

Testimony of Tom Ebzery to the Interim Revenue and Transportation Committee

Feb 18, 2014

Madame Chair and Members of the Committee: For the record my name is Tom Ebzery and I am a Billings attorney who represents a number of Centrally Assessed Utilities and a Large Industrial Facility. Mr. Dave Galt from the Montana Petroleum Association in December addressed issues involving refineries and large industrial facilities. My focus, as requested by Ms. Moore, will be on Centrally Assessed companies. For the record, Montana statutes define these companies' assets as property operated in more than one county or more than one state which includes amongst others telephone, electric power or transmission lines.

First, the focus of my testimony will follow the charge to this Committee, but I wanted to make a few points regarding central assessment. Second, the testimony I am offering is not on behalf of any specific public utility or telecommunications company but represents ideas I have formed over the years and more recently in consultation with tax managers from these companies. Central Assessment in Montana is not unique and many states and nearly all of the companies I represent are involved in the process in one form or another. What is the principal reason for the appeals? Generally it is the difference in a company's view of "Fair Market Value" (FMV) as contrasted to that of the Department of Revenue (DOR). In Montana we have three methods to reach FMV and they are similar in most states: Income Indicator, Cost Indicator and Market (stock and debt) Indicator. Appeals result from the final valuation and there is no hard and fast rule or statute which of these methods DOR should use.

Unlisted in your study plan is how to address this issue and if there should there be a narrowed choice for the Department? The last time your Committee looked at the valuation process was 1993-4 interim. Perhaps next time if some changes are made to the appeal process the next interim may want to look at a more formal and defined process to ascertain fair market value.

As for the appeals process it is pretty clear that during the past 8 or 9 years in particular there were a significant number of large appeals. As nearly everyone

has testified, this takes time, dollars and the ensuing appeal results in tax protests which can adversely impact schools and counties not getting tax dollars in a timely manner. SB 380 by Senator Thomas was enacted this past session which provides for "mandatory mediation" prior to going to the State Tax Appeals Board (STAB). The "bypass" of STAB provisions was contained in a vetoed bill two years ago. They were in the introduced version of the Thomas bill but were deleted and hopefully will be considered in the future.

Third, I will offer a salute to new Director Kadas on behalf of me and my clients for what I believe is a new attitude in the Department from the top down. I think the willingness to openly discuss these cases prior to costly appeals is refreshing and we are pleased. I also thank Chair Karen Powell who has appeared before the legislature and this Committee on behalf of the State Tax Appeal Board and has offered some constructive suggestions. In fact, I used some of her discussion on the Model ABA Act as some of the suggestions I am making today.

SJR 23 Legislature Hearings: In March and April 2013, I testified before both Taxation Committees and offered the following suggestions on how to improve the process. Dusting off my notes here is what I suggested and these are in no particular order:

1. Eliminate STAB for Centrally Assessed Companies and go directly to District Court after mandatory mediation. This is essentially SB 380 as introduced.
2. Require that STAB members be attorneys and members of the State Bar of Montana.
3. Possible substitution of a Tax Court similar to Montana's Water Court with a Tax Specialist attorney appointed by the Supreme Court
4. Creation of a Montana Tax Court of 1 to 3 Judges selected for a certain period of time from the Montana District Court System. Both this and the previous suggestion I would limit to centrally assessed and large industrial facilities.
5. Possibly adopt a new tribunal or tax court similar to Oregon to hear appeals and render decisions.

6. Streamline the STAB process by requiring sworn testimony similar to utility rate cases before the Public Service Commission.

Current Recommendations: During the past 6 months, I reviewed many of the excellent materials prepared by Megan Moore and Jaret Coles as well as examining the materials and testimony by Karen Powell and DOR's Deputy Chief Counsel Dan Whyte. I looked at other states and have refined my April suggestions to three sets of recommendation packages for this Committee.

