

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

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|---------------------------|---|----------------------------|
| MISSOURI RIVERSIDE, INC., |) | |
| |) | DOCKET NO.: MT-2000-4 |
| Appellant, |) | |
| |) | |
| -vs- |) | FACTUAL BACKGROUND, |
| |) | CONCLUSIONS OF LAW, |
| THE DEPARTMENT OF REVENUE |) | ORDER and OPPORTUNITY |
| OF THE STATE OF MONTANA, |) | <u>FOR JUDICIAL REVIEW</u> |
| |) | |
| Respondent. |) | |

The above-entitled appeal was heard on December 7, 2001, in the City of Great Falls, 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 duly given as required by law.

The Taxpayer did not appear for the scheduled hearing. The Department of Revenue (DOR), represented by Jim McKeon, tax specialist, presented testimony in opposition to the appeal. In addition to testimony, an exhibit from the DOR was received in evidence. The Taxpayer is the appellant in this proceeding and, therefore, has the burden of proof. The Board finds that the Taxpayer failed to meet that burden. Based on the evidence, this Board further finds as follows:

STATEMENT OF THE ISSUE

The issue in this matter is whether the Taxpayer should be held liable for Montana accommodations tax for the 2nd, 3rd, and 4th quarters of 1997, and the 2nd, 3rd and 4th quarters of 1998. The Taxpayer argues that, based upon information he received from the DOR, he was exempt from collection of the tax. The DOR contends the facility was not exempt and that, during the period at issue, the Taxpayer failed to collect the required tax from the users of his facility and that the resulting, tax, penalties, and interest and now due and owing from the Taxpayer.

FACTUAL BACKGROUND

1. Due, proper and sufficient notice was given of this matter, the hearing hereon, and of the time and place of the hearing. All parties were afforded the opportunity to present evidence, oral and documentary.

2. Facts 3 through 19 are from the DOR Hearing Examiner's decision dated July 15, 1999 as the taxpayer was not present to provide evidence and testimony to this Board.

3. The Taxpayer owns and operates the Missouri Riverside Outfitters and Lodge located near Cascade, Montana. The Taxpayer provides lodging to the users of his

lodging facility during the normal course of his business activity.

4. During the process of establishing his business, the Taxpayer called the DOR to inquire if his business would be subject to collecting the accommodation tax. The DOR informed him that his business would be required to collect the tax. At that time, the DOR sent the necessary reporting forms to the Taxpayer with which to report and remit the taxes that the firm collected. The taxpayer acknowledges his receipt of the reporting forms. However, the Taxpayer maintains the DOR failed to include a copy of the Accommodations Tax Guide in its initial and subsequent mailings to the Taxpayer.

5. The DOR's records indicate the Taxpayer's first active quarter for the purposes of collecting the accommodations tax was the first quarter of 1993.

6. The Taxpayer collected the required Montana accommodations tax, filed reports, and remitted timely payment of the tax to the DOR from the first quarter of 1993 through the first quarter of 1997.

7. In a form letter dated June 11, 1997, the DOR informed all registered lodging facility owners that the Montana Legislature had made changes in the Average Daily Accommodation Charge (ADAC) for the accommodations tax. The

effective date of the change was July 1, 1997.

8. Based on his reading of the DOR's letter of June 11, 1997, the Taxpayer determined his lodging facility was exempt from collecting any accommodations tax.

9. The Taxpayer contends that he filed a quarterly report for the accommodations tax for the 2nd quarter of 1997, indicating no tax had been collected. On the back of that report, the Taxpayer claims he wrote a note stating it was his belief that his lodging facility was exempt from collecting any further Accommodations Tax. The DOR has no record of receiving a report from the Taxpayer for the 2nd quarter of 1997.

10. The DOR routinely issues notices of delinquency to entities required to collect the accommodation tax when it is apparent that accommodations tax quarterly reports have not been timely filed by an owner or operator of a lodging facility. The DOR's records indicate that such notices were mailed to the Taxpayer on October 3, 1997; April 6, 1998; April 10, 1998; January 12, 1999; January 15, 1999; and February 10, 1999. Said notices were for the 2nd, 3rd, and 4th quarters of 1997, and the 1st, 2nd and 3rd quarters of 1998, respectively.

