



ORIGINAL

FILED

06/07/2022

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 22-0081

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.

FILED

JUN 07 2022

Bowen Greenwood
Clerk of Supreme Court
State of Montana

**REPLY BRIEF OF PETITIONER/APPELLANT,
JAMES C. WANGERIN, CPA**

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

APPEARANCES:

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

PETITIONER AND APPELLANT

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

ATTORNEY FOR RESPONDENT
AND APPELLEE, MDOR

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STANDARD OF REVIEW.....	1
SUMMARY OF THE ARGUMENT.....	1
ARGUMENT.....	2
CONCLUSION.....	9
CERTIFICATE OF COMPLIANCE.....	11
CERTIFICATE OF SERVICE.....	12

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	1
<i>Melvin V Department of Revenue</i> IT 2015-1, Montana Tax Appeal Board.....	8
<i>State ex rel. McCarten v. Corwin</i> 119 Mont. 520, 529, 177 P.2d 189, 194 (1947)	8
<i>Bick v. state, Dep't of Justice, Div. of Motor Vehicles,</i> 224 Mont. 455, 457, 730 P.2d 418, 420 (1986)	9

STATE STATUTES:

§ 2-4-102 (11), MCA	5
§ 2-3-103 (1) (a), MCA	8
§ 2-4-308, MCA	6
§ 2-4-315, MCA	2
§ 15-30-2605, MCA	passim
§ 15-30-2605 (3), MCA	passim

ADMINISTRATIVE RULES OF MONTANA:

42.2.311	7
----------------	---

OTHER AUTHORITIES:

Montana Rules of Appellate Procedure (M.R.App.P.) 6(1)	1
--	---

STANDARD OF REVIEW

This Court may review the judgement, as well as all previous orders and rulings excepted or objected to which led to and resulted in the judgement.” 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.

SUMMARY OF THE ARGUMENT

There was a systemic problem of the Department requiring all employees to follow the incorrect interpretation that issuing of the audit adjustment letter satisfies the “determined by the department” requirement of § 15-30-2605(3), MCA. See Record pages 3, 6, and 381.

Statute of limitations are a restraint on the Department. Department's interpretation of § 15-30-2605, MCA, is of significant interest to the public.

Such significant interest to the public triggered the notice requirements associated with the constitutional right of participation, Article II, section 8 of the Montana Constitution.

Since the Department’s amplification that “issuing of the audit adjustment letter satisfies the “determined by the department” requirement of § 15-30-2605(3), MCA” is NOT correct, the Department should have approved Wangerin’s petition

and initiated rulemaking proceedings in accordance with the provisions of the Administrative Procedure Act (MCA 2-4-315).

ARGUMENT

At D.C. Transcript at P. 37 line 21, the Department states:

“There’s no reasonable interpretation of 2605 that implies or indicates in any way shape or form that the Department has to go through uh, the informal review ...”

This indicates the District Court judge may NOT have been aware that Department was changing their interpretation to mean, “The Department sends a Notice of Determination that must satisfy the statute’s three-year deadline.” See page 10 of the Response Brief.

In D.C. Doc. 29 at 7 the Judge writes:

“... it is clear that § 15-30-2605’s statute of limitation is applicable to the time the Department has to complete an audit adjustment.”

This indicates that the judge was NOT aware that the Department’s interpretation of § 15-30-2605, MCA now requires the Notice of Determination to be issued within the original statute of limitations. See page 10 of the Response Brief.

Brian Olsen was the Department’s Audit Unit Manager for the 2020 audit and 2021 audits in question. Regarding the question: “What was the interpretation of § 15-30-2605?”, Brian Olsen’s written response was, “That the auditor’s adjustment must be mailed prior to the expiration of the date prescribed by the section.” (See page 391 of the Record #101) Brian’s interpretation is clearly in conflict with Page

9 of Response Brief, where the Department argues, “After informal review, the Department sends a notice of determination that must satisfy the statute’s three-year deadline. ...)”

The document ending the three-year deadline is NOT defined in § 15-30-2605, MCA.

Wangerin’s rule request is to adopt a rule that would specify the document that must be issued within the original statute of limitations.

On page 16 of the Response Brief, the Department argues,

“The three-year deadline plainly relates to the determination, which the Department satisfies by sending a notice of determination following the informal review.”

The Department’s position was very different on March 1, 2021, when Department of Revenue’s Attorney wrote:

“The audit adjustment letter is the one that is under the statutory deadline of three years.” See record Page 6.

On July 12, 2021 on page 261 of the Record, Dave Burleigh wrote:

“As we have previously discussed, the Department’s position is that the adjustment letter must be sent prior to the three-year statute of limitation.”

