

BEFORE THE STATE BOARD OF EQUALIZATION
FOR THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF)
TRAVELOCITY.COM LP FROM A) Docket No. **2010-112**
DECISION BY THE DEPARTMENT)
OF REVENUE)

IN THE MATTER OF THE APPEAL OF)
PRICELINE.COM, INC. FROM A) Docket No. **2010-115**
DECISION BY THE DEPARTMENT)
OF REVENUE)

IN THE MATTER OF THE APPEAL OF)
HOTELS.COM, L.P. FROM A) Docket No. **2010-113**
DECISION BY THE DEPARTMENT)
OF REVENUE)

IN THE MATTER OF THE APPEAL OF)
HOTWIRE.COM, INC. FROM A) Docket No. **2010-114**
DECISION BY THE DEPARTMENT)
OF REVENUE)

IN THE MATTER OF THE APPEAL OF)
EXPEDIA, INC. FROM A DECISION BY) Docket No. **2010-146**
THE DEPARTMENT OF REVENUE)

IN THE MATTER OF THE APPEAL OF)
ORBITZ, LLC FROM A DECISION BY) Docket No. **2010-117**
THE DEPARTMENT OF REVENUE)

IN THE MATTER OF THE APPEAL OF)
TRIP NETWORK, INC. (d/b/a) Docket No. **2010-127**
CHEAPTICKETS) FROM A DECISION)
BY THE DEPARTMENT OF REVENUE)

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

APPEARANCES

Lawrence J. Wolfe, P.C., Holland & Hart LLP, appeared on behalf of Travelocity.com, LP, priceline.com, Inc., Hotels.com, L.P., Hotwire.com, Inc., Expedia, Inc., Orbitz, LLC, and Trip Network, Inc. (d/b/a Cheaptickets.com) (Petitioners). Brian Stagner and Derek Montgomery, Kelly Hart & Hallman, LLP, also appeared on behalf of Petitioner Travelocity.com, LP. Darrel J. Hieber, Celso M. Gonzalez-Falla, and Stacy R. Horth-Neubert, Skadden, Arps, Slate Meagher & Flam, LLP, also appeared on behalf of Petitioner priceline.com, Inc. James P. Karen, Emmanuel Ubinas and Tamara Marinkovic, Jones Day, also appeared on behalf of Petitioners Hotels.com, L.P., Hotwire.com, Inc. and Expedia, Inc. Elizabeth B. Harrington, Jeffrey A. Rossman, Thomas A. McCann and Michael Yellin, McDermott Will & Emery, LLP, also appeared on behalf of Petitioners Orbitz, LLC, and Trip Network, Inc. (d/b/a Cheaptickets). Mr. Wolfe signed Petitioners' Briefs. Petitioners' oral argument was made by Mr. Rossman.

Martin L. Hardsocg, Deputy Attorney General, Cathleen D. Parker, Senior Assistant Attorney General, and Sean C. Chambers, Senior Assistant Attorney General, appeared on behalf of the Wyoming Department of Revenue (Department). The Department's oral argument was made by Ms. Parker.

STATEMENT OF THE CASE

Petitioners are online travel companies. Petitioners operate websites that allow customers to research travel destinations and book reservations in hotels, including Wyoming hotels. Petitioners use a business practice known as the merchant model. In a merchant model transaction, a customer prepays for a stay at a Wyoming hotel through a Petitioner's website. After the completion of the customer's stay, the Petitioner reimburses the hotel for the cost of the room based on an amount negotiated between a Petitioner and the hotel. The Wyoming Department of Revenue determined Petitioners were required to register as "vendors" and to collect tax on the hotel rates charged to their customers for Wyoming hotel rooms and notified Petitioners of its final decision.

The Department issued final decision letters to Petitioners Travelocity.com, LP, priceline.com, Incorporated, Hotels.com, L.P., Hotwire.com, Inc., and Orbitz, LLC on July 19, 2010. The Department issued a final decision letter to Petitioner Trip Network, Inc. (d/b/a Cheaptickets) on August 5, 2010. Petitioners Travelocity.com, LP, priceline.com, Incorporated, Hotels.com, L.P., Hotwire.com, Inc., Orbitz, LLC, and Trip Network, Inc. (d/b/a Cheaptickets) filed appeals of the Department's final decision with the State Board of Equalization (Board) on August 18, 2010. The Department issued a revised final decision

letter to Petitioner Expedia, Inc. on December 1, 2010. Expedia, Inc. filed an appeal of the Department's final decision with the Board on December 17, 2010.

On August 11, 2011, after the Board had set these matters for hearing, the parties filed a Stipulated Agreement and Proposed Order for Written Submissions in Lieu of Hearing. The Board issued an Order Vacating Hearing Order and Setting Schedule for Written Submissions in Lieu of Hearing on August 24, 2011. On September 26, 2011 the parties filed "Petitioners' and Wyoming Department of Revenue's Joint Stipulations of Facts."

The parties submitted briefs in lieu of a hearing pursuant to the Board's Order and Rules. *Rules, State Board of Equalization, Chapter 2 §§ 12, 19*. Petitioners filed Petitioners' Brief in Support of Vacating and Dismissing the Department of Revenue's Final Administrative Decisions Against Petitioners on October 3, 2011. The Department of Revenue filed its Reply Brief on October 24, 2011. Petitioners filed Petitioners' Reply Brief in Support of Vacating and Dismissing the Wyoming Department of Revenue's Final Administrative Decisions Against Petitioners on November 18, 2011. Oral arguments were heard by the Board on April 26, 2012.

The Board, consisting of Chairman Steven D. Olmstead and Vice Chairman Paul Thomas Glause, considered this matter.¹

ISSUES

Petitioners presented the following contentions on appeal:

1. Petitioners' reservation facilitation services are not subject to Wyoming sales tax based on its plain and ordinary meaning. [*Petitioners' Brief in Support of Vacating and Dismissing the Wyoming Department of Revenue's Final Administrative Decisions Against Petitioners*, p. 20].
2. Petitioners are not "vendors" and thus have no obligation to collect the tax. [*Petitioners' Brief in Support of Vacating and Dismissing the Wyoming Department of Revenue's Final Administrative Decisions Against Petitioners*, p. 20].
3. The Department's implementing rule and official publications confirm the statute's plain meaning. [*Petitioners' Brief in Support of Vacating and Dismissing the*

¹Deborah J. Smith, the Board's third member, retired effective December 9, 2012, during the time this matter was pending. The Board position was vacant at the time this opinion was issued.

Wyoming Department of Revenue's Final Administrative Decisions Against Petitioners, p. 23].

4. Petitioners' online reservation services are not "lodging services" subject to the sales tax. [*Petitioners' Brief in Support of Vacating and Dismissing the Wyoming Department of Revenue's Final Administrative Decisions Against Petitioners*, p. 26].
5. Petitioners do not "sell" hotel rooms and a taxable "sale" does not occur when a Petitioner facilitates an online hotel reservation. [*Petitioners' Brief in Support of Vacating and Dismissing the Wyoming Department of Revenue's Final Administrative Decisions Against Petitioners*, p. 27].
6. The Department's construction of the tax would result in double taxation. [*Petitioners' Brief in Support of Vacating and Dismissing the Wyoming Department of Revenue's Final Administrative Decisions Against Petitioners*, p. 32].
7. A myriad of authorities have recognized that online travel companies are not vendors of lodging services. [*Petitioners' Brief in Support of Vacating and Dismissing the Wyoming Department of Revenue's Final Administrative Decisions Against Petitioners*, p. 32].
8. The sales tax is, at best, ambiguous and thus must be resolved in Petitioners' favor. [*Petitioners' Brief in Support of Vacating and Dismissing the Wyoming Department of Revenue's Final Administrative Decisions Against Petitioners*, p. 35].
9. The Department cannot tax sales transactions completed outside Wyoming's borders. [*Petitioners' Brief in Support of Vacating and Dismissing the Wyoming Department of Revenue's Final Administrative Decisions Against Petitioners*, p. 37].
10. Imposition of the sales tax on the Petitioners is prohibited by the Commerce Clause of the United States Constitution. [*Petitioners' Brief in Support of Vacating and Dismissing the Wyoming Department of Revenue's Final Administrative Decisions Against Petitioners*, p. 39].
11. The Department's selective classification or enforcement of the sales tax violates Petitioners' right to equal protection. [*Petitioners' Reply in Support of Vacating and Dismissing the Wyoming Department of Revenue's Final Administrative Decisions Against Petitioners*, p. 65].
12. Wyoming's sourcing rules prevent the application of the sales tax to the Petitioners. [*Petitioners' Brief in Support of Vacating and Dismissing the Wyoming Department of Revenue's Final Administrative Decisions Against Petitioners*, p. 51].

13. The Due Process Clause prohibits imposition of Wyoming Sales Tax on Petitioners' travel facilitation transactions. *Petitioners' Reply in Support of Vacating and Dismissing the Wyoming Department of Revenue's Final Administrative Decisions Against Petitioners*, p. 66].
14. The Department is equitably estopped from retroactively enforcing the sales tax against Petitioners based on Wyoming's own prior conduct. [*Petitioners' Brief in Support of Vacating and Dismissing the Wyoming Department of Revenue's Final Administrative Decisions Against Petitioners*, p. 52].
15. The sales tax, as interpreted by the Department, results in a discriminatory tax prohibited by the Internet Tax Freedom Act. [*Petitioners' Brief in Support of Vacating and Dismissing the Wyoming Department of Revenue's Final Administrative Decisions Against Petitioners*, p. 53].

