

GALE PIKE,

Appellant,

v.

STATE OF MONTANA,
DEPARTMENT OF REVENUE,

Respondent.

CASE No: PT-2020-44

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

STATEMENT OF THE CASE

This is an appeal of a decision by the Department of Revenue's Office of Dispute Resolution (ODR), which affirmed the Department of Revenue's (DOR) calculation of tax, interest, and penalties due resulting from a Montana land sale in 2015. We affirm DOR's determination.

ISSUE TO BE DECIDED

Whether the Department of Revenue's estimate of Mr. Pike's tax liability for the tax year 2015 and resulting penalty and interest are correct.

EXHIBIT LIST

The following evidence was submitted at the hearing:

- A. DOR Exhibit A - Confidential RTC data and 1099-S;
- B. DOR Exhibit B - Delinquency letters (9/27/18, 1/16/19, and 2/15/19);
- C. DOR Exhibit C - 6/3/2019 Estimation Letter and 6/11/19 Notice of Assessment;
- D. DOR Exhibit D - 7/5/19 Letter from Mr. Pike and 7/15/19 DOR Response;
- E. DOR Exhibit E - 8/16/19 Letter from Mr. Pike;
- F. DOR Exhibit F - MDOR's Final Determination Letter;

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G. DOR Exhibit G - Confidential documents sent to Mr. Pike 12/3/2019.

Taxpayer's Appeal to MTAB Dated September 10, 2020.

The Board conducted a hearing, in Helena by Zoom teleconference on February 2, 2021 at which the following were present:

- a. Nicholas Gochis, DOR Counsel; Joseph Vidal, Income Tax Specialist; and Micah Christensen, Unit Manager for the Individual Income Tax Compliance Unit.
- b. Gale H. Pike, the Taxpayer.

The record includes the original file forwarded from the ODR, any documents submitted to the Montana Tax Appeal Board (MTAB) with the appeal, the recording of the hearing at the MTAB, and additional materials submitted by the parties for the MTAB hearing. After the Taxpayer voluntarily disconnected from the hearing, the Board allowed either party thirty additional days to file information with the Board. No additional evidence or other material was filed.

FINDINGS OF FACT

1. To whatever extent the foregoing findings of fact may be construed as conclusions of law, they are incorporated accordingly.
2. On February 2, 2015, Taxpayer Gail Pike sold his property in the Gallatin Gateway area of Gallatin County, Montana, for a confidential amount. *Dept. Ex. A*. The geocode of the land is 06-0339-28-4-06-05-0000. *Id.*
3. DOR auditor Marla Wolstein sent a letter dated September 27, 2018 to Mr. Pike regarding the land sale and informed him the DOR was unable to match the sale with any Montana

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income tax return. *Dept Ex. B.* In the letter, Ms. Wolstein explained that capital gains from the sale of Montana property are reportable as income under Montana law. *Id.* She sought to obtain additional information from Mr. Pike about the transaction and if a tax return had been filed reporting any capital gains. *Id.* In the letter, Ms. Wolstein requested that Mr. Pike respond within 30 days. *Id.* Mr. Pike did not respond, and the DOR issued additional letters on January 16, 2019, and on February 5, 2019, but Mr. Pike did not respond to those letters until his tax liability was estimated and sent to him. *MTAB Hrg. 32:57-34:45, ODR Order, Pg. 9.*

4. The DOR estimated the tax liability for the 2015 land sale at \$10,283.28, including penalties and interest calculated through July 11, 2019; the DOR notified Mr. Pike that it was estimating his tax due in a letter dated June 3, 2019, and then sent the amount of tax, penalties, and interest assessed in a Notice of Assessment dated June 11, 2019. *Dept Ex. C.* Mr. Pike responded, stating it was the second response he had provided the DOR and that he was not a Montana resident, had not visited the state in ten years, and stated “I owe nothing.” *Dept Ex. D.* Attached to Mr. Pike’s letter was the Notice of Assessment with an updated address. *Id.* DOR auditor Julie McKenna responded to Mr. Pike’s letter stating that Mr. Pike was required to report the land sale and requested he submit any tax returns he may have filed regarding the sale. *Id.* Mr. Pike responded in a letter dated August 16, 2019 in which he pointed out the sales had occurred four or five years prior and asked why the “escrow” was not responsible for filing the reports. *Dept. Ex. E.*

5. DOR Unit Manager for the Individual Income Tax Compliance Unit, Micah Christensen, responded to Mr. Pike’s letter on September 10, 2019. *Dept. Ex. F.* In his letter, Mr. Christensen explained that Montana law requires a gain associated with the sale of land to be reported as Montana income, and since Mr. Pike had not responded to DOR’s request for information, Montana law allows for the DOR to estimate taxable income based on

