

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0081

JAMES C. WANGERIN, CPA,

Petitioner and Appellant,

v.

STATE OF MONTANA,
DEPARTMENT OF REVENUE,

Respondent and Appellee.

**RESPONSE BRIEF OF RESPONDENT/APPELLEE,
MONTANA DEPARTMENT OF REVEUE**

On Appeal From the Montana Third Judicial District Court,
Powell County, The Honorable Ray J. Dayton Presiding

APPEARANCES:

DAVE BURLEIGH
Senior Tax Counsel
MONTANA DEPARTMENT OF
REVENUE
Legal Services Office
125 N Roberts St
PO Box 7701
Helena, MT 59604
Telephone: (406) 444-4033
E-mail: David.Burleigh@mt.gov

James C. Wangerin
413 Main St.
Deer Lodge, MT 59722
Telephone: (406) 846-1862
Email: jim@wangerin.com

PETITIONER AND APPELLANT

ATTORNEY FOR RESPONDENT
AND APPELLEE, MDOR

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUE.....	1
STATEMENT OF CASE	1
STATEMENT OF FACTS	1
STANDARD OF REVIEW	5
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. THIS COURT SHOULD AFFIRM THE DISTRICT COURT’S ORDER BECAUSE THE DEPARTMENT CORRECTLY INTERPRETED § 15-30- 2605, MONT. CODE ANN.....	7
A. The Department’s interpretation of § 15-30-2605, MCA, effectuates the Legislature’s intent	7
B. Wangerin’s novel interpretation of §15-30-2605, MCA, contradicts Montana law	14
II. THE DEPARTMENT’S DENIAL OF WANGERIN’S RULE REQUEST WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS NOT ARBITRARY OR CAPRICIOUS	18
A. The Department correctly denied Wangerin’s Rule Request and interpretation of § 15-30-2605, MCA, because it contradicts the plain language of the statute, legislative intent, and Montana law	18
B. The Department’s interpretation of § 15-30-2605, MCA, does not violate Wangerin’s or Taxpayers’ rights.....	20
1. The Department’s interpretation of § 15-30-2605, MCA, is not a rule subject to the MAPA rulemaking process	20

2.	Taxpayers’ procedural rights regarding the 2017 Audits are not within the purview of this appeal.....	21
3.	Wangerin’s right to participate remains unaffected.....	21
CONCLUSION		24
CERTIFICATE OF COMPLIANCE		25
CERTIFICATE OF SERVICE		26

TABLE OF AUTHORITIES

CASES:

<i>Boyne USA, Inc. v. Dep't of Revenue of Montana</i> , 2021 MT 155, 404 Mont. 347, 490 P.3d 1240	6
<i>Core-Mark Int'l, Inc. v. Mont. Bd. Of Livestock</i> , 2014 MT 197, 375 Mont. 25, 329 P.3d 1278	6
<i>Mt. Water Co. v. Mont. Dep't of Revenue</i> , 2020 MT 194, 400 Mont. 484, P.3d 136.....	8
<i>Saari v. Winter Sports</i> , 2003 MT 31, 314 Mont. 212, 64 P.3d 1038	8
<i>Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality</i> , 2019 MT 213, 397 Mont. 161, 451 P.3d 493	8
<i>Eisenmenger by Eisenmenger v. Ethicon, Inc.</i> , 264 Mont. 393, 411, 871 P.2d 1313 (1994).....	8
<i>Hawley v. Board of Oil & Gas Conservation, et al</i> , 2000 MT 2, 297 Mont. 467, 993 P.2d 677.....	8
<i>Baitis v. Dep't of Revenue</i> , 2004 MT 17, 319 Mont. 292, 83 P.3d 1278	8, 12, 18, 19, 23
<i>Giacomelli v. Scottsdale Ins. Co.</i> , 2009 MT 418, 354 Mont. 15, 221 P.3d 666	11
<i>Mont. Power Co. v. Mont. PSC</i> , 2001 MT 102, 305 Mont. 260, 26 P.3d 91.....	13
<i>State ex rel. Anderson v. State Bd. of Equalization</i> (1957), 133 Mont. 8, 319 P.2d 221, 224.....	17
<i>Mont. Indep. Living Project v. State, DOT</i> , 2019 MT 298, 398 Mont. 204, 454 P.3d 1216	19

Table of Authorities

Continued

Krakauer v. State,

2016 MT 230, 384 Mont. 527, 381 P.3d 524 22

STATE STATUTES:

§ 1-2-101, MCA	8, 14, 16
§ 1-2-106, MCA	14
§ 1-3-233, MCA	15
§ 2-3-102(3)(a), MCA	20
§ 2-4-101(2)(a), MCA	22
§ 2-4-102(11)(b)(i), MCA	20
§ 2-4-102(14)(b), MCA	23
§ 2-4-305(2), MCA	18, 19
§ 2-4-315, MCA	1
§ 2-4-601, MCA	10, 20
§ 2-4-602, MCA	5
§ 15-1-201, MCA	23
§ 15-1-211, MCA	10, 15, 20
§ 15-1-222, MCA	15
§ 15-30-2605, MCA	<i>passim</i>
§ 15-30-2605(1), (3), MCA	9
§ 15-30-2620, MCA	16
§ 15-30-2642, MCA	10, 15, 16, 20
§ 84-4920, RCM	17

