48 Op. Att'y Gen. No. 25

CITIES AND TOWNS - Authority of self-governing city to establish tiered resort tax schedule;
LOCAL GOVERNMENT - Authority of self-governing city to establish tiered resort tax schedule;
MUNICIPAL CORPORATIONS - Authority of self-governing city to establish tiered resort tax schedule;
PUBLIC FUNDS - Authority of self-governing city to establish tiered resort tax schedule;
MONTANA CODE ANNOTATED - Sections 7-1-101, -106, -112, 7-6-1501 to -1509, 15-10-420;
MONTANA CONSTITUTION - Article XI, section 6;
MONTANA LAWS OF 1985 - Chapter 729;
OPINIONS OF THE ATTORNEY GENERAL - 44 Op. Att'y Gen. No. 5 (1991), 41 Op. Att'y Gen. No. 75 (1986).

HELD:

A municipality with self-governing powers may, under Mont. Code Ann. §§ 7-6-1501 to -1509, establish a tiered resort tax schedule providing different tax rates, none of which exceed 3 percent, for similar goods or services according to the character of the business in which the goods or services are sold or offered.

December 28, 2000

Mr. John M. Phelps
Whitefish City Attorney
204 Central Avenue
Whitefish, MT 59937

Dear Mr. Phelps:

You have requested my opinion on a question concerning a self-governing city's power to enact a tiered resort tax. In particular, you ask:

May a charter city with self-governing powers adopt and enforce a tiered resort tax rate, applying different rates of tax to different categories of establishments and retail items, instead of applying a flat rate to all establishments and retail items?

You also asked whether the proposed tiered tax schedule would meet constitutional challenges on equal protection grounds. Although I decline to give an opinion on the constitutionality of the resort tax statutory framework itself, inasmuch as it is my duty as Attorney General to defend constitutional challenges against state statutes, my staff has researched the issue and will provide the results of that research by separate letter of advice.

The City of Whitefish, a city with self-governing powers under its charter, currently imposes a flat 2 percent resort tax on all establishments and retail items subject to the tax. Pursuant to Mont. Code Ann. § 7-6-1504(1), the existing resort tax was approved by the Whitefish electors at an election held on November 7, 1995. The City Council has considered submitting to the Whitefish electors an amendment to the resort tax that would vary the percentage of the tax in the following manner:

1. The rate of the resort tax would be 3 percent on the retail value of all goods and services sold, except for goods and services sold for resale, at hotels, motels, and other lodging or camping facilities;

2. The rate of the resort tax would be 2 percent on the retail value of all goods and services sold, except for goods and services sold for resale, at:

a. restaurants, fast food stores, and other food service establishments;

b. taverns, bars, nightclubs, lounges, and other public establishments that serve beer, wine, liquor, or other alcoholic beverages by the drink; and

c. destination ski resorts and other destination recreational facilities.

3. The rate of the resort tax would be 1 percent on luxuries, as defined by Mont. Code Ann. § 7-6-1501(1), to mean any gift item, luxury item, or other item normally sold to the public or to transient visitors or tourists.

The Whitefish charter was adopted by the electors of Whitefish in 1980 and amended in 1985. Under the Montana Constitution, article XI, section 6 (incorporated within Mont. Code Ann. § 7-1-101), "A local government unit adopting a self-government charter may exercise any power not prohibited by this constitution, law, or charter." A self-governing city has all the powers of government save those specifically prohibited. D & F Sanitation Serv. v. City of Billings, 219 Mont. 437, 445, 713 P.2d 977, 982 (1986); 44 Op. Att'y Gen. No. 5, 402 (1991). In this regard, Mont. Code Ann. § 7-1-106 provides:

The powers and authority of a local government unit with self-government powers shall be liberally construed. Every reasonable doubt as to the existence of a local government power or authority shall be resolved in favor of the existence of that power or authority.

Mont. Code Ann. § 7-1-112(1) restricts the taxing authority of local governments with self-governing powers. It provides:

A local government with self-government powers is prohibited the exercise of the following powers unless the power is specifically delegated by law:

(1) the power to authorize a tax on income or the sale of goods or services, except that, subject to 15-10-420, this section may not be construed to limit the authority of a local government to levy any other tax or establish the rate of any other tax; . . . .

In my opinion, the requirement of delegation has been satisfied by Mont. Code Ann. § 7-6-1502, which provides:

As required by 7-1-112, 7-6-1501 through 7-6-1507 specifically delegate to the electors of each respective resort community the power to authorize their municipality to impose a resort tax within the corporate boundary of the municipality as provided in 7-6-1501 through 7-6-1507.

The resort tax statutes set a maximum level of 3 percent without mention of a differential schedule of tax rates. Mont. Code Ann. § 7-6-1503(1).