The Department of Revenue presented the following contentions in reply:

1. The Department correctly determined that the Petitioners are required to collect and remit sales and lodging taxes upon the full price paid for lodging. [*Wyoming Department of Revenue's Reply Brief*, p 9].
2. The incidence of the tax—the event which is taxed—is the retail customer's payment in exchange for taxable services. [*Wyoming Department of Revenue's Reply Brief*, p. 11].
3. Tax is due on the full retail sales price rather than the wholesale or “net” rate that hotels charge the Petitioners. [*Wyoming Department of Revenue's Reply Brief*, p. 51].
4. Numerous other courts have required online travel companies to collect and remit occupancy taxes on the full price paid for hotel rooms. [*Wyoming Department of Revenue's Reply Brief*, p. 13].
5. Petitioners sell Wyoming lodging accommodations to their customers and are, consequently, vendors subject to Wyoming sales taxes. [*Wyoming Department of Revenue's Reply Brief*, p. 22].
6. Petitioners obtain, by contract, specific permission and authority to sell lodging services to their customers for a purchase price. [*Wyoming Department of Revenue's Reply Brief*, p. 27].
7. Petitioners' earlier representations in contracts and public filings are an objective indication of their collective intent and purpose superior to more recent

- representations formulated to escape liability under the tax laws of Wyoming and other governmental entities. [*Wyoming Department of Revenue's Reply Brief*, p. 40].
8. After contracting with Petitioners, a hotel becomes an agent of the online travel company, and must treat the online travel company's customers in a certain manner. [*Wyoming Department of Revenue's Reply Brief*, 40].
 9. Petitioners' customers purchase lodging accommodations directly from Petitioners and do not enter into contracts with hotels for those services. [*Wyoming Department of Revenue's Reply Brief*, p. 45].
 10. The rule of strict construction does not relieve the Petitioners from their responsibilities to collect taxes as intended by the legislature. [*Wyo. Dep't of Revenue's Reply Brief*, p. 48].
 11. The Petitioners' interpretation of Wyoming's tax laws, if accepted, generates an absurd, nonsensical result and promotes form over substance to avoid the legislature's clear intent that the purchase price of Wyoming lodging be taxed. [*Wyoming Department of Revenue's Reply Brief*, p. 50].
 12. The Step Transaction Doctrine should disallow the Petitioners from conveniently separating their multi-phase transactions to avoid paying taxes on the prices they in fact collect for Wyoming lodging. [*Wyoming Department of Revenue's Reply Brief*, p. 56].
 13. The Petitioners' retention of a commission prior to the determination of sales tax liability is a sham transaction that lacks economic substance beyond the creation of tax benefits. [*Wyoming Department of Revenue's Reply Brief*, pp. 59-60].
 14. Petitioners' nexus, Commerce Clause, and related objections lack merit. [*Wyoming Department of Revenue's Reply Brief*, p. 60].
 15. The merchant model transactions do not trigger the Commerce Clause. [*Wyoming Department of Revenue's Reply Brief*, p. 61].
 16. The Department's imposition of taxes upon the Petitioners' sales of hotel rooms does not violate the Commerce Clause. [*Wyoming Department of Revenue's Reply Brief*, p. 62].
 17. Wyoming is not estopped from enforcing its sales tax laws. [*Wyoming Department of Revenue's Reply Brief*, p. 75].

18. The Department's actions do not violate the Internet Tax Freedom Act. [*Wyoming Department of Revenue's Reply Brief*, p. 75].
19. The statutes are not unconstitutionally vague. [*Wyoming Department of Revenue's Reply Brief*, p. 77].
20. The Department is not seeking to impose sales tax twice. [*Wyoming Department of Revenue's Reply Brief*, p. 78].

The Board restates the issues the parties would have the Board decide as follows:

1. Does the plain language of Wyoming's sales tax apply to the Petitioners' merchant model transactions?
2. Are Petitioners in the business of selling living quarters in Wyoming hotels or similar establishments and therefore "vendors" as defined by Wyoming Statutes Annotated § 39-15-101(a)(xv)?
3. Is the "sales price paid for living quarters in" Wyoming hotels the price paid by a transient guest or the price paid by a Petitioner? *Wyo. Stat. Ann. § 39-15-103(a)(i)(G)*.
4. Are Petitioners' facilitation fees charges for "services necessary to complete the sale" of living quarters in Wyoming hotels and therefore part of the sales price paid for living quarters in Wyoming hotels? *Wyo. Stat. Ann. § 39-15-101(a)(viii)(A)(III)*.
5. Do the Department's rules prevent the application of Wyoming's sales tax to the Petitioners?
6. Do Wyoming's sourcing rules prevent the application of Wyoming's sales tax to the Petitioners?
7. Can Petitioners' merchant model transactions be characterized as step transactions?
8. Can Petitioners' merchant model transactions be characterized as sham transactions?
9. Does application of Wyoming's sales tax to Petitioners' merchant model transactions violate the Dormant Commerce Clause of the United States Constitution?
10. If Petitioners sell living quarters in Wyoming hotels, do the sales take place outside Wyoming's borders?

11. Does application of Wyoming's sales tax to Petitioners' merchant model transactions violate Petitioners' right to equal protection under the United States Constitution or the Wyoming Constitution?

12. Is Wyoming's sales tax unconstitutionally vague?

13. Is the Department of Revenue equitably estopped from enforcing Wyoming's sales tax against Petitioners?

The Board affirms the decision of the Department requiring Petitioners to register as vendors and remit taxes on the full amount charged to transient guests for living quarters in Wyoming hotels.

JURISDICTION

The Board shall review final decisions of the Department on application of any interested person adversely affected. *Wyo. Stat. Ann. § 39-11-102.1(c)*. A taxpayer's appeal must be filed with the Board within thirty days of the Department's final decision. *Rules, Wyoming State Board of Equalization, Chapter 2 § 5(a)*. Petitioners timely appealed the final decisions of the Department, effective August 18, 2010, and December 17, 2010. The Board has jurisdiction to decide this matter.

FINDINGS OF FACT

The parties filed a request for the Board to decide this matter without hearing. The parties filed Joint Stipulations of Fact, pursuant to Board Rules. *Rules, Wyoming State Board of Equalization, Chapter 2 § 15*.

1. Petitioners, Travelocity.com, LP; priceline.com, Incorporated; Hotels.com, L.P.; Hotwire.com, Inc.; Expedia, Inc.; Orbitz, LLC; and Trip Network, Inc. (d/b/a Cheaptickets) are online travel companies. [*Joint Stipulations of Fact*, pp. 3–4].

2. Petitioners do not own hotels in the State of Wyoming, and do not maintain a physical place of business, offices, call-centers, computer servers, or employees in the State of Wyoming. [*Joint Stipulations of Fact*, p. 4].

3. Petitioners have contracted with hotels, hotel chains, and/or lodging service providers which operate in Wyoming. [*Joint Stipulations of Fact*, p. 1].

4. Each of the Petitioners' advertising (TV, radio and print) has been, and continues to be, national in nature. Because the Petitioners' advertising is national in nature, the Petitioners expect, and do not dispute, that their advertising reaches Wyoming. [*Joint Stipulations of Fact*, p. 4].

5. Petitioners are technology companies that host travel websites through which they provide travel-related information and travel services over the internet and through call-centers. The Petitioners offer a full range of travel services, making it easy for travelers to design and plan business and personal travel, locate hotels and attractions, compare the offerings of multiple competing travel suppliers, and request a variety of reservations, including airline reservations, car rental reservations, and reservations for many other types of travel services. The Petitioners allow travelers to customize travel and vacation packages, combining reservations for different travel components, often at reduced prices. [*Joint Stipulations of Fact*, pp. 5–6].

6. Petitioners collect a wide array of hotel information and publish it on their websites, allowing travelers to plan trips and place reservations over the Internet through one convenient source at any time of the day or night. The websites list numerous hotels in many jurisdictions all over the country, including Wyoming, describing each hotel's location, room reservation offerings, amenities, star ratings, and reviews. The websites allow travelers to search for hotel reservations using any one of a number of parameters such as a name, brand, location, price, and quality rating. [*Joint Stipulations of Fact*, p. 5].

7. The hotel reservations are made by travelers using the "prepaid" or "merchant" model, whereby customers pay in full for the reservations at the time the reservations are made. [*Joint Stipulations of Fact*, p. 5].

8. Full payment for hotel accommodations are paid to the Petitioners as merchants of record. [*Joint Stipulations of Fact*, p. 5].

9. In a prepaid transaction, the traveler's credit card is charged a single total amount; this amount includes two items, the room reservation rate and an amount for tax recovery charges and fees. [*Joint Stipulations of Fact*, p. 5].

10. The room reservation rate includes the "net rate" which is later passed on to the hotel, and an amount retained by the Petitioner. [*Joint Stipulations of Fact*, p. 5].

11. The tax recovery charges and fees include a charge equal to the estimated amounts for excise and other taxes imposed on the net rate and an additional fee for services provided by the Petitioners. [*Joint Stipulations of Fact*, p. 5].

12. The tax recovery charge is calculated by applying the anticipated tax rate, which is supplied by the hotel, to the anticipated “net rate”. [*Joint Stipulations of Fact*, p. 5].

13. The Petitioners and hotels typically agree by contract not to disclose the “net rate” to the customer. [*Joint Stipulations of Fact*, p. 5].

14. Petitioners do not disclose to hotels the amount of the “room rate” charged to travelers. [Affidavit of Dan Noble, p. 10; *Bathing in the Hotel Merchant Tax Quagmire*, PhoCus Wright Connect, Dec. 22, 2009, DOR Ex. 580, p. 572].

15. As a result of the way taxes and fees are bundled, the actual amount of tax paid is not disclosed to travelers. *Supra* ¶¶ 9-13.

16. Before a reservation is completed, the traveler must accept the Petitioner’s terms and conditions, as well as the hotel’s and/or the Petitioner’s cancellation policy and other rules and restrictions set by the hotel and posted on the Petitioner’s website. [*Joint Stipulations of Fact*, p. 5].

17. The traveler’s payment is submitted over the Internet or over the phone. [*Joint Stipulations of Fact*, p. 5].

18. Once the transaction is completed, the traveler has a reservation at the hotel for the date selected, but the traveler has not been registered at the hotel or assigned any particular hotel room. [*Joint Stipulations of Fact*, p. 5].

19. When the traveler arrives at the hotel in which a reservation has been made, the traveler registers as a guest of the hotel, and the hotel then typically assigns the traveler a room and provides the traveler with the key. [*Joint Stipulations of Fact*, p. 5].

20. The traveler pays the hotel directly for any incidental services. [*Joint Stipulations of Fact*, p. 6].

21. The hotel bills the Petitioner, either through an invoice or a single-use credit card, for the “net rate” plus applicable taxes owed on the “net rate”. [*Joint Stipulations of Fact*, p. 6].

22. Certain Petitioners, including priceline.com, Incorporated; Hotwire.com, Inc.; and Travelocity.com, LP, also use a reservation model referred to as the “opaque” model. Under the “opaque” model, a traveler does not know the identity of the hotel they have reserved a room at before paying for a reservation. [*Joint Stipulations of Fact*, p. 6].

23. Travelers who use the “opaque” model are generally not allowed to cancel their reservations and there is, with few exceptions, no refund of the reservation price paid. [*Joint Stipulations of Fact*, p. 6].
24. When using the “opaque” model, Petitioners often remit payment of the “net rate” and the amount of tax calculated by the hotel on the “net rate” in advance of the traveler’s stay at the hotel. [*Joint Stipulations of Fact*, p. 6].
25. Petitioners’ merchant model transactions differ from retail model transactions traditionally used by travel agents. In the retail model, a hotel receives payment directly from a transient guest and the travel agent is paid a commission by the hotel. [*Bathing in the Hotel Merchant Tax Quagmire*, PhoCus Wright Connect, Dec. 22, 2009, DOR Ex. 580, p. 563].
26. Any portion of the Conclusions of Law: Principles of Law, or the Conclusions of Law: Application of Principles of Law set forth below, which includes a finding of fact, may also be considered a Finding of Fact and, therefore, is incorporated herein by reference.