ADMINISTRATIVE RULES OF MONTANA

42.2.101	10
42.2.311	22
42.2.311(1)	23, 24
42.2.312(1)	23
42.2.510	20
42.2.510(4)	4

Table of Authorities

Continued

42.2.510(5)	10
42.2.510(6)	5
42.2.613	10, 20
42.2.616	5

OTHER AUTHORITIES:

Internal Revenue Manual (IRM)	3
Merrian-Webster.com	11
Montana Administrative Procedure Act (MAPA)	<i>passim</i>
Montana Constitutional Convention (MCC), Vol. V	22, 23
Montana Rules of Appellate Procedure (M.R.App.P.) 6(1)	6, 21

STATEMENT OF THE ISSUES

1. Whether the Montana Department of Revenue's (Department) interpretation of § 15-30-2605, MCA, is correct.
2. Whether the district court correctly affirmed the Department's interpretation of § 15-30-2605, MCA, and denial of James C. Wangerin's (Wangerin) request for an administrative rule interpreting § 15-30-2605, MCA.

STATEMENT OF THE CASE

Wangerin filed a rule request pursuant to the Montana Administrative Procedure Act (MAPA). Bates Nos. Wangerin PJR-MDOR 00001-9 (Rule Request). After the Department denied the Rule Request (Bates Nos. Wangerin PJR-MDOR 000010-14), Wangerin appealed to the district court. (D.C. Doc. 1.) The district court affirmed the Department's denial of the Rule Request and statutory interpretation. (D.C. Doc. 29.)

STATEMENT OF THE FACTS

Wangerin seeks to force the Department to change its traditional interpretation of the plain language of § 15-30-2605, MCA, and adhere to federal Internal Revenue Service (IRS) operating procedures. *See generally, Amended Appellant's Brief (Opening Brief)*. Pursuant to § 2-4-315, MCA, Wangerin formally requested the Department adopt an administrative rule stating, "[t]he date for stopping the statute of limitations for individual income tax for MCA 15-30-2605 [sic] is the date of

decision with respect to which all rights of appeal have been waived or exhausted.” (Bates Nos. 000001-2.) Wangerin based the Rule Request on his belief that § 15-30-2605, MCA, mandates the Department to adopt IRS operating procedures and manuals that essentially require the Department to complete an audit, revise the return, conduct informal review, provide a contested case hearing pursuant to the MAPA, and issue a final agency decision that is ripe for appeal to the Montana Tax Appeal Board (MTAB) within the three-year statutory deadline. (Bates Nos. 000001-9.)

The Department denied Wangerin’s Rule Request for several reasons, including that the Department’s long-standing interpretation of § 15-30-2605, MCA, simply requires it to “determine” the correct amount of tax due within the three-year period, the existing appeal process protects taxpayers’ rights, and because the Rule Request seeks to engraft requirements on the statute that the Legislature never intended. (Bates Nos. 000010-14 ¶¶ 6, 7, 10) (internal citations omitted).

Wangerin filed a Petition for Judicial Review (PJR) requesting the district court reverse the Department’s denial of his Rule Request and to order the Department to adopt a rule to clarify § 15-30-2605, MCA. (D.C. Doc. 1 at p. 6.) After briefing and a hearing, the district court affirmed the Department’s denial of the Rule Request and interpretation of § 15-30-2605, MCA. D.C. Docs. 6-11, 12, 14, 15, 17, 21, 26, 28, 29.

The context of the Rule Request is that Wangerin and his son, Andy Wangerin, own and operate a professional tax preparation firm in Deer Lodge, Montana. The Wangerins' firm prepared and filed 2017 IIT returns on behalf of their clients (Taxpayers). Pursuant to § 15-30-2605, MCA, in late 2020 and early 2021 the Department started auditing about a half-dozen of Taxpayers' 2017 IIT returns (2017 Audits) by sending Information Request Letters to Taxpayers, notifying them of the audit and requesting specific documents. Bates Nos. Wangerin PJR-MDOR 000015-22.

The Wangerins' firm asserted that the audits were untimely based on the Wangerins' view that § 15-30-2605, MCA, requires the Department to comply with IRS internal audit procedures. Bates Nos. Wangerin PJR-MDOR 000023-25, 47-48. The IRS's Internal Revenue Manual (IRM) adheres to a "26/27 examination cycle," which requires them not to start an audit unless the audit and all processing can be completed within 26 or 27 months after the date the return was filed so that there is time for an appeal process enabling the taxpayer's case to ripen for tax court jurisdiction prior to the three-year deadline. IRM 4.10.2.2.2. However, following its longstanding interpretation of Montana's statutory three-year deadline, the Department rejected Wangerin's interpretation of the statute, and issued Audit Adjustment Letters, revising the returns, explaining the revisions, and notifying

Taxpayers of their appellate rights and procedures. Bates Nos. Wangerin PJR-MDOR 000026-27, 35-36; *see also* D.C. Doc. 10 at 5, n.1.

