

BEFORE THE STATE BOARD OF EQUALIZATION
FOR THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF)
YELLOW BOOK SALES & DIST. CO. FROM A) Docket No. **2010-65**
DENIAL OF REFUND REQUEST BY THE EXCISE)
DIVISION OF THE DEPARTMENT OF REVENUE)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

APPEARANCES

Wayne A. Trumbull, Esq., Affinity Tax Group, LLC, appeared on behalf of Yellow Book Sales and Distribution Company, Inc., (Petitioner).

Cathleen D. Parker, Senior Assistant Attorney General, and Megan L. Nicholas, Assistant Attorney General, appeared for the Department of Revenue (Department).

STATEMENT OF THE CASE

Petitioner, Yellow Book Sales and Distribution Company, Inc., (Yellow Book) is a telephone book publishing and distributing company. Yellow Book requested a refund from the Department for sales and use tax paid for the time period from December 2006, through May 2009. The Department issued a final decision letter to Petitioner on February 1, 2010, denying the refund. Petitioner filed an appeal of the Department's final decision with the State Board of Equalization (Board) on February 26, 2010. Petitioner and the Department both filed a Preliminary Statement and Brief. Petitioner filed a Reply Brief. Petitioner and the Department, on June 1, 2010, filed a "Joint Motion to Assign Case to Expedited Docket" and waived a hearing before the Board. The parties, on June 1, 2010, filed "Stipulated Facts and Legal Issue." No hearing was held in this matter.

ISSUES

We identified the following issues:

1. Is Yellow Book's transaction with its printer classified as a sale of printed matter or a printing service?
2. If Yellow Book's transaction with its printer is properly classified as printing service, is the service subject to Wyoming sales tax under *Wyo. Stat. Ann. §39-15-103*?
3. If Yellow Book's transaction is a service or a product, is it taxable in Wyoming?

[*Stipulation of Facts and Legal Issue*, p. 4; *Yellow Book's Proposed Findings of Fact and Conclusions of Law*, p. 2].

We affirm the decision of the Department denying Petitioner's request for sales and use tax refund.

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 decision of the Department, effective February 26, 2010, and the Board has jurisdiction to decide this matter.

The Board, consisting of Chairman Steven D. Olmstead; Vice Chairman Deborah J. Smith; and Board Member Paul Thomas Glause¹, considered this matter.

FINDINGS OF FACT

The parties filed a request for the Board to decide this matter without hearing. The parties filed Stipulation of Facts and Legal Issues, pursuant to Board Rules. *Rules, Wyoming State Board of Equalization, Chapter 2 § 15*. The parties represented the stipulation contained all

¹ Thomas D. Roberts term on the Board expired March 1, 2011. Paul Thomas Glause's term on the Board began March 1, 2011, and he participated in this decision by reviewing the materials filed with the Board.

material facts necessary for the Board to decide the issues presented in this appeal. Paragraphs 1-24 of the Findings of Fact were stipulated by the parties:

1. On June 22, 2009, Yellow Book filed a refund claim with the Department claiming the printing expense related to printing Wyoming telephone directories was not subject to Wyoming sales or use tax. [*Stipulation of Facts and Legal Issue*, p. 1].
2. The basis for Yellow Book's refund claim is that it purchases a printing service from the printer that prints its Wyoming directory and that printing services are not subject to tax under Wyoming sales and use tax law. [*Stipulation of Facts and Legal Issue*, p. 1].
3. The refund claim was \$16,492.54 and covers the period of December 2006 through May 2009. [*Stipulation of Facts and Legal Issue*, p. 1].
4. On February 1, 2010 the Department denied Yellow Book's refund claim. [*Stipulation of Facts and Legal Issue*, p. 1].
5. The basis for the Department's denial is that a sale of tangible property had occurred between Yellow Book and the printer. The property was then delivered into Wyoming for use by Yellow Book which created a taxable event under the Use Tax Statutes. [*Stipulation of Facts and Legal Issue*, p. 2].
6. On February 26, 2010 Yellow Book filed an appeal of the Department's decision. [*Stipulation of Facts and Legal Issue*, p. 2].
7. Yellow Book is in the business of producing and distributing telephone directories. [*Stipulation of Facts and Legal Issue*, p. 2].
8. All internal content necessary to produce a telephone directory, telephone listings, advertisements, telephone numbers, graphic art, etc. are created in an electronic file. [*Stipulation of Facts and Legal Issue*, p. 2].
9. The electronic file with all of the internal content is sent electronically to the third party printer which is located outside of Wyoming. [*Stipulation of Facts and Legal Issue*, p. 2].
10. Yellow Book provides all of the paper on which the text of the directory is printed [*Stipulation of Facts and Legal Issue*, p. 2].