CONCLUSIONS OF LAW: PRINCIPLES OF LAW

27. Upon application of any person adversely affected, the Board must review final Department actions concerning state excise taxes and “[h]old hearings after due notice in the manner and form provided in the Wyoming Administrative Procedure Act and its own rules and regulations of practice and procedure.” *Wyo. Stat. Ann. § 39-11-102.1(c) and(c)(viii)*. The Board must “[d]ecide all questions that may arise with reference to the construction of any statute affecting the assessment, levy and collection of taxes, in accordance with the rules, regulations, orders and instructions prescribed by the department.” *Wyo. Stat. Ann. § 39-11-102.1(c)(iv)*.

28. The Board’s Rules provide:

Except as specifically provided by law or in this section, the Petitioner shall have the burden of going forward and the ultimate burden of persuasion, which burden shall be met by a preponderance of the evidence. If Petitioner provides sufficient evidence to suggest the Department determination is incorrect, the burden shifts to the Department to defend its action. For all cases involving a claim for exemption, the Petitioner shall clearly establish the facts supporting an exemption. In proceedings involving the question of whether or not there is a taxable event under Wyoming law, the Petitioner shall have the burden of going forward and the Department shall have the ultimate burden of persuasion.

Rules, Wyoming State Board of Equalization, Chapter 2 § 20.

29. “A preponderance of the evidence is ‘proof which leads the trier of fact to find that the existence of the contested fact is more probable than its non-existence.’” *Mitcheson v. State, ex rel. Wyo. Workers’ Safety & Compensation Div.*, 2012 WY 74, ¶ 11, 277 P.3d 725, 730 (Wyo.2012) (quoting *Kenyon v. State ex rel. Wyo. Workers’ Safety & Comp. Div.*, 2011 WY 14, ¶ 22, 247 P.3d 845, 851 (Wyo.2011)).

30. The role of this Board is strictly adjudicatory:

It is only by either approving the determination of the Department, or by disapproving the determination and remanding the matter to the Department, that the issues brought before the Board for review can be resolved successfully without invading the statutory prerogatives of the Department.

Amoco Production Co. v. Wyo. State Bd. of Equalization, 12 P.3d 668, 674 (Wyo.2000). See *Amoco Production Co. v. Dep’t of Revenue*, 2004 WY 89, ¶ 22, 94 P.3d 430, 440 (Wyo.2004).

31. It is an elementary rule of statutory interpretation that all portions of an act must be read *in pari materia*, and every word, clause and sentence of it must be considered so that no part will be inoperative or superfluous. Also applicable is the oft-repeated rule that it must be presumed the Legislature did not intend futile things. *Hamlin v. Transcon Lines*, 701 P.2d 1139, 1142 (Wyo.1985). See *TPJ v. State*, 2003 WY 49, ¶ 11, 66 P.3d 710, 713 (Wyo.2003).

32. Wyoming Statutes Annotated § 8-1-103 provides in part:

(a) The construction of all statutes of this state shall be by the following rules, unless that construction is plainly contrary to the intent of the legislature:

(i) Words and phrases shall be taken in their ordinary and usual sense, but technical words and phrases having peculiar and appropriate meaning in law shall be understood according to their technical import.

33. According to the Wyoming Supreme Court, statutory interpretation starts with the plain language of the statute:

As we have often stated, our rules of statutory construction focus on discerning the legislature’s intent. In doing so, we begin by making an “inquiry respecting the ordinary and obvious meaning of the words employed according to their arrangement and connection.” *Parker Land and Cattle Company v. Wyoming Game and Fish Commission*, 845 P.2d 1040, 1042 (Wyo.1993)

(quoting *Rasmussen v. Baker*, 7 Wyo. 117, 133, 50 P. 819, 823 (1897)). We construe the statute as a whole, giving effect to every word, clause, and sentence, and we construe together all parts of the statute *in pari materia*. *State Department of Revenue and Taxation v. Pacificorp*, 872 P.2d 1163, 1166 (Wyo.1994).

Chevron U.S.A., Inc. v. Department of Revenue, 2007 WY 79, ¶ 15, 158 P.3d 131, 136 (Wyo.2007).

34. The Wyoming Supreme Court has previously summarized a number of useful precepts concerning statutory interpretation:

In interpreting statutes, our primary consideration is to determine the legislature's intent. All statutes must be construed in *pari materia* and, in ascertaining the meaning of a given law, all statutes relating to the same subject or having the same general purpose must be considered and construed in harmony. Statutory construction is a question of law, so our standard of review is *de novo*. We endeavor to interpret statutes in accordance with the legislature's intent. We begin by making an inquiry respecting the ordinary and obvious meaning of the words employed according to their arrangement and connection. We construe the statute as a whole, giving effect to every word, clause, and sentence, and we construe all parts of the statute in *pari materia*. When a statute is sufficiently clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of statutory construction. Moreover, we must not give a statute a meaning that will nullify its operation if it is susceptible of another interpretation.

Moreover, we will not enlarge, stretch, expand, or extend a statute to matters that do not fall within its express provisions.

Only if we determine the language of a statute is ambiguous will we proceed to the next step, which involves applying general principles of statutory construction to the language of the statute in order to construe any ambiguous language to accurately reflect the intent of the legislature. If this Court determines that the language of the statute is not ambiguous, there is no room for further construction. We will apply the language of the statute using its ordinary and obvious meaning.

BP America Production Co. v. Dep't of Revenue, 2005 WY 60, ¶ 15, 112 P.3d 596, 604 (Wyo.2005) (internal citations and quotations omitted), *quoted in Cheyenne Newspapers, Inc. v. Building Code Board of Appeals of the City of Cheyenne*, 2010 WY 2, ¶ 9, 222 P.3d 158, 162 (Wyo.2010).

35. “We must accept statutes as they are written; neither omitting words that are included, nor including words that are omitted.” *Cheyenne Newspapers, Inc. v. Building Code Board of Appeals of the City of Cheyenne*, 2010 WY 2, ¶ 9, 222 P.3d 158, 162 (Wyo.2010); *accord BP America Production Co. v. Dep’t of Revenue*, 2005 WY 60, ¶ 15, 112 P.3d 596, 604 (Wyo.2005); *Hede v. Gilstrap*, 2005 WY 24, ¶ 6, 107 P.3d 158, 163 (Wyo.2005); *Fontaine v. Bd. of County Comm’rs of Park County*, 4 P.3d 890, 895 (Wyo.2000); *In re Adoption of Voss*, 550 P.2d 481, 485 (Wyo.1976).

36. “A basic tenet of statutory construction is that the omission of words from a statute is considered to be an intentional act by the legislature, and this [Board] will not read words into a statute when the legislature has chosen not to include them.” *Merrill v. Jansma*, 2004 WY 26, ¶ 29, 86 P.3d 270, 285 (Wyo.2004). “Words may not be inserted in a statutory provision under the guise of interpretation.” *In re Adoption of Voss*, 550 P.2d 481, 485 (Wyo.1976); *accord Spreeman v. State*, 2012 WY 88, ¶ 13, 278 P.3d 1159, 1163 (Wyo.2012); *Adelizzi v. Stratton*, 2010 WY 148, ¶ 11, 243 P.3d 563, 566 (Wyo.2010).

37. In construing statutes, the following standard applies:

The paramount consideration is to determine the legislature’s intent, which must be ascertained initially and primarily from the words used in the statute. We look first to the plain and ordinary meaning of the words to determine if the statute is ambiguous. A statute is clear and unambiguous if its wording is such that reasonable persons are able to agree on its meaning with consistency and predictability. Conversely, a statute is ambiguous if it is found to be vague or uncertain and subject to varying interpretations. If we determine that a statute is clear and unambiguous, we give effect to the plain language of the statute.

RME Petroleum Co. v. Dep’t of Revenue, 2007 WY 16, ¶ 25, 150 P.3d 673, 683 (Wyo.2007)(citations omitted); *quoted in Morris v. CMS Oil and Gas Co.*, 2010 WY 37, ¶ 26, 227 P.3d 325, 333 (Wyo.2010) and *Kennedy Oil v. Dep’t of Revenue*, 2008 WY 154, ¶ 10, 205 P.3d 999, 1003 (Wyo.2008)).

38. In interpreting a statute, the Board will give deference to the statutory interpretation of an agency charged with administration of a statute, unless that interpretation is clearly erroneous. *Parker Land & Cattle Company*, 845 P.2d 1040, 1045 (Wyo.1993).

39. Tax statutes are strictly construed in favor of the taxpayer. “[T]axes may not be imposed by any means other than a clear, definite and unambiguous statement of legislative authority.” *Qwest Corp. v. State ex rel. Wyo. Dep’t of Revenue*, 2006 WY 35, ¶ 9, 130 P.3d 507, 511 (Wyo.2006) (citation omitted).

40. Wyoming imposes a sales tax on the sale of tangible personal property, admissions and services. *Wyo. Stat. Ann. § 39-15-101, et seq.*

41. The Wyoming Statutes Annotated provides that a “taxable event” means: “The sales price paid for living quarters in hotels, motels, tourist courts and similar establishments providing lodging service for transient guests.” *Wyo. Stat. Ann. § 39-15-103(a)(i)(G).*

42. “‘Transient guest’ means a guest who remains for less than thirty continuous days.” *Wyo. Stat. Ann. § 39-15-101(a)(xiv).*

43. “‘Lodging service’ means the provision of sleeping accommodations to transient guests and shall include the providing of sites for the placement of tents, campers, trailers, mobile homes or other mobile sleeping accommodations for transient guests.” *Wyo. Stat. Ann. § 39-15-101(a)(i).*

44. “‘Sale’ means any transfer of possession in this state for a consideration.” *Wyo. Stat. Ann. § 39-15-101(a)(vii).*

45. “‘Retail sale’ means any sale, lease or rental for any purpose other than for resale sublease or subrent.” *Wyo Stat. Ann. § 39-15-101(a)(vi).*

46. “‘Wholesale sale’ means a sale of tangible personal property or services to a vendor for subsequent sale.” *Wyo. Stat. Ann. § 39-15-101(a)(xvi).*

47. Wyoming Statutes Annotated § 39-15-101(a) defines “sales price” in pertinent part as follows:

(viii) “Sales Price”

(A) Shall apply to the measure subject to sales tax and means the total amount or consideration, including cash, credit, property and services for which personal property or services are sold, leased or rented, valued in money, whether received in money or otherwise, without any deduction for the following:

- (I) The seller’s cost of property sold;
- (II) The cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller and any other expense of the seller;
- (III) Charges by the seller for any services necessary to complete the sale other than delivery and installation charges;

48. Consideration is “[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to

do something, [especially] to engage in a legal act.” *Black’s Law Dictionary* 324 (8th ed. 2004).

49. “‘Taxpayer’ means the purchaser of tangible personal property, admissions or services which are subject to taxation under this article.” *Wyo. Stat. Ann. § 39-15-101(a)(x)*.