The Wangerins' firm informally appealed several of these 2017 Audits raising their interpretation of § 15-30-2605, MCA, among other issues. Department personnel communicated extensively with Wangerin regarding all aspects of the audits and reviewed all documentation the Taxpayers provided. Bates Nos. Wangerin PJR-MDOR 000023-180. The Department met with the Wangerins on February 26, 2021, to discuss several issues they raised regarding the 2017 Audits. Bates Nos. Wangerin PJR-MDOR 000182-85. At Wangerin's request, and as allowed by Rule, the parties agreed to set settlement conferences after the three-year deadline. ARM 42.2.510(4); Bates Nos. 000181, 184.

The Department advised Wangerin that it had determined to adhere to its longstanding interpretation of § 15-30-2605, MCA, and move forward with the audit procedure. *Id.* at 000182, 184. Anticipating setting settlement conferences after Tax Day (initially April 15, 2021, moved to May 17, 2021), the Department did not complete the informal reviews or issue notice of determination letters relative to most of the 2017 Audits. (*See* D.C. Doc. 14 at "Page 396-97" [sic]).

The parties failed to schedule settlement conferences immediately after Tax Day. Although the Department only issued one Notice of Determination Letter, Wangerin appealed several 2017 Audits to the Department's Office of Dispute

Resolution (ODR). Because no notice of determination letters were issued in most of those appeals, ODR dismissed them without prejudice and instructed Taxpayers that they could refile once the informal review process was complete. *See* ARM 42.2.510(6); D.C. Doc. 14 at “Page 396-97” [sic]. Rather than pursuing informal review processes, the parties negotiated settlement agreements.

In settling, Taxpayers waived their rights to further proceedings in the 2017 Audits with one remarkable caveat. In order to close the 2017 Audits but still preserve Taxpayers’ avenue for judicial review of the Department’s statutory interpretation, the Department agreed that if a court reviewing the denial of the Rule Request interpreted § 15-30-2605, MCA, in a manner that rendered the 2017 Audits untimely, the Department would reopen the 2017 Audit files, accept the returns as originally filed, and issue refunds or credits to the Taxpayers. (*See* D.C. Doc. 19, Section II; D.C. Doc. 28 at “Page 406” [sic].)

One 2017 Audit was procedurally ripe at ODR. The parties proceeded through informal discovery under the MAPA contested case provisions prior to settling that audit. Portions of that discovery appear in the Record. Section 2-4-602, MCA; ARM 42.2.616; *see* Bates Nos. Wangerin PJR-MDOR 000261-374, 383-92; D.C. Docs. 14 at “Pages 375-405” [sic] and 28 at “Page 406” [sic].

STANDARD OF REVIEW

“[T]his Court may review the judgment, as well as all previous orders and

rulings excepted or objected to which led to and resulted in the judgment.”
M.R.App.P. 6(1).

This Court reviews the Department’s interpretation of § 15-30-2605, MCA, for correctness. *Boyne USA, Inc. v. Dep’t of Revenue of Montana*, 2021 MT 155, ¶ 12, 404 Mont. 347, 490 P.3d 1240.

This Court reviews the Department’s denial of Wangerin’s Rule Request to determine if the Department’s action was “arbitrary, capricious, unlawful, or not supported by substantial evidence.” *Core-Mark Int’l, Inc. v. Mont. Bd. Of Livestock*, 2014 MT 197, ¶ 20, 375 Mont. 25, 329 P.3d 1278 (citations omitted).

SUMMARY OF THE ARGUMENT

The Montana Supreme Court should affirm the district court’s *Order Affirming the Department of Revenue’s Decision (Order)* because the district court correctly affirmed the Department’s interpretation of § 15-30-2605, MCA, and denial of Wangerin’s Rule Request. *See, generally*, D.C. Doc. 29.

The Department correctly interpreted the plain statutory language of § 15-30-2605, MCA. The Department’s interpretation observes the rules of statutory construction, adheres to legislative intent as determined by the plain, unambiguous statutory language, and is in harmony with other statutes. Section 15-30-2605, MCA, does not require the Department to issue a final agency decision (or, as Wangerin’s proposed rule suggested, “all rights of appeal have been waived or exhausted”) prior

to the three-year statutory deadline because the Legislature omitted any requirement that MAPA contested case procedures be complete prior to the expiration of the three-year deadline.

