

**BEFORE THE STATE BOARD OF EQUALIZATION**  
**FOR THE STATE OF WYOMING**

IN THE MATTER OF THE APPEAL OF )  
**T-JOE’S BAR & LOUNGE** FROM A )  
SALES AND USE TAX AUDIT ASSESSMENT ) Docket No. **2012-64**  
BY THE EXCISE DIVISION OF THE )  
DEPARTMENT OF REVENUE )  
(Audit period 7/1/08 through 6/30/11) )

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

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**APPEARANCES**

T. Michael Tuttle appeared on behalf of T-Joe’s Bar & Lounge (T-Joe’s) at the scheduling conference and pre-hearing conference held in this matter. Mr. Tuttle failed or refused to appear at the scheduled hearing and no one appeared at the scheduled hearing in this matter on behalf of T-Joe’s.

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

**STATEMENT OF THE CASE**

T-Joe’s Bar & Lounge, was audited by the Department of Audit (DOA) for the time period July 1, 2008, through June 30, 2011. DOA issued an “Audit Findings” letter to T-Joe’s on June 1, 2012, finding a deficiency of \$34,256.87 for sales tax on sales and purchases. On June 13, 2012, the Department issued an audit assessment letter which assessed T-Joe’s \$34,256.87 for additional sales tax, \$3,438.17 for penalties, and \$3,570.28 for accrued interest on the sales tax deficiency, for a total of \$ 41,265.32. T-Joe’s filed an appeal of the Department’s assessment with the State Board of Equalization (Board) on July 9, 2012.

## ISSUES

T-Joe's presented the following contentions in its Notice of Appeal:

- 1) I am being unlawfully taxed on items that I've previously paid the tax on such as my utility bill, parts, supplies, food etc, etc.
- 2) I am being taxed on items that are not taxable such as labor, insurance, phone, etc., etc.
- 3) I am being taxed on my overhead which is included in my plate costs.
- 4) All of the sales taxes have been paid on all the items I use in my business such as napkins, straws, candles, condiments, spices, food, beverages etc. Therefore, I am requesting a complete item breakdown of all the things included in the \$34,381.51 figure.
- 5) The sales tax law, as you are applying it to me, is inequitable, ambiguous, discriminatory, and violates [Wyo. Stat. Ann. §] 39-16-105 Exemptions (v).
- 6) I am prepared to argue my contentions in a judicial proceeding before a jury to get this matter resolved in order to secure and ensure my rights of Due Process.

*[Taxpayer's Notice of Appeal].*

The Department identified two contested issues of law:

- 1) Did the Department properly determine that sales tax is due on the price paid for meals and alcohol with the deductions claimed by Petitioner?
- 2) Did the Department correctly impose interest on Petitioner for under reporting of sales tax?

*[Department's Issues of Fact and Law and Exhibit List, p. 1].*

The Board concludes T-Joe's is subject to the assessment of sales tax, penalties 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)*. T-Joe's 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 and Vice Chairman Paul Thomas Glause, held a hearing on January 10, 2013, at which the Department presented testimony and exhibits.<sup>1</sup> No one appeared at the hearing on behalf of T-Joe's.

## FINDINGS OF FACT

1. T-Joe's is a retail restaurant and bar establishment located in Laramie County, Wyoming, and is owned by T. Michael Tuttle. [Petitioner's Preliminary Statement, ¶ 1; Hearing Recording].
2. Daniel Noble was the Administrator of the Excise Tax Division for the Department of Revenue.<sup>2</sup> He testified the Department received a call from T-Joe's bookkeeper around September 2010. The bookkeeper informed the Department that T-Joe's was changing its practice of how it reported sales for tax purposes and she would no longer sign the Wyoming Vendor Sales/Use Tax Returns for T-Joe's because of this change. Mr. Noble referred this information to the DOA for its consideration. [Hearing Recording].
3. The DOA initially contacted T. Michael Tuttle on August 4, 2011, concerning its plan to perform a sales tax audit of T-Joe's Bar and Lounge, for the time period of July 1, 2008 through June 30, 2011. On August 5, 2011, the DOA sent an engagement letter to T-Joe's Bar and Lounge confirming the DOA would begin the fieldwork for the audit on November 14, 2011. [Exhibit 500, p. 0002; Exhibit 501, p. 0005; Hearing Recording].
4. The DOA issued an "Audit Findings" letter to T-Joe's on June 1, 2012, indicating T-Joe's owed \$31,776.81 in tax on sales and \$2,480.06 for sales tax on purchases, for a total of \$34,256.87. [Exhibit 502, p. 0006-0007; Hearing Recording].

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<sup>1</sup> E. Jayne Mockler was appointed to the Board on March 20, 2013, and participated in this decision by reviewing the record and the materials filed with the Board.

<sup>2</sup> Daniel Noble was appointed Director of the Department of Revenue by Governor Mead in July 2013.