50. The Department’s Rules define “purchaser” as a person “to whom a service is furnished.” *Rules, Wyoming Department of Revenue, Chapter 2 § 3(mm)*.

51. “‘Vendor’ means any person engaged in the business of selling at retail or wholesale tangible personal property, admissions or services which are subject to taxation under this article.” *Wyo. Stat. Ann. § 39-15-101(a)(xv)*.

52. Wyoming Statutes Annotated § 39-15-106(a) provides in part: “Every vendor shall obtain from the department a sales tax license to conduct business in the state.”

53. The definition of “service” includes: “6a) an act giving assistance or advantage to another b) the result of this; benefit advantage c) [pl.] friendly help; also professional aid or attention [the fee for his services].” *Webster’s New World College Dictionary* 1310 (4th ed. 2002).

54. Wyoming Statutes Annotated § 39-15-103(b)(i) provides:

(b) Basis of tax. The following shall apply:

(i) Except as provided by W.S. 39-15-105, there is levied and shall be paid by the purchaser on all sales an excise tax upon all events as provided by subsection (a) of this section;

55. Wyoming Statutes Annotated § 39-15-103(c) provides in pertinent part:

(c) Taxpayer. The following shall apply:

(i) Except as otherwise provided, every vendor shall collect the tax imposed by this article and is liable for the entire amount of taxes imposed;

(ii) Every person purchasing goods or services taxed by this article is liable for the taxes and shall pay the tax owed to the department unless the taxes have been paid to a vendor;

(iii) Any tax due under this article constitutes a debt to the state from the persons who are parties to the transaction, other than any vendor or other seller who is prohibited or not authorized by law to collect any tax under this article, and is a lien from the date the tax is due on all the real and personal property of those persons;

56. The Wyoming Supreme Court has stated “[p]roperly promulgated rules and regulations have the same force and effect of law. We construe them as we construe statutes.” *Johnson v. City of Laramie*, 2008 WY 73, ¶ 7, 187 P.3d 355, 357 (Wyo.2008).

57. Chapter 2, section 15 of the Department’s Rules addresses the sales tax on lodging in pertinent part as follows:

(r) Lodging.

(i) The total amount charged transient guests for board or room or both is subject to the sales tax and any local option lodging tax. The taxable sales price shall include all charges made for all services and supplies furnished in connection with the lodging service. This charge shall include charges for such services as room service meals.

(ii) Charges made by a lodging establishment for facilities other than lodging, such as meeting rooms, sample rooms and ballrooms shall not be subject to the sales tax.

Rules, Wyoming Department of Revenue, Ch. 2 § 15(r).

58. Wyoming has adopted a statute addressing what jurisdiction’s tax rate is applied to a transaction. The sourcing statute provides in pertinent part:

(f) The tax rate imposed on a transaction subject to this chapter shall be sourced as follows:

(i) The retail sale, excluding lease or rental, of a product shall be sourced as follows:

(A) When the product is received by the purchaser at a business location of the seller, the sale shall be sourced to that business location;

(B) When the product is not received by the purchaser at a business location of the seller’s, the sale shall be sourced to the location where receipt by the purchaser, or purchaser’s agent designated as such by the purchaser, occurs, including the location indicated by instruction for delivery to the purchaser or donee, known to the seller;

* * *

(F) For the purposes of this paragraph the terms “receive” and “receipt” mean taking possession of tangible personal property, making first use of services or taking possession or making first use of digital goods, whichever comes first.

Wyo. Stat. Ann. § 39-15-104(f).

59. The Department's Rules address third-party sellers:

(c) Auctioneers and Selling Agents.

(i) Auctioneers and Selling Agents shall be considered vendors as defined by W.S. 39-15-101(a)(xv) and W.S. 39-16-101(a)(x). As agents for unknown or undisclosed principals, auctioneers or selling agents are required to have a sales tax license to conduct sales upon which the tax has been imposed and are responsible for the correct collection and remittance of the tax on such sales.

Rules, Wyoming Department of Revenue, Chapter 2 § 15(c).

60. The step-transaction doctrine is “[a] method used by the Internal Revenue Service to determine tax liability by viewing the transaction as a whole, and disregarding one or more nonsubstantive, intervening transactions taken to achieve the final result.” *Black's Law Dictionary* 1454 (8th ed. 2004).

61. The sham transaction doctrine provides that “a transaction is not entitled to tax respect if it lacks economic effects or substance other than the generation of tax benefits, or if the transaction serves no business purpose.” *Winn-Dixie Stores, Inc. v. Comm'r*, 254 F.3d 1313, 1316 (11th Cir. 2001).

62. Chapter 2, section 9(a) of the Department's Rules addresses non-taxable transactions.

(a) General. Non-taxable transactions, including sales made for resale, shall be shown separately from taxable charges on sales invoices. The entire invoice amount shall be subject to sales/use tax if the nontaxable or exempt charges are not separately shown and distinguishable from taxable charges.

63. Exemptions from taxation are not favored.

First, exemptions are not favored and generally taxation is held to be the rule and exemption the exception, which means there is a presumption against a grant of exemption and in favor of the taxing power. *Appeal of Chicago & North Western Ry. Co.*, 70 Wyo. 84, 246 P.2d 789, 795, rehearing denied 70 Wyo. 119, 247 P.2d 660; *State Tax Commission v. Graybar Electric Company, Inc.*, 86 Ariz. 253, 344 P.2d 1008, 1012; *Cornell College v. Board of Review of Tama County*, 248 Iowa 388, 81 N.W.2d 25, 26. See also 84 C.J.S. Taxation § 225, pp. 431-432.

State Bd. of Equalization v. Wyoming Auto. Dealers Ass'n, 395 P.2d 741, 742 (Wyo.1964).

64. Wyoming Statutes Annotated § 39-15-105(a)(i)(A) exempts from the sales tax “[s]ales which the state of Wyoming is prohibited from taxing under the laws or constitutions of the United States or Wyoming.”

65. The United States Constitution gives Congress the power to regulate interstate commerce. *U.S. Const. art. I, § 8, cl. 3*. The United States Supreme Court has “consistently held this language to contain a further, negative command, known as the Dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject.” *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179, 115 S.Ct. 1331, 1335, 131 L.Ed.2d 261 (1995).

66. The United States Supreme Court outlined a four part test for the constitutionality of state taxes under the Dormant Commerce Clause. To be valid under the commerce clause, the tax must be applied to activity with a substantial nexus to the taxing state; the tax must be fairly apportioned; the tax must not discriminate against interstate commerce; and the tax must be fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 1079, 51 L.Ed.2d 326 (1977).

67. The United States Supreme Court has enunciated standards for evaluating whether a statute violates due process because it is overly vague:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298 - 2299, 33 L.Ed.2d 222 (1972); see *Haddenham v. City of Laramie*, 648 P.2d 551 (Wyo. 1982); *Yeik v. Dep't of Revenue*, 595 P.2d 965 (Wyo.1979).

These standards should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test

because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action.

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982).

68. Wyoming's Constitution provides for equal protection under the law and prohibits special or local laws. The Wyoming Constitution, article 1, § 34 provides: "All laws of a general nature shall have a uniform operation," and article 3, § 27 prohibits special or local laws in enumerated circumstances:

The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: For ... granting to any corporation, association or individual ... any special or exclusive privilege, immunity or franchise whatsoever.

Wyo. Const. art. 3, § 27.

69. "The standard of equal protection found in the Wyoming Constitution does not require that all people be treated with exact equality in taxing and licensing." *Allhusen v. State By and Through Wyoming Mental Health Professions Licensing Bd.*, 898 P.2d 878, 885 (Wyo.1995).

The prohibition against special legislation does not mean that a statute must affect everyone in the same way. It only means that the classification contained in the statute must be reasonable, and that the statute must operate alike upon all persons or property in like or the same circumstances and conditions. *Nation v. Giant Drug Company*, Wyo., 396 P.2d 431, 434; and *State v. Sherman*, 18 Wyo. 169, 105 P. 299, 300.

Mountain Fuel Supply Co. v. Emerson, 578 P.2d 1351, 1356 (Wyo.1978), quoted in *Allhusen*, 898 P.2d at 884.

70. The following standard is applied in determining whether there has been prohibited selective enforcement prohibited by the equal protection clauses of the Wyoming and United States constitutions:

Selective discriminatory enforcement of a facially valid law is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Holder v.*

City of Allentown, 987 F.2d 188, 197 (3d Cir.1993). To establish a selective enforcement claim, [Petitioner] must show (1) that it was treated differently from another, similarly situated, and (2) “that this selective treatment was based on an unjustifiable standard, such as race, or religion, or some other arbitrary factor, ... or to prevent the exercise of a fundamental right.” *Dique v. N.J. State Police*, 603 F.3d 181, 184 n. 5 (3d Cir.2010) (quotation marks omitted). Hence, to maintain an equal protection claim of this sort, JHEP must provide evidence of discriminatory purpose, not mere unequal treatment or adverse effect. *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 88 L.Ed. 497 (1944).

Jewish Home of Eastern PA v. Centers for Medicare and Medicaid Services, 693 F.3d 359, 363 (3d Cir. 2012).

71. The Internet Tax Freedom Act established a moratorium on state taxes which discriminate against internet commerce. *47 U.S.C. § 151 note, Internet Tax Freedom Act § 1101(a)(2)*. The Internet Tax Freedom Act considers a tax discriminatory if the tax:

- (2) Discriminatory tax.—The term ‘discriminatory tax’ means—
 - (A) any tax imposed by a State or political subdivision thereof on electronic commerce that—
 - (i) is not generally imposed and legally collectible by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means;
 - (ii) is not generally imposed and legally collectible at the same rate by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means, unless the rate is lower as part of a phase-out of the tax over not more than a 5-year period; [or]
 - (iii) imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means.

47 U.S.C. § 151 note, Internet Tax Freedom Act § 1105(2)(A)(i)(ii)&(iii).

72. Equitable estoppel is a legal doctrine “which has the effect of precluding an individual from asserting his rights against another person who relied, to his detriment, on the voluntary conduct of the former. ... In its current form, equitable estoppel requires ‘some misrepresentation and is generally applied to prevent fraud, either constructive or actual’” *Knori v. State, ex rel., Dept. of Health, Office of Medicaid*, 2005 WY 48, ¶ 10, 109 P.3d 905, 908 (Wyo.2005) (citations omitted).

73. When equitable estoppel is asserted against the government rather than a private citizen, “the standard for equitable estoppel is higher, requiring ‘even more egregious conduct.’” *Knori, supra* 205 WY 48, ¶ 11, 109 P.3d at 909 (quoting *Department of Family Services v. Peterson*, 957 P.2d 1307, 1312 (Wyo.1998)). In order to prevail against the government on a claim of equitable estoppel, the petitioner “must demonstrate: (1) authorized affirmative misconduct; (2) reliance; (3) substantial prejudice; (4) rare and unusual circumstances; and (5) a situation that will not defeat public policy.” *Knori, supra*, 205 WY 48, ¶ 11, 109 P.3d at 909.