The Department correctly rejected Wangerin's Rule Request. The Department's action was supported by substantial evidence and was not arbitrary, capricious, or unlawful because the Department reviewed Wangerin's argument and supporting documentation and properly interpreted the statute by following the plain statutory language and giving effect to all related statutes. The Department's interpretation of § 15-30-2605, MCA, is not a rule subject to MAPA's rulemaking requirements. The Department's refusal to adopt Wangerin's Rule Request did not prejudice Wangerin's rights, because his right to participate is not implicated by the Department's interpretation of § 15-30-2605, MCA. The district court's *Order* should be affirmed.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S *ORDER* BECAUSE THE DEPARTMENT CORRECTLY INTERPRETED § 15-30-2605, MCA.

A. The Department's interpretation of § 15-30-2605, MCA, effectuates the Legislature's intent.

This Court has held that statutes must be construed "in accordance with the plain meaning of its express language in context of the larger statutory scheme in

which the Legislature inserted it.” *Mt. Water Co. v. Mont. Dep’t of Revenue*, 2020 MT 194, ¶ 27, 400 Mont. 484, 469 P.3d 136.

When interpreting statutes, [the Court’s] role is “to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.” Section 1-2-101, MCA. In doing so, we must pursue the intent of the Legislature and that *intent is determined by interpreting the plain meaning of the language used.* (citation omitted). Furthermore, where the language used is clear and unambiguous, the statute speaks for itself and we will not employ other means of interpretation.

Saari v. Winter Sports, 2003 MT 31, ¶ 22, 314 Mont. 212, 64 P.3d 1038 (emphasis added). Courts may not interpret statutes in a vacuum, but must construe them in a way that gives effect to all the related statutes. *Mont. Env’tl. Info. Ctr. v. Mont. Dep’t of Env’tl. Quality*, 2019 MT 213, ¶ 46, 397 Mont. 161, 451 P.3d 493. “[W]e presume that the legislature would not pass meaningless legislation, and we must harmonize statutes relating to the same subject, giving effect to each.” *Eisenmenger by Eisenmenger v. Ethicon, Inc.*, 264 Mont. 393, 411, 871 P.2d 1313 (1994). “Interpretations that give effect to the legislation are always preferred over interpretations that treat the statute as void or as mere surplusage.” *Hawley v. Board of Oil & Gas Conservation, et al*, 2000 MT 2, ¶ 12, 297 Mont. 467, 993 P.2d 677 (citation omitted). “A statute must be construed reasonably and in a way that is best able to effectuate its purpose, rather than in a way which would weaken that purpose.” *Baitis v. Dep’t of Revenue*, 2004 MT 17, ¶ 22, 319 Mont. 292, 83 P.3d 1278 (citation omitted).

The Department reasonably interprets § 15-30-2605, MCA, according to its plain statutory language, in harmony with other statutory provisions, and in a manner that best effectuates its purpose. Section 15-30-2605, MCA, states in relevant part: “If, in the opinion of the department, any return of a taxpayer is in any essential respect incorrect, it may revise the return. ... [T]he amount of tax due may be determined by the department within 3 years after the return was filed.” Section 15-30-2605(1), (3), MCA. Reading the provisions together, subsection (1) provides the Department broad authority to revise an incorrect return, while subsection (3) places a time limit on the exercise of that authority, allowing the Department three years from the date the return is filed to determine the proper amount of tax due. *Id.* Since its promulgation in 1979, the Department has interpreted this language to require it to determine the correct amount of tax prior to the statutory deadline. *See*, Bates Nos. Wangerin PJR-MDOR 000011-12 ¶ 6. The Department administers the statute by first initiating an audit, notifying the taxpayer, and requesting information. (Bates Nos. 000015-22). If the Department forms the opinion that the return was incorrect as filed, it adjusts the amount of tax owed and sends the taxpayer an audit adjustment letter notifying the taxpayer of the adjustment and providing 30 days to request an informal review. *See* D.C. Doc. 10 at 7; Bates Nos. 000011-12, 26-39. After informal

review, the Department sends a notice of determination that must satisfy the statute's three-year deadline. *Id.*; D.C. Transcript at p. 37, ll. 4-6; ARM 42.2.510(5).¹

The district court agreed with the Department's interpretation and stated that, "[b]ased on the title, content, and subject matter of the statute, the plain meaning of the statute is that the Department has three years from the last day of filing to determine the correct amount of tax that is due on an incorrect filing." D.C. Doc. 29 at 6.

Reading § 15-30-2605, MCA, to give meaning to all relevant Montana statutes reveals that the Legislature intended the "determination" that tolls § 15-30-2605, MCA, to be just one step in the process to obtain a final agency decision. The Department's authority to audit taxpayers in § 15-30-2605, MCA, is tied to several other Montana statutes, including the notice requirement of § 15-30-2642, MCA, which, in turn, is tied to taxpayers' rights to review and appeal under § 15-1-211, MCA, and MAPA. *See* §§ 2-4-601 *et seq.*, 15-1-211, 15-30-2605, -2642, MCA. These provisions contain their own timing requirements. *Id.* The Department's long-standing interpretation of § 15-30-2605, MCA, cooperates with these statutes by recognizing taxpayers' appellate rights and keeping the appeals within the provisions of Montana law. By following the statute's plain meaning and seeking procedural

¹ The case then proceeds to settlement of the outstanding balance, payment, collections, or an appellate process, as provided by statute. *See* §§ 2-4-601 *et seq.*, 15-1-211, 15-30-2605, -2642, MCA; ARM 42.2.101 *et seq.*, .613 *et seq.*

guidance elsewhere in the same statutory scheme, the Department's audit process accurately identifies and adheres to legislative intent.

