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**PRECAP: Montana Department of Revenue v. Priceline.com, Inc.:
Are Montana's Lodge Tax Statutes Really that Ambiguous?**

Aaron Brann

No. DA 14-0260
Montana Supreme Court

Oral Argument: Friday, April 10, 2015

I. QUESTION PRESENTED

Can the Montana Department of Revenue tax the amount that online travel companies collect for online services under Montana's Lodging Sales and Use Taxes?

II. FACTUAL AND PROCEDURAL BACKGROUND¹

This case arises from the Department of Revenue's (the "Department") attempt to tax online travel companies ("OTCs"). OTCs are internet-based companies that post travel information online, allowing customers to reserve hotel accommodations or car rental services through a third-party provider (rather than going directly to the hotel or car rental company). OTCs are typically used by hotels and rental car companies to fill rooms or rent cars that they may not be able to otherwise. Once a traveler reserves a service through an OTC, the OTC charges: (i) a rental rate set by the hotel or rental car company ("net rate"); (ii) a fee for the OTC's online services; and (iii) a combined amount which includes an estimation of taxes the hotel or rental car company will eventually have to remit ("tax recovery charge"), and an additional service charge retained by the OTC as compensation. The OTC forwards the net rate and tax recovery charge to the hotel or rental car company when billed, and the hotel or rental car company pays the Department based on the net rate.

In 1987, Montana enacted the Lodging Use Tax ("LUT").² The LUT requires "[t]he owner or operator of a facility" to collect 4% of the "accommodation charge collected by the facility."³ "Accommodation

¹ The facts presented in this section are drawn from Answer Br. of Defs./Appellees, *Mont. Dept. of Revenue v. Priceline.com, Inc. et al.* (Mont. Oct. 14, 2014) (No. DA 1-0260) (hereinafter Answer Br. of Def.). The Briefs of the Petitioner were sealed by order of the Court because previously stipulated "restricted information" revealing Appellee's transaction data and confidential contracts was inadvertently included. For purposes of continuity, certain sections of the Defendants' arguments are not covered in this article.

² Mont. Code Ann. §§ 15-65-101 to -131 (2013).

³ *Id.* at §§ 15-65-111(1); 112(1).

charge” is defined as “the fee charged by the owner or operator of a facility for use of the facility for lodging. . . .”⁴

In 2003, under the Montana Economic Development Tax Act (the “2003 Act”), the legislature enacted the Lodging Sales Tax (“LST”)⁵ which taxed “3% on accommodations and campgrounds”; and the Rental Vehicle Tax (“RVT”) which taxed “4% on the base rental charge for rental cars.”⁶ The 2003 Act did not enumerate any other specific services to be taxed.

The scope of the Lodging Taxes appears to be very similar. The LST’s definition of “accommodations” and the LUT’s definition of “facility” are essentially indistinguishable—both statutes use the defining language “a building containing individual sleeping rooms or suites . . .”⁷ The Lodging Taxes’ similarity is echoed by the Department’s own administrative rules which state that “[f]acility” as defined under the LUT and “[a]ccommodations” as defined under the LST are “synonymous.”⁸

In December 2003, the Department issued The Montana Lodging Facility Use and Sales and Use Tax Guide.⁹ It articulates that the Lodging Taxes equate to a “combined . . . total of 7% tax on accommodations in the State of Montana.”¹⁰

Importantly, OTCs are not included in the statutory language of the Lodging Taxes. In 2007, the Department unsuccessfully attempted to expand the Lodging Taxes to include fees charged by travel “intermediaries.”¹¹ The Department proposed to define “intermediary” to include “a person, other than the owner or operator of the facility, who collects an accommodation charge from the user.”¹² Also, the Department wanted to remove the language “by the owner or operator of a facility” from the LUT’s definition of “[a]ccommodation charge.” The legislature rejected the proposed amendments, excluding from the statutes any language that would explicitly allow taxes to be collected from OTCs.

In 2010, the Department commenced the current lawsuit, seeking declaratory and injunctive relief. The District Court granted summary judgment to the OTCs and held that OTCs are not required to collect and remit taxes on the amounts charged for their online services under the relevant Montana statutes. The Department appealed.

⁴ *Id.* at § 14–65–101(1).

⁵ Collectively, the LUT and LST are referred to hereinafter as the “Lodging Taxes.”

⁶ *Id.* at § 15–68–102.

⁷ *Id.* at § 15–68–101(1); and § 15–65–101(4).

⁸ Admin. R. Mont. 42.14.101(3) (2014).