11. The paper stock remains the property of Yellow Book at all times and when received by the printer may not be used for any other purpose other than to print the Company's directories. [*Stipulation of Facts and Legal Issue*, p. 2].
12. The printer uses an offset lithography process to print the directories. [*Stipulation of Facts and Legal Issue*, p. 2].
13. Printers which print and bind books and similar items without publishing are classified as manufacturers under code 323117 and 323119 of the North American Industrial Classification System. "The Manufacturing sector comprises establishments engaged in the mechanical, physical, or chemical transformation of materials, substances, or components into new products." [*Stipulation of Facts and Legal Issue*, p. 2].
14. The printer provides the supplies necessary for the plate making and printing, to include covers, glue and ink. [*Stipulation of Facts and Legal Issue*, p. 2].
15. The printer prints all of the text pages and covers. [*Stipulation of Facts and Legal Issue*, p. 2].
16. The printer binds the text pages and covers, the result of which is a finished telephone directory. [*Stipulation of Facts and Legal Issue*, p. 3].
17. The printer holds the paper stock and finished directories as bailee and must keep them separate from its own materials and materials of other third parties. [*Stipulation of Facts and Legal Issue*, p. 3].
18. The printer never takes title or ownership of the directories. [*Stipulation of Facts and Legal Issue*, p. 3].
19. Title to the finished directories vests in Yellow Book immediately upon completion of the directories. [*Stipulation of Facts and Legal Issue*, p. 3].
20. Once the directories are completed Yellow Book directs an interstate common carrier to pick up the directories from the printer and deliver the directories to Wyoming. [*Stipulation of Facts and Legal Issue*, p. 3].
21. The directories are temporarily stored in Wyoming at temporary storage facilities leased by Yellow Book. [*Stipulation of Facts and Legal Issue*, p. 3].

22. The telephone directories are picked up at the storage facility by independent delivery companies that deliver the books to businesses and residences in the geographic region that the telephone directory covers. [*Stipulation of Facts and Legal Issue*, p. 3].

23. The telephone directories are distributed free of charge to all businesses and residences in the geographic area that the directory covers. [*Stipulation of Facts and Legal Issue*, p. 3].

24. The printer's invoice separately states the printing service and any tangible supplies provided by the printer, as follows:

- Text Presswork: Preparing the press to print text pages of the directory
- Running: Printing the text pages
- Binding: Binding the pages together
- Cover Pre-press: Preparing the printing press to print the directory cover
- Cover press: Printing the covers
- Cost of supplies: Ink, glue, covers, tabs and shrink wrap
- Postage: Cost of Postage

[*Stipulation of Facts and Legal Issue*, p. 3].

25. The Department, on February 1, 2010, issued a final determination letter to Petitioner, denying Petitioner's request for a \$16,492.52 refund pertaining to amended returns for the periods of 12/06, 02/07, 06/07, 02/08, 05/08, 12/08, and 05/09. [*Notice of Appeal*].

26. On February 26, 2010, Petitioner filed a letter with the Board as a Notice of Appeal, challenging the Department's final decision letter of February 1, 2010. [*Notice of Appeal*].

27. 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

28. 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)*.

29. The Board’s Rules provide that:

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.

30. “The phrase, ‘preponderance of the evidence,’ has been given various definitions by different courts but, according to *McCormick, et al. on Evidence 2nd Ed. H.B.*, s. 339, p. 794, the most acceptable meaning seems to be proof which leads the trier of fact to find that the existence of the contested fact is more probable than its non-existence.” *Scherling v. Kilgore*, 599 P.2d 1352, 1359 (Wyo. 1979).

