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IN THE SUPREME COURT OF THE STATE OF MONTANA

OMIMEX CANADA, LTD., )

Case No. DA 07-0356

Plaintiff and Appellant, )

vs. )

**BRIEF IN OPPOSITION AND  
OBJECTIONS TO PETITION  
FOR REHEARING**

STATE OF MONTANA, )  
DEPARTMENT OF REVENUE, )

Defendant and Respondent. )

The Court ruled on December 2, 2008, that Omimex Canada, Ltd.’s (“Omimex”) properties are classified as class eight properties under § 15-6-138, MCA, therefore subject to a tax rate of 3%. The Department of Revenue (“DOR”) filed a petition for rehearing.

1 Omimex refutes DOR’s petition for rehearing. The petition doesn’t meet  
2 the criteria set forth in Rule 20(1)(a), M.R.App.P., for the Honorable Supreme  
3 Court to consider a rehearing. With its ruling, *Omimex v. Dept. of Revenue*,  
4 2008 MT 403, the Court has informed the parties of the law and no further  
5 reconsideration is needed.

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7 **STANDARDS**

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9 Mont. R. App. P. 20(1)(a) states the criteria for petitions for rehearing.

10 The Court confines itself to the case it is presented. *Feely v. Lacey*  
11 (1958), 133 Mont. 283, 293, 322 P.2d 1104, 1109; *In re Murphy’s Estate*  
12 (1920), 57 Mont. 273, 188 P. 146. “It is the universal rule—and this court has  
13 repeatedly held—that the court will not consider grounds [for rehearing] not  
14 presented upon the original hearing.” *Murphy’s*, 188 P. at 151. A party cannot  
15 gain rehearing on issues that were not raised earlier.  
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19 **ARGUMENTS**

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21 **DOR’s Petition Does Not Meet the Criteria for Rehearing.**

22 “Overlook” means “fail to notice or consider.” Random House  
23 Webster’s Dictionary, 2d ed. (1997). Because the Court did not ‘fail to notice’  
24 any of the identified facts, issues, or law, the petition lacks merit. “The court  
25

1 should not be asked to reconsider matters which have been already considered  
2 and determined . . .” *Collins v. Metropolitan Life Ins. Co.* (1905), 32 Mont.  
3 329, 348, 80 P. 1092, 1093.  
4

5 **(A) The Court Did Not Overlook Some Fact Material to the**  
6 **Decision.**

7 Petitioner is not entitled to rehearing when the purportedly overlooked  
8 fact was either immaterial to the decision or was not overlooked. *See Sell v.*  
9 *Sell* (1920), 58 Mont. 329, 193 P. 561, 563-564; *In re Tuohy’s Estate* (1905), 33  
10 Mont. 230, 83 P. 486, 492.  
11

12 Petitioner claims the Court overlooked material facts when considering  
13 that Omimex “is a natural gas company”. Petition, pp. 2-5.  
14

15 The Court, however, did not fail to notice or consider the nature of  
16 Omimex’s properties and their activities. *Omimex*, ¶¶ 6-9. Upon this Court’s  
17 consideration of the record it found “[t]he parties and the District Court  
18 consistently considered it [Omimex] to be a natural gas company.” *Omimex*, ¶  
19 8.  
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22 The term “natural gas companies” appears in § 15-6-141(1)(b), MCA.  
23 Since the term is not defined in the tax statutes, as a matter of statutory  
24 construction, it is given its usual and ordinary meaning. *Dunnington v. State*  
25

1 *Compensation Ins. Fund*, 303 Mont. 252, 256, 15 P.3d 475, 478 (2000). The  
2 District Court recognized Omimex’s role in the natural gas industry:  
3

4       In order to move natural gas from where it is located in the  
5 ground to retail markets where it is utilized, the natural gas  
6 system includes several discrete operations or processes. Those  
7 include exploration for and production of natural gas, gas  
8 gathering, gas processing, gas transmission, and gas  
9 distribution. Some natural gas companies engage almost  
10 entirely in one of those areas, such as distribution or exploration  
11 or production. Other companies occupy a wider niche in the  
12 vertical chain of the natural gas industry. Omimex engages in  
13 exploration and production of natural gas, the gathering of  
14 natural gas for itself and third parties, the processing of natural  
15 gas for itself and third parties, and the transportation of natural  
16 gas for itself and third parties. (Findings of Fact, Conclusion of  
17 Law and Order (“FOF”), p. 4).