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information in its possession. *Id.* Additionally, Mr. Christensen informed Mr. Pike the DOR would still accept a 2015 tax return if submitted. *Id.*

6. On October 1, 2019, Mr. Pike filed an APLS102F Referral to ODR, and a hearing was held on April 2, 2020. Mr. Pike testified that all his financial records were destroyed in a California wildfire in 1993 and he could not document the purchase price of the property. *ODR Hrg. Transcr. 6:14-7:11, ODR Order, Pg. 11.* Further, Mr. Pike asserted that he had drilled two of the three wells, installed a fence and a septic system on the property, and the cost of the capital improvements plus carrying cost paid negated any gain realized from the sale. *ODR Hrg. Transcr. 8:17-9:4, MTAB Dkt. 1.* Mr. Christensen responded that DOR had not received a response to any of its letters, so DOR estimated the taxes due. *ODR Hrg. Transcr. 12:9-13:17.* Additionally, at the hearing, Mr. Christensen stated that it is not uncommon for taxpayers to recreate the information requested and even send a written explanation of their recollection of the purchase price and improvements made to the property. *ODR Hrg. Transcr. 17:18-18:4.* He further stated that any information provided by Mr. Pike would still be considered. *ODR Hrg. Transcr. 22:6-18.* ODR found for the DOR, stating that Mr. Pike did not overcome the burden of proving the land sale did not produce a gain and that he was required by law to file a Montana income tax return. *ODR Order, Pg. 12.*

7. Mr. Pike appealed the ODR Opinion to the Montana Tax Appeal Board on September 17, 2020, and a hearing was held on February 2, 2021. *MTAB Dkt. 1.* At the hearing, Mr. Pike testified that he did not remember how much he had paid for the property or for the improvements he made to the property. *MTAB Hrg. 19:05-20:20.* He further testified that improvements to the property included three wells, fencing, and a septic system. *Id.* Additionally, Mr. Pike testified that he sold the property for half the value the state assessed to the property. *Id.*

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8. At the hearing, Mr. Pike asserted he had lost all his documents pertaining to the land in a wildfire. *MTAB Hrg. 20:30-22:25*. The Board reminded Mr. Pike he has the burden to prove the DOR made a mistake in calculating his 2015 taxes, at which time Mr. Pike said he would like to stop the hearing and disconnected from the zoom/telephonic hearing. *Id.*

9. The hearing continued with the DOR presenting its case. The DOR called Joseph Vidal, a DOR auditor, as a witness. Mr. Vidal testified that Mr. Pike did not respond to the letters dated September 27, 2018, January 16, 2019, and February 5, 2019, sent by the DOR. *MTAB Hrg. 32:57-34:45*. When Mr. Pike did not respond to DOR's letter, auditors estimated Mr. Pike's tax liability for 2015 and assessed penalties and interest. *MTAB Hrg. 34:54-35:05. Dept Ex. C*. The tax liability was determined using \$0 as the basis of the property based on the information the DOR had in its possession and no additional information from Mr. Pike. *Dept Ex. C, MTAB Hrg. 36:20-46, 49:05-50:17*.

10. DOR Unit Manager for the Individual Income Tax Compliance Unit, Micah Christensen, testified that he issued a final determination letter, which is dated September 10, 2019. *MTAB Hrg. 46:14-43, Dept. Ex. F*. Mr. Christensen determined that even though Mr. Pike was not a Montana resident, the land sale occurred in Montana, and Mr. Pike still had a filing requirement to report the sale proceeds. *MTAB Hrg. 47:45-48:44*. Mr. Christensen testified that he informed Mr. Pike that even though DOR had estimated his tax liability, he could still file a return, and the DOR would consider that return. *Id.* Mr. Pike had still not filed a return as of the date of the hearing. *Id.*

11. Mr. Christensen testified further that after the final determination letter was sent, Mr. Pike called the DOR. Mr. Christensen further testified that DOR explained the filing

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requirements and the DOR's basis for estimating the tax due. He testified that DOR also explained that if Mr. Pike could not find the documents establishing a basis for the land value, the DOR would consider any document that would attest to the land's basis, including title company documents, documents recorded at the county, or a reasonable itemization of approximate purchase price and improvements. *MTAB Hrg. 51:49-53:55, 1:01:30-1:03:35*. Mr. Christensen testified that the DOR did not receive any documents from Mr. Pike. *Id.* The DOR documented this conversation in its December 3, 2019 letter. Dept. Ex. G.