Well-established rules of statutory construction do not require reference to the legislative history of a statute when it is not ambiguous. When interpreting statutes, the role of a court "is simply 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." Mont. Code Ann. § 1-2-101, quoted in State ex rel. Keyes v. Montana Thirteenth Jud. Dist. Ct., 1998 MT 34, ¶ 15, 288 Mont. 27, 955 P.2d 639. See also In re R.L.S., 1999 MT 34, ¶ 12, 293 Mont. 288, 977 P.2d 967 ("It is not our function to insert language into a statute which has not been placed there by the Legislature"). "Where the language is clear and unambiguous, no further interpretation is required." Keyes, ¶ 15. See also GBN, Inc. v. Montana Dep't of Revenue, 249 Mont. 261, 265, 815 P.2d 595, 597 (1991); State ex rel. Roberts v. Public Serv. Comm'n, 242 Mont. 242, 246, 790 P.2d 489, 492 (1990). Further, "an interpretation of a statute which gives it effect is preferred to one which renders it void." Mead v. M.S.B., Inc., 264 Mont. 465, 474, 872 P.2d 782, 788 (1994), citing Mont. Code Ann. § 1-3-232. "In particular, 'whenever there are differing possible interpretations of [a] statute, a constitutional interpretation is favored over one that is not.'" Huether v. Sixteenth Jud. Dist. Ct., 2000 MT 158, ¶ 28, 57 State Rptr. 647, 4 P.3d 1193, citing Department of State Lands v. Pettibone, 216 Mont. 361, 374, 702 P.2d 948, 956 (1985). "A statute should be interpreted to give a lawful result if possible." Link v. City of Lewistown, 253 Mont. 451, 454, 833 P.2d 1070, 1073 (1992), citing Grossman v. Dep't of Natural Resources, 209 Mont. 427, 451, 682 P.2d 1319, 1332 (1984) ("Neither statutory nor constitutional construction should lead to absurd results, if reasonable construction will avoid it.").

In this instance, although the resort tax statutes are not ambiguous from the standpoint of establishing a maximum rate of tax for a "resort area" or a "resort community," they are arguably ambiguous on the question of whether a differential tax schedule is permissible. The statutes neither prohibit nor explicitly permit a differential schedule. In that circumstance, it is proper to refer to the legislative history. Montana Dep't of Revenue v. Puget Sound Power & Light Co., 179 Mont. 255, 263, 587 P.2d 1282, 1287 (1978). Accord Albright v. State, 281 Mont. 196, 210, 933 P.2d 815, 825 (1997). The statutes enacted as chapter 729 of the 1985 Montana Laws originated as House Bill 826. Records of testimony and evidence before the committees considering the bill show that the principal aim of the resort tax was to fund services in resort areas. These areas require extra revenue to offset the extraordinary cost of providing public facilities and services for the tourist season. These must be maintained even during the off-season, when the area's population has decreased markedly. The minutes of the committee meetings, together with the summarized and written comments from both proponents and opponents, do not refer to a differential tax schedule applying different rates according to the character of a business. There was instead concern that the bill, if enacted, be drawn to apply restrictively to resort areas so that it would not be interpreted as a general sales tax. See, e.g., Mins., Senate Taxation Comm., Apr. 23, 1985, at 1.

A statute's words and phrases "are construed according to the context and the approved usage of the language," although technical terms are to be given the "peculiar and appropriate" meaning they have acquired in law or through statutory definition. Mont. Code Ann. § 1-2-106. See Billings Firefighters Local 521 v. City of Billings, 1999 MT 6, ¶¶ 20-21, 293 Mont. 41, 973 P.2d 222. The statute that fixes the resort tax rate is Mont. Code Ann. § 7-6-1503: "(1) The rate of the resort tax must be established by the election petition or resolution provided for in 7-6-1504, but the rate may not exceed 3%." "Exceed" is defined as (transitively) "[t]o go or be beyond the limit or measure of; to overdo or overtax" and (intransitively) "[t]o go too far; to pass the proper or usual bounds or measure." Webster's New International Dictionary 888 (2d ed. 1941). Given the meaning of the word "exceed," it is clear that the statute sets an upper limit for the tax rate, but does not specify a particular rate. An ordinance fixing differential rates is thus not inconsistent with the word "exceed," since none of the proposed rates exceed 3 percent.

Section 7-6-1503 refers to a singular rate by its use of the term, "the rate." Although the term could be interpreted to mean that the statute permits only a single tax rate, Mont. Code Ann. § 1-2-105(3) provides, "The singular includes the plural and the plural the singular." See Hauswirth v. Mueller, 25 Mont. 156, 162, 64 P. 324, 326 (1901). Multiple rates are not expressly prohibited. Had the legislature desired otherwise, it could have so provided in unequivocal terms. See North v. Bunday, 226 Mont. 247, 251-56, 735 P.2d 270, 272-76 (1987).

A differential tax structure is not inconsistent with the discernible concerns revealed in the committee minutes. Indeed, it is arguable that a differential rate furthers the express purpose of the resort tax statutes by taxing at a higher rate those businesses drawing more of their customers from tourists than those serving a greater proportion of local residents. Motels, hotels, and lodging facilities typically serve tourists, in contrast to destination ski resorts or other recreational facilities that are heavily used by local residents as well as by tourists.

Mont. Code Ann. § 7-1-106 obligates me to resolve all reasonable doubts as to the existence of the power to levy a tiered resort tax in favor of the existence of the power. Accordingly, I hold that applying a different tax rate not to exceed 3 percent to the goods and services sold at businesses of differing character within the resort area is within the power of a resort community operating under a self-government charter.

THEREFORE, IT IS MY OPINION:

A municipality with self-governing powers may, under Mont. Code Ann. §§ 7-6-1501 to -1509, establish a tiered resort tax schedule providing different tax rates, none of which exceed 3 percent, for similar goods or services according to the character of the business in which the goods or services are sold or offered.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/jbw/dm