5. On June 13, 2012, the Department issued an assessment letter to T-Joe's, based on the DOA audit, for unpaid taxes in the amount of \$34,256.87, penalties in the amount of \$3,438.17, and interest in the amount of \$3,570.28, for a total assessment of \$41,265.32. [Exhibit 514, pp. 00113–0118; Hearing Recording].
6. T-Joe's filed a Notice of Appeal with the State Board on July 9, 2012, challenging the Department's June 13, 2012, final decision. [Notice of Appeal].
7. The Board entered a Hearing Order on September 19, 2012. The Hearing Order, among other things, set this matter for a prehearing conference on December 13, 2012, and for a hearing on January 10, 2013. [Hearing Order].
8. T-Joe's did not file an updated summary of the contentions of the parties, a summary of remaining issues of fact and law for determination by the Board, or a list of exhibits, as required by the Hearing Order. The Board's hearing officer extended the time for T-Joe's to submit the required information to December 21, 2012. [Prehearing Order].
9. On December 21, 2012, T-Joe's filed a letter addressed to the Board's hearing officer which stated in part, "I respectfully decline any further meetings with the Board of Equalization or it's representative concerning T-Joe's Bar & Lounge and the alleged tax bill in question." [December 21, 2012, Letter from T. Michael Tuttle; Hearing Recording].
10. The Board held a hearing on January 10, 2013. No one appeared on behalf of T-Joe's at the hearing, which was convened at 9:00 a.m. as scheduled and recessed for 10 minutes to give additional time for someone to appear on behalf of T-Joe's. [Hearing Order; Hearing Recording].
11. Steve Kisicki, an employee of the DOA, testified on behalf of the Department. Mr. Kisicki is an auditor with the DOA Excise Tax Division, and was the lead auditor who examined the business records provided by T-Joe's during the audit. [Exhibit 500, pp. 0001-0004; Hearing Recording].
12. Mr. Kisicki prepared the Audit Report of T-Joe's for the period of July 1, 2008, through June 30, 2011. [Exhibit 502, pp. 0006-0007; Hearing Recording].
13. T-Joe's provided monthly profit and loss statements for Mr. Kisicki to review, but did not provide any daily cash register receipts. [Exhibit 507, pp. 0032-0067; Hearing Recording].
14. Mr. Kisicki compared the amount of sales shown in the profit and loss statements with the amount of sales reported in the Wyoming Vendor Sales/Use Tax Returns filed by T-Joe's

for the audit period. [Exhibit 507, pp. 0032-0067; Exhibit 508, pp. 0068-0103; Hearing Recording].

15. Mr. Kisicki prepared a spreadsheet which contained information from the Wyoming Vendor Sales/Use Tax Returns filed by T-Joe's for the audit period. He discovered that T-Joe's began taking large deductions from its reported sales in September 2010. [Exhibit 505, pp. 0024-025; Exhibit 507, pp. 0032-0067; Exhibit 508, pp. 0068-0103; Hearing Recording].

16. The amount of sales shown in the profit and loss statements for T-Joe's matched the total amount subject to sales tax reported in the Wyoming Vendor Sales/Use Tax Returns filed by T-Joe's from July 2008 through August 2010. During this time period all of the Wyoming Vendor Sales/Use Tax Returns were signed by Penny L. Franz as comptroller or bookkeeper. [Exhibit 507, pp. 0032-0057; Exhibit 508, pp. 0068-0093; Hearing Recording].

17. Beginning in September 2010, the Wyoming Vendor Sales/Use Tax Returns for T-Joe's were signed by T. Michael Tuttle as president or owner. This also corresponds with the date T-Joe's began taking large deductions on the Wyoming Vendor Sales/Use Tax returns to arrive at the total amount of sales subject to tax. [Exhibit 508, pp. 0094-0103; Hearing Recording].

18. Starting in September 2010, T-Joe's began taking a deduction on the Wyoming Vendor Sales/Use Tax Returns in an amount equal to the difference between the total sales and cost of goods for restaurant purchases shown on its profit and loss statements. This deduction resulted in the total amount of sales subject to tax reported on the Wyoming Vendor Sales/Use Tax Returns being equal to the costs of goods for restaurant purchases shown on T-Joe's profit and loss statement each month. [Exhibit 507, pp. 0058-0067; Exhibit 508, pp. 0094-0103; Hearing Recording].

19. T-Joe's did not provide any documentation to support the deductions it was taking from its gross sales to arrive at the total amount of sales subject to tax. [Hearing Recording].

20. The DOA reviewed all business records provided by T-Joe's for the audit and made a finding of a tax payment deficiency in the amount of \$34,256.87, as indicated in the June 1, 2012, "Audit Findings" letter to T-Joe's. [Exhibit 502, pp. 0006-0007; Hearing Recording].

21. The audit also revealed that T-Joe's had not paid sales tax on poker tables it rented or on a liquor control system it had leased. [Exhibit 502, pp. 0006-0007; Exhibit 503, pp. 0008-0012; Exhibit 509, pp. 0104-0105; Hearing Recording].

22. T-Joe's menu states sales tax is included in the cost of the meal. [Hearing Recording].

23. The Department determined T-Joe's sales tax deficiency was due to its negligence or intentional disregard of the rules and assessed a penalty in the amount of 10% of the deficiency. [Exhibit 514, pp. 0111-0118; Hearing Recording].