12. Mr. Christensen testified that unless additional information is provided to the DOR, it is their procedure to value the land at a \$0 basis. *MTAB Hrg. 54:42-56:20*. He further testified that DOR does try to find a basis but without evidence the DOR uses \$0 as the basis for consistency and to treats all taxpayers alike. *Id.*

13. At the time of the estimate, the DOR was unaware of an additional sale by Mr. Pike in 2013; DOR decided to wait until the 2015 land sale proceedings were finished to pursue the 2013 sale. *MTAB Hrg. 58:29-59*.

14. Because the DOR stated during the hearing that it would consider any credible information provided by the Taxpayer to establish a cost basis greater than zero against which the capital gain could be calculated, the Board issued an order giving Mr. Pike and the DOR one month to submit any additional evidence to be considered by the Board. *MTAB Dkt. 8*. Mr. Pike did not submit any additional evidence.

JURISDICTION AND STANDARD OF REVIEW

15. The Montana Tax Appeal Board is an independent agency not affiliated with the Montana Department of Revenue. Mont. Const., Art. VIII § 7; Mont. Code Ann. § 15-2-101.

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16. The Taxpayer filed a timely appeal of the DOR's decision to the MTAB. Therefore, this Board maintains jurisdiction to hear and decide this matter as a direct appeal to MTAB from a decision of the DOR. Mont. Code Ann. § 15-2-302.

17. This Board may hear appeals de novo. *Puget Sound Energy, Inc. v. State*, 2011 MT 141, ¶ 30, 361 Mont. 39, 255 P.3d 171. "A trial de novo means trying the matter anew, the same as if it had not been heard before and as if no decision had been previously rendered." *McDunn v. Arnold*, 2013 MT 138, 303 P.3d 1279 (2013).

18. The Board's order is final and binding upon all parties unless changed by judicial review. Mont. Code Ann. § 15-2-302.

CONCLUSIONS OF LAW

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

20. All residents and nonresidents taxpayers who have a gross income for any given tax year that is greater than the maximum standard deduction for that taxpayer's filing status, are required to file a Montana income tax return. Mont. Code Ann. § 15-30-2602(1).

21. The Department is tasked with the administration and enforcement of all state income tax. *MCA Title 15, Chapter 30*.

22. If a taxpayer does not file a return as required, the DOR may, at any time, audit the Taxpayer or estimate the taxable income of the taxpayer from any information in its possession and, based on the audit or estimate, assess the taxpayer for the taxes, and interest

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due. Mont. Code Ann. § 15-30-2605(2). The Department may also request further information and attendance of the taxpayer to determine the accurate amount of tax due. *Id.*

23. “If a taxpayer does not file a delinquent return within 30 days after the date of a written request to file the return or obtain the department’s consent to file the return at a later date, the department will estimate the taxpayer’s taxable income.” Mont. Admin. R. 42.15.325(2).
24. “The initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side”. Mont. Code Ann. § 26-1-401. In this case, Mr. Pike has the burden of proving the DOR’s estimate of his tax due was improper.
25. A tax is imposed upon each nonresident equal to the tax computed under Mont. Code Ann. § 15-30-2103 as if the nonresident were a resident during the entire tax year, multiplied by the ratio of Montana source income to a total income from all sources. Mont Code Ann. § 15-30-2104.
26. Under Montana Law, Montana source income includes any gain attributable to the sale or transfer of tangible property located in the state. Mont. Code Ann. § 15-30-2101(18)(a)(ii).
27. The DOR may require persons to furnish information concerning their ... cost and value of property ... which may enable the department to ascertain the value of the relative burdens borne by all kinds of property and occupations in the state. Mont. Code Ann. § 15-1-301(3).
28. DOR is entitled to a “presumption of correctness if its decisions are pursuant to an administrative rule or regulation, and the rule or regulation is not arbitrary, capricious or otherwise unlawful.” *Dept. of Revenue v. Burlington N. Inc.*, 169 Mont. 202, 214, 545 P.2d

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1083, 1090 (1976). However, DOR cannot rely entirely on the presumption in its favor and must show the propriety of their action. *Western Air Lines, Inc. v. Michunovich*, 149 Mont. 347, 353, 428 P.2d 3, 7 (1967).