⁹ *Montana Lodging Facility Use and Sales and Use Tax Guide*, Revised Dec. 2003 (hereinafter *Guide*). The *Guide* is attached as Appendix A to Ans. Br. of Def., *supra* n. 1.

¹⁰ *Id.* at 1.

¹¹ Mont. HB 147, 60th Leg. Sess. 5:1–2 (Dec. 22, 2006).

¹² *Id.* at 4:11–12.

III. ARGUMENTS FROM THE APPELLEES AND AMICUS BRIEFS

A. Defendants / Appellees Argument on appeal¹³

1. *The Lodging Taxes do not apply to the OTCs or the amounts they charge for their online services.*¹⁴

Under the LUT, “[t]he owner or operator of a facility shall collect the tax imposed[.]”¹⁵ A “facility” is “a building containing individual sleeping rooms or suites, providing overnight lodging facilities for periods of less than 30 days to the general public for compensation.”¹⁶

Under the LST, taxes must be collected by the “seller.”¹⁷ A “seller” is “a person that makes sales, leases, or rentals of personal property or services.”¹⁸ The Defendants argue that to be a “seller” the OTCs (1) must actually *perform* the taxable service pursuant to the statutory definition of “sale,”¹⁹ and (2) transfer possession or control of the building or structure that is the accommodation pursuant to the statutory definitions of “lease” and “rental.”²⁰

The Defendants argue the “owner or operator” under the LUT and the “seller” under the LST are synonymous because the Department’s own rules define them as such: “Seller” means a seller as defined in Montana statute²¹ and *includes an owner or operator of a facility.*²² It follows then that the OTCs are not “owners or operators” of facilities for purposes of both the LUT *and* the LST: the Department’s rules define an “owner or operator” as “any person or organization who rents a lodging facility to the public and is ultimately responsible for the financial affairs of the facility.”²³ The Defendants point out that the Lodging Taxes have been construed coextensively by the Department, quoting language from the Department’s Brief: “[a]ll parties agree that

¹³ All arguments in this section come from Ans. Br. of Def., *supra* n. 1 and Response Br. of Def./Appellees to the Multistate Tax Commn. Amicus Curiae Br., *Mont. Dept. of Revenue v. Priceline.com, Inc. et al.* (Nov. 13, 2014) (Cause No. DA 14-0260) (hereinafter Response Br. of Def.). This article will not review the arguments asserting that the Department’s common law theories do not provide an independent basis for liability (for lack of space); or the argument that MTC ignores the unique and limited nature of the Lodging Taxes, as the Amicus Curiae Brief of the Montana Chamber of Commerce and Montana Taxpayers Association addresses this issue.

¹⁴ This article will not review the argument that the RVT does not apply to OTCs.

¹⁵ Mont. Code Ann. § 15-65-112(1).

¹⁶ *Id.* at § 15-65-101(4)(a).

¹⁷ *Id.* at § 15-68-102.

¹⁸ *Id.* at § 15-68-101(16).

¹⁹ *Id.* at § 15-68-101(13).

²⁰ *Id.* at § 15-68-101(6)(a).

²¹ Mont. Code Ann. § 14-68-191.

²² Admin. R. Mont. 42.14.101(16) (emphasis added).

²³ *Id.* at 42.13.101(9).

the Taxes are administered coextensively as a single 7% tax.” Since the OTCs’ involvement is limited to passing along rent and taxes to a hotel, the Defendants argue they are not “ultimately responsible” for the financial affairs of the facility and thus not responsible for Lodging Taxes.

Additionally, Defendants argue that the amounts the OTCs charge for their online services are not subject to the Lodging Taxes because they are not specified in the Lodging Taxes. Under the LUT, a tax is imposed on “the accommodation charge by the facility.”²⁴ Under the LST, taxes are required on the “sale price” for “accommodations and campgrounds.”²⁵ The Defendant argues that the definition of “sale price” does *not* include the OTCs compensation because OTCs are *not* “owners or operators” (the Department’s rules state that “sales price” is synonymous with “accommodation charge”).²⁶ Additionally, the Department’s Guide specifies that “accommodation charges do not include charges for . . . reservation *services fees*.”²⁷ The amounts the OTCs charge for their services are not to charge for lodging, but to connect people with hotels.

2. Any ambiguity in the taxing statutes must be resolved in favor of the OTCs and against the Department.

The Defendants feel there is no reason to hold that the plain language of the taxing statutes is ambiguous, as they clearly do not encompass OTCs. However, to the extent that any ambiguity does arise in the taxing statutes, “the long settled rule that where a taxing statute is susceptible of two constructions any reasonable doubt as to persons or property intended to be within a particular tax should be resolved in favor of the taxpayer against the taxing authority.”²⁸

Since the OTCs are taxpayers, argues the Defendants, any ambiguity should be resolved in their favor.

