

**BEFORE THE STATE BOARD OF EQUALIZATION**

**FOR THE STATE OF WYOMING**

IN THE MATTER OF THE APPEAL OF            )  
**SIDELINES SPORTS BAR** FROM A            )     Docket No. **2010-83**  
SALES AND USE TAX AUDIT                 )  
ASSESSMENT BY THE EXCISE DIVISION     )  
OF THE DEPARTMENT OF REVENUE         )

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**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

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**APPEARANCES**

Eric K. Nelson and Orintha E. Karns of Brown, Drew & Massey, LLP appeared on behalf of Sidelines Sports Bar. (Taxpayer). Mr. Nelson appeared at the hearing in this matter.

Cathleen D. Parker, Senior Assistant Attorney General, appeared on behalf of the Wyoming Department of Revenue (Department).

**STATEMENT OF THE CASE**

Taxpayer, Sidelines Sports Bar, was audited by the Department of Audit (DOA) for the time period July 1, 2006, through June 30, 2009. DOA issued an "Audit Findings" letter to Taxpayer on May 14, 2010, finding a deficiency of \$68,281.00 for sales tax on sales and purchases. On May 14, 2010, the Department issued an audit assessment letter which assessed Taxpayer for additional sales tax and accrued interest on the sales tax deficiency, indicating a total assessment due in the amount of \$82,663.17. Taxpayer filed an appeal of the Department's assessment with the State Board of Equalization (Board) on June 11, 2010.

**ISSUES**

The Taxpayer presented the following issues of fact and law for our review:

1. Whether all applicable sales tax has been paid by Petitioner for "cover charges"?

2. Whether the Department has changed its interpretation of applicable Department Rules and Regulations?
3. Whether “cover charges” collected by Petitioner are subject to sales tax under Wyo. Stat. Ann. § 39-15-103(a)(i)(H) and applicable rules and regulations?
4. Whether the Department may retroactively apply newly promulgated Rules and Regulations to the Petitioner?
5. Whether the Department may charge interest on any outstanding sales tax liability?

[*Taxpayer’s Statement of Issues of Fact and Law and Exhibit Index, p. 1*].

The Department identified the following issues of fact and law:

1. Whether the cover charges for admission to the business are subject to sales tax?
2. Whether Petitioner is liable for sales tax under Wyo. Stat. Ann. § 39-15-103(a)(i)(H)?

[*Department’s Issues of Fact and Law and Exhibit Index, p. 1*].

We conclude Taxpayer is subject to the assessment of sales tax and interest imposed by the Department as a result of the audit.

## **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)*. Taxpayer timely appealed the final decision of the Department, 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 Glause, held a hearing on March 29, 2011.

## **FINDINGS OF FACT**

1. Taxpayer is a retail restaurant and bar establishment located in Casper, Wyoming. [Hearing Recording].
2. Taxpayer is owned by Crossroads View, Inc., which in turn is owned by Sonny Pilcher. [Hearing Recording].
3. Sonny Pilcher was initially contacted by DOA on November 12, 2009, concerning its plan to perform a sales tax audit of Sidelines Sports Bar. On January 11, 2010, DOA proceeded with the audit of Taxpayer for the time period of July 1, 2006, through June 30, 2009. [Exhibit 500, p. 0002; Hearing Recording].
4. The DOA issued an Audit Findings letter to Taxpayer on May 14, 2010, indicating Taxpayer owed \$65,825.53 in tax for sales, and, \$2,355.47 for sales tax from purchases or related services, for a total of \$68,281.00. [Exhibit 500, pp. 0002-0010; Hearing Recording].
5. On May 14, 2010, the Department issued an assessment letter to Taxpayer, based on the DOA audit, for unpaid taxes in the amount of \$68,281.00 and interest in the amount of \$14,382.11, for the total sum of \$82,663.17. [Exhibit 501, p. 11; Hearing Recording].
6. Taxpayer filed a Notice of Appeal with the Board on June 11, 2010, challenging the final decision of the Department in the assessment letter of May 14, 2010, and requested a refund in the amount of \$34,837.00. [Notice of Appeal; Hearing Recording].
7. The Board held a hearing on March 29, 2011. Mr. Pilcher testified under oath on behalf of Taxpayer. [Hearing Recording].
8. Mr. Pilcher testified he has been the owner of Sidelines Sports Bar for the past eight and half years. He has been in the bar business for over twenty years. Mr. Pilcher stated his former manager of twenty years, Bobbi Gerlock, “resigned last month”, and he just recently took a more active role in the management of Sidelines Sports Bar. [Hearing Recording].
9. Mr. Pilcher, or his former manager, Bobbi Gerlock, signed the Sales/Use Tax Returns submitted to the Department for Sidelines Sports Bar for the audit period of July 1, 2006, through June 30, 2009. [Exhibit 502, pp. 0014-0059; Hearing Recording].