18       It simply stands to reason that a company, such as Omimex, primarily  
19 engaged in natural gas, is a “natural gas company”. Further, the District Court  
20 did not find that “Omimex is a sophisticated international pipeline company”.  
21 *See* Petition, p. 2. Instead, its ruling acknowledged that a natural gas company,  
22 such as Omimex, can engage in a number of discrete activities in the industry.  
23 DOR did not contest this.

24       Nor did this Court overlook Omimex’s oil production. *See Omimex*, ¶¶  
25 7-8. Omimex’s oil is clearly secondary, when compared to the gas. “The wells  
collectively produce over 10 million cubic feet of natural gas a day and slightly

1 less than 600 barrels of oil a day.” *Id.* at ¶ 7. DOR never asserted in this case  
2 that Omimex’s oil production should be considered a separate line of business  
3 or that it precluded Omimex from being a natural gas company. Accordingly,  
4 there is no basis for the assertion (Petition, p. 4) that the decision leaves  
5 Omimex’s oil lines in class nine. Therefore, the Court correctly classified “the  
6 Omimex properties as class eight properties under § 15-6-138, MCA”. *Omimex*,  
7 ¶ 27.  
8

9  
10 Nor did this Court overlook Omimex’s pipeline property. The Court  
11 recognized that Omimex owns gathering lines: “Each [Omimex] property has  
12 gathering lines that, at low pressure, move untreated gas or oil from Omimex’s  
13 and often other parties’ individual wells to central collecting points for further  
14 transmission in large high pressure lines”. *Id.*, ¶ 7. As DOR noted in its  
15 Appellee’s Brief, pp. 4-5, pipelines are necessary to collect natural gas obtained  
16 from the ground. The contention that somehow owning a pipeline precludes  
17 one from being a “natural gas company” is nonsensical.  
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21 Prior to the Court’s decision, DOR didn’t argue that Omimex was not a  
22 natural gas company. *See* Appellee’s Brief, p. 34. DOR’s assertion that having  
23 pipelines or oil in these circumstances keeps Omimex from being considered a  
24  
25

1 “natural gas company” is unsupported by cited legal authorities in DOR’s  
2 petition.

3  
4 So, DOR cannot claim that the Court overlooked the character of  
5 Omimex. That “[t]he parties and the District Court consistently considered  
6 [Omimex] to be a natural gas company” was supported. *Omimex*, ¶ 8.

7  
8 DOR shows nothing that counters the paramount fact that Omimex “still  
9 does not have a major distribution system in this state as required by § 15-6-  
10 141(1)(b), MCA.” *Omimex*, ¶ 26.

11  
12 **(B) The Court Did Not Overlook Legislative Intent.**

13 Petitioner claims the Court overlooked and misunderstood legislative  
14 intent as grounds for rehearing. In the Appellee’s Brief, p. 33-35 and ftn. 8,  
15 DOR presented its legislative intent in support of the District Court’s order.

16  
17 This Court did not overlook this legislative intent. Rather, the Court  
18 considered legislative intent, including iterations prior to 1999. *Omimex*, ¶¶ 22,  
19 24.

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21 This Court did not misunderstand legislative intent.  
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If the legislature had intended to place all centrally assessed natural gas companies into class nine, it had two simple ways to do so: it could have deleted § 15-6-141(1)(b), MCA, altogether or, if for some reason the legislature wanted to single out centrally assessed natural gas companies to be certain they would all be placed in class nine, it could have deleted the qualifier “having a major distribution system in this state.” It did not do either. *Omimex*, ¶ 25.

The plain meaning of the statute agrees with the Court’s discussion of legislative intent. If the intent of the legislature can be determined by looking to the plain meaning of the words in a statute, no further inquiry is required. *Omimex*, ¶ 21.

