

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of)	NOTICE OF AMENDMENT AND
ARM 42.14.101, 42.14.106,)	REPEAL
42.14.113, 42.14.202, 42.14.203,)	
42.14.205, 42.14.303, 42.14.1002,)	
42.14.1003, 42.14.1102, 42.14.1105,)	
42.14.1201, 42.14.1202 and the)	
repeal of ARM 42.14.206, 42.14.207,)	
42.14.302, 42.14.304, 42.14.1001,)	
42.14.1101 pertaining to lodging)	
facility sales and use taxes and rental)	
vehicle sales and use taxes)	

TO: All Concerned Persons

1. On November 19, 2021, the Department of Revenue (department) published MAR Notice No. 42-1043 pertaining to the public hearing on the proposed amendment and repeal of the above-stated rules at page 1653 of the 2021 Montana Administrative Register, Issue Number 22.

2. On December 13, 2021, the department held a public hearing to consider the proposed amendment and repeal. The following commenter appeared and provided oral testimony on the proposed rulemaking: Michael Green, attorney, Crowley Fleck, PLLP, on behalf of the Montana Lodging and Hospitality Association (MLHA). The department also received written comments, questions, and recommendations for additional amendments from Mr. Green and the MLHA.

3. The department has amended ARM 42.14.113, 42.14.203, 42.14.205, 42.14.303, 42.14.1002, 42.14.1003, 42.14.1102, 42.14.1105, 42.14.1201, and 42.14.1202 as proposed.

4. The department has repealed ARM 42.14.206, 42.14.207, 42.14.302, 42.14.304, 42.14.1001, and 42.14.1101 as proposed.

5. The department has amended the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

42.14.101 DEFINITIONS The following definitions apply to this subchapter:
 (1) through (4) remain as proposed.
(5) "Online hosting platform sale" means any sale facilitated through an online hosting platform, as defined in 15-68-101, MCA.
 (5) through (8) remain as proposed but are renumbered (6) through (9).
(10) "Sale" means sale as defined in 15-68-101, MCA. In the case of online hosting platform sales, a sale for purposes of tax collection obligations occurs at the

time the seller collects funds from the purchaser and does not include any transaction occurring between a seller and an online hosting platform.

(9) and (10) remain as proposed but are renumbered (11) and (12).

AUTH: 15-1-201, 15-65-102, 15-68-801, MCA

IMP: 15-65-101, 15-68-101, MCA

42.14.106 REGISTRATION AND PERMIT (1) remains as proposed.

(2) A seller who is registering multiple accommodations locations and who has elected to file a combined lodging facility sales and use tax return may file one registration listing separately each accommodations location. The combined return can only include accommodations that are located:

(a) remains as proposed.

(b) within a recognized Convention and ~~Visitors~~ Visitors Bureau (CVB).

(3) through (9) remain as proposed.

AUTH: 15-65-102, 15-68-801, MCA

IMP: 15-65-114, 15-68-401, 15-68-402, MCA

42.14.202 COMBINED CHARGE FOR SERVICES; DEPARTMENT INSPECTION OF RECORDS (1) through (8) remain as proposed.

(9) Each seller shall maintain records necessary to document gross receipts for the lodging facility sales and use tax. A seller may be required to substantiate gross receipts reported for a particular quarter. For audit purposes, the seller may be required to ~~reconstruct~~ provide the department access to, or copies of, data which substantiates the reported gross receipts from the original lodging facility sales and use tax receipts.

(10) Such records shall include specific electronic or physical documentation of exempt charges, including but not limited to sales generated through online hosting platforms and short-term rental marketplace. Documentation for centrally billed federal exemptions shall include the first six digits on each credit card used to pay for the accommodations. Documentation for long-term exempt accommodations may include the folio or similar documentation.

(11) remains as proposed.

AUTH: 15-1-201, 15-65-102, 15-68-801, MCA

IMP: 2-18-501, 15-65-111, 15-65-113, 15-68-102, 15-68-502, MCA

6. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT 1: The MLHA supports adoption of most of the rules proposed by the department but requests revisions to certain rules to fully address the impacts of Senate Bill 52 (2021) (SB 52).

RESPONSE 1: The department appreciates industry support in the undertaking of such a lengthy and substantial rules project that entails much more than the implementation of SB 52. The department also appreciates the MLHA's offering of revisions, some of which have been incorporated to the rules upon adoption, which are described in these responses and indicated in the final version of the revised rules' text.

COMMENT 2: Mr. Green made comments at the December 13, 2021 public hearing that the MLHA believes that notwithstanding Comment 1, there has been a lack of stakeholder engagement with the MLHA to discuss the department's implementation of SB 52 prior to the filing of the department's proposal rules notice which could have resolved some of the MLHA's issues with the department's proposals.