CONCLUSIONS OF LAW: APPLICATION OF PRINCIPLES OF LAW

74. Petitioners’ appeals were timely filed and the Board has jurisdiction to hear them. *Wyo. Stat. Ann. § 39-11-102.1(c)*; *Rules, Wyoming State Board of Equalization, Chapter 2 § 5*.

75. The primary issue in this appeal is whether the plain language of Wyoming’s sales tax applies to the Petitioners’ merchant model sales of lodging at Wyoming hotels. To determine if Petitioners are liable for Wyoming sales tax, the Board must determine: (a) whether Petitioners are vendors as defined by Wyoming Statutes Annotated § 39-15-101; and (b) whether the “sales price paid for living quarters” is the amount paid to Petitioners or some other amount.

76. The Board must also determine whether or not Wyoming’s sales tax is ambiguous as applied to the Petitioners, either because of Wyoming’s sourcing rules or the Department’s Rules or because the Department’s construction leads to an absurd result.

77. Vendors who sell temporary living quarters in Wyoming hotels are responsible for collecting Wyoming’s sales tax. *Wyo. Stat. Ann. §§ 39-15-103; supra* ¶¶ 41, 44, 51, 55. Petitioners contend they are not vendors because they do not buy or sell hotel rooms. Petitioners argue they do not and cannot purchase and then resell accommodations because hotels own, possess, and control the sleeping accommodations at all times. [*Petitioners’ Brief in Support of Vacating and Dismissing the Wyoming Department of Revenue’s Final Administrative Decisions against Petitioners*, p. 28]. The Board concludes Petitioners’ argument is flawed.

78. Wyoming’s sales tax on temporary living quarters is a tax on the sale of a lodging service, not a tax on the provision of lodging services. The tax is levied on the “**sales price paid** for living quarters in hotels, motels, tourist courts and similar establishments providing lodging service for transient guests.” *Wyo. Stat. Ann. § 39-15-103(a)(i)(G)* (emphasis added); *supra* ¶¶ 41, 43.

79. The seller of lodging services is liable for the tax even if the seller does not provide the services being sold. *Supra* ¶¶ 51, 55. “‘Sale’ means any transfer of possession in this state for a consideration.” *Wyo. Stat. Ann. § 39-15-101(a)(vii)*; *supra* ¶ 44. The definition of “sale” focuses on the transaction. The plain language of Wyoming’s sales tax does not require a vendor possess the tangible personal property, or provide the service, being sold. *Supra*, ¶¶ 41, 44, 45, 51, 55. “The courts must follow, and cannot extend, statutory definitions.” *Hede v. Gilstrap*, 2005 WY 24, ¶ 6, 107 P.3d 158, 163 (Wyo.2005); *supra* ¶¶ 35, 36.

80. A “wholesale sale” includes the sale of services to a vendor for subsequent sale. *Wyo. Stat. Ann. § 39-15-101(a)(xvi)*; *supra* ¶ 46. The taxable service in question is the provision of sleeping accommodations for a limited period of time. *Supra* ¶¶ 42, 43. The service of providing sleeping accommodations necessarily takes place on a specific date or dates. If the Petitioners took possession of the hotel room on those dates, the service would have already been performed, and there would be nothing to resell. There is no reason to add to the statutes a requirement that a vendor must obtain the right to receive a service or control over the means of providing a service in order to resell a service. *Supra* ¶ 35, 36.

81. If the Board were to accept Petitioners’ interpretation of what is required to buy and resell a service, Wyoming’s statutory provision allowing for the wholesale sale of services would be rendered meaningless in all but the most unusual business transactions involving the resale of a service. *Wyo. Stat. Ann. § 39-15-101(a)(xvi)*; *supra* ¶ 46. Because the Board presumes the legislature did not intend futile things, it cannot accept this interpretation. *Supra* ¶ 31.

82. In its ordinary and usual sense, the provision of services to a vendor for subsequent sale includes any situation where a vendor receives consideration for a service from the recipient of the service, and pays the provider of the service for the service received by the recipient. When the words are taken in their ordinary and usual sense, it is clear Petitioners sell hotel rooms to transient guests. *Supra* ¶¶ 32–34.

83. Exempting third party sellers from the duty to collect sales tax because they do not own or control the property being sold goes against the Department of Revenue’s longstanding interpretation of the sales tax. Auctioneers and selling agents are all treated as vendors. *Rules, Wyoming Department of Revenue, Chapter 2 § 15(c),(i)*; *supra* ¶ 59. Like the Wyoming Supreme Court, the Board gives deference to the statutory interpretation of the agency charged with administration of a statute, unless that interpretation is clearly erroneous. *Parker Land & Cattle Company v. Wyoming Game and Fish Commission*, 845 P.2d 1040, 1045 (Wyo.1993); *Johnson v. City of Laramie*, 2008 WY 73, ¶ 17, 187 P.3d 355, 357 (Wyo.2008); *supra* ¶¶ 38, 57.

84. Wyoming’s sales tax statutes do not contain an exemption specifically for third party sellers. *See Wyo. Stat. Ann. § 39-15-105; supra ¶ 64.* When the absence of a specific exemption for merchant model transactions is considered in conjunction with the presumption against a grant of exemption and in favor of the taxing power, the Department’s taxability determination is not erroneous or illegal. *State Bd. of Equalization v. Wyoming Auto. Dealers Ass’n*, 395 P.2d 741, 742 (Wyo.1964); *supra ¶ 63*

85. Wyoming’s sales tax on lodging is calculated based on the **sales price paid for living quarters**. *Wyo. Stat. Ann. §39-15-103(a)(i)(G); supra ¶ 41.* Petitioners argue the statute is ambiguous, suggesting it not clear whether the taxable amount is the price paid by a transient for living quarters or the price paid by a Petitioner for living quarters occupied by a transient. When read *in pari materia*, the meaning of “sales price paid” is unambiguous. *Supra ¶¶ 33, 34.*

86. Wyoming’s sales tax statutes define “taxpayer” as the “purchaser of . . . services which are subject to taxation under this article.” *Wyo. Stat. Ann. § 39-15-101(a)(x); supra ¶ 49.* The Department’s Rules define “purchaser” as a person “to whom a service is furnished.” *Rules, Wyoming Department of Revenue, Chapter 2 § 3(mm); supra ¶ 50.* A “purchaser” is “[o]ne who obtains property for money or other valuable consideration; a buyer.” *Black’s Law Dictionary* 1270 (8th ed. 2004). A transient guest who ultimately obtains a hotel room in exchange for monetary consideration is a purchaser of lodging services. *Supra ¶¶ 7–10, 15, 17, 48.* Because a transient guest is the purchaser of taxable lodging services, the transient guest fits Wyoming’s definition of a “taxpayer”. *Supra ¶¶ 49, 50.*

87. “Sales price . . . means the total amount or consideration . . . for which . . . services are sold.” *Wyo. Stat. Ann. § 39-15-101(a)(viii); supra ¶ 47.* The common meaning of “consideration” is “a recompense, as for a service rendered; fee; compensation.” *Webster’s New World College Dictionary* 311 (4th ed. 2002). The legal meaning of “consideration” is “[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee.” *Black’s Law Dictionary* 324 (8th ed. 2004); *supra ¶ 48.* Interpreting a different statute, the Wyoming Supreme Court determined the common meaning of “price” was “the full amount paid.” *Lance Oil and Gas Co. v. Wyoming Dep’t of Revenue*, 2004 WY 156, ¶ 13, 101 P.3d 899, 903 (Wyo.2004).

88. Wyoming’s statutory definition of “sales price” unequivocally bases the tax on the **total amount** paid. Sellers are not allowed to deduct any of the following from the sales price:

- (I) The seller’s cost of property sold;
- (II) The cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller and any other expense to the seller;

(III) Charges by the seller for any services necessary to complete the sale.

Wyo. Stat. Ann. § 39-15-101(a)(viii); supra ¶ 47.

89. When Wyoming's statute imposing a sales tax on the sales price paid for living quarters in Wyoming hotels is read *in para materia* with Wyoming's definitions of taxpayer and sales price, it is clear the price paid by the purchaser of lodging services is the "sales price paid for living quarters." *Wyo. Stat. Ann. § 39-15-103(a)(i)(G)*. Because a transient guest purchases living quarters, the amount paid by a transient guest for living quarters is subject to the tax. *Supra ¶¶ 33, 34, 47, 49, 50.*

90. Petitioners contend a portion of the amount they receive from a transient guest for a Wyoming hotel room is for a non-taxable facilitation service charge. [*Petitioners' Brief in Support of Vacating and Dismissing the Wyoming Department of Revenue's Final Administrative Decisions against Petitioners*, p. 27]. Petitioners receive consideration from the transient guests for the rental of hotel rooms in Wyoming. *Supra ¶ 10*. Wyoming's sales tax on lodging does not distinguish between the amounts paid based on how Petitioners may characterize the amounts paid. It is irrelevant whether some of the amounts received by Petitioners could be characterized as consideration for facilitation services. Because transient guests cannot obtain a hotel room through the Petitioners' websites without paying the full amount charged by Petitioners, all charges for services included in that amount are "charges for services necessary to complete the sale," which are not deductible from the taxable "sales price." *Wyo. Stat. Ann. § 39-15-101(a)(viii); supra ¶ 47.*

91. The use of Petitioners' websites is free of charge. *Supra ¶ 5*. Only when a transient guest books a room through a Petitioner is there a charge. Therefore, any amount a Petitioner receives from transient guest is not consideration for the use of a Petitioner's free services. *Supra ¶ 48*. The amounts paid by a transient guest to Petitioners in the merchant model hotel room transactions must be characterized as either consideration for living quarters in Wyoming hotels, consideration for the Petitioners' service of booking the hotel and taking care of payment, or taxes. Booking and paying for a hotel room are integral and necessary parts of the sale of living quarters in a hotel. In effect, Petitioners' argument seems to be that sellers can deduct charges for the service of selling a hotel room from the sales price of the hotel room. Wyoming's statutes unambiguously prohibit a seller from adjusting the sales price in this way. *Wyo. Stat. Ann. § 39-15-101(a)(viii); supra ¶ 47.*

92. Any person engaged in the business of selling services which are subject to sales tax is a vendor under Wyoming law. *Wyo. Stat. Ann. § 39-15-101(a)(xv); supra ¶ 51*. Petitioners routinely accept payment for living quarters in Wyoming hotels from the transient guests.

Supra ¶¶ 7–11, 87, 88. Therefore, Petitioners are vendors as defined by Wyoming Statutes Annotated section 39-15-101(a)(viii). *Supra* ¶ 47.

93. The plain language of Wyoming’s sales tax statutes requires Petitioners register as vendors and collect the tax on the full sales price paid by transient guests to Petitioners for living accommodations in Wyoming hotels, without deduction for any charges for facilitation services. *Supra* ¶¶ 47, 51, 89.