31. 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 Company v. Wyoming State Board of Equalization, 12 P.3d 668, 674 (Wyo. 2000). *See also Amoco Production Company v. Department of Revenue*, 2004 WY 89, ¶ 22, 94 P.3d 430, 440 (Wyo. 2004). The Board’s duty is to adjudicate the dispute between Petitioner and the Department.

32. 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 it must be

presumed the Legislature did not intend futile things. *Hamlin v. Transcon Lines*, 701 P.2d 1139, 1142 (Wyo. 1985). See also *TPJ v. State*, 2003 WY 49, ¶ 11, 66 P.3d 710, 713 (Wyo. 2003).

33. 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.

34. “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).

35. 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 Am. Prod. Co. v. Dep't of Revenue, 2005 WY 60, ¶ 15, 112 P.3d 596, 604 (Wyo.2005) (internal citations and quotations omitted). We must accept statutes as they are written; neither omitting words that are included, nor including words that are omitted. *Id.*; *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).

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).

36. “The omission of words from a statute must be considered intentional on the part of the legislature.... Words may not be supplied in a statute where the statute is intelligible without the addition of the alleged omission.... Words may not be inserted in a statutory provision under the guise of interpretation.... The Supreme Court will not read into laws what is not there....” *Matter of Adoption of Voss*, 550 P.2d 481, 485 (Wyo. 1976) (citations omitted).

37. The Wyoming Supreme Court has stated it construes statutes according to the following standard:

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.

Morris v. CMS Oil and Gas Co., 2010 WY 37, ¶26, 227 P3d. 325, 333 (Wyo. 2010).

38. To address an apparent ambiguity, we may resort to extrinsic aids to interpretation to confirm plain meaning. *Parker Land & Cattle Company v. Wyoming Game and Fish Commission*, 845 P.2d 1040, 1043 (Wyo. 1993). We 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 v. Wyoming Game and Fish Commission*, 845 P.2d 1040, 1045 (Wyo. 1993).

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

40. “A use tax is generally regarded as a ‘necessary complement’ to the sales tax which is designed to protect state revenues by diminishing the perceived advantage to residents from traveling out-of-state to make untaxed purchases while also protecting local businesses from out-of-state competition able to offer lower prices because of a reduced tax burden.” *Barcon, Inc. v. State Bd. of Equalization*, 845 P.2d 373, 378 (Wyo. 1992) (citations omitted). The legislature intended that the use tax be complementary to the Wyoming sales tax. *Id.* at 379. The Sales and Use tax laws are complementary. *Rules, Wyoming Department of Revenue Chapter 2 § 2(a).*

41. The Wyoming Statutes Annotated provides that a “taxable event” means: “The sales price of every retail sale of tangible personal property within the state.” *Wyo. Stat. Ann. §39-15-103(a)(i)(A).*

42. “‘Sale’ means any transfer of possession in this state for a consideration including the fabrication of tangible personal property when the materials are furnished by the purchaser....” *Wyo. Stat. Ann. §39-15-101(a)(vii).*

43. “Sale” also means “the transfer of possession of tangible personal property from a vendor for a consideration for storage, use or other consumption in Wyoming....” *Wyo. Stat. Ann. §39-16-101(a)(iii)*.

44. “‘Manufacturing’ means the operation of producing a new product, article, substance or commodity different from and having a distinctive nature, character or use from the raw or prepared material.” *Wyo. Stat. Ann. §39-16-101(a)(xv)*.

45. “‘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)*; and, *Wyo. Stat. Ann. §39-16-101(a)(vii)*.

46. “‘Use’ means the exercise of any right or power over tangible personal property incident to ownership or by any transaction where possession is given by lease or contract.” *Wyo. Stat. Ann. §39-16-101(a)(ix)*.

47. “‘Tangible personal property’ means all personal property that can be seen, weighed, measured, felt or touched or that is any other manner perceptible to the senses....” *Wyo. Stat. Ann. §39-15-101(a)(ix)*.