*B. Amicus Brief of the Multistate Tax Commission*²⁹

The Multistate Tax Commission (“MTC”) argues that the Montana Legislature intentionally patterned its laws on transactional statutes common to other jurisdictions, and therefore, should follow the

²⁴ Mont. Code Ann. § 15–65–111(1). The “accommodation charge” is the “fee charged by the owner or operator of a facility for use of the facility for lodging.” *Id.* at § 15–65–101(1).

²⁵ *Id.* at § 15–68–102(1)(a), (2).

²⁶ Admin. R. Mont. 42.14.101(15).

²⁷ *Guide* at 2 (emphasis added).

²⁸ *Cherry Lane Farms v. Carter*, 456 P.2d 296, 301 (Mont. 1969).

²⁹ All arguments in this section come from Br. of Multistate Tax Commn. as Amicus Curiae in Support of Pl./Appellant Mont. Dept. of Rev. (Oct. 14, 2014) (No. DA 14-0260) (hereinafter MTC’s Br.). This article will not review the MTC’s argument that the OTCs are “sellers.”

lead of other jurisdictions when handling the OTCs. If Montana does not follow the lead of other states, because its taxing statutes are so similar, it could undermine the enforcement authority of other jurisdictions. First, the MTC argues that the sales tax should be based on the retail amount paid by the consumer opposed to the actual “accommodation charge” or “sale price” as the Lodging Taxes require. The MTC states that it is confusing for intermediaries to collect the tax recovery charge, because ultimately, they have no way to effectively estimate its basis. Additionally, the MTC urges the Court to adopt a presumption of taxability to be imposed on all vendors (and therefore, OTCs).

*C. Amicus Brief of the Montana Chamber of Commerce and Montana Taxpayers Association*³⁰

The Montana Chamber of Commerce and Montana Taxpayers Association (“Montana Amici”) strongly oppose attempts to judicially expand the Lodging Taxes subsequent to the legislature’s rejection of proposed amendments to the Lodging Taxes in 2007. In response to the MTC’s argument that Montana’s tax statutes are intentionally patterned after (and therefore comparable to) statutes in other jurisdictions, the Montana Amici argue that Montana’s tax statutes are *not* similar at all. The sales tax provisions are expressly limited. They are far more limited than the general sales tax found in 45 other states.

Montana has rejected numerous attempts to impose a general sales tax.³¹ Given the legislature’s rejection of House Bill 147 in 2007, the Montana Amici argue that it is clear that the legislature wants to preserve a limited sales tax in Montana.

IV. ANALYSIS OF THE APPELLANTS’ BRIEF AND AMICUS BRIEFS

Clearly, the underlying issue is whether the OTCs can be taxed pursuant to the Lodging Taxes. In order to determine whether the OTCs can be taxed, the Court will have to determine whether the statutes are ambiguous. It is unfortunate that the Department’s Briefs are sealed, because it is unclear how the Department intends to frame its argument. If the statutes are ambiguous, the Court will have to determine if the OTCs are in fact taxpayers, and therefore, deserving of a favorable statutory interpretation.

³⁰ All arguments in this section come from Amicus Curiae Br. of the Mont. Chamber of Com. and Mont. Taxpayers Assn. (Nov. 14, 2014) (No. DA 14-0260). This article will not address the Montana Amici’s argument that the MTC’s interpretation of the Lodging Taxes are “contrary to Montana law and bad for Montana business.”

³¹ See e.g., Mont. SB 299, 53d Leg., Reg. Sess. (Feb. 12, 1993); Mont. SB 143, 56th Leg., Reg. Sess. (Mar. 26, 1999).

The Defendants present a persuasive argument that the statutes are *not* ambiguous. Plain reading of statutory language notwithstanding, the Defendants cite to specific regulations promulgated by the Department which support the viewpoint that an unambiguous reading of the taxing statutes yields absolutely no requirement for OTCs to be taxed in Montana.

Additionally, the legislative history of the Lodging Taxes is clear. In 2007, the legislature rejected the Department's proposed amendments that would allow OTCs to be taxed. From the available briefs, it appears the Department is resorting to its last available channel to accomplish its objectives: a court order stating that it has the authority to tax the OTCs.