11. The Taxpayer acknowledges receipt of at least some of the delinquency notices that were sent by the DOR. To

the best of his recollection, he thought he had received them as a result of "some paper glitch or paper error" and therefore chose to ignore them.

12. Having received no response to the numerous delinquency notices mailed to the Taxpayer, the DOR's Brad Burns, an auditor, placed a telephone call to the Taxpayer in March of 1999 to inquire into the status of the missing reports. During the phone conversation, Mr. Burns inquired as to the rates the Taxpayer's facility charged for its rooms. The Taxpayer responded that his facility's daily rate had been \$65.00 during 1997 and \$68.00 in 1998. Based on that information, Mr. Burns determined that the facility should have collected, and should be currently collecting, the accommodations tax and informed the Taxpayer accordingly.

13. It was both the testimony of the Taxpayer, and that of the DOR, that after receiving the DOR's June 11, 1997 letter, the Taxpayer had inadvertently miscalculated the ADAC for his lodging facility and concluded the facility was exempt from collecting any further tax. Based on his miscalculations, the Taxpayer had ceased collecting any further taxes.

14. Mr. Burns sent a letter to the Taxpayer on March 31, 1999, which explained the ADAC. He went on to say that

the Taxpayer would be responsible for any accommodations tax that should have been collected during the 2nd, 3rd, and 4th quarters of 1997, and the 2nd, 3rd and 4th quarters of 1998. Additionally, Mr. Burns enclosed a current copy of the Accommodation Tax Guide.

15. On April 3, 1999, the Taxpayer responded to the DOR's letter. He stated that he rejected the DOR's finding that he was liable for the tax that should have been collected from his customers. He requested an administrative review of said findings. Furthermore, in an attempt to resolve the matter, he requested a meeting with Mr. Burns on April 9, 1999, to discuss the assessment.

16. The Taxpayer met with Mr. Burns and his supervisor, Bill Kloker, Transition Manager, on April 9, 1999, to discuss the matter. During the meeting, the Taxpayer was requested to file the missing quarterly reports.

17. Based on the quarterly reports filed by the Taxpayer for the 2nd, 3rd and 4th quarters of 1997, and the 2nd, 3rd and 4th quarters of 1998, the DOR issued the taxpayer a Notice of Assessment on May 1, 1999. The tax, penalty, and interest shown thereon totaled \$3,057.81.

18. On June 1, 1999, the Office of Dispute Resolution received the Taxpayer's file from the Compliance, Valuation

and Resolution Process for the purposes of scheduling and conducting a hearing on the appealed assessment.

19. The matter came on for informal hearing before the DOR on July 1, 1999 in Helena, Montana. The Taxpayer, represented by Leonard Gidlow, participated telephonically from his establishment in Cascade, Montana. The DOR was represented by Bill Kloker, Transition Manager. David G. Olsen, DOR hearing examiner, conducted the hearing.

DOR'S CONTENTIONS

At the hearing before this Board, the DOR was represented by Income Tax Specialist Jim McKeon. DOR Exhibit A contains a summary of the chronology of events pertaining to this matter.

The amount of monies due and owing (assessment, penalty and interest) through December 2001 is \$3,828.08.

DOR Exhibit A shows that the Taxpayer's filing history, from the 4th quarter of 1992 to the present, has been one of timely return filings and cooperation with the DOR. The period in dispute, 1997 and 1998, is the only deviation from this pattern.

According to Mr. McKeon, the taxpayer agrees that the tax is due and owing for each quarter and that his establishment is subject to the accommodations tax with the exception of the periods in dispute.

The crux of the issue is a letter that was issued June 11, 1997, which was a form letter sent by the DOR to all accommodation tax registrants informing them of a change in the average daily accommodation charge (ADAC). The rate was changed at that time from \$18.72 to \$21.84 pursuant to a change in the allowable lodging charge afforded to state employees traveling within Montana. According to the June 11, 1997 letter, "If your ADAC is less than the new \$21.84 and your facility is a motel, hotel, hostel, public lodging house or a bed and breakfast facility, your facility is exempt from the accommodations' tax. . ." Section 15-65-101 (4), MCA, defines the accommodation charge and a facility subject to the lodging facility use tax. This section states that "any hotel, motel, hostel, public lodginghouse, or bed and breakfast facility whose average daily accommodation charge for single occupancy does not exceed 60% of the amount authorized in 2-18-501 for the actual cost of lodging for travel within the state of Montana. . ." does not fall under the statutory definition of a facility for lodging facility use tax purposes.