48. A taxable event also means “[p]ersons storing, using or consuming tangible personal property or specified digital products, except as otherwise provided in this paragraph, are liable for the tax imposed by this article.” *Wyo. Stat. Ann. §39-16-103(a)(i)*.

49. Wyoming sales tax statute states: “‘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 the article.” *Wyo. Stat. Ann. §39-15-101(a)(xv)*.

50. Wyoming use tax statute defines “vendor” as:

any person engaged in the business of selling at retail or wholesale tangible personal property, having or maintaining within the state directly or by any subsidiary, an office, distribution house, sales house, warehouse or other place of business or any agents operating or soliciting sales or advertising within this state under the authority of the vendor or its subsidiary, regardless of whether the place of business or agent is located in the state permanently or temporarily or whether the vendor or subsidiary is qualified to do business within this state.

* * *

‘Vendor’ also includes every person who engages in regular or systematic solicitation by three (3) or more separate transmittances of an advertisement

or advertisements in any twelve (12) month period in a consumer market in this state by distribution of catalogs, periodicals, advertising flyers, or other advertising or by means of print, radio, television or other electronic media, by mail, telegraph, telephone, computer data base, cable, optic, microwave, satellite or other communication system for the purpose of effecting retail sales of tangible personal property.

Wyoming Statutes Annotated § 39-16-101(a)(x).

51. Wyoming Statutes Annotated § 39-15-101 defines sales price as:

(a)(viii)(A) Shall apply to the measure 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 deductions for the following:

* * *

(II) The cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller and any other expenses of the seller.

52. Wyoming Statutes Annotated § 39-15-103(a)(i)(J) imposes sales tax on “[t]he sales price paid for services performed for the repair, alteration or improvement to tangible personal property.”

53. 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.

54. The complementary use tax, Wyoming Statutes Annotated § 39-16-104 provides, in part:

(a) Except as otherwise provided, there is levied and shall be paid by the purchaser an excise tax at the same rate applied under W.S. 39-15-104 upon sales in Wyoming.

55. Wyoming Statutes Annotated § 39-15-103 further provides in 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.

56. 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).

57. Alteration is defined as “(1) an altering or being altered; (2) the result of this; change.” *Webster’s New World College Dictionary, 4th Ed. p. 41 (IDG Books Worldwide, Inc., 2000).*

58. Fabrication is defined as “(1) a fabricating or being fabricated; construction; manufacture.” Fabricate is defined as “(1) to make, build, construct, etc. esp. by assembling parts, manufacture.” *Webster’s New World College Dictionary, 4th Ed. p. 507 (IDG Books Worldwide, Inc., 2000).*

59. Service is defined as “(3) (a) work done for a master or feudal lord, (b) work done or duty performed for another or other [repair service].” *Webster’s New World College Dictionary, 4th Ed. p. 507 (IDG Books Worldwide, Inc., 2000).*

60. Transform is defined as “(1) to change the form or outward appearance of; (2) to change the condition, nature, or function of; convert.” *Webster’s New World College Dictionary, 4th Ed. p. 1520 (IDG Books Worldwide, Inc., 2000).*

61. Convert is defined as “(1) to change the from one form or use to another; transform;” *Webster’s New World College Dictionary, 4th Ed. p. 318 (IDG Books Worldwide, Inc., 2000).*

62. “Printers. Printers produce tangible personal property. The printer’s retail sale shall be subject to the sales tax. Printers shall not deduct labor or services charges from the tax

base of the sale.... All charges made for copying or reproduction services shall be subject to the sales tax.” *Rules, Wyoming Department of Revenue Chapter 2 § 15(z)*.

63. The Department adopted rules addressing use tax, in part:

(i) Transactions Subject to the Use tax. The purchase or lease of all tangible personal property outside this state for use, storage, or consumption within this state shall be subject to the use tax, providing the same transaction would be subject to the sales tax if the transaction had occurred wholly within Wyoming.

(ii) The use tax shall be determined by when tangible personal property is first stored, or first used or first consumed in Wyoming.

Rules, Wyoming Department of Revenue Chapter 2 § 4(i).

