BEFORE THE MONTANA TAX APPEAL BOARD

THE TOBACCONIST, INC., Appellant, -vs- THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, Respondent.	)	DOCKET NO.: MT-2014-1 ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Procedural Background

On July 18, 2014, The Tobacconist, Inc. (Taxpayer), filed a Complaint with this Board timely appealing a final agency decision from the Montana Department of Revenue (Department or DOR.) The Taxpayer is appealing the Department's assessment of additional tax on Other Tobacco Products. The Complaint also raised a constitutional challenge to the Department's decision. This Board accepted the Taxpayer's appeal of the Department's final agency decision but is not vested with jurisdiction to issue a ruling on the constitutional challenge.

On December 9, 2014, the parties filed a Stipulation of Facts. On January 20, 2015, both parties filed motions with this Board. Taxpayer filed a Motion to Reverse and Dismiss and the Department filed a Motion for

Summary Judgment. Pursuant to Rule 12(d), M.R.Civ.P., this Board converted the Taxpayer's Motion to Reverse and Dismiss into a cross-motion for summary judgment and gave the parties opportunity to present all material pertinent to the cross-motions. On March 26, 2015, the Board held a hearing on the cross-motions for summary judgment.

Standard of Review

The purpose of summary judgment is to dispose of those actions which do not raise genuine issues of material fact and to eliminate the expense and burden of unnecessary trials. *Hajenga v. Schwein*, 2007 MT 80, 336 Mont. 507, 510-12, 155 P.3d 1241; see also *Boyes v. Eddie*, 1998 MT 311, ¶ 16, 292 Mont. 152, 970 P.2d 91 (citing *Kane v. Miller*, 258 Mont. 182, 186, 852 P.2d 130, 133 (1993)). However, summary adjudication should "never be substituted for a trial if a material factual controversy exists." *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 71, 304 Mont. 356, 22 P.3d 631. The Montana Supreme Court has stated that summary judgment is an extreme remedy that should be granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Lee*, ¶ 25.

The party seeking summary judgment has the burden of demonstrating a complete absence of any genuine factual issues. *Id.*, ¶ 25. Where the moving party is able to demonstrate that no genuine issue as to any material fact remains in dispute, the burden then shifts to the party opposing the motion.

Id., ¶ 26. To raise a genuine issue of material fact, the party opposing summary judgment must present material and substantial evidence rather than merely conclusory or speculative statements. *Id.*, ¶ 26.

When faced with cross-motions for summary judgment, a district court is not required to grant judgment as a matter of law for one side or the other,"[r]ather, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Ike v. Jefferson Nat. Life Ins. Co.*, 267 Mont. 396, 399-400, 884 P.2d 471 (1994) (quoting *Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2nd Cir.1993)). "[T]he fact that both parties have moved for summary judgment does not establish, in and of itself, the absence of genuine issues of material fact." *Montana Metal Buildings*, 283 Mont. at 477, 942 P.2d at 698 (citing *Duensing v. Traveler's Companies*, 257 Mont. 376, 385, 849 P.2d 203, 209 (1993)).

That district court standard applies to a decision by this Board on the cross-motions for summary judgement. Consequently, in evaluating cross-motions for summary judgment, this Board must evaluate each party's motion on its own merits. *Hajenga v. Schwein*, 2007 MT 80, ¶¶ 11-20, 336 Mont. 507, 510-12, 155 P.3d 1241, 1243-45.

Background

Taxpayer is legally licensed to sell tobacco and "Other Tobacco Products" (OTP) under the laws of the State of Montana. Some examples of Other Tobacco Products are cigars, pipe tobacco, snuff and chewing tobacco. Because OTP are packaged differently and vary in weight, they are taxed differently than cigarettes. *Stipulation of Facts*, ¶1. §16-11-111(7), MCA, requires collection and payment to the state of an *ad valorem,* or percentage-of-price, tax "of 50 percent of the wholesale price, to the wholesaler, of all tobacco products other than cigarettes and moist snuff." *Stipulation of Facts*, ¶3. This tax will be referred to as the "OTP tax." The OTP tax must be pre-collected and paid by the wholesaler to the DOR upon the sale of OTP products to a Montana retailer. *Stipulation of Facts*, ¶4.