Moreover, the Department's interpretation of the word "determine" furthers this legislative intent. To zero in on a generally understood meaning and context of a statutorily undefined term, the court "may consider dictionary definitions, prior case law, and the larger statutory scheme in which the term appears." *Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 18, 354 Mont. 15, 221 P.3d 666. Here, "determine" is statutorily undefined. Both parties acknowledge that several definitions of "determine" exist; however, only the Department's proffered definition leads to a reasonable interpretation of legislative intent. D.C. Docs. 6 pp. 5-7; 10 pp. 6-8; 12 pp. 2, 6-7. Because the audit process requires the taxing authority to review evidence and decide the correct amount of taxes, the most reasonable interpretation is that the Legislature intended the word "determine" to be read as the word is generally understood; something in the vein of "to officially decide something because of evidence, facts, or with authority, to be the cause of or reason for something, to learn or find out something by getting information." www.merriam-webster.com/dictionary/determine. This definition of "determine" works perfectly with the statutory language and larger statutory scheme by ensuring the other Montana statutes remain effective and concurs with the Department's

process of informal review and issuing a notice of determination. *See* § I.B.1, *infra*. This Court should affirm the Department’s interpretation of § 15-30-2605, MCA.

The Legislature’s acquiescence to the Department’s interpretation of § 15-30-2605, MCA, creates a presumption that the Department correctly interprets the statute. “It is presumed that the Legislature is acquainted with the law; that it has knowledge of the state of it upon the subjects on which it legislates; that it is informed of previous legislation and the construction it has received.” *Baitis*, ¶ 24 (internal citation omitted)(holding that where Legislature acquiesced to the Department’s interpretation of statute for over forty years, the Court presumes the Department’s interpretation is proper). Here, the Legislature has not changed the controlling language of the statute since 1979 (noting that the time period was shortened from five years to three years in 2015) and has never indicated the Department is misconstruing that language. Indeed, on several occasions, Wangerin has requested legislation to require the Department to mimic federal audit procedures and no legislator has proposed such a bill. *See* Bates Nos. 000051, 54, 57. Legislative action since promulgating the language shows that the Department’s interpretation is correct. As the district court held, “[t]here are no other reasonable interpretations and the statute’s intent is not at issue.” D.C. Doc. 29 at 7; *see also* § II.A, *infra*.

Even if this Court finds that the statutory intent is unclear, the Department's lengthy administration of the statute guides the Court's interpretation of § 15-30-2605, MCA. "It is a well-accepted rule of statutory construction that the long and continued contemporaneous and practical interpretation of a statute by the executive officers charged with its administration and enforcement constitutes an invaluable aid in determining the meaning of a doubtful statute." *Mont. Power Co. v. Mont. PSC*, 2001 MT 102, ¶ 24, 305 Mont. 260, 26 P.3d 91 (internal citations and quotations omitted).

[T]he foregoing rule of deference applies, generally speaking, where the particular meaning of a statute has been placed in doubt, and where a particular meaning has been ascribed to a statute by an agency through a long and continued course of consistent interpretation, resulting in an identifiable reliance.

Id. at ¶ 25. Such an administrative interpretation is entitled to respectful consideration. *Id.* The Department's interpretation should stand unless this Court finds "compelling indications" that it is wrong. *Id.* Here, the Department's traditional interpretation of the language has remained consistent and unchallenged for over 40 years. Indeed, the record reveals that Department personnel operate according to the Department's interpretation of the statute and readily describe the Department's interpretation to taxpayers when prompted. *See* Audit Adjustment Letter, Bates No. 000026 (stating, "[t]he IRS procedure regarding the timing of an audit does not affect the Montana Department of Revenue's processes.") The Department's longstanding

adherence to the plain statutory language enables taxpayers to rely on the Department's procedures and is entitled to deference in construing the legislative intent of § 15-30-2605, MCA. This Court should reaffirm the Department's interpretation of § 15-30-2605, MCA.

B. Wangerin's novel interpretation of § 15-30-2605, MCA, contradicts Montana law.

Wangerin forwards several invalid interpretations of the statute that do not comport with the rules of statutory construction, thus fail to accurately describe legislative intent. *Opening Brief* at 7, 13. Contrary to § 1-2-106, MCA, Wangerin fails to determine legislative intent from the plain statutory language. For example, § 15-30-2605, MCA, references no federal audit procedures, much less a requirement that the Department adopt them. Section 15-30-2605, MCA. Yet, Wangerin would have the statute silently incorporate federal operating procedures and manuals. *Opening Brief* at 10. Wangerin's interpretation ignores the plain statutory language requiring the Department only to determine the correct amount of taxes within three years.