10. Sidelines Sports Bar is operated as a combined restaurant, sports bar and a dance club. Meals are regularly served to the public until 9:00 p.m. daily. After 9:00 p.m. the business is operated as a dance club. [Hearing Recording].

11. Sidelines Sports Bar displays sports memorabilia and offers various forms of entertainment including beer pong tournaments, pool tables, dart boards and numerous televisions broadcasting sporting events and pay-per-view programs. [Exhibit 504, pp. 0061-0068; Hearing Recording].

12. On Wednesdays, Fridays and Saturdays Taxpayer began collecting a cover charge at 9:00 p.m. Wednesdays were known as "Hump Night" and Fridays were known as "Ladies Night". There was a \$15.00 cover charge on Wednesdays and Fridays for which the customer received a wristband. The wristband entitles customers to certain alcoholic drinks. Customers have the option of paying a \$5.00 cover charge and paying for their own drinks. There was a \$5.00 cover charge on Saturdays. [Exhibit 504, pp. 0061-0068; Hearing Recording].

13. Mr. Pilcher testified he deducted \$5.00 of each cover charge from his gross sales because he did not believe he was required to remit sales tax on cover charges. He further testified that \$10.00 of each \$15.00 cover charge was included in his gross sales to reflect the cost of the alcoholic drinks. [Exhibit 503, p. 0060; Hearing Recording].

14. Mr. Pilcher testified he was not aware of any statute requiring sales tax to be collected on cover charges, but was aware of the Department's Vender Manual that required sales tax to be collected on cover charges. [Exhibit 507, p.100; Exhibit 508, p. 122; Hearing Recording].

15. Monthly sales reports were available for the restaurant side of the business for inspection by the DOA. However, no monthly sales reports were available for the bar side of the business. Mr. Pilcher testified the daily cash register receipts for both the cover charges and the bar were destroyed after the deposits were made for the day. Sales for the bar side of the business were determined by subtracting the sales from the restaurant side of the business from the total deposits. [Exhibit 101, Exhibit 102; Hearing Recording].

16. Mr. Pilcher testified sales tax was remitted on the \$10.00 portion of the cover charges because they were included in his gross sales. He believed he was due a refund because the Department's assessment failed to recognize he had already paid sales tax on the \$10.00 portion of the cover charges. [Notice of Appeal; Hearing Recording].

17. Mr. Pilcher admitted Sidelines Sports Bar had failed to pay sales tax on certain purchases of tangible property and related services. He admitted the items purchased were not resold by the business and were subject to sales tax. Taxpayer did not refute the assessment of sales tax associated with the purchases or related services. [Exhibit 500, p. 0004; *Taxpayer's Updated Summary of Contentions*; Hearing Recording].

18. Mr. Pilcher testified regarding Exhibit 503. He stated the first column was the date, the second column represented his gross sales, the third column was the door cover charges, the fourth column was taxable sales (gross sales minus cover charges) and the fifth column was sales tax remitted. He reported the taxable sales on his Sales/Use Tax Returns submitted to the Department and remitted sales tax on that amount. [Exhibit 503, p. 60; Exhibit 102; Hearing Recording].