It is undisputed that Taxpayer is responsible for collecting and paying the OTP tax on OTP products it purchases from manufacturers or out-of-state wholesalers. Taxpayer reports and pays the OTP tax monthly using DOR Form TP-101 which must be filed together with copies of all itemized invoices procured from the manufacturers or wholesalers of all tobacco products. Mont. Admin. R. 42-31-202. Manufacturers and wholesalers do not use a standard invoice form. See Exhibit A attached to the Stipulation of Facts. The representative sample of invoices provided to this Board show that one invoice itemizes the amount of federal excise tax (FET) the manufacturer or wholesaler

paid on the tobacco products sold to Taxpayer and the other four invoices do not separately itemize the amount of FET paid. *Id.*

FET is a federal tobacco tax that is applied at the moment a manufacturer sells its tobacco product to a wholesaler. *Stipulation of Facts*, ¶16. Each of the sellers in the representative sample invoices are wholesalers in the supply chain. *Stipulation of Facts*, ¶17. Each of the sellers represented in the sample invoices would have paid FET on the products that were sold to Taxpayer regardless of whether the FET amount is separately itemized on the invoice. *H'rg Tr.* 22:1-11.

DOR audited Taxpayer's OTP returns for tax periods from the beginning of 2010 into 2013. *Stipulation of Facts*, ¶12. DOR determined that Taxpayer had deducted the FET from the wholesale price it used to calculate the OTP tax whenever the invoice separately itemized the FET. The DOR auditor disallowed Taxpayer's FET deduction and adjusted Taxpayer's OTP tax liability based on the determination that wholesale price includes the FET. *Stipulation of Facts*, ¶19. Taxpayer timely filed a referral to the DOR's Office of Dispute Resolution. *Stipulation of Facts*, ¶21. After a hearing on the matter, the Hearing Examiner found in favor of the DOR and ordered that the tax, penalties and interest, as assessed by the DOR, remained due and owing. *Stipulation of Facts*, ¶23. Taxpayer timely appealed to this Board.

Discussion

The dispositive issue in the present case is one of statutory construction of the wholesale price definition found in §16-11-102(2)(t). At issue is whether the term "wholesale price" as applied in §16-11-111(7) includes or excludes the FET.

DOR argues that the plain meaning of the term "wholesale price" does not allow Taxpayer to deduct the FET from the wholesale price and thus no further inquiry of legislative intent is necessary. DOR reasons that the placement of the phrase "to the wholesaler" in §16-11-111(7) implies that the wholesale price must be viewed from the perspective of the wholesaler, not the manufacturer. Therefore, for purposes of calculating the OTP tax, the amount of FET that may have been passed through to the Taxpayer is not relevant. From the Taxpayer's perspective, the minimum price that the Taxpayer pays for OTP includes the FET and any other mark-up or profits passed along by the manufacturer or wholesaler in the supply chain. Thus, the DOR concludes that its interpretation of the statute (not allowing Taxpayer to deduct out the FET when it is separately itemized on an invoice) applies the plain meaning of the definition of "wholesale price."

Taxpayer argues that the statute is ambiguous because it does not specifically state whether FET is included or excluded from the "wholesale price." Taxpayer argues that since the word "include" is not written into the

statute, the legislature did not intend to include the FET in the taxable basis. Taxpayer concludes that the DOR's interpretation of wholesale price to include FET creates an ambiguity, and cites a number of cases that hold any ambiguities in tax statutes should be resolved in a taxpayer's favor and against the DOR. In the alternative, Taxpayer argues that legislative intent is a question of fact, and thus a determination of whether the legislature intended to include or exclude FET from the "wholesale price" raises a question of fact that cannot be resolved on Summary Judgment.