94. Petitioners’ tax recovery charges are not separately stated on the invoice presented to the transient guest. *Supra* ¶ 15. To be excluded, Wyoming statutes requires that such charges be separately stated. *Wyo. Stat. Ann. § 39-15-101(a)(viii)(B)(III)*.

95. Petitioners collect Wyoming sales tax from their customers, transient guests, and the full amount of tax is due to the state even if the hotel is never paid for lodging services. *Rules, Wyoming Department of Revenue, Chapter 2 § 11(c); Wyo. Stat. Ann. § 39-15-108(c)(iv)*. Petitioners are vendors. *Wyo. Stat. Ann. § 39-15-101(a)(xv); supra* ¶ 92.

96. Petitioners contend it is absurd to require the collection of sales tax at the time of the sale even though lodging may never be provided to a transient guest. [*Petitioners’ Reply in Support of Vacating and Dismissing the Wyoming Department of Revenue’s Final Administrative Decisions against Petitioners*, p. 37]. The collection of sales tax at the time a transient guest makes a reservation and pays a Petitioner, before a hotel stay is completed, is required by Wyoming’s sales tax statutes. *Supra* ¶ 95. Petitioners’ concern that the stay may subsequently be cancelled is provided for by the provision for a credit. *Rules, Wyoming Department of Revenue, Chapter 2 § 10(b)*.

97. Petitioners contend the Department’s interpretation of the tax leads to absurd results because the Department’s construction would lead to double taxation. [*Petitioners’ Brief in Support of Vacating and Dismissing the Wyoming Department of Revenue’s Final Administrative Decisions against Petitioners*, p. 32]. The fact that both Petitioners and hotels are vendors under Wyoming law does not mean taxpayers are subject to double taxation. All wholesalers and retailers are vendors under Wyoming law. *Supra* ¶ 51. The Department treats sales made for resale as non-taxable transactions. *Rules, Wyoming Department of Revenue, Chapter 2 § 9(a); supra* ¶ 62. In addition, Petitioners are entitled to a credit for the portion of the tax due which has already been received by the Department. *Rules, Wyoming Department of Revenue, Chapter 2 § 10(b)*.

98. Petitioners’ contention that the Department’s implementing rules and official publications relieve them of their tax collection duty is flawed. The Department’s Rules provide that “[n]othing in these rules in any way shall be construed to limit any power arising under the laws of the State of Wyoming to levy sales or use taxes.” *Rules, Wyoming*

Department of Revenue, Chapter 2 § 15 (pp). Even if the Department’s Rules based the tax on the amount charged by a hotel, which they do not, Wyoming law taxes the full price paid by a transient guest as the purchaser of accommodations in Wyoming. *Supra* ¶¶ 45, 46, 87–89.

99. Petitioners’ contention that Wyoming’s sourcing rules, found at Wyoming Statutes Annotated section 39-15-104(f), source the tax rate to the location of the internet customer is based on the premise that their service for facilitating the sale of a hotel room is severable from the sale of the Wyoming hotel room. Because the Board finds the price paid for facilitating the sale of living quarters to be part of the price paid for living quarters in a Wyoming hotel, the tax rate on the transaction is sourced to the location of the hotel pursuant to Wyoming Statutes Annotated section 39-15-104(f)(i)(B). *Supra* ¶¶ 56, 90.

100. The Petitioners have also raised a number of other legal issues. Petitioners suggest the Department’s application of Wyoming’s sales tax statutes to their merchant model would be unconstitutional under the Dormant Commerce Clause, the Due Process Clause, or Equal Protection Clause. Petitioners also claim Wyoming’s sales tax is void for vagueness and the Department is equitably estopped from enforcing Wyoming’s sales tax against them.

101. Petitioners contend taxing their markup violates the Dormant Commerce Clause of the United States Constitution. [*Petitioners’ Brief in Support of Vacating and Dismissing the Wyoming Department of Revenue’s Final Administrative Decisions against Petitioners*, p. 39]. The United States Supreme Court has outlined a four part test for the constitutionality of state taxes under the Dormant Commerce Clause: (1) The tax must be applied to activity with a substantial nexus to the taxing state. (2) The tax must be fairly apportioned. (3) The tax must not discriminate against interstate commerce. (4) The tax must be fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 282, 97 S.Ct. 1076, 1080, 51 L.Ed.2d 326 (1977); *supra* ¶ 66.

102. Wyoming’s sales tax on Petitioners transactions meets the first part of the *Complete Auto* test. *Supra* ¶¶ 66, 101. Petitioners have a substantial nexus to Wyoming because they sell services which can only be performed at Wyoming hotels. *Supra* ¶¶ 9, 83, 89. Petitioners collect Wyoming sales tax pursuant to their contracts with Wyoming hotels. *Supra* ¶¶ 4, 9, 11, 13, 15, 21. Petitioners cannot claim the protection of the Dormant Commerce Clause when they voluntarily assumed the duty to collect Wyoming taxes and collected a portion of the tax due. *Supra* ¶¶ 11, 12, 24; *see Buehner Block Co., Inc. v. Wyo. Dep’t of Revenue*, 2006 WY 90, ¶ 19, 139 P.3d 1150, 1157 (Wyo.2006);

103. Because the tax is based on the sale of a Wyoming service, received by the purchaser in Wyoming, Wyoming’s imposition of the tax is not a tax on a transaction occurring outside the state’s borders. *Supra* ¶¶ 7, 12-15, 77, 86. The United States Supreme Court has “held

that the entire gross receipts derived from sales of services to be performed wholly in one State are taxable by that State, notwithstanding that the contract for performance of the services has been entered into across state lines with customers who reside outside the taxing State.” *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 188, 115 S.Ct. 1331, 1340, 131 L.Ed.2d 261 (1995) (discussing *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823 (1938)); *supra* ¶ 65. The sale of a Wyoming hotel room does not become an interstate sale simply because the seller and buyer are located outside the state. See *Mayor & City Council of Baltimore v. Priceline.com Inc.*, No. MJG-08-3319, 2012 WL 3043062, *6 (D. Md. July 24, 2012) (concluding that “the retail rental of a hotel room, whether facilitated online using interstate or international computer servers or in person at the hotel reception desk, is most sensibly viewed as a discrete event facilitated by the laws and amenities of the place of the hotel.”).

104. Wyoming’s sales tax on Petitioners transactions meets the second part of the *Complete Auto* test. *Supra* ¶¶ 66, 101. Wyoming’s imposition of sales tax on the Petitioners’ markup is fairly apportioned. The United States Supreme Court’s general rule has been to sustain sales taxes measured by full value. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, *supra* 514 U.S. at 196, 115 S.Ct. at 1344. The Dormant Commerce Clause analysis of a sales tax “should not lose touch with the common understanding of a sale.” *Id.* 514 U.S. at 191, 115 S.Ct. at 1341. Allowing a seller to separate a charge for a service from a charge for facilitating the sale of that same service goes against the common meaning of a sale. *Supra* ¶¶ 87, 88, 91.

105. Wyoming’s sales tax on Petitioners’ transactions also meets the third part of the *Complete Auto* test. *Supra* ¶¶ 66, 101. Wyoming’s tax does not discriminate against interstate commerce because the incidence of the tax is on the price paid by a hotel guest when transient guests purchase temporary living quarters in a Wyoming hotel. *Supra* ¶¶ 41, 78, 87, 88. The tax is applied at the same rate regardless of where the hotel room is purchased or from whom it is purchased.

106. Petitioners contend the application of Wyoming’s sales tax to their transactions discriminates against interstate commerce because the Department has not enforced the tax against other in-state travel intermediaries using the merchant model. [*Petitioners’ Reply in Support of Vacating and Dismissing the Wyoming Department of Revenue’s Final Administrative Decisions against Petitioners*, p. 64]. Petitioners have the burden of providing sufficient evidence to suggest this allegation is true. *Rules, Wyoming State Board of Equalization, Chapter 2 § 20; supra* ¶ 28. The Petitioners have asserted but not provided any evidence that other Wyoming entities use the merchant model.

107. Finally, Wyoming’s sales tax on Petitioners transactions meets the fourth part of the *Complete Auto* test. *Supra* ¶¶ 66, 101. Wyoming’s sales tax is fairly related to the services

provided by Wyoming because the tax is paid by a transient guest who stays in a Wyoming hotel.

The fair relation prong of *Complete Auto* requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity. If the event is taxable, the proceeds from the tax may ordinarily be used for purposes unrelated to the taxable event. Interstate commerce may thus be made to pay its fair share of state expenses and contribute to the cost of providing *all* governmental services, including those services from which it arguably receives no direct benefit.

Jefferson Lines, supra, 514 U.S. at 199, 115 S.Ct. at 1345 (internal quotations omitted).

108. Courts in other jurisdictions have concluded taxing the online travel companies' markup does not violate the Dormant Commerce Clause. The Supreme Court of South Carolina concluded the first two prongs of the *Complete Auto* test were not violated when an online travel company was required to pay sales tax on its markup. *Travelscape, LLC v. South Carolina Dept. of Revenue*, 391 S.C. 89, 105, 705 S.E.2d 28, 36 (S.C. 2011). Four federal district courts also concluded taxing the online travel companies' markup does not violate the Dormant Commerce Clause. *Village of Rosemont, Ill. v. Priceline.com*, No. 09C4438, 2011 WL 4913262 (N.D. Ill. Oct 14, 2011); *City of San Antonio v. Hotels.com*, No. SA-06-CA-381-OG, Dkt. #853, p. 11 (W.D. Tex. Sep 28, 2009); *Mayor & City Council of Baltimore v. Priceline.com Inc.*, No. MJG-08-3319, 2012 WL 3043062, *2-7 (D.Md. July 24, 2012); *City of Charleston v. Hotels.com, LP*, 586 F.Supp.2d 538, 544 (D.S.C.2008). The Supreme Court of Georgia found the commerce clause was not implicated because the tax was on hotel guests. *Expedia, Inc. v. City of Columbus*, 681 S.E.2d 122, 128 (Ga.2009).

109. Petitioners contend Wyoming's sales tax is void for vagueness. [*Petitioners' Brief in Support of Vacating and Dismissing the Wyoming Department of Revenue's Final Administrative Decisions against Petitioners*, p. 51]. A statute is not unconstitutionally vague "[i]f legislative intent can be ascertained with reasonable certainty." *Haddenham v. City of Laramie*, 648 P.2d 551, 555 (Wyo.1982). "Other statutes may also be drawn upon as sources from which to clarify how a statute will work, in order to save it from invalidity on grounds of uncertainty." *Haddenham*, 648 P.2d at 555 quoting *1A Sutherland on Statutory Construction* (4th ed. 1972), § 21.16, p. 96. Wyoming's sales tax statutes, when read *in pari materia*, express an unambiguous legislative intent to tax the amount paid by a transient guest for living quarters in Wyoming. *Supra* ¶¶ 33, 34, 47, 49, 50, 89, 90.