The determination as to whether or not a facility is subject to the lodging facility use tax is accomplished as follows (pursuant to the 1997 amendment to the authorized cost of lodging for travel within Montana found in 2-18-501,

MCA):

$$\begin{aligned} \$35.00 \times 4\% \text{ (lodging facility tax rate)} &= \$1.40 \\ \$35.00 + \$1.40 &= \$36.40 \times 60\% = \$21.84 \end{aligned}$$

The Taxpayer misunderstood this letter and arrived at the mistaken conclusion that his establishment was no longer subject to the lodging facility use tax.

DOR Exhibit A contains a copy of a March 31, 1999 letter to the Taxpayer from Brad Burns, an auditor with the DOR. Mr. Burns' discusses the DOR's understanding that the Taxpayer's nightly charge for accommodation is \$65 for each room. Mr. Burns' stated that this would be the Taxpayer's ADAC since all of the rooms were rented for the same price. Thus, the Taxpayer would be responsible for collecting and reporting the subject tax: $\$65.00 \times 60\% = \39 which is more, not less, than the \$21.84 exemption threshold. Mr. Burns also included a copy of a DOR publication explaining the accommodation tax.

Mr. Gidlow responded by letter dated April 3, 1999. He stated that the Accommodation Tax Guide was the first he had ever received. He argued that, had he been privy to the information contained in the guide, he would have understood the ADAC and the formula for computing tax liability. He calculated the ADAC by taking 4% of the lodging charge in 1997 (\$62) and then multiplying by the maximum of 6 rooms and arriving at \$14.88. He then stopped collecting the tax

for the period in dispute and stated that he did not have the money to pay them. He concluded by stating that he "will be vehemently fighting the filing of 1997 and 1998 taxes for a system that did not adequately inform me what was required for compliance and distributed misleading correspondence to myself."

Mr. McKeon stated that the subject assessment was based upon information supplied by the Taxpayer. It was not an estimated assessment.

In conclusion, the DOR's position is that the Taxpayer is subject to the lodging facility use tax pursuant to statute and administrative rule.

BOARD'S DISCUSSION

The Taxpayer was subject to the collection and reporting of lodging facility use tax for the periods in dispute.

It is unfortunate that the Taxpayer was confused by the DOR's June 11, 1997 letter informing registrants of the 1997 amendment to the ADAC and, as a consequence, made an erroneous assumption regarding the collection and reporting of the lodging facility use tax. However, the Board expects that, with the exercise of a reasonable amount of care to his business affairs, the Taxpayer might have avoided this

problem through direct inquiry to the DOR to clear up the uncertainty.

CONCLUSIONS OF LAW

1. Section 15-2-302, MCA. Direct appeal from department decision to state tax appeal board - hearing. (2)(a) Except as provided in subsection (2)(b), the appeal is made by filing a complaint with the board within 30 days following receipt of notice of the department's final decision.
2. Section 15-65-101, MCA. **Definitions.**
3. Section 15-65-111, MCA. **Tax rate.**
4. Section 15-65-112, MCA. **Collection and reporting.**
5. Section 15-65-113, MCA. **Audits - records.**
6. Section 15-65-114, MCA. **Registration number - application to department.**
7. Section 15-65-115, MCA. **Failure to pay or file - penalty - review - interest.**
8. ARM 42-14-101 through 42.14.111 **Lodging Facility Use Tax.**
9. The appeal of the Taxpayer is hereby denied and the decision of the Department of Revenue upheld.

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ORDER

IT IS THEREFORE ORDERED by the State Tax Appeal Board of the State of Montana that the DOR's assessment of tax, penalty and interest shall be affirmed.

DATED this 12th day of December, 2001.

BY ORDER OF THE
STATE TAX APPEAL BOARD

(S E A L)

GREGORY A. THORNQUIST, Chairman

JEREANN NELSON, Member

MICHAEL J. MULRONEY, 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 12th day of December, 2001, 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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