RESPONSE 2: Mr. Green's comments do not present a complete recollection about stakeholder engagement in this rulemaking. Department representatives had several telephone calls with Mr. Green and with Stuart Doggett, executive director of the MLHA, regarding the department's implementation of SB 52; and department representatives also met with the MLHA's representatives on or about October 20, 2021, to discuss the direction and general substance of the department's rule proposals that became MAR Notice No. 42-1043.

Further, the Montana Administrative Procedure Act (MAPA) affords all interested persons, including industry stakeholders, the opportunity to attend rules hearings and/or to submit data, testimony, or comments to the department for its consideration and response before the conclusion of the comment deadline and within a statutory schedule. In most instances, the department believes the MAPA process works well and is sufficient without engaging in quasi-negotiated rulemaking with only a select number of stakeholders.

COMMENT 3: The MLHA requests the department clarify the single sales approach for online platform sales which the MLHA refers to as the "single seller model." While the MLHA disagrees with the department that this approach is required by SB 52, the MLHA is supportive of the prospective application of a single seller approach.

The MLHA believes clarifications should be incorporated into the rules regarding tax collection, reporting, and payment obligations under different online sales models. The MLHA offers that it is important to clarify that the lodging taxes are imposed on the "retail sale," which is the transaction with the end user, and not the transaction between the lodging provider and the online platform. Additionally, the MLHA contends that the collection responsibility should fall to the business which is actually collecting the sales price from the end user.

The MLHA requests the department add provisions to the definitions in ARM 42.14.101 to clarify that there is a single seller for each transaction and that the seller is the entity which is collecting funds from the purchaser. The MLHA also requests the department adopt language in ARM 42.14.303 to clarify that transactions occurring between lodging providers and online platforms are exempt from tax.

RESPONSE 3: Based on SB 52 and the legislature's clear definition of seller, the department has amended ARM 42.14.101 to add the definitions of "online hosting platform sale" and "sale" which the department believes adds clarity to instances when multiple parties are involved in a transaction; however, there is one seller in each transaction required to collect and remit the taxes.

COMMENT 4: The MLHA asks the department to recognize that the express intent of SB 52 was to resolve the split-tax collection issues created by the *Priceline* decision by aligning the tax base in statute for both lodging taxes. The MLHA contends the tax base adopted by SB 52 is intended to capture the types of online platform revenues addressed in *Priceline*, but exclude the resort services fees addressed in *Boyne USA v. DOR*. The MLHA requests the department clarify in ARM 42.14.202 that fees like the resort services fees at issue in *Boyne* are not included in the definition of sales price.

RESPONSE 4: As to the first portion of the comment, the MLHA requests the department to render a legal conclusion which the department contends is unnecessary. The court's *Priceline* and *Boyne* decisions speak for themselves and the department has noted those rules that are proposed for amendment or repeal based on the litigation. It is also not for the department to opine on the legislative intent of SB 52 because the language of the bill is unambiguous and legislative intent is necessary only in those instances where statutory language is ambiguous. The department contends that it is attempting to implement the will of the legislature in the rules package based on the department's review of the plain language in SB 52.

Regarding the MLHA's request to amend ARM 42.14.202, the department is disinclined to adopt rules which are contradictory to the clear language of the statutes.

COMMENT 5: Mr. Green commented that the MLHA is supportive of the amendment to proposed ARM 42.14.202(8) to add cleaning charges, but the MLHA is also concerned that the addition of charges in the subsection may introduce a further expansion of taxable services under the statute.

RESPONSE 5: The department responds that ARM 42.14.202(8) addresses the practice of separately stating charges for miscellaneous services which reduces the tax base. If a charge, such as a cleaning charge, must be paid as part of the sales price, the separately stated charge must be included in the sales price when calculating the tax. This rule provides further guidance to the legislature's adoption of the language in 15-68-101(12)(d), MCA. The department is not seeking to expand taxable services with the amendment to ARM 42.14.202(8).

COMMENT 6: The MLHA requests the department to clarify that recordkeeping requirements do not require businesses to maintain records in a format different than records are kept in the normal course of business. The MLHA's members are concerned that language regarding "original" receipts and "specific

documentation" could require businesses to maintain paper records for transactions which are tracked through the business's electronic business records.

RESPONSE 6: Based on the comments and suggestions provided, the department has amended ARM 42.14.202(9) and (10), upon adoption, to clarify some flexibility in the form of the records subject to audit and to lessen industry concerns.

/s/ Todd Olson
Todd Olson
Rule Reviewer

/s/ Brendan Beatty
Brendan Beatty
Director of Revenue

Certified to the Secretary of State February 1, 2022.