19. Mr. Pilcher was not able to sufficiently explain why there was a negative number in the third column of Exhibit 503 for the cover charges that were deducted from gross sales for September 2006 and January 2007. It was also unclear as to why all of the numbers in the third column were not represented by whole dollars, since he testified the cover charges were either \$5.00 or \$15.00. [Exhibit 503, pp. 60; Hearing Recording].

20. The Taxpayer requested the interest imposed by the Department be waived, but offered little evidence as to why interest should be waived. [Hearing Record].

21. Justin Delo, an employee of the DOA, testified on behalf of the Department. Mr. Delo is an auditor with the DOA Excise Tax Division, and was the lead auditor who examined the business records provided by Taxpayer during the audit. [Exhibit 500, pp. 0002-0010; Hearing Recording].

22. Mr. Delo prepared the DOA Audit Report letter mailed to Taxpayer regarding the audit for the period of July 1, 2006, through June 30, 2009. [Exhibit 500, pp. 0002-0003; Hearing Recording].

23. Mr. Delo also prepared a spreadsheet of Taxpayer's daily deposits to establish the total amount of deposits for each month of the audit period. He then compared the total of each month's deposits to the taxable sales Taxpayer reported on the monthly Sales/Use Tax Returns for the audit period. He discovered there was a consistent pattern of under reporting. [Exhibit 505, pp. 0069-0090; Exhibit 502, pp. 0014-0059; Hearing Recording].

24. Mr. Delo stated he asked Mr. Pilcher if there were any unreported sales that would explain the difference between the total of the daily deposits for the months and the amount of taxable sales reported on the Sales/Use Tax Returns. Mr. Pilcher explained he deducted

the cover charges from his gross sales to arrive at his taxable sales. He reported the taxable sales on the Sales/Use Tax Returns since he did not believe the cover charges were subject to sales tax. [Exhibit 505, pp. 0069-0090; Exhibit 503, p. 60; Hearing Recording].

25. Mr. Delo then compared the total of the daily deposits for each month to the gross sales shown in Exhibit 503. He determined the total of the daily deposits for each month were fairly consistent with the gross sales before the cover charges were deducted. By comparing the two figures he was able to establish a “comfort level” that the gross sales set forth in Exhibit 503 were reliable. [Exhibit 505, pp. 0069-0090; Exhibit 503, p. 60; Hearing Recording].

26. Mr. Delo demonstrated how the DOA determined they were not taxing any portion of the cover charges twice, as alleged by Mr. Pilcher. He illustrated the procedure using January and February 2008 as examples. He compared the net sales (gross sales minus cover charges) shown in column four of Exhibit 503 to the taxable sales shown on the Sales/Use Tax Returns in Exhibit 502 and the taxable sales the Taxpayer reported in Exhibit 102. For January and February 2008 each of the three Exhibits showed identical sales of \$99,107.68 and \$96,040.40 respectively. [Exhibit 503, p. 0060; Exhibit 502, pp. 00036, 0037; Exhibit 102; Hearing Recording].

27. Mr. Delo added the total cover charges to the total taxable sales the Taxpayer showed in Exhibit 102. When added together, the cover charges and the taxable sales reported by the Taxpayer were roughly equal to the total of the daily deposits computed by Mr. Delo in Exhibit 505. Thus he was able to conclude no portion of the cover charges were taxed twice. [Exhibit 500, p. 0009; Exhibit 102; Exhibit 505, pp.0069-0090; Hearing Recording].

28. Taxpayer’s sales tax deficiency was determined by totaling the cover charges Taxpayer subtracted from its gross sales in Exhibit 503 for each month. Sales tax was assessed on the total of the cover charges which had been subtracted from gross sales. The total of the cover charges for the audit period was \$1,318,235.58. [Exhibit 503, p. 0060; Exhibit 500, p. 0009; Hearing Recording].