29. The Taxpayer bears the burden of proving the error of DOR's decision. *Farmers Union Cent. Exch., Inc. v. Dep't of Revenue of State of Mont.*, 272 Mont. 471, 476, 901 P.2d 561, 564 (1995); *Western Air Lines*, 149 Mont. at 353, 428 P.2d at 7.
30. When construing a statute, it is the Board's role to "determine what in terms or substance is contained in it, and not to insert what has been omitted or to omit what has been inserted." *State v. Minett*, 2014 MT 225, ¶ 12, 376 Mont. 260, 332 P.3d 235; Mont. Code Ann. § 1-2-101.
31. In the construction of a statute, the intention of the legislature is to be pursued if possible. When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it. Mont. Code Ann. § 1-2-102.
32. "[T]ax statutes are to be strictly construed against the taxing authority and in favor of the taxpayer." *Western Energy Co. v. State, Dep't of Revenue*, 1999 MT 289, ¶ 10, 297 Mont. 55, 990 P.2d 767.
33. "Administrative agencies enjoy only those powers specifically conferred upon them by the legislature. Administrative rules must be strictly confined within the applicable legislative guidelines. Indeed, it is axiomatic in Montana law that a statute cannot be changed by administrative regulation. We look to the statutes to determine whether there is a legislative grant of authority." *Bick v. State, Dep't of Justice, Div. of Motor Vehicles*, 224 Mont. 455, 457, 730 P.2d 418, 420 (1986).

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34. “A valid and enforceable agency rule cannot exceed its enabling statute....” *Glendive Med. Ctr., Inc. v. Montana Dep’t of Pub. Health & Human Servs.*, 2002 MT 131, ¶ 29, 310 Mont. 156, 49 P.3d 560.
35. The Board “may not amend or repeal any administrative rule of the department,” but may enjoin its application if the Board concludes the rule is “arbitrary, capricious, or otherwise unlawful.” Mont. Code Ann. § 15-2-301.
36. First, there is no dispute that gain on a sale results in tax due. When the Taxpayer did communicate with the Board, he did not claim his gain was not taxable. Montana based gain generates tax due to the state whether the owner lives in Montana or elsewhere. Based on the evidence presented, we find that some tax was due.
37. With the sale amount reported and uncontested, the remaining question in this case is how much tax was due. By minimally documenting expenses and communicating this information with the DOR, Taxpayer could have reduced the tax by establishing a basis that included his costs for the land. DOR testified they would have accepted almost any evidence of these expenses, but none was provided by Mr. Pike after several requests.
38. The Board is sympathetic to the plight of any taxpayer who lost their financial records through no fault of their own. However, we have been given no evidence that the Taxpayer made any effort to contact public agencies in Gallatin County who may have been able to assist in reconstructing the records after the loss of those originals.

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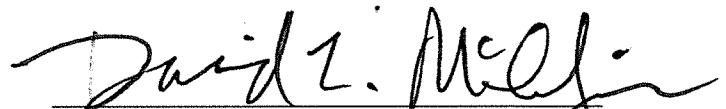
39. We were given no testimony that the Taxpayer has other mitigating circumstances that would prevent him from seeking such information when faced with a significant tax bill owing.
40. This Board provided the Taxpayer with every opportunity within our power to submit sworn testimony or evidence of his sale or any other evidence prior to the hearing, during the hearing, or after the hearing to allow him to establish a basis for his sale, as did the DOR prior to the appeal to this Board. Despite the DOR's apparent willingness to work with the Taxpayer and accept almost any document as evidence, he was unable to replicate and submit any documentation of his expenses. The DOR was even willing to consider a letter from Mr. Pike providing information on the purchase price of the land and the amounts he spent on improvements as a starting point to determine basis, but none was provided.
41. Nor was any evidence or testimony proffered in support of the notion that the DOR had made an error in calculating that a gain had not been reported nor in the amount of tax due.
42. In light of these circumstances, the Board has no legal option aside from upholding the DOR and ordering the Taxpayer to pay the tax, interest, and penalties as Montana law requires.

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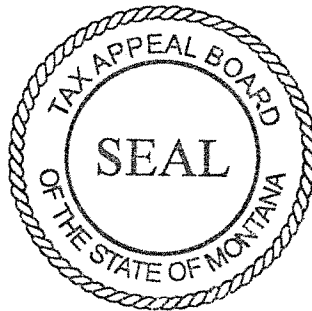
ORDER


43. GALE PIKE's appeal and complaint in this matter is denied.

Ordered May 20, 2021

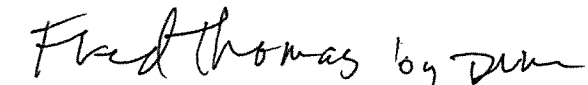


David L. McAlpin, Chairman
MONTANA TAX APPEAL BOARD





Amie Zendron, Member
MONTANA TAX APPEAL BOARD



Fred Thomas, 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. Mont. Code Ann. § 15-2-303(2). 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).

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Certificate of Service

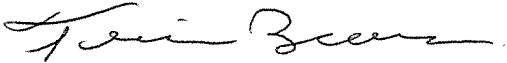
I certify that I caused a true and correct copy of the foregoing *findings of Fact*, Conclusions of Law, Order, and Opportunity for Judicial Review to be sent by United States Mail via Print, Email and Mail Services Bureau of the State of Montana on May 20, 2021 to:

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