In violation of § 1-2-101, MCA, Wangerin's interpretation would require this Court to insert terms and procedural requirements that the Legislature omitted from the statute. Throughout the Montana Code Annotated, where the Legislature intends to adopt federal law, it expresses that desire with plain statutory language. *See* D.C.

Doc. 10 at 10-11. Wangerin's request ignores the plain statutory language by inserting procedural requirements that the Legislature omitted.

Wangerin's conclusion that the Department must adopt federal operating procedures also violates § 1-3-233, MCA, because it is unreasonable. The Department administers Montana's tax laws and regulations, and Montana taxpayers can rely on Montana's Taxpayer Bill of Rights found at § 15-1-222, MCA. Wangerin's interpretation would have one believe that the Legislature intended the Department, in this one instance and without explicitly saying so, to follow unreferenced federal procedures to protect taxpayers' rights. Moreover, federal tax law, Treasury Regulations, and federal tax policies and procedures are not administered by the Department. The IRS's policies and procedures do not refer to Montana's tax laws. It is unreasonable to interpret § 15,30,2605, MCA, to depend on obscure federal procedures.

Wangerin's failure to harmonize the Montana Code Annotated also renders many Montana statutes ineffective, void, or mere surplusage. For example, Wangerin's interpretation fails to harmonize § 15-30-2605, MCA, with the rest of the Code because it ignores the timing procedures of MAPA and §§ 15-1-211, 15-30-2605, and -2642, MCA, rendering them ineffective, void, and mere surplusage.

Additionally, Wangerin's requested definition of "determine" unreasonably seeks to restrict the Department's authority to determine the correct amount of taxes

in ways the Legislature did not intend. Section 15-30-2605, MCA, contains generally understood terms and no language with peculiar legal meaning. *Id.* The three-year deadline plainly relates to the determination, which the Department satisfies by sending a taxpayer a notice of determination following the informal review. Section 15-30-2642, MCA. However, Wangerin's interpretation would require the Department to complete a full contested case hearing and issue a final agency decision, pursuant to MAPA, prior to the three-year deadline. *Opening Brief* at 6-11. The statute simply does not say that. Adopting Wangerin's view would require this Court to insert terms and requirements the Legislature omitted from the statute, contrary to § 1-2-101, MCA. Wangerin's construction inappropriately inserts procedural requirements implicating a legal term of art, "final agency decision," that the Legislature omitted.

Wangerin further erroneously argues that, because "determine" is not defined in the Montana Code Annotated, the Department must adopt and adhere to the requirements of a federal "notice of deficiency." *Opening Brief* at 8-11, citing § 15-30-2620, MCA. But the Internal Revenue Code does not define "determine." Rather, Wangerin unreasonably equates the generic term "determine," to the federal term of art "notice of deficiency." *Opening Brief* at 8-16. There is simply no statutory language indicating that the Legislature intended to adopt federal agencies' internal guidance.

Finally, Wangerin's reliance on *Anderson* is misplaced. *Opening Brief* at 13. Construing a statute of limitations in favor of the taxpayer is required *when the legislative intent of the statute is in doubt*. *State ex rel. Anderson v. State Bd. of Equalization* (1957), 133 Mont. 8, 13, 319 P.2d 221, 224. This Court in *Anderson* analyzed the operative language of § 15-30-2605, MCA's pre-1972 ancestor, Revised Code of Montana (RCM) 1947, § 84-4920, which contained very similar language authorizing the Department to audit IIT returns: "[i]f, in the opinion of the Board [of Equalization—predecessor to the Department of Revenue] any return of a taxpayer is in any essential respect incorrect, it may revise such return ... the amount of tax due under any return shall be determined by the Board within three years after the return was made." *Id.* at 12 (citing RCM, § 84-4920). Here, because the legislative intent is not in doubt, Wangerin is not entitled to special favor. D.C. Doc. 29 at p. 7; § I.A, *supra*. *Anderson* does not support Wangerin's position. This Court should reaffirm the Department's interpretation of § 15-30-2605, MCA.

Wangerin's argument presents no compelling indication that the Department has incorrectly interpreted the statutory language for four decades. The district court correctly determined that Wangerin's arguments do not cast doubt on the meaning of the plain language of the statute. *Order*, D.C. Doc 29 at 7. This Court should defer to the Department's longstanding interpretation of the plain statutory language and affirm the district court's *Order*.

II. THE DEPARTMENT’S DENIAL OF WANGERIN’S RULE REQUEST WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS NOT ARBITRARY OR CAPRICIOUS.

A. The Department correctly denied Wangerin’s Rule Request and interpretation of § 15-30-2605, MCA, because it contradicts the plain language of the statute, legislative intent, and Montana law.