29. The DOA reviewed all business records provided by Taxpayer for the audit and made an initial finding of a tax payment deficiency in the amount of \$68,281.00, as indicated in the May 14, 2010, “Audit Findings” letter to Taxpayer. [Exhibit 500, pp. 0001-0010; Hearing Recording].

30. Terri Lucero, Education/Taxability Manager for the Department’s Excise Tax Division, testified on behalf of the Department regarding its findings and the issues related to the Department’s assessment letter sent to Taxpayer. [Hearing Recording].

31. The Department's May 14, 2010, letter to Taxpayer, based upon DOA's audit findings, was a final administrative decision. The Department determined there was a tax deficiency of \$68,281.00, together with accrued interest of \$14,382.17, for a total of \$82,883.17. [Exhibit 501, pp. 0011-0013; Hearing Recording].

32. The interest assessed to Taxpayer was based upon the statutory provision of *Wyo. Stat. Ann. § 39-15-108(b)(i)*, and calculated on the remaining balance of sale tax due after all sales tax returns were filed and corresponding remittances were made. [Exhibit 501, pp. 0011-0013; Hearing Recording].

33. Ms. Lucero testified the criteria the Department used to determine if good cause existed to waive interest was not within the realm of her authority. [Hearing Record].

34. Ms. Lucero explained the Department has not changed its position on the taxability of cover charges. She stated the Lodging and Hospitality publication originally issued in January 2001 and revised in August 2005, always provided cover charges were subject to sales tax. She went on to testify the Department's Vendor Manual, effective in 2002, as well as the current version of the Department's Vendor Manual, both provide admissions to places of amusement or entertainment are taxable. [Exhibit 507, p. 100; Exhibit 508, pp. 119, 122; Hearing Record].

35. On June 11, 2010, Taxpayer filed a letter with the Board appealing the Department's May 14, 2010, assessment. [Notice of Appeal].

36. 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**

37. 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)*.

38. 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.*

39. “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).

40. 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 a taxpayer and the Department.

41. 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).



42. “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).

43. 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).

44. “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).

45. 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).

46. Wyoming Statutes impose an excise tax on the following:

(a) Taxable event. The following shall apply:

(i) Except as provided by W.S. 39-15-105, there is levied an excise tax upon:

(A) The sales price of every retail sale of tangible personal property within the state;

\* \* \*

(F) The sales price paid for meals and cover charges at any place where meals are regularly served to the public;

\* \* \*

(H) The sales price paid for each admission to any place of amusement, entertainment, recreation, games or athletic event;

\* \* \*

(N) The sales price paid for alcoholic beverages;

*Wyo. Stat. Ann. § 39-15-103(a)(i)(A), (F), (H), (N).*

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

48. “‘Alcoholic beverages’ means beverages that are suitable for human consumption and contain one-half of one percent or more of alcohol by volume.” *Rules, Wyoming Department of Revenue, Chapter 2 §3(e).*

49. “‘Sale’ means any transfer of title or possession in Wyoming for a consideration . . .” *Wyo. Stat. Ann. § 39-15-101(a)(vii).*

50. Wyoming Statutes Annotated § 39-15-101 (a)(viii) defines sales price as:

(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:

(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 expenses of the seller;

51. Wyoming Statutes Annotated § 39-15-107 provides in part:

(a) Returns, reports and preservation of records. The following shall apply:

(i) Each vendor shall on or before the last day of each month file a true return showing the preceding month’s gross and remit all taxes to the department. The returns shall contain such information and be made in the manner as the department by regulation prescribes. The department may allow extensions for filing returns and paying taxes by regulation, but no extension may be more than ninety (90) days.

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(ii) Every vendor and person liable for the payment of sales tax under this article shall preserve for three (3) years at his principal place of business, suitable records and books as may be necessary to determine the amount of tax for which he is liable under this article, together with all invoices and books showing all merchandise purchased for resale. All records, books and invoices shall be available for examination by the department during regular business hours except as arranged by mutual consent;

(iii) If any vendor or person liable for the payment of sales tax under this article fails to comply with paragraph (ii) of this subsection, he shall bear the burden of proof as the correctness of any assessment of taxes imposed by the department for the period for which records were not preserved in any court action or proceeding.