The interpretation and construction of a statute is a matter of law. *State v. Brown*, 2009 MT 452, 354 Mont. 329, 223 P.3d 874; *State v. Triplett*, 2008 MT 360, 346 Mont. 383, 195 P.3d 819. When interpreting a statute, the court seeks "to implement the objectives the legislature sought to achieve, and if the legislative intent can be determined from the plain language of the statute, the plain language controls." *Moreau v. Transp. Ins. Co.*, 2015 MT 5, ¶ 13, 378 Mont. 10, 342 P.3d 3, 5, *reh'g denied* (Feb. 10, 2015).

Words used in the statutes of Montana are to be construed according to the context in which they are found, and according to their normal usage, unless they have acquired some peculiar or technical meaning. §1-2-106, MCA. The starting point for statutory construction is the plain language of the statute, and if the plain language is clear and unambiguous no further interpretation is required. *Vader v. Fleetwood Enterprises, Inc.*, 2009 MT 6, ¶30, 348 Mont. 344, 201

P.3d 139. In reviewing the construction of a statute, the role of the judge is simply to ascertain and declare what is in terms or in substance already contained therein, not to insert what has been omitted or to omit what has been inserted. §1-2-101, MCA; see *Miller v. Eighteenth Judicial Dist. Court,* 2007 MT 149 ¶38, 337 Mont. 488, 162 P.3d 121, *Rich v. State Farm Mut. Auto Ins. Co.*, 2003 MT 51, ¶11, 314 Mont. 338, 66 P.3d 274; *Busch v. Atkinson*, 278 Mont. 478, 483-84, 925 P.2d 874, 877 (1996). A court may not create an ambiguity where none exists, nor may it rewrite a statute, by ignoring clear and unambiguous language, in order to accomplish what it may feel is a more sensible or palatable purpose. See *State ex rel. Palagi v. Regan*, 113 Mont. 343, 351–52, 126 P.2d 818, 824 (1942); cf. *Heggem v. Capitol Indem. Corp.*, 2007 MT 74, ¶ 22, 336 Mont. 429, 154 P.3d 1189.

The Taxpayer argues the maxim that ambiguous tax statutes must be strictly construed in favor of the taxpayer. *See Western Energy Co. v. Dep't of Revenue*, 1999 MT 289, ¶ 10, 297 Mont. 55, 990 P.2d 767 (citations omitted.) Taxpayer argues that when "ambiguity exists in the statute, doubt should be resolved in the taxpayer's favor." Here, however, the statute is not susceptible to two constructions, as there is no ambiguity. *See Lucas Ranch, Inc. v. Montana Dep't of Revenue*, 2015 MT 115, ¶ 21.[1] The plain language of the OTP tax

[1] Lucas Ranch was decided well after the parties were involved in this appeal, but it provides guidance for statutory interpretation.

statutes do not mention an FET deduction. It is well-settled law that a tax deduction cannot be inferred or presumed, as deductions are authorized only under clear statutory provisions. *Baitis v. Dep't of Revenue*, 2004 MT 17, ¶ 25, 319 Mont. 292, 83 P.3d 1278. An expense may be deducted "only when the legislature specifically establishes the deduction." *In re Est. of Langendorf*, 262 Mont. 123, 126, 863 P.2d 434, 436 (1993) (citation omitted). A revenue statute authorizing a deduction must be construed with specificity rather than the more liberal construction we generally apply to revenue laws. *Cyprus Mines Corp.*, 172 Mont. at 118, 560 P.2d at 1343 (citation omitted). *Westmoreland Res. Inc. v. Dep't of Revenue*, 2014 MT 212, ¶ 11, 376 Mont. 180, 183-84, 330 P.3d 1188, 1191.

In the present matter the OTP tax statutes and definitions do not include a deduction for FET in the definition of either "wholesale price" or "established price." To the contrary, the definition of "wholesale price" states it must be calculated "before any discount or reduction." §16-11-102(2)(t), MCA.

The legislature has used its authority to allow deductions for FET in different sections of the tax code. For example, the definition of "Sales price" for purposes of calculating the Retail Telecommunications Excise Tax states "the term does not include . . . federal excise taxes." §15-53-129(b)(iii), MCA. Similarly, the definition of "Base rental charge" for the purposes of calculating

Sales Tax states "the term does not include . . . federal excise taxes." §15-68-101, MCA. In contrast, the legislature defined "wholesale price" for purposes of calculating the OTP tax to be calculated "before any reduction or deduction."