The Department denied Wangerin’s Rule Request because it was based on his erroneous interpretation of the statute. *See* § I.B., *supra*. Moreover, Wangerin’s proffered definition of “determine” contradicts the Department’s role in collecting taxes. The plain statutory language requires the Department to determine the correct amount of taxes. Section 15-30-2605, MCA. The Department does not approach this task with an attitude of “being resolved not to change its mind,” as Wangerin asserts the word “determine” means. D.C. Doc. 14 at “Pages 380-81” [sic]. To the contrary, the Department understands that determining the correct amount of taxes sometimes *requires* it to change its mind. *Id.*

Wangerin’s requested rule is superfluous. No rule is necessary to explain that the Department will follow the plain language of the statute. *Baitis*, ¶¶ 21-22; *see also* § I, *supra*. Moreover, the Department cannot “unnecessarily repeat statutory language” in its rulemaking. Section 2-4-305(2), MCA. Where a statute’s plain language is clear and unambiguous, there is no need for an interpretive administrative rule. *Baitis*, ¶ 26. In *Baitis*, the taxpayers argued that the Department should have adopted a rule to formalize its policy disallowing deductions for federal

self-employment taxes. *Id.* The Department’s longstanding policy was premised on its interpretation of the Montana statutes. *Id.* This Court agreed with the Department’s interpretation of the plain language of the statute and refused to require the Department to adopt a rule explaining its interpretation, holding that “[t]he Department is not required to promulgate a rule explaining the denial of a tax deduction, when that deduction is not explicitly provided for within the language of the code.” *Id.* Here the Department correctly interprets the plain statutory language, so Wangerin’s requested rule is not just unnecessary but prohibited. *See* § 2-4-305(2), MCA.

Wangerin’s requested rule is further prohibited because it contradicts the plain language of § 15-30-2605, MCA. Administrative regulations cannot change a statute. *Mont. Indep. Living Project v. State, DOT*, 2019 MT 298, ¶ 31, 398 Mont. 204, 454 P.3d 1216. Wangerin’s requested rule would inappropriately change the meaning of the statute by restricting the Department’s authority to determine the correct amount of taxes within three years in ways the Legislature did not intend. *See* § I.B., *supra*. On the other hand, the Department’s longstanding interpretation of § 15-30-2605, MCA, comports with legislative intent and the rules of statutory construction. D.C. Doc. 29 at 7, *see also* § I.A., *supra*. Thus, the Department’s denial of Wangerin’s Rule Request was not arbitrary or capricious, but rather was based on substantial evidence and was consistent with the law. This Court should affirm the

district court's decision affirming the Department's denial of Wangerin's Rule Request.

B. The Department's interpretation of § 15-30-2605, MCA, does not violate Wangerin's or Taxpayers' rights.

1. The Department's interpretation of § 15-30-2605, MCA, is not a rule subject to the MAPA rulemaking process.

As a threshold matter, Wangerin falsely premises his assertion that he was harmed by the Department's traditional interpretation of § 15-30-2605, MCA, on the mistaken belief that the Department's interpretation is a "rule" subject to the rulemaking requirements in MAPA. (*Opening Brief* at 1, 4-5, 11-13). However, the term "rule" specifically excludes "statements concerning only the internal management of an agency or state government and not affecting private rights or procedures available to the public." Sections 2-3-102(3)(a), 2-4-102(11)(b)(i), MCA. The Department's interpretation of § 15-30-2605, MCA, concerns only the Department's management of the statute. The Montana Code Annotated provides the taxpayers' procedural rights elsewhere, and the Department's interpretation of § 15-30-2605, MCA, does not affect them. *See* §§ 2-4-601 *et seq.*, 15-1-211, 15-30-2605, -2642, MCA; ARM 42.2.510, .613 *et seq.*; *see also* D.C. Doc. 10 at 10. Thus, the Department's interpretation is not a "rule" subject to MAPA rulemaking procedures.

//

2. Taxpayers’ procedural rights regarding the 2017 Audits are not within the purview of this appeal.

Wangerin’s *Opening Brief* exceeds the scope of this review in arguing certain aspects of the 2017 Audits, which are not at issue in this appeal. *Opening Brief* at 3, 5, 13-14. “[T]his Court may review the judgment, as well as all previous orders and rulings excepted or objected to which led to and resulted in the judgment.” M.R.App.P. 6(1). However, the Rule Request did not involve any particular aspects of the 2017 Audits. Instead, the Taxpayers all knowingly, intelligently, and voluntarily waived their rights to hearing and appeal by settling their cases. Issues and facts pertinent to specific 2017 Audits were not within the scope of the district court’s review of the denial and were not properly raised or preserved during the Rule Request or district court review. Moreover, the particulars of the 2017 Audits are not relevant to the instant issues of statutory construction and Rule Request denial. This Court should disregard Wangerin’s arguments regarding the “docketed case” and any communications specific to the 2017 Audits made after March 1, 2021, the date Wangerin requested to set settlement conferences after the statutory deadline in order to avoid the statutorily-provided appeal process through ODR. *Opening Brief* at 3, 5, 13-14; *see also* D.C. Doc. 14 at “Page 396-97” [sic].