52. 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.

53. Wyoming Statutes Annotated § 39-15-103(c)(i) provides:

(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.

54. Wyoming Statutes Annotated § 39-15-108(b) provides:

(b) Interest. The following shall apply:

(i) If the amount of tax paid is less than the amount due, the difference together with interest thereon at the rate of one percent (1%) per month from the time the return was due shall be paid by the vendor or any person liable for the payment of the sales tax under this article within ten (10) days after notice and demand is made by the department. Effective July 1, 1994, interest at an annual rate equal to the average prime interest rate as determined by the state treasurer during the preceding fiscal year plus four percent (4%) shall be added to the delinquent tax. To determine the average prime interest rate, the state treasurer shall average the prime interest rate for at least seventy-five percent (75%) of the thirty (30) largest banks in the United States. The interest rate on delinquent taxes shall be adjusted on January 1 of each year following the year

in which the taxes first became delinquent. In no instance shall the delinquent tax rate be greater than eighteen percent (18%) from any sale made on or after July 1, 1994. The interest rate on any delinquent tax from any sale made before July 1, 1994, shall be one percent (1%) per month from the date the return was due until paid;

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(iii) The department may credit or waive interest imposed by this subsection as part of a settlement or for any other good cause.

55. The Wyoming Supreme Court has defined good cause.

To constitute "good cause" the evidence presented must demonstrate:

" \* \* \* such a cause as justifies an employee's voluntarily leaving the ranks of the employed and joining the ranks of the unemployed; the quitting must be for such a cause as would reasonably motivate in a similar situation the average able-bodied and qualified worker to give up his or her employment with its certain wage rewards in order to enter the ranks of the compensated unemployed. The terms 'good cause' and personal reasons' connote, as minimum requirements, real circumstances, substantial reasons, objective conditions, palpable forces that operate to produce correlative results; adequate excuses that will bear the test of reason; just grounds for action. \* \* \* "

81 C.J.S. Social Security and Public Welfare s 226(a), pp. 448-452; *Erie Resistor Corporation v. Unemployment Compensation Board of Review*, 1953, 172 Pa.Super. 430, 94 A.2d 367, 369; 18A Words and Phrases, 'Good Cause,' pp. 58-64 (1956) (1979 Pocket Part, pp. 20-23).

That definition has been followed consistently. *Southwest Wyoming Rehabilitation Center v. Employment Sec. Com'n of Wyoming*, 781 P.2d 918, 921 (Wyo.1989); *Beddow v. Employment Sec. Com'n of Wyoming*, 718 P.2d 12, 14 (Wyo.1986); *Employment Sec. Com'n of Wyoming v. Bryant*, 704 P.2d 1311, 1315-17 (Wyo.1985); *Scott v. Fagan*, 684 P.2d 805, 809 (Wyo.1984).

*Hat Six Homes, Inc. v. State, Dept. of Employment, Unemployment Ins. Com'n*, 6 P.3d 1287, 1293, 1294 (Wyo. 2000).

56. “The use of the verb ‘may’ generally indicates the authority found in the statute is “to be exercised at the discretion of the court.” Citations omitted. *In re Estate of George*, 2003 WY 129, ¶ 10, 77 P.3d 1219, 1222 (Wyo. 2003).

57. Amusement is defined as “(1) the condition of being amused (2) something that amuses or entertains; entertainment.” *Webster’s New World College Dictionary*, 4<sup>th</sup> Ed. p. 48 (Wiley Publishing, Inc., 2002).

58. Entertainment is defined as “(1) an entertaining or being entertained (2) something that entertains; interesting, diverting, or amusing thing.” *Webster’s New World College Dictionary*, 4<sup>th</sup> Ed. p. 474 (Wiley Publishing, Inc., 2002).