In *Westmoreland* the Montana Supreme Court affirmed this Board's decision to strictly construe §15-35-102(11), MCA to a plain reading. The petitioner argued that because the Legislature authorized the deduction of taxes paid to "federal, state, or local governments," the category "local governments" included tribal governments. The Court did not allow the petitioner to deduct taxes paid to the tribal governments as "taxes paid on production" from the "contract sale price." The Court would not infer the term "local government" to include tribal governments. The Court emphasized that it is not the duty of the Court to insert what has been omitted from a statute. The Court reasoned that the Legislature specifically refers to tribes or tribal land when it intends to do so and would have specifically mentioned tribal governments if it intended to do so in the statute. *Westmoreland* (citing *Citizens for Balanced Use v. Maurier*, 2013 MT 166, 370 Mont. 410, 303 P.3d 794).

The instant case is analogous. The Taxpayer would have this Board insert or infer a "Federal Excise Tax" deduction into the meaning of "wholesale price" where the statute has not specifically mentioned FET

expressly as a deduction. This Board cannot insert, infer, or presume an FET deduction where the legislature has not specifically mentioned a deduction.

Taxpayer's argument attempts to read ambiguity where none exists. Taxpayer may find it more palatable or sensible to deduct FET before remitting the wholesale price to the DOR but this is not what the plain language of the statute says. *State ex rel. Palagi* admonishes us not to create an ambiguity where none exists, nor to rewrite a statute, by ignoring clear and unambiguous language, in order to accomplish what we may feel is a more sensible or palatable purpose. See *State ex rel. Palagi v. Regan*, 113 Mont. 343, 351–52, 126 P.2d 818, 824 (1942). After the Taxpayer reads ambiguity into the statute, he goes further to suggest that because the statute is susceptible to more than one meaning, it should be construed in favor of the taxpayer. However, where a statute is clear this Board will strictly construe the statute as it is written by the Legislature.

Secondly, the Taxpayer argues that the lack of an FET phrase in the statute means that the Legislature intended to exclude FET from the taxable basis. This argument is inapposite to how the Courts and the Board interprets statutes. See discussion of *Westmoreland* above.

Taxpayer erroneously argues that legislative intent is a matter of fact and not of law. *State v. Triplett*, stands for the proposition that statutory interpretation, including ascertaining the legislative intent, is a matter of law and

not of fact. *State v. Triplett*, 2008 MT 360, ¶ 13, 346 Mont. 383, 195 P.3d 819. Even if we attempt a legislative intent analysis, the Department's argument is still convincing. When interpreting a statute, this Board seeks "to implement the objectives the legislature sought to achieve, and if the legislative intent can be determined from the plain language of the statute, the plain language controls." *Moreau*, ¶ 13. From the plain reading, the objective of the Legislature was to make the state excise taxes straightforward and simple to calculate.

This Board must apply the law as written by the legislature. The meaning of wholesale price is plain. This Board must give the term a plain reading. The legislature did not specifically exclude FET from the definition of wholesale price. Therefore, the Taxpayer may not deduct federal excise tax before calculating the amount of OTP tax due and remitting the balance to the DOR.

Conclusion

For the foregoing reasons, the Board finds and concludes that there are no issues of material fact. The Department of Revenue is entitled to judgment in its favor. The Department of Revenue's audit assessment should be upheld.

ORDER

IT IS THEREFORE ORDERED by the Montana Tax Appeal Board of the State of Montana that the Department of Revenue's motion for summary judgement be granted. Taxpayer's cross-motion for summary judgment is denied. The Department's audit assessment is hereby upheld and the hearing vacated.

Dated this 15th day of June 2015.

BY ORDER OF THE
STATE TAX APPEAL BOARD

DAVID A. McALPIN, Chairman

(SEAL)

STEPHEN A. DOHERTY, Member

VALERIE A. BALUKAS, 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 16th day of June 2015, 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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