The MTC's brief appears to go beyond the scope of the Lodging Taxes by ignoring not only the language in the statutes themselves, but also the legislative history of Montana which favors a limited sales and use tax. The MTC, rather than touching on the issue as it affects *Montana*, argues from a platform of national tax policy, urging the Court to align itself with other jurisdictions.

Although the Department's arguments are not available, it seems probable that the Court's decision in this case will speak to the Court's resolution of the tension between legislative intent and statutory text that might be found ambiguous.

V. ARGUMENTS FROM THE APPELLANTS' BRIEF³²

The Department argues the OTCs should pay taxes. They are not *taxpayers* but *sellers*, and, therefore, *tax collectors*.³³

The Presumption of Taxability pursuant to Montana statute establishes that "all sales by a person engaging in business are subject to the sales tax or use tax[.]"³⁴ "[E]ngaging in a business" is "carrying on or causing to be carried on any activity with the purpose of receiving direct or indirect *benefit*."³⁵ The Department argues that because the OTCs monetarily benefit from their business, the District Court (in overlooking this tax presumption) effectively created a tax deduction in favor of the OTCs.

The Department then argues that the OTCs are not taxpayers. The taxpayer is the purchaser (not the OTC). Defined by Montana

³² All arguments come from Opening Br. of Pl./Appellant, *Mont. Dept. of Revenue v. Priceline.com, Inc. et al.* (Mont. April 3, 2015) (No. DA 14-0260). Redacted versions of the Appellant's briefs were released on April 3, 2015, while the original Opening Brief of Plaintiff / Appellant was filed on Aug. 12, 2014.

³³ This article will not discuss the Department's arguments based on failed itemization, a failed fiduciary duty on part of the OTCs, and "breakage."

³⁴ Mont. Code Ann. § 15-68-103(1) (2013).

³⁵ *Id.* at § 15-68-101(5) (emphasis added).

statute, the “purchaser” is “a person to whom the sale of personal property is made or to whom a sale is furnished.”³⁶ Pursuant to the Department’s regulations, “purchaser” is “synonymous” with the word “user”³⁷ which is defined as “person(s) renting and paying for the lodging facilities[.]”³⁸ The Department clarifies that because the LUT requires imposing a tax on “the user”³⁹ and the LST requires a tax on the “the purchaser,”⁴⁰ it was erroneous for the District Court to categorize the OTCs as taxpayers because OTCs fall outside the plain language of the relevant Montana statutes. The identification of the taxpayer has been determinative in multiple OTC cases decided outside of Montana.⁴¹

The proper category for OTCs is tax *collectors*. The Department argues that because the OTCs have admitted to *selling* hotel rooms,⁴² they are “sellers” pursuant to the LST which requires taxes to be “collected by the *seller* and paid to the department by the *seller*.”⁴³ Since taxes are required to be collected by the “seller,” the “seller” is a tax collector.

The Department argues that the OTCs are “owners and operators” under the LUT. Defined as “any person or organization that rents a lodging facility to the public and is ultimately responsible for the financial affairs of the facility. Such person may be [a] . . . corporation . . . or other . . . entity.”⁴⁴ The Department argues that the OTCs *are* ultimately responsible for the facilities and any other conclusion would frustrate Montana’s taxing system: to hold an OTC responsible for less (or zero) taxes compared to a hotel for an identical transaction, simply for being an intermediary, would be antithetical.

VI. ANALYSIS OF THE APPELLANTS’ ARGUMENT

The logic of the Department’s position is persuasive on its face. It does not immediately reconcile that third-party intermediaries should pay less taxes than hotels when providing an arguably indistinguishable service to the consumer. Given the legislative history of Montana’s Lodging Taxes, however, it is likely that the Court will consider the tension between the legislature’s intent, and statutory language that may be susceptible to more than one interpretation, before announcing a position on this issue.

³⁶ *Id.* at § 15–68–101(10).

³⁷ Admin. R. Mont. 42.14.101(13) (2014).

³⁸ *Id.* at 42.14.101(12).

³⁹ Mont. Code Ann. § 15–65–111(1).

⁴⁰ *Id.* at § 15–68–102(2).

⁴¹ See *Charleston v. Hotels.com, LP*, 520 F. Supp. 2d 757 (D. S.C. 2007); *Expedia, Inc. v. Columbus*, 681 S.E.2d 122 (Ga. 2009).

⁴² The Opening Brief of Plaintiff / Appellant cites to multiple exhibits wherein the OTCs describe themselves as sellers.

⁴³ Mont. Code Ann. § 15–68–102(2) (emphasis added).

⁴⁴ Admin. R. Mont. 42.14.101(10).