59. Entertain is defined as “(1) [Archaic] to keep up; maintain (2) to hold the interest of and give pleasure to; divert; amuse (3) to give hospitality to; have has a guest.” *Webster’s New World College Dictionary*, 4<sup>th</sup> Ed. p. 474 (Wiley Publishing, Inc., 2002).

60. Recreation is defined as “(1) refreshment in body or mind, as after work, by some form of play, amusement, or relaxation (2) any form of play, amusement, or relaxation used for this purpose, as games, sports, or hobbies.” *Webster’s New World College Dictionary*, 4<sup>th</sup> Ed. p. 1198 (Wiley Publishing, Inc., 2002).

61. Game is defined as “(1) any form of play or way of playing; amusement; recreation; sport; frolic.” *Webster’s New World College Dictionary*, 4<sup>th</sup> Ed. p. 582 (Wiley Publishing, Inc., 2002).

## **CONCLUSIONS OF LAW: APPLICATION OF PRINCIPLES OF LAW**

62. Taxpayer’s appeal was filed timely and the Board has jurisdiction to hear this matter. *Wyo. Stat. Ann. §39-11-102.1(c)*; *Facts*, ¶¶ 6, 35; *Conclusions* ¶ 37.

63. Taxpayer argues it is not liable for the payment of sales tax on cover charges, either because “cover charges” are not subject to sales tax or because taxability is due to a change in the Department’s rules and regulations. Taxpayer’s argument falls short for following reasons. [Taxpayer’s Statement of Issues of Fact and Law and Exhibit Index, p. 1].

64. Taxpayer fails to recognize that in exchange for the \$15.00 cover charges, customers received wristbands which entitled them to alcoholic drinks. That portion of the cover charge representing the advance purchase price of drinks is taxable pursuant to Wyo. Stat. Ann. § 39-15-101(a)(N). Under the definition of “tangible personal property” found in Wyo. Stat. Ann. § 39-15-101(a)(ix), the wristband would constitute the sale of tangible personal property. Therefore, the entire \$15.00 cover charge would be subject to sales tax. *Facts*, ¶¶ 12,13, 16; *Conclusions*, ¶¶ 46-49.

65. For those customers who only paid a \$5.00 cover charge and did not receive a wristband, we must look further. Pursuant to Wyo. Stat. Ann. § 39-15-103(a)(F), cover charges are a taxable event at “any place where meals are regularly served to the public.” Even though the Taxpayer stopped serving meals to the public at 9:00 p.m. before it began collecting a cover charge, it was nonetheless still regularly serving meals to the public. It was the character of the business that changed at 9:00 p.m., not the place of business. All of the cover charges would therefore be subject to sale tax. *Facts*, ¶¶ 1, 10, 12, 13, 16 ; *Conclusions*, ¶ 46.

66. Wyoming Statutes Annotated § 39-15-103(a)(H) provides the sales price paid for each admission to any place of amusement, entertainment, recreation, games or athletic event is a taxable event. In the case at hand the cover charge constitutes the price of admission. When we apply the facts of this case to this statute, it is abundantly clear that the Taxpayer’s business constitutes a place of entertainment. Under this analysis all of the cover charges would be subject to sales tax. *Facts*, ¶¶ 1, 10-13; *Conclusions*, ¶¶ 46, 57-61.

67. The DOA took reasonable and proper steps in comparing the monthly totals of Taxpayer’s daily deposits to Taxpayer’s sales tax returns filed with the Department. Contrary to Taxpayer’s assertion, the comparison showed the Taxpayer consistently subtracted the cover charges from its gross sales to arrive at the amount of sales it reported on the sales tax returns. *Facts*, ¶¶ 13, 15, 18, 23-28; *Conclusions*, ¶¶ 51-53.

68. The demonstration by the DOA of how they calculated the amount of cover charges subject to sales tax made it obvious they did not include any portion of the cover charges in their calculations that sales tax, if any, was previously paid on. The DOA determined the amount of cover charges subtracted from the Taxpayer’s gross sales from the Taxpayer’s own documentation. The Taxpayer’s argument it was due a refund was flawed. It was clear from the evidence that no portion of the cover charges were being taxed twice as alleged by the Taxpayer. *Facts*, ¶¶ 6, 13, 16, 18-19, 24, 26-28; *Conclusions*, ¶¶ 46, 50, 51.