64. “Purchases by Businesses. Purchases by businesses and professional persons of equipment, tools and supplies for use in conducting their businesses or professions shall be subject to the sales or use tax.” *Rules, Wyoming Department of Revenue Chapter 2 § 15 (bb)*.

65. 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).

CONCLUSIONS OF LAW: APPLICATION OF PRINCIPLES OF LAW.

66. Petitioner’s appeal was timely filed and the Board has jurisdiction to hear this matter. *Wyo. Stat. Ann. §39-11-102.1(c); Facts, ¶¶ 6, and 25-26.*

67. There are three issues to be decided in this matter. The first issue was whether Yellow Book’s transaction with its out-of-state printer was a sale or a service. *Stipulation of Facts and Legal Issue; Facts, ¶¶ 9, 20.* The second issue was whether Yellow Book’s transaction with its printer properly classified as printing service, was the service subject to Wyoming sales tax under *Wyo. Stat. Ann. §39-15-103? Stipulation of Facts and Legal Issue; Facts, ¶¶ 12, 15-16.* The third, and ultimate issue was whether the Petitioner’s transaction with the printer a sale or service, was the transaction taxable. *Stipulation of Facts and Legal Issue; Facts, ¶¶ 1-5, 25-26.*

68. Petitioner is in the advertising business, producing and distributing telephone directories in Wyoming. Petitioner’s final product was delivered from its printer into

Wyoming for storage. The directories were, at the direction of Petitioner, distributed in the appropriate geographic area to Wyoming businesses and residences free of charge. *Facts*, ¶¶ 7-8, 20-23.

69. All the electronic data necessary for the phone directory, along with paper stock owned by Petitioner, was provided to the third party printer for use in the manufacturing process. The printer provided the lithography process and other supplies necessary to produce the final product. *Facts*, ¶¶ 8-10, 12, 14-16, 24.

70. Petitioner paid sales and use tax to the Department for the printing of the phone directories. Petitioner filed amended returns for December 2006, February 2007, June 2007, February 2008, May 2008, December 2008 and May 2009, requesting a \$16,492.52 refund. *Facts*, ¶¶ 1-3, 25.

71. Petitioner asserts the printing of the phone directories was a service, which was not taxable, because printing was not specifically listed in Wyoming Statute §39-15-103. [*Yellow Book's Proposed Findings of Fact and Conclusions of Law*, p. 11]. Petitioner states:

It was Yellow Book's intention to procure printing service from its printer. In Yellow Book's transaction with its printers the content (graphic artwork and telephone listings) and paper were supplied to the printers. In turn the printers simply *converted* the printing plates, printed it on Yellow Book's paper and glued the individual pages of the directories together. Yellow Book asked the printer to simply print the graphic artwork on its paper and bind the pages.

[*Yellow Book's Proposed Findings of Fact and Conclusions of Law*, p. 9], (emphasis added).

72. Petitioner further asserts it owned the paper stock upon which the directory was printed. Petitioner believes there was no sales transaction between it and the printer, and therefore, no sales or use tax due. [*Yellow Book's Proposed Findings of Fact and Conclusions of Law*, p. 11; *Yellow Book's Reply Brief*, p. 2].

73. Petitioner agrees the printed telephone directory is tangible property. [*Yellow Book's Proposed Findings of Fact and Conclusions of Law*, p. 7].

74. Petitioner summarily argues “[o]nly those services that are specifically enumerated under Wyoming tax law are subject to tax.” “Printing services are not one of the enumerated taxable service,” therefore, Petitioner argues, is not subject to Wyoming sales or use tax. Petitioner references Wyoming Statute § 39-15-103 as its sole source. Petitioner simply states printing services were not specifically enumerated taxable services as a basis for its

argument, again, citing Wyoming Statute § 39-15-103 as its only source. Petitioner believes the Board should consider and follow the holding from the Arizona Court of Appeals case, *QWEST DEX, Inc. v. Arizona Department of Revenue*, 109 P.3d 118 (Ariz. 2005), as being similar to this matter and persuasive. [*Yellow Book's Proposed Findings of Fact and Conclusions of Law* , pp. 9-10].