DOR’s belated reference to one legislator’s unclear snippet, not in the record presented to this Court, is inadequate. Petition, pp. 5-6. The “remarks of a legislator, even those of the sponsoring legislator, will not override the plain meaning of a statute.” *U.S. v. Tabacca*, 924 F.2d 906, 911 (9th Cir. 1991). Tax law is exclusively statutory. *See Swartz v. Berg* (1966), 147 Mont. 178, 411 P.2d 736. “Nothing is taxable unless clearly authorized by statute.” *Id.*, 147 Mont. at 182, 411 P.2d at 738.

The Court addressed DOR’s argument that legislative intent was determinative by clarifying the background to § 15-6-141, MCA. The Court

1 carefully noted that “prior to” the 1999 amendment, natural gas companies  
2 without a major distribution system in this state were *not* class nine (previously  
3 class eleven) property. *Omimex*, ¶ 24. Natural gas companies other than  
4 centrally assessed natural gas companies having a major distribution system in  
5 this state were excepted from the statutory definition of class nine, previously  
6 class eleven, property. *Omimex*, ¶ 22. The Court noted that in 1999 the  
7 legislature amended relevant statutes as a result of deregulation and  
8 restructuring of electrical generation facilities. *Id.*, ¶¶ 22-23. The streamlining  
9 of statutes in 1999 did not alter the statutory “. . . status quo regarding natural  
10 gas companies’ tax classification”. *Omimex*, ¶ 23.

14 Remarkably, DOR confuses the Court’s reference to “status quo”.  
15  
16 Petition, p. 8. The reference to the “status quo” by the Court in ¶ 23 is directed  
17 to the meaning of the statute, not DOR’s interpretation and application of the  
18 statute. This Court does not give deference to an agency’s incorrect legal  
19 reasoning. *See Grouse Mountain Associates, Ltd. v. Montana Dept. of Public*  
20 *Service Regulation, Montana P.S.C. (1997)*, 284 Mont. 65, 69, 943 P.2d 971,  
21 973-974.

24 DOR’s practice at the time with regard to classifying property of the  
25 Montana Power Company (“MPC”) is not determinative of the classification of

1 property in the hands of a different entity, Omimex. MPC was an “. . .  
2 integrated natural gas production and distribution (“wellhead to burner tip”)  
3 system . . .” (*Omimex*, ¶ 10). MPC had “a major distribution system in this  
4 state.” In contrast, Omimex “still does not have a major distribution system in  
5 this state as required by § 15-6-141(1)(b), MCA.” *Omimex*, ¶ 26. (“It is also  
6 undisputed that Omimex is not regulated and does not operate as a public utility  
7 system.” FOF, p. 10.)  
8  
9

10 Therefore, legislative intent does not prove DOR’s contention that  
11 Omimex should be considered within class nine property.  
12

13 **(C) The Decision Does Not Conflict with a Statute or Controlling**  
14 **Decision.**

15 DOR presented a barren central assessment and classification argument  
16 to this Court. Appellee’s Brief, pp. 37-38. DOR does not allege that the  
17 Court’s decision conflicts with a statute or controlling decision. “Because  
18 Omimex’s properties are centrally assessed, DOR has classified the property as  
19 class nine property under 15-6-141, MCA, which is taxed at a rate of 12%.”  
20 *Omimex*, ¶ 14. The Court considered DOR’s practice concerning central  
21 assessment and classification and the District Court’s ruling to that effect. *See*  
22 *Omimex*, ¶ 27. This Court’s decision cited to all the key statutes: §§ 15-6-138,  
23  
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1 15-6-141 and 15-23-101, MCA. DOR's disagreement with the Court's analyses  
2 of these statutes is not grounds for rehearing.

3  
4 The decision shows that this Court did *not* overlook the issue of central  
5 assessment. Rather, it determined "it is not necessary to address whether the  
6 District Court was in error when it upheld the central assessment of Omimex's  
7 property since where the property is assessed does not make any difference for  
8 its classification." *Omimex*, ¶ 27 (emphasis added).