110. Petitioners contend the Department's enforcement of Wyoming's sales tax against them violates equal protection because the Department has not enforced the tax against

similarly situated companies. [*Petitioners' Reply in Support of Vacating and Dismissing the Wyoming Department of Revenue's Final Administrative Decisions against Petitioners*, p. 65]. The mere existence of other entities who have escaped enforcement does not relieve Petitioners of their obligation to comply with the law. Petitioners have failed to show that they were treated differently from other similarly situated entities based on an unjustifiable standard or an arbitrary factor. *Supra* ¶ 70.

111. Wyoming's equal protection case law deals with classifications established by law. *Supra* ¶¶ 68, 69. The Wyoming Supreme Court has held that classifications which do not implicate fundamental rights must have a rational basis. *Garton v. State*, 910 P.2d 1348, 1354 (Wyo.1996); *Allhusen v. State By and Through Wyoming Mental Health Professions Licensing Bd.*, 898 P.2d 878, 885 (Wyo.1995); *Johnson v. State Hearing Examiner's Office*, 838 P.2d 158, 167 (Wyo.1992); *Hays v. State ex rel. Wyoming Workers' Compensation Div.*, 768 P.2d 11, 15–16 (Wyo.1989); *Mountain Fuel Supply Company v. Emerson*, 578 P.2d 1351, 1354-55 (Wyo.1978);. In *Allhusen*, the Wyoming Supreme Court summarized the four part equal protection test as follows:

The four aspects of the test inquire as to (1) what class is harmed by the legislation and has that group been subjected to a tradition of disfavor by our laws; (2) what is the public purpose to be served by the law; (3) what is the characteristic of the disadvantaged class that justifies disparate treatment; and (4) how are the characteristics used to distinguish people for disparate treatment relevant to the purpose the challenged law purportedly intends to serve.

Allhusen v. State By and Through Wyoming Mental Health Professions Licensing Bd., *supra* 898 P.2d at 885.

112. Wyoming law requires all vendors engaged in the business of selling taxable services to collect sales tax from their customers. *Supra* ¶¶ 55, 56. The law treats all vendors equally. Vendors are singled out to bear this burden because they are in the best position to calculate and collect sales taxes. Petitioners are the only party to merchant model hotel transactions who have the ability to calculate and collect the tax. Petitioners do not disclose the amount of tax paid by the transient guest, nor do they disclose the sales price paid to the hotel. *Supra* ¶¶ 14, 15. Petitioners have a tax obligation because they are vendors as defined by Wyoming Statutes Annotated section 30-15-101(a)(xv). *Supra* ¶ 92.

113. Petitioners contend the application of Wyoming's sales tax laws to their merchant model transactions violates the Internet Tax Freedom Act. [*Petitioners' Brief in Support of Vacating and Dismissing the Wyoming Department of Revenue's Final Administrative*

Decisions against Petitioners, p. 53]. The Internet Tax Freedom Act prohibits states from enacting taxes that discriminate against internet commerce. A tax is discriminatory if it:

(i) is not generally imposed and legally collectible by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means;

(ii) is not generally imposed and legally collectible at the same rate by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means; [or]

(iii) imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means.

47 U.S.C. § 151 note, *Internet Tax Freedom Act* § 1105; *supra* ¶ 71.

114. Wyoming’s sales tax is imposed at the same rate on the sales price paid for accommodations regardless of whether the transaction takes place online or through some other means. Any vendor in the business of selling lodging services is obligated to collect the tax regardless of whether the transaction takes place online or through some other means. *Supra* ¶ 55. Travel agents who use the retail model do not provide a service “similar” to the service provided by Petitioners. Under the travel agent’s retail model the sales price for living quarters is paid to a hotel; under this model, a hotel has the obligation to collect the tax because the hotel, not the travel agent, acts as the vendor. *Supra* ¶ 25.

115. Petitioners contend the Department is precluded from collection of the sales tax from them because of the Department’s failure to enforce the tax in the past, relying on the legal doctrine of equitable estoppel. [*Petitioners’ Brief in Support of Vacating and Dismissing the Wyoming Department of Revenue’s Final Administrative Decisions against Petitioners*, p. 53]. Petitioners’ equitable estoppel claim against the Department requires Petitioners prove “(1) authorized affirmative misconduct; (2) reliance; (3) substantial prejudice; (4) rare and unusual circumstances; and (5) a situation that will not defeat public policy.” *Knori v. State, ex rel., Dept. of Health, Office of Medicaid*, 2005 WY 48, ¶ 11, 109 P.3d 905, 909 (Wyo.2005); *supra* ¶¶ 72, 73.

116. “In cases where the state’s actions involved mere negligence or oversight, the courts have refused to apply equitable estoppel.” *Knori, supra*, 2005 WY 48, ¶ 12, 109 P.3d at 909--910 (quoting with approval *Carlson v. Arizona Department of Economic Security*, 184 Ariz. 4, 906 P.2d 61, 63–65 (App. Div. 1 1995)). Petitioners’ equitable estoppel claim fails on the

first element because the Department's failure to enforce the tax does not rise to the level required in Wyoming. *Supra* ¶¶ 73, 74, 115.

117. Petitioners' equitable estoppel claim also fails on the second element. In lawsuits across the country, Petitioners have taken the position they are not subject to local taxes. *See James A. Amdur, Obligation of Online Travel Companies to Collect and Remit Hotel Occupancy Taxes*, 61 A.L.R. 6th 387 (2011). The possibility that local taxing authorities might take a contrary position has been evident for some time. *See* DOR Ex. 512, Hotels.com SEC Form 10-k for year ending December 31, 2002, p. DOR 62; DOR Ex. 571, priceline.com Incorporated, SEC Form 10-K for the year ending December 31, 2003, No. 0-25581, p. 16, DOR p. 313. The first contact between the Department and Petitioners occurred in 2010, and the Petitioners had, at that time, already taken the position they were not subject to Wyoming's sales tax. Affidavit of Daniel W. Noble DOR Appendix A, p. 4. Petitioners failed to demonstrate reliance on the Department's actions in their decision not to fully collect Wyoming sales tax. For these reasons, the Board concludes Petitioners have not met their burden to prove their equitable estoppel claim.

118. Courts addressing Petitioners' claims of violations of the Due Process Clause, the Equal Protection Clause, the Internet Tax Freedom Act, the Dormant Commerce Clause, and/or equitable estoppel have unanimously concluded those claims are without merit. *See Travelscape, LLC v. South Carolina Dept. of Revenue*, 391 S.C. 89, 705 S.E.2d 28, (S.C. 2011); *Expedia, Inc. v. City of Columbus*, 285 Ga. 684, 681 S.E.2d 122 (Ga.2009); *Mayor & City Council of Baltimore v. Priceline.com Inc.*, No. MJG-08-3319, 2012 WL 3043062 (D.Md. July 24, 2012); *City of San Antonio, Tex. v. Hotels.com*, No. SA-06-CA-381-OG (W.D.Tex Sept. 28, 2009); *Dist. Of Columbia v. Expedia, Inc.*, Case No. 2011 CA 002117 B (Sept. 24, 2012).

119. The Department suggests the Board should apply two legal doctrines, the step transaction doctrine and the sham transaction doctrine, to reveal the substance of the Petitioner's transactions rather than the form of those transactions. [*Wyo. Dep't of Revenue's Reply Brief*, pp. 55-60].

120. The step-transaction doctrine is "[a] method used by the Internal Revenue Service to determine tax liability by viewing the transaction as a whole, and disregarding one or more nonsubstantive, intervening transactions taken to achieve the final result." *Black's Law Dictionary* 1454 (8th ed. 2004); *supra* ¶ 60. Our research indicates Wyoming courts have not adopted the step transaction doctrine for state tax issues. Most of the cases cited by the Department either deal with transactions between related parties, *True v. United States*, 190 F.3d 1165 (10th Cir. 1999); *Ind. Dep't of State Revenue v. Belterra Resort Ind., LLC*, 935 N.E.2d 174 (Ind. 2010); *Kornfeld v. Comm'r*, 137 F.3d 1231, 1233 (10th Cir. 1998); *Del Commercial Prop., Inc. v. Comm'r*, 251 F3d 210 (D.C. Ct. App. 2001), or complex

transactions where the ownership of a business or real estate was transferred. *Shuwa Invs. Corp. v. County of Los Angeles*, 1 Cal.App.4th 1635 (Cal. App. 2d Dist. 1991); *Comm'r v. Court Holding Co.*, 324 U.S. 331, 65 S.Ct. 707 (1945). Therefore, the step transaction doctrine does not apply to the Petitioners' merchant model transactions.

121. Under the sham transaction doctrine, "a transaction is not entitled to tax respect if it lacks economic effects or substance other than the generation of tax benefits, or if the transaction serves no business purpose." *Winn-Dixie Stores, Inc. v. Comm'r*, 254 F.3d 1313, 1316 (11th Cir. 2001); *supra* ¶ 61. The Board finds there are valid economic reasons for Petitioners to structure their merchant model transactions so as to retain their markup before remitting payment to hotels. *Supra* ¶¶ 5, 6, 13, 14. Therefore, Petitioners' merchant model transactions are not sham transactions.

122. Although this case is one of first impression in Wyoming, Petitioners have litigated or are in the process of litigating similar disputes in a number of jurisdictions around the country. The resolution of those lawsuits has turned on the specific language of statutes or ordinances which taxed hotel stays. A number of courts ruled in favor of online travel companies because the tax was based on the amount received by hotels. *Infra* ¶ 123. Courts were split when the tax was based on the full amount paid, but only hotels had a statutory duty to collect the tax. *Infra* ¶¶ 124, 125. A few courts found tax laws to be ambiguous, and ruled in favor of the online travel companies because of the rule of strict construction of tax statutes. *Infra* ¶ 126–128. When courts interpreted tax laws similar to Wyoming's, where the basis of the tax was the full amount paid, and the person receiving the money was responsible for collecting the tax, the online travel companies have been held liable for taxes. *Infra* ¶¶ 128–130.