75. Petitioner further asserts the holding in an Indiana Tax Court case, *Ameritech Publishing v. Indiana Department of Revenue*, 855 N.E.2d 1096 (October 19, 2006)² should be guidance in this matter, as “the facts in the Ameritech case are virtually identical to Yellow Book’s facts.” [*Yellow Book's Reply Brief*, p. 3].

76. The Department argues the transaction between Petitioner and the printer was a sale of tangible personal property, which was subject to tax pursuant to Wyoming Statute § 39-15-103(a)(i)(A). [*Wyoming Department of Revenue's Brief*, pp. 3 and 8].

77. The Department asserts Wyoming Statute § 39-15-101(a)(vii), applies in this matter, as “sale” includes the fabrication of tangible personal property when materials are furnished by the purchaser. [*Wyoming Department of Revenue's Brief*, pp. 3-4]; *Conclusions*, ¶ 42.

78. The Department promulgated a rule specifically addressing the product produced by printers as being taxable. *Rules, Wyoming Department of Revenue Chapter 2 § 15(z)*. The Department asserts the rule comports with “Wyo. Stat. Ann. § 39-15-103 (a)(i)(A)”, which includes, in part “the fabrication of tangible personal property when the materials are furnished by the purchaser.” Petitioner supplied paper stock, whether title transferred or not, was irrelevant, as the final product was the tangible personal property to be taxed. *See Bigsby v. Johnson*, 99 P.2d, 268, 271 (Cal. 1940). We agree the possession or transfer of paper stock or whether held by bailee was irrelevant in determining whether the final product was taxable in this matter. [*Wyoming Department of Revenue's Brief*, pp. 2-4]; *Conclusions*, ¶¶ 41-43.

79. Petitioner argues it should not be subject to sales tax for producing its telephone directory. Petitioner’s argument fails for the following reasons: First, Yellow Book’s telephone directory was a personal tangible product, which no one denies. The telephone directory was produced out-of-state, shipped to and stored in Wyoming, and then first used or consumed in this state when it was delivered to Wyoming businesses and households by

² An unpublished opinion referenced in the North Eastern Reporter in a table captioned “Disposition of Cases by Unpublished Memorandum Decision in the Indiana Tax Court.”

Petitioner. *Facts*, ¶¶ 9, 20-23, [*Yellow Book's Proposed Findings of Fact and Conclusions of Law*, p. 7]; *Conclusions*, ¶¶ 41-43, 48, 50, 63.

80. Second, Petitioner's argument fails because the process of producing the telephone directory by Yellow Book's printer was a service of producing a new product, by **converting** its paper stock and electronic data into a directory, as Yellow Book argues. It is clear this **converting** was done by fabrication, by alteration, and by transformation of the raw products into usable telephone directories. It doesn't matter whether Yellow Book owned the raw paper stock. Yellow Book, as a vendor, acquired the service of the printer to make the final telephone directory product, which was its advertising media. Yellow Book was simply purchasing a supply in the form of a telephone directory for its advertising, which is a taxable event. *Facts*, ¶¶ 12-16; *Conclusions*, ¶¶ 44, 50, 57-64.

81. Third, Petitioner's argument fails because Yellow Book did not provide any persuasive authority applicable in Wyoming, which exempts printing products or services from being taxed, whether the printing process was done in Wyoming or out-of-state. The two cases, *QWEST DEX* and *Ameritech Publishing*, *supra* ¶¶ 75-76, which Petitioner cites as authority involve state statutes (*i.e. Arizona and Indiana*) different than statutes in Wyoming. There is no expressed exemption for tangible personal property for printing products or services in Wyo. Stat. Ann. § 39-16-105, nor in Wyo. Stat. Ann. § 39-15-105, except for newspapers under Wyo. Stat. Ann. § 39-15-105 (a)(viii) (D). *Facts*, ¶¶ 7, 9, 12, 15-16, 20-24; *Conclusions*, ¶¶ 40, 56, 62-65.