9  
10 Valuation was not contested in this case. *See Omimex*, ¶¶ 14, 17; FOF, p.  
11  
12 3. Truth be known, Omimex did not contest the tax year 2004 value because it  
13 was very close to the values Omimex reported to the counties for local  
14 assessment. *See* Deposition of Rick Firmine, pp. 64-66, February 7, 2005  
15 (submitted by DOR to the District Court for filing in the record on December  
16 23, 2005). The parties recognized that notwithstanding their differences  
17 regarding whether the properties should be centrally assessed, the case could be  
18 resolved on the basis of classification:  
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21  
22 ... the real issue in this case is neither the central assessment  
23 nor valuation of oil and gas properties - it is the tax rate which  
24 is the exclusive province of the Legislature. Appellee's Brief,  
25 p. 43.

1 Assessment and classification are two statutorily distinct matters.  
2 Assessment, or appraisal, refers to the process of valuing property, while  
3 classification is quite different and involves determining the tax rate to be  
4 applied. §§ 15-8-111(5), (6), 15-1-101(1)(b), 15-1-101(1)(u), MCA. “For the  
5 purpose of taxation, the taxable property in the state shall be classified in  
6 accordance with this part.” §15-6-101(2), MCA (emphasis added).  
7  
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9 Components of property taxation have not changed with the Court’s  
10 decision. Property tax is calculated by taking assessed value, multiplying it by  
11 the tax rate (which is determined through classification of the property),  
12 producing thereby the taxable value, which latter figure is multiplied by the  
13 number of mills levied by the taxing jurisdiction, resulting in the actual property  
14 tax. *See* § 15-8-701, MCA.  
15  
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17 “Regardless of whether Omimex’s property is centrally or locally  
18 assessed, its tax rate class is determined by the application of the physical  
19 attributes of Omimex’s Montana properties to the terms of the property  
20 classification statutes, §§ 15-6-138 and -141, MCA.” *Omimex*, ¶ 18.  
21  
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23 DOR’s *post hoc, ergo propter hoc* argument, that central assessment  
24 alone compels class nine property classification, flows in reality from nothing  
25 more than “[t]he Department’s longstanding interpretation of the central

1 assessment and classification statutes . . .” Petition, p. 12. Internal policies of  
2 DOR cannot conflict with the law. *See Northwest Airlines, Inc. v. State Tax*  
3 *Appeal Bd.* (1986), 221 Mont. 441, 720 P.2d 676.  
4

5 Administrator Gene Walborn, for the DOR, agreed that centrally assessed  
6 property could be placed in different classifications. *See Walborn, Tr.*, 199-  
7 200. At one point, DOR took the position that centrally assessed property could  
8 be classified in class eight. *Id.*, *Tr.*, 194-195. *See also*, Plaintiff’s Exhibit 4;  
9 Minute Entry admitting Exhibit 4 (September 19, 2006). Contrary to DOR’s  
10 assertion in the petition for rehearing (Petition, p. 12), this Court has not created  
11 a new class of property, nor could it, since that is the exclusive province of the  
12 legislature. *See Omimex*, ¶ 25.  
13  
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16 Of note, nowhere in the Appellee’s Brief is “harmonization” mentioned  
17 (Petition, pp. 3-4), or that a new property tax classification could be created if  
18 the Court were to place Omimex’s properties in class eight. A party cannot  
19 gain rehearing by scatter shooting issues that were not raised earlier.  
20

21 DOR’s concern over its practice of piecemeal or brick-by-brick valuation  
22 of class eight property (Petition, p. 12) is laid to rest because DOR may  
23 continue to centrally assess the property, or not. With this decision, the Court  
24 has not disturbed the existing central assessment.  
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Respectfully submitted this 14<sup>th</sup> day of January, 2009.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 20 of the Montana Rules of Appellate Procedure, I certify that this Brief in Opposition and Objections to Petition for Rehearing is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2003 is 2,477 words, not exceeding 2,500 words.

DATED this 14<sup>th</sup> day of January, 2009.

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1 **Certificate of Service**

2 I, one of the attorneys of the law firm of Crowley Fleck PLLP, hereby  
3 certify that on the 14<sup>th</sup> day of January, 2009, I mailed a true and correct copy of  
4 the foregoing document postage prepaid, to the following:

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