part of the accommodations charge in MCA §15-65-101(1), and part of the total consideration of the sales price as defined in MCA §15-68-101(14)(a). Through evidence presented by both Boyne, and the DOR, it is clear the RSF is not a charge for meals, transportation, entertainment, or any other similar charges. It is a flat 7% of the room rate that goes into Boyne’s general fund. During the online reservation process Boyne does not offer an opt-out option, nor is there any information concerning the existence of a process to request a decrease or removal of the fee. While Boyne repeatedly refers to the RSF as a waivable fee, neither of Boyne’s witnesses could recollect one single instance where they had seen the RSF waived.
43. As such, this Board finds the RSF is part of the accommodations charge, as defined by statute, and Boyne is responsible for both the Lodging Facility Use Tax and the Sales Tax on the RSF.

VI. Equal Protection

44. “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Constitution of the United States of America, Amendment XIV, Section 1.

BEFORE THE MONTANA TAX APPEAL BOARD

State CPA Society, Montana Dept. of Revenue

45. “Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.” Constitution of the State of Montana, Article II, Part II, Section 4.

46. An equal protection analysis involves a three-tiered process. Duane C. Kohoutek, Inc. v. State, 2018 MT 123, ¶34, 391 Mont. 345, 417 P. 3d 1105. “... (1) identify the classes involved and determine if they are similarly situated; (2) determine the appropriate level of scrutiny to apply to the challenged legislation; and (3) apply the appropriate level of scrutiny to the challenged legislation.” Id. “[T]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.” Powell v. State Compensation Ins. Fund, 2000 MT 321, ¶22, 302 Mont. 518, 15 P. 3d 877.

47. “Consequently, when addressing an equal protection challenge, [the] Court must first identify the classes involved and determine whether they are similarly situated. If the classes at issue are not similarly situated, then the first criteria for proving an equal protection violation is not met and we need look no further.” Id.

48. The evidence presented by Boyne lacks any examples of the other entities Boyne refers to in their briefing as being treated differently by the DOR. “It is not this Court’s job to conduct legal research on a party’s behalf or to develop legal analysis that may lend support to the position the party advances.”

REPORT OF THE MONTANA TAX APPEAL BOARD

Annual Report to the Governor, Department of Revenue

Broadwater Dev., L.L.C. v. Nelson, 2009 MT 317, ¶43, 352 Mont. 401, 219 P.3d 492.

49. Without any identifying information concerning existing classes, this Board is unable to determine whether they are similarly situated. As such, the Equal Protection claim fails the first prong of the test, and the Board need look no further.

BEFORE THE MONTANA TAX APPEAL BOARD

Before DCA, Part 2 - Montana Dept. of Revenue

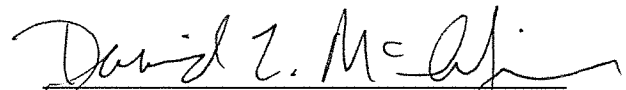
ORDER

50. Concerning the issue of Lodging Facility Use and Sales Taxes on the no-show and cancellation forfeited deposits, Boyne does not owe a tax obligation to the State of Montana.

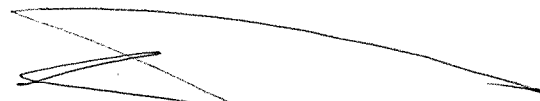
51. Concerning the issue of the Resort Services Fees, Boyne is responsible for the Lodging Facility Use and Sales Taxes, interest and penalties due and owing the State of Montana. The DOR is directed to calculate the total amount of Boyne's tax obligation in concurrence with this opinion and notify Boyne of that account.

Ordered June 12, 2019.




David L. McAlpin, Chairman
MONTANA TAX APPEAL BOARD


Steve Doherty, Member
MONTANA TAX APPEAL BOARD


Valerie Balukas, Member
MONTANA TAX APPEAL BOARD

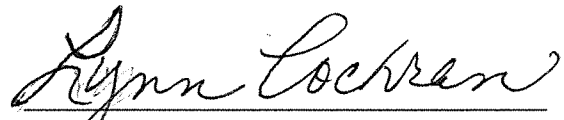
Notice: You may be entitled to judicial review of this Order by filing a petition in district court within 60 days of the service of this Order. The Department of Revenue shall promptly notify this Board of any judicial review to facilitate the timely transmission of the record to the reviewing court. MCA §15-2-303(2).

Certificate of Service

I certify that I caused a true and correct copy of the foregoing Order to be sent by United States Mail via Print and Mail Services Bureau of the State of Montana on June 12, 2019 to:

Michael Green, D. Wiley Barker
Crowley Fleck PLLP
P.O. Box 797
Helena, Montana 59624-0797

Teresa G. Whitney, R. Samuel Willette
Montana Department of Revenue
P.O. Box 7701
Helena, Montana 59604-7701


Lynn Cochran, Paralegal Assistant
MONTANA TAX APPEAL BOARD