3. Wangerin’s right to participate remains unaffected.

Wangerin lacks standing to assert an affront to his right to participate. “[S]tanding depends on whether the constitutional or statutory provision ... can be

understood as granting persons in the plaintiff's position a right to judicial relief.” *Krakauer v. State*, 2016 MT 230, ¶ 16, 384 Mont. 527, 381 P.3d 524 (internal citations omitted). Here, Wangerin's right to participate does not extend to the Department's interpretation of § 15-30-2605, MCA. Delegate Dahood clearly delineated the scope of the right to participate during the 1972 Constitutional Convention:

[w]hat is intended by Section 8 is that any *rules and regulations* that shall be made and formulated and announced by any governmental agency... shall not be made until some notice is given so that the citizen will have a reasonable opportunity to participate with respect to his opinion, either for or against that particular administrative action.

Montana Constitutional Convention (MCC), Vol. V at 1655 (emphasis added). Delegate Dahood went on, “the Legislature ... will have the opportunity and ... latitude to set forth the guidelines that will best implement that particular policy. ...” *Id.* at 1656. Indeed, the Legislature promulgated MAPA specifically “to provide for public participation in [governmental] action.” Section 2-4-101(2)(a), MCA. However, here the Department made, formulated, or announced no rule or regulation. *See* § II.B.1, *supra*; MCC, Vol. V at 1655. Rather, § 15-30-2605, MCA, is a purely legislative edict with plain directives for the Department to follow. *See* § I, *supra*. The Department's interpretation is not a rule, regulation, or policy that merits public participation or requires adherence to MAPA. *See* ARM 42.2.311. Neither the Montana Constitution nor Montana Code Annotated can provide

Wangerin relief because the Department's interpretation of § 15-30-2605, MCA, simply follows the statutory language. ARM 42.2.312(1); *see also* § II.B.1, *supra*; MCC, Vol. V at 1655. This Court should disregard Wangerin's claim that the Department violated his right to participate because he lacks standing to assert it.

Regardless of Wangerin's standing, the Legislature requires no rule to interpret § 15-30-2605, MCA. *See* § 15-30-2605, MCA. "The [D]epartment *may* make rules to supervise the administration of all revenue laws of the state and assist in their enforcement." Section 15-1-201, MCA (emphasis added). State agencies *may* adopt rules to codify a statutory interpretation. *Id.* at § 2-4-102(14)(b) (emphasis added). Agencies have discretion to adopt rules unless the Legislature explicitly requires it. *Id.* Here, Wangerin's request for an alternate interpretation does not change the Department's *authority* to promulgate an interpretive rule into an *obligation* to do so. Section 15-30-2605, MCA; *see also* *Baitis*, ¶ 26. The Department has no obligation to follow the MAPA rule-making procedures to interpret § 15-30-2605, MCA, so Wangerin's right to participate in the rulemaking procedure does not apply.

Moreover, the record shows Wangerin participates prodigiously in the affairs of government. The Department's objectives in providing public participation are to respond to public concerns and improve the public's understanding of official programs and actions. ARM 42.2.311(1). In addition to contacting Legislators and

Legislative Services personnel, requesting legislation, and requesting an interpretive rule directly from the Department, Wangerin communicated extensively with Department personnel regarding his interpretation of § 15-30-2605, MCA. *See* Bates Nos. WANGERIN PJR-MDOR 000001-374. The Department's interactions with Wangerin establish that it met its goals to foster public participation and improve his understanding of the Department's processes. Indeed, every document in the record, every brief, even the Rule Request itself demonstrate that Wangerin participates in the affairs of government, and that the Department responded to his concerns and attempted to help him understand § 15-30-2605, MCA. *Id.*; D.C. Docs. 1-31; ARM 42.2.311(1). The Department's denial of Wangerin's Rule Request does not violate his right to participate. This Court should reaffirm the Department's denial of the Rule Request.

CONCLUSION

This Court should affirm the district court's ruling.

Dated this 25th day of May 2022.

A handwritten signature in blue ink, appearing to read 'DAVID BURLEIGH', is written over a horizontal line.

DAVID BURLEIGH
Senior Tax Counsel
Attorney for State of Montana, Department
of Revenue

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 5,402 words, excluding certificate of service and certificate of compliance.

A handwritten signature in blue ink, reading "Kandy J. Fleming", is written over a horizontal line.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Response Brief of Respondent/Appellee Montana Department of Revenue to be served via United States Postal Service and Email Service as follows:

James C. Wangerin
413 Main St.
Deer Lodge, MT 59722
jim@wangerin.com

Dated this 25th day of May 2022.

A handwritten signature in blue ink, reading "Kady J. Fleming", is written over a horizontal line.

CERTIFICATE OF SERVICE

I, David Gail Burleigh, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-25-2022:

James C. Wangerin (Appellant)
413 Main Street
Deer Lodge MT 59722
Service Method: Conventional

Electronically signed by Kandy Fleurisma on behalf of David Gail Burleigh
Dated: 05-25-2022