On July 15, 2021, on page 10 of the Record, Dave Burleigh writes:

“Enclosed please find a formal Notice of Denial of your Petition to Adopt a new Administrative Rule Dated March 1, 2021. ... the Department denies your Petition for the same reasons I have previously described to you regarding our analysis of the statute of limitations for audits contained in § 15-30-2605, Mont. Code Ann.”

In The Notice of Denial to Adopt a New Administrative Rule, Director Brendan Beatty states,

“Section 15-30-2605, MCA, expressly states that the Department can determine the amount of tax due for up to three years. This occurs when the Department issues its audit findings, and that determination is presumed correct.” See Record page 12.

The different interpretations are indicative that the legislative intent is in doubt.

The Record combined with Response Brief clearly indicate the Department’s interpretation of § 15-30-2605 was incorrect at the time of denying Wangerin’s Petition.

On page 3 of the Record, Dave Burleigh wrote:

“Though reasonable minds can differ on the interpretation of the legislature intent to make the statute of limitations similar to other Montana tax types or the IRS, the Department’s interpretation is the one under which all our personnel operate until they are instructed otherwise. ... While we understand your position, we will continue to interpret these statutes of limitation as we have been doing until the legislature or other courts instruct us otherwise.”

The fact that reasonable minds can differ indicates that legislative intent is in doubt.

On September 1, 2021, on page 385 and 386 of the Record, Wangerin asks Dave Burleigh the question, “Do you agree that Dave Burleigh was in error in determining that auditor’s information request was a proposed assessment?” and Dave Burleigh responded, “Yes ...”

On August 6, 2021, on Page 382 of the Record, Wangerin asks the question, "Could "Uniform with other tax types" be construed to mean uniform with the statute of limitations in the Internal Revenue Code?" and Senator Greg Hertz responded, "That was the intent."

Since Department's interpretation was incorrect, Wangerin's Rule Request should NOT have been denied.

At the time that Wangerin filed the Rule Request the Department's interpretation of § 15-30-2605, MCA was incorrect.

Wangerin filed a Rule Request for clarification of § 15-30-2605, MCA. It is possible that after an opportunity for participation to create an administrative rule that the Department would create a rule that states Department's argument on page 16 of the Response Brief, "The three-year deadline plainly relates to the determination, which the Department satisfies by sending a notice of determination following the informal review."

§ 2-4-102 (11) (a), MCA, states:

"Rule" means each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency. The term includes the amendment or repeal of a prior rule."

Since the Department-wide interpretations of 15-30-2605, MCA were not adopted as legislative rules pursuant to the Montana Administrative Procedures Act they are an invalid rule. They were also NOT treated as an interpretive rule. Each

adjective or interpretive rule or portion of a rule must contain a statement in the historical notations that the rule is advisory only but may be a correct interpretation of the law. This statement must be placed in the Administrative Rules of Montana when the next reprinting of the rule occurs. (MCA 2-4-308)

It is important to compare the 2020 audit to the 2021 audits to determine whether the Department's incorrect interpretation that "issuing of the audit adjustment letter satisfies the "determined by the department" requirement of § 15-30-2605(3), MCA" is longstanding.

The particulars of the audits in 2021 when compared to audit in 2020 are relevant to show that the Department's interpretation had changed. The audit in 2020 indicated prior administration's interpretation and handling of 2020 audit. The prior administration's interpretation is like that on page 16 of the Response Brief, where the Department argues, "The three-year deadline plainly relates to the determination, which the Department satisfies by sending a notice of determination following the informal review." This is substantially different from the 2021 audits where taxes were assessed even though notice of determination was NOT issued within the original statute of limitations.

On October 26, 2021 on page 381 of the Record, the Director wrote:

"... issuing the audit adjustment letter satisfies the "determined by the department" requirement of § 15-30-2605(3), MCA."

The Department also does NOT have a longstanding policy of adoption of agencywide interpretation of statutes required to be followed by all Department employees until instructed otherwise by legislature or a court without going through Montana Administrative Procedures Act or placed in the Administrative Rules of Montana when the next reprinting of the rule occurs per MCA 2-4-308. In addition, the 2021 audits show that taxpayers and taxpayer representative (Wangerin) were prejudiced by use of the incorrect interpretation that "... issuing the audit adjustment letter satisfies the "determined by the department requirement of § 15-30-2605(3), MCA." The Department should have used the interpretation, "The three-year deadline plainly relates to the determination, which the Department satisfies by sending a notice of determination following the informal review." Using the correct interpretation would have resulted in the cases being accepted as filed. This would have negated the need to settle the cases long after the original statute of limitations had expired. Wangerin also had to spend considerable time representing clients after the original statute of limitations had expired. Department has raised the issue of taxpayers and Wangerin not being prejudiced by denial of Wangerin's Petition.