69. The DOA applied the sales tax rate to the total of the monthly cover charges subtracted from the gross sales to determine the Taxpayer's sales tax deficiency. *Facts*, ¶¶ 13, 16, 18, 24, 26-28; *Conclusions*, ¶ 52, 53.

70. The Department is authorized to waive interest "as part of a settlement or for any other good cause." *Facts*, ¶¶ 20, 31-33; *Conclusions*, ¶¶ 54-56.

71. The phrase "for good cause" clearly defines a standard applicable to Department decisions for the waiver of interest in the absence of a settlement. This Board is not authorized to exercise its discretion or usurp the Department's authority to waive interest. The Board is confined to approving or disapproving the determination by the Department of whether there was "good cause" to waive the interest. The Department's exercise of discretion must be considered in light of the taxpayer's evidentiary burdens. *Facts*, ¶¶ 20, 31-33; *Conclusions*, ¶¶ 40, 54-56.

72. The Department was vested with the authority to determine whether the Taxpayer's contentions established sufficient good cause to waive interest in light of the other facts known to them. Even though Ms. Lucero stated the criteria the Department used to determine if good cause existed to waive interest was outside the realm of her authority, we conclude the Taxpayer did not provide sufficient evidence to suggest the Department determination was incorrect. The Department could have reasonably weighed the facts as they did, and declined to grant a waiver of interest. *Facts*, ¶¶ 20, 31-33; *Conclusions*, ¶¶ 40, 54-56.

73. The Taxpayer did not present any evidence the Department had changed its interpretation of the statutes or rules regarding the taxability of cover charges, or retroactively applied newly promulgated rules. The only evidence presented on this issue was by the Department. The Lodging and Hospitality publication, as well as the current and former versions of the Department's Vendor Manual, make it clear the Department has not changed its interpretation of the statutes or rules regarding the collection of sales tax on cover charges during the audit period. *Facts*, ¶ 34; *Conclusions*, ¶ 38.

74. The Taxpayer did not dispute the portion of the Department's assessment of sales tax on certain purchases of tangible personal property and related services. *Facts*, ¶¶ 4, 17.

75. The Department was correct in the assessment of unpaid sales tax, and the imposition of interest against Taxpayer was appropriate. *Facts*, ¶¶ 27-34; *Conclusions*, ¶¶ 46-54.



**ORDER**

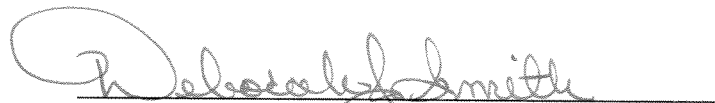
**THEREFORE, IT IS HEREBY ORDERED** the Department's levy of tax and interest against Taxpayer is **affirmed**.

**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 24<sup>th</sup> day of May, 2011.

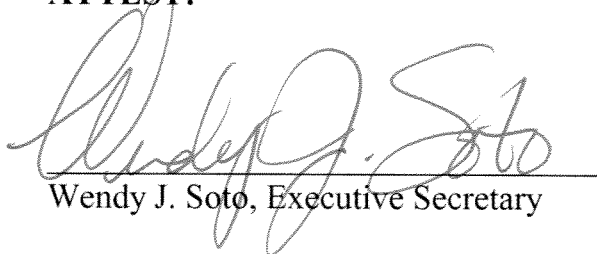
**STATE BOARD OF EQUALIZATION**

  
Steven D. Olmstead, Chairman

  
Deborah J. Smith, Vice-Chairman

  
Paul Thomas Glause, Board Member

**ATTEST:**

  
Wendy J. Soto, Executive Secretary

## CERTIFICATE OF SERVICE

I hereby certify that on the 24<sup>th</sup> day May, 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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