Summary: I submit that the purpose of an interim committee should ascertain as much knowledge of the subject to be studied as possible. Significant background material has been submitted so far as well as two opportunities for the public, Department and STAB to submit input. Once the information is in the Committee should either: (a) continue to ask for more information; or (b) create a sub group to review recommendations made to date and report back to the full RATIC at the next meeting. Such a group should not be too large--possibly 4 RATIC members evenly divided. (The group should review all recommendations made to date, comment and make recommendations to the full Committee at its next meeting.)

Thank you for the opportunity to testify and I will stand for any questions at the appropriate time.

Recommendation package #1: State Tax Appeal Board (Input from ABA Model)

1. Require that State Tax Appeal Board Members be lawyers and members of Montana State Bar. They must have “substantial knowledge of tax law and substantial experience in making the record in a tax case suitable for judicial review “ (ABA Model Act)
2. Term remains six years--appointed by Governor from a list of 3-5 lawyers recommended by the Judicial Nominating Commission, with advice and consent of Senate; Limited to two terms of six years; Chair selected by other members not to exceed 4 years.
3. Compensation: Parity with State District Court Judges; Benefits also the same; Prohibition of obtaining additional employment.
4. Discovery: Rules of Montana District Courts apply; Parties make every effort to achieve discovery by informal consultation or communication before triggering discovery rules authorized by MCA (ABA Model)
5. Require mandatory mediation and encourage informal dispute resolution prior to bringing the appeal to STAB.
6. Charge a filing fee for Centrally Assessed and Large Industrial Facilities: Similar to District Court; process for appeals from CTABS remain the same.
7. Existing procedures for tax protests: Very open to suggestions to place more dollars in counties and schools;
8. Hearing process remains essentially the same; encourage use of pre-filed sworn testimony prior to adjudication by the panel.
9. Once a decision is rendered by STAB either party has 60 days to appeal to the Montana Supreme Court; the District Court is bypassed; (Redundant-record already established with STAB)
10. Effective date: January 1, 2016.

Recommendation package #2: Create Montana Tax Court (Exclude Centrally Assessed and Large Industrial Properties from the State Tax Appeal Board; Large Industrial Facilities may still appeal first to the County Tax Appeal Board; Create by statute a specific Centrally Assessed and Large Industrial Facility Tax Court.)

1. Operates similar to the Montana Water Court; Attorney and member of State Bar of MT
2. Appointed by Chief Justice of Montana Supreme Court from a list of 3-5 members screened and recommended by the Judicial Nominating Commission, "with substantial knowledge of tax law and substantial experience in making the record in a tax case suitable for judicial review." ABA Model. One Chief Tax Judge and provide for appointment of an Associate Tax Court judge if approved by the Montana Legislature if the case load is warranted.
3. Tax Court would have jurisdiction over all centrally assessed and large industrial property taxes as well as their appeals of income and excise taxes.
4. Advice and Consent of the Senate.
5. Six year term with maximum of two terms.
6. Compensation parity with State District Court including benefits and retirement.
7. Similar procedures apply as to informal dispute resolution; mandatory mediation and protest procedures prior to filing direct appeal with Centrally Assess/Large Facilities Tax Court; Large Industrial Facilities may still utilize CTAB prior to appeal to above court.
8. Discovery procedures: Montana Rules of Civil Procedure similar to STAB including encouraging pre-filed testimony under oath by appellant and Department of Revenue.
9. Filing Fees similar to District Court
10. Appeal Directly to Montana Supreme Court

### Recommendation Package # 3: Create Three person Tax Tribunal or Tax Court

1. Either replace STAB or limit to appeal review from CTAB.
2. Three members who are attorneys and members of the Montana State Bar
3. Appointed by Governor for six year terms; advice and consent of Senate
4. Compensation parity with District Court Judges including benefits.
5. Chief Judge selected amongst the members and rotated every two years.
6. Authorized to hire Magistrates composed of lawyers to assist in mediation. STAB is eliminated for Centrally Assessed and Large Industrial Facilities
7. This tax tribunal or court will hear all types of tax matters including those of income, property, excise and so forth. Replaces District Courts in Tax Matters
8. Appeals from this Court direct to Montana Supreme Court