The 2021 audits indicate the systemic problems created by using incorrect interpretation of § 15-30-2605, MCA.

ARM 42.2.311 PUBLIC PARTICIPATION provides:

(1) Public participation is encouraged and assisted to the fullest extent practicable. Participation must be consistent with other requirements of state law and the rights and requirements of personal privacy. The major objectives of such participation include: (a) greater responsiveness of governmental actions to public concerns and priorities; and (b) improved public understanding of official programs and actions. (2) Prior to the adoption, amendment, or repeal of a rule or policy or the granting or denying of certain licenses, the department shall, where the decision is of significant public interest, give adequate notice and opportunity to participate in the decision-making process.

§ 15-30-2605, MCA is a restraint on the time in which the Department must determine the correct amount of tax. This is of significant interest to the public.

Department's failure to permit and encourage public to participate in Department interpretation of MCA 15-30-2605 is a violation of MCA 2-3-103 (1) (a):

Each agency shall develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public ...

Internal deadlines created by Department for purposes of its own administrative processes cannot supersede and significantly shorten the Legislature's grant of time set forth in a specific statute of limitation. In *Melvin V Department of Revenue* IT-2015-1, the Montana Tax Appeal Board stated:

34. "The 'public policy' of the state is for the law-making power of the state to declare. The state has no 'public policy' except that found in its Constitution and Laws, which are made by the law-making power and not by administrative officers acting solely on their own ideas of public policy in promulgating a rule or so-called 'regulation.'" *State ex rel. McCarten v. Corwin*, 119 Mont. 520, 529, 177 P.2d 189, 194 (1947).

35. "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).

Since the Department incorrectly denied Wangerin's compliant Petition, Wangerin was incorrectly denied right to participate in rulemaking proceedings.

CONCLUSION

The Department's interpretation that issuing of the audit adjustment letter satisfies the "determined by the department" requirement of § 15-30-2605(3), MCA is NOT correct.

By mistake, the District Court affirmed the Department's interpretation that issuing of the audit adjustment letter satisfies the "determined by the department" requirement of § 15-30-2605(3), MCA.

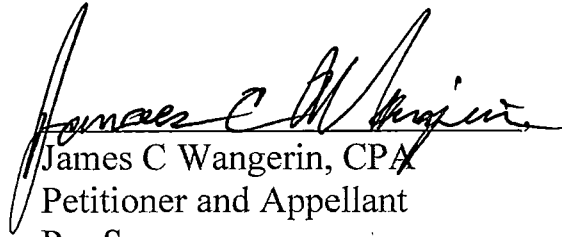
The District Court was NOT aware of and therefore could NOT affirm the Department's interpretation that, "The three-year deadline plainly relates to the determination, which the Department satisfies by sending a notice of determination following the informal review."

Because District Court was NOT aware of Department's change of interpretation of § 15-30-2605, MCA, the District Court made a mistake in affirming the Department's decision based on an incorrect interpretation.

The Supreme Court should send the case back to the District Court and Department of Revenue consistent with the instructions that the Department initiate rulemaking

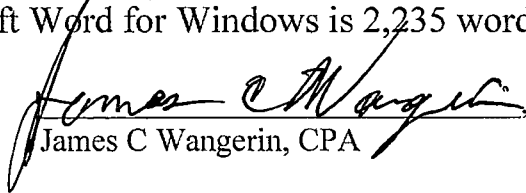
proceedings to create a legislative rule to amplify the “determined by the department” requirement of § 15-30-2605(3), MCA.

Dated this 4th day of June, 2022.


James C Wangerin, CPA
Petitioner and Appellant
Pro Se

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2,235 words.


James C Wangerin, CPA

CERTIFICATE OF SERVICE

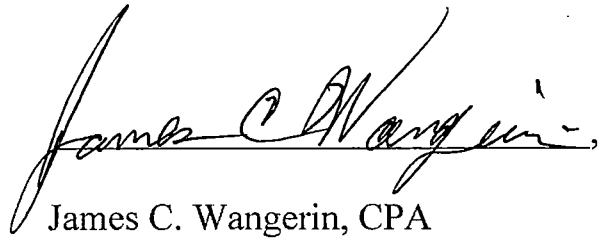
I hereby certify that I caused a true and accurate copy of the foregoing Reply Brief of Petitioner/Appellant James C Wangerin, CPA to be served via United States

Postal Service and email service as follows:

DAVE BURLEIGH
Montana Department of Revenue
Legal Services Office
127 N Roberts St.
PO BOX 7701
Helena MT 59604

David.Burleigh@mt.gov

Dated this 4th day of June, 2022.


James C. Wangerin, CPA