82. Petitioner argued there was no sale between its printer and itself, because it owned the paper and advertising electronic data. Petitioner further argued the printer only acted as a bailee of Petitioner's paper and data, and there could be no sale involved in the transaction, as the printer was never an owner of the paper or electronic data. Again, Petitioner's argument is without merit. Wyo. Stat. Ann. § 39-15-101 (a)(vii) defines "sales" in part, as "any transfer of title or possession in this state for consideration, *including the fabrication of tangible personal property when materials are furnished by the purchaser*. Additionally, "manufacturing" under the use tax statute, Wyo. Stat. Ann. § 39-16-101(a)(xv), takes into consideration that raw materials would be supplied to produce a new product or distinctively different product. In this case, that new product was Petitioner's telephone directory. The telephone directories were then shipped, stored and first used and consumed in this state, thus subject to Wyoming use tax. (Emphasis added). *Facts*, ¶¶ 7-11, 17-18, 20-23; *Conclusions*, ¶¶ 41-43, 46-50.

83. "A use tax is a tax on the enjoyment of that which was purchased," and complements the sales tax. The use tax is designed to tax sales not reached by sales tax and thus reaches use or consumption in the state of property purchased outside of it. The purpose of the use

tax is “to more evenly distribute the tax burden among all consumers by imposing a tax on the fruits of an interstate purchase as well as on the sale of property in the State.” A use tax serves to prevent “avoidance of a state’s sales tax by the purchase of goods in another state and to place retailers in the state upon equal footing with out-of state competitors, who are not obligated to collect and remit sales tax.”(Citations omitted). *May Department Stores Co. v. Strayhorn*, WL 1898244 (Tex. App.-Austin) No. 030300729-CV (Tex. 2004). We believe sales and use tax statutes, as complementary, should be read together. *Facts*, ¶¶ 9, 14-16; *Conclusions*, ¶¶ 32-43, 45-46, 48, 52-55.

84. We agree with the Department there should be a use tax imposed on Petitioner’s telephone directory. We believe, however, the use tax was due not solely because it was a tangible personal property, but also because a non-exempt service produced the tangible personal property subject to the use tax. *Facts*, ¶¶ 12-16, and 24; *Conclusions*, ¶¶ 44, 46, 48-49, 52-53, and 60.

85. We also agree with the Department deference should be given to its rule pertaining to printers producing tangible personal property. The Department’s rule was reasonable and does not contradict the plain language of sales and use tax statutes. It has the same force and effect of law. *See, RME Petroleum Co. v. Wyo. Dept of Revenue*, 2007 WY 16, ¶ 44, 150 P.3d 673, 689 (Wyo.2007); and, *Olivas v. State ex rel. Wyo. Workers’ Safety & Comp. Div.*, 206 WY 29, ¶15, 130 P.3d 476,484 (Wyo. 2006). *Facts*, ¶¶ 5, 25; *Conclusions*, ¶¶ 38, 40, and 62-63.

86. Yellow Book was initially correct in remitting sales and use tax as required by Wyoming law. Yellow Book was incorrect to request a refund, claiming the printing of their telephone directories was not a taxable event, simply because it was a service in which there was no sale taking place. The printing of Petitioner’s telephone directory is a service, which produces tangible personal property, therefore it is taxable. There is no exemption for either the service or the product in Wyoming, thus, the production of the telephone directories is taxable. Petitioner failed to meet its burden of proof. The Department was correct in denying a refund to Yellow Book and its decision is affirmed. *Facts*, ¶¶ 4, 25; *Conclusions*, ¶¶ 29-30, 53-55.

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ORDER

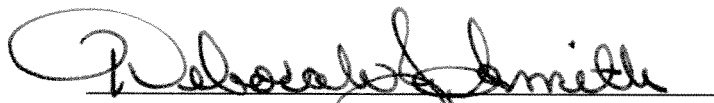
THEREFORE, IT IS HEREBY ORDERED the Department's denial of Petitioner's request for a refund is **affirmed**.

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 29th day of April, 2011.

STATE BOARD OF EQUALIZATION


Steven D. Olmstead, Chairman


Deborah J. Smith, Vice-Chairman


Paul T. Glause, Board Member

ATTEST:


Wendy J. Soto, Executive Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of April 2011, 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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