123. The majority of the cases that have been decided in favor of online travel companies are easily distinguishable from the instant case because the applicable statutes or ordinances based the tax on the amount received by the provider of the lodging services. *City of Birmingham v. Orbitz, LLC*, 93 So.3d 932, 936 (Ala. 2012) (applying a statute that based the tax on "charges made for the use of rooms ... by every person who is engaged in the business of renting rooms or lodgings or furnishing accommodations to transients."); *Louisville/Jefferson County v. Hotels.com, L.P.*, 590 F.3d 381, 382 (6th Cir. 2009) (applying a statute that based the tax on "the rent for every occupancy of a suite, room, or rooms, charged by all persons, companies, corporations, or other like or similar persons, groups or organizations doing business as motor courts, motels, hotels, inns or like or similar accommodations businesses."); *City of Bowling Green v. Hotels.com, L.P.*, 357 S.W.3d 531 (Ky. Ct. App. 2011) review denied (Feb 15, 2012) (applying the same statute as *Louisville/Jefferson, supra*); *City of Goodlettsville v. Priceline.com, Inc.*, 844 F.Supp.2d 897, 902 (M.D. Tenn. 2012) (applying an ordinance which based the tax on the consideration charged by the operator of a hotel); *Pitt County v. Hotels.com, L.P.*, 553 F.3d 308, 311-12

(4th Cir. 2009) (applying a statute which based the tax on the gross receipts derived by retailers from the rental of rooms, when retailers were defined as hotel operators); *City of Philadelphia v. City of Philadelphia Tax Review Bd.*, 37 A.3d 15, 19 (Pa. Commw. Ct. 2012) appeal denied *City of Philadelphia v. City of Philadelphia Tax Review Bd.*, 50 A.3d 1253 (Pa.2012) (applying an ordinance which based the tax on “the consideration received by each operator of a hotel.”); *In re Transient Occupancy Tax Cases*, No. B230457, p. 9 (Cal. Ct. App. Nov. 1, 2012) (applying the city of Anaheim’s ordinance which calculated the tax based on “consideration charged by an operator,” where operator was defined as the proprietor of a hotel); *In re Transient Occupancy Tax Cases*, No. B236166, p. 2 (Cal. Ct. App. Nov. 1, 2012) (applying the city of Santa Monica’s ordinance which based the tax on the “total amount paid for room rental by or for any such transient to any hotel.”); *Transient Occupancy Tax Cases, City of San Diego v. Hotels.com, L.P.*, No. JCCP 4472 (Cal. Sup. Ct. Sep. 6, 2011) (applying an ordinance which based the tax on the amount charged by the hotel operator); *City of Orange, Texas v. Hotels.com, LP*, No. 1:06-CV-413, 2007 WL 2787985, *8 (E.D. Tex. Sept. 21, 2007) (applying an ordinance which based the tax “on the amount of consideration paid to the hotel or motel.”); *Mayor & City Council of Baltimore v. Priceline.com Inc.*, No. MJG-08-3319, (D. Md. Aug. 2, 2011) (finding online travel companies liable under an ordinance targeting any person “receiving consideration for the rental of a hotel room,” but finding the online travel companies had no liability under an earlier ordinance where the tax was calculated on the gross amounts paid to the owners and operators of hotels).

124. Some cases are distinguishable because courts finding applied statutes which put the tax obligation on the provider of lodging services. *St. Louis County v. Prestige Travel, Inc.*, 344 S.W.3d 708, 713 (Mo.2011) (applying a statute requiring only a “person, firm or corporation engaged in the business of operating a hotel or motel” to file a tax return); *City of Branson, Mo. v. Hotels.com, L.P.*, No. 31106CC5164 (Greene County Cir. Ct. Jan. 28, 2012) (applying the same statutes as *St. Louis County, supra*); *City of Columbus, Ohio v. Hotels.com, L.P.*, 693 F.3d 642 (6th Cir.2012) (applying ordinances which put the tax collection obligation on “vendors,” defined as owners or operators of hotels who furnish lodging, “operators,” or “hotels”).

125. Online travel companies were ordered to collect hotel taxes in Georgia even though the statutes put the tax collection obligation on the provider of lodging services. The online travel companies became liable because they agreed by contract to collect the tax in lieu of the hotels. *Expedia, Inc. v. City of Columbus*, 285 Ga. 684, 688, 681 S.E.2d 122, 127 (Ga.2009); *Hotels.com, L.P. v. City of Columbus*, 286 Ga. 130, 686 S.E.2d 91 (Ga.2009) reconsideration denied (Nov 9, 2009); *City of Atlanta v. Hotels.com*, 289 Ga. 323, 325, 710 S.E.2d 766, 768 (Ga.2011) reconsideration denied (June 13, 2011).

126. Some courts ruled in favor of online travel companies, finding the controlling laws ambiguous. *Orange County v. Expedia, Inc.*, Case No. 2006-CA-2104-O (Cir. Ct. of Orange County, Fla. June 22, 2012) (granting summary judgment for an online travel company reasoning the company could not rent, lease, or let hotel rooms because it does not own, possess, or have a leasehold interest to convey in such rooms); *Orbitz, LLC v. Broward County, Fla.*, Case No. 2009-CA-126 (Cir. Ct. of Leon County, Fla. July 13, 2012) (concurring with the reasoning outlined in *Orange County, supra*); *Leon County v. Hotels.com*, not reported in Fed.Supp.2d, No. 06-21878-CIV, 2006 WL 3519102 (S.D.Fla. Dec. 6, 2006), summary judgment granted (April 19, 2012).

127. Texas courts split on the issue. In *City of Houston v. Hotels.com, L.P.*, 357 S.W.3d 706, 716 (Tex. App. 2011), the Texas appellate court determined “the price paid for the occupancy of a sleeping room in the hotel” could reasonably be construed to mean the price paid to a hotel. A federal district court applying similar ordinances came to the opposite conclusion holding online travel companies liable for taxes after a jury trial on the issue of whether the companies controlled hotels. *City of San Antonio, Texas, v. Hotels.com*, Civil No. SA-06-CA-381-OG, (W.D. Tex. July 1, 2011).

128. Many of the decisions, while adverse to taxing authorities in other jurisdictions, support the Department’s position in this case. See *Louisville/Jefferson County v. Hotels.com*, 590 F.3d 381, 385 (6th Cir. 2009) (noting that the amount by the ultimate consumer was not conclusive because the tax was levied on the hotel, not the occupant of the room); *In re Transient Occupancy Tax Cases*, B236166, pp. 10, 12, 13 (Cal. Ct. App. Nov. 1, 2012) (noting that the tax was based on the amount paid by a transient rather than the amount charged by a hotel); *City of Orange, Texas v. Hotels.com, L.P.*, No. 1:06-CV-413, 2007 WL 2787985, *7 n. 3 (E.D. Tex. Sept. 21, 2007) (distinguishing the city’s ordinance from the broader language in the Texas Tax Code which based the tax on the price paid for a room); *Mayor & City Council of Baltimore v. Priceline.com*, No. MJG-08-3319, p. 14 (D. Md. Aug. 2, 2011) (noting that online travel companies receive consideration for hotel rooms; characterizing the online travel companies’ argument that they merely book rooms and do not rent rooms as “synonym seeking gamesmanship;” and characterizing the online travel companies’ service fees as fees for services necessary to complete the transaction).

129. Although no court has ruled on statutes identical to Wyoming, courts that found for the taxing authorities support the Board’s reasoning. The Supreme Court of South Carolina harmonized a sales tax statute which levied the tax on the “gross proceeds derived from the rental or charges for any” hotel rooms with a provision subjecting every person in the business of furnishing hotel rooms to the tax. *Travelscape, LLC v. South Carolina Dept. of Revenue*, 391 S.C. 89, 97, 705 S.E.2d 28, 32 (S.C.2011). “Gross proceeds” was defined as “the value proceeding or accruing from the sale, lease, or rental of tangible personal property ... without any deduction for ... the cost of materials, labor, or service.” *Travelscape*, 391 S.C.

at 97-98, 705 S.E.2d at 32. The Supreme Court of South Carolina determined the online travel company could not deduct the cost of their services from the gross proceeds it received from renting hotel rooms. *Id.* The court reasoned the online travel company was in the business of furnishing hotel rooms because the company was accepting money in exchange for supplying hotel rooms. *Travelscape*, 391 S.C. at 102, 705 S.E.2d at 35.

130. In *Village of Rosemont, Ill. v. Priceline.com Inc.*, No. 09C4438, 2011 WL 4913262 (N.D.Ill. Oct 14, 2011), an Ohio federal district court found an online travel companies liable for tax under a municipal ordinance concluding any person receiving consideration for the rental of a hotel room was responsible for collecting the tax. *Id.* at *1. The court found consideration was the amount paid in a bargain, and the bargain was between the consumer and the online travel company. The court concluded the consideration was the amount the consumer paid to the online travel company in exchange for a room. *Id.* at *3. The court concluded requiring the online travel companies to collect the taxes was consistent with the collection provisions of the ordinance because only the online travel companies were in a position to collect the tax. *Id.* at *3.

131. The Superior Court of the District of Columbia found online travel companies liable for sales tax under a sales tax system very similar to Wyoming. *District of Columbia v. Expedia, Inc.*, Case No. 2011 CA 002117 B (Sept. 24, 2012). In the District of Columbia, vendors were taxed on the gross receipts derived from selling specific services. *Id.* at 13. The tax was a percentage “of the gross receipts from the sale or charges for any room or rooms, lodgings, or accommodations furnished to a transient by any hotel.” *Id.* The superior court held this language imposed a tax on the sale or charge for the service, not the provision of the service. *Id.* Because the undisputed facts showed the online travel companies charged transients for the transaction where a hotel room is reserved and paid for, the online travel companies were not merely facilitators, but were instead vendors making taxable retail sales under the District of Columbia Code. *Id.* at 15. The District of Columbia’s definition of sales price was very similar to Wyoming’s definition. *See supra* ¶ 47. The superior court concluded the sales price included the “cost of any acillary services provided as a part of the otherwise taxable sales.” *District of Columbia, supra*, Case No. 2011 CA 002117B, p. 15.

132. After carefully examining the facts and the parties’ assertions and contentions, the Board concludes the Department correctly determined pursuant to Wyoming law and its rules that Petitioners were vendors, engaging in taxable transactions, and liable to collect and remit sales taxes on the full amount paid by transient guests to Petitioners for lodging in Wyoming hotels.

ORDER

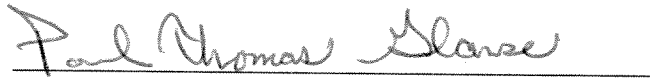
THEREFORE, IT IS ORDERED the Department's final administrative decisions that the Petitioners are legally liable for the sales taxes on the entire price paid to Petitioners by transient guests for living quarters in hotels and similar establishments in Wyoming, and that Petitioners are required by Wyoming law to register with the Department as vendors are **affirmed**.

Pursuant to *Wyo. Stat. Ann. § 16-3-114* and *Rule 12, Wyoming Rules of Appellate Procedure*, any person aggrieved or adversely affected in fact by this decision may seek judicial review in the appropriate district court by filing a petition for review within 30 days of the date of this decision.

DATED this 28th day of February, 2013.

STATE BOARD OF EQUALIZATION


Steven D. Olmstead, Chairman


Paul Thomas Glause, Vice-Chairman

ATTEST:


Jana Fitzgerald, Executive Assistant

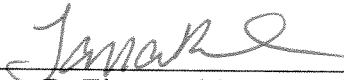
CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of February 2013, I served the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** by placing a true and correct copy thereof in the United States Mail, postage prepaid, and properly addressed to the following:

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