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

24. 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)*.

25. 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.*

26. "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., § 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).

27. 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.

28. 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).

29. 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).

30. Wyoming Statutes section 39-15-103 provides in part:

(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;

(B) The gross rental paid for the lease or contract transferring possession of tangible personal property if the transfer of possession would be taxable if a sale occurred;

\* \* \*

(F) The sales price paid for meals and cover charges, excluding all gratuities regardless of whether offered by the customer or invoiced by the seller, at any place where meals are regularly served to the public;

\* \* \*

(N) The sale price paid for alcoholic beverages;

\* \* \*

(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.

(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 ....

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

32. “‘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)(2006)*.

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

34. Wyoming Statutes section 39-15-101(a)(viii) defines sales price as:

(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** 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 expense of the seller .... ( emphasis added).

35. Wyoming Statutes section 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 sales 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. ...

(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.

36. Chapter 2, section 15 of the Department's rules addresses the sales tax on meals in pertinent part as follows:

(u.) Meals. ...

(i.) All establishments of any nature which sell and serve food and meals to the general public shall collect tax on the amount charged for all meals sold. Tax shall not be collected on food or meals furnished without charge to employees. Napkins, disposable food containers, and similar consumable items sold with the food at no additional charge to the customer shall be considered to be wholesale purchases for resale and exempt from the tax.

*Rules, Wyoming Department of Revenue, Ch. 2 § 15(u.)(i.) (2006).*

37. 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)

38. Wyoming Statutes section 39-15-105(a)(iii) provides:

(a) The following sales or leases are exempt from the excise tax imposed by this article:

\* \* \*

(iii) For the purpose of exempting sales of services and tangible personal property consumed in production, the following are exempt:

\* \* \*

(F) Wholesale sales excluding sales of controlled substances as defined by W.S. 35-7-1002(a)(iv) which are not sold pursuant to a written prescription of or through a licensed practitioner as defined by W.S. 35-7-1002(a)(xx);

39. “‘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)*.

40. The Department’s rules define “purchaser” as a person “to whom a sale of personal property is made or to whom a service is furnished.” *Rules, Wyoming Department of Revenue, Chapter 2 § 3(qq.)(2006)*.

41. “‘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)*.

42. Wyoming Statutes section 39-16-105(a)(v)(A) provides:

(a) The following purchases or leases are exempt from the excise tax imposed by this article:

(v) For the purpose of exempting sales of services and tangible personal property which are alternatively taxed, the following are exempt:

(A) Purchases which are taxable under the provisions of the Selective Sales Tax Act of 1937, and purchases for which a sales tax has been previously paid ....

43. There is a distinction between a use tax and sales tax.

The legislature intended that the use tax be complementary to the sales tax. *Exxon Corp. v. Wyoming State Bd. of Equalization*, 783 P.2d 685, 688 (Wyo. 1989), *cert. denied* 495 U.S. 910, 110 S.Ct. 1937, 109 L.Ed. 2d 300 (1990). The purpose of the statute is to put property bought outside the state, for which no sales tax has been paid, on an equal footing with property purchased within the state that is subject to tax. *Id.*

*Wyoming Dept. of Revenue v. Calhoun*, 981 P.2d 480, 483 (Wyo. 1990).

44. Wyoming Statutes section 39-15-108 provides in part:

(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.

(c) Penalties. The following shall apply:

(i) If any part of the deficiency is due to negligence or intentional disregard of rules and regulations but without intent to defraud there shall be added a penalty of ten percent (10%) of the amount of the deficiency plus interest as provided by paragraph (b)(i) of this section.

\* \* \*

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

45. 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. Comm'n*, 6 P.3d 1287, 1293–1294 (Wyo. 2000).

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

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

47. T-Joe’s appeal was filed timely and the Board has jurisdiction to hear this matter. *Wyo. Stat. Ann. § 39-11-102.1(c)*; *supra* ¶¶ 6, 24.

48. T-Joe’s contends it is not liable for the payment of any sales tax deficiency because it has previously paid sales tax on its utility bills, parts, supplies and food, and that labor, insurance and overhead are not taxable. T-Joe’s further contends the sales tax laws as applied to them, are inequitable, ambiguous and discriminatory. [Taxpayer’s Notice of Appeal]. Because T-Joe’s failed to appear at the hearing in this matter there are no facts in the record to support T-Joe’s contentions.

49. From the Notice of Appeal it appears T-Joe's is relying on Wyoming Statutes section 39-16-105(a)(v)(A) for legal support of its contentions. This statute provides that "[p]urchases which are taxable under the provisions of the Selective Sales Tax Act of 1937, and purchases for which a sales tax has been previously paid" are exempt from use tax. T-Joe's reliance on this statute is misplaced. The price T-Joe's charged its customers for meals and alcoholic beverages was subject to sales tax, not use tax. *Supra* ¶¶ 8-10, 42, 43.

50. It is well established in Wyoming that "[a]ll 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." *BP Am. Prod. Co. v. Dep't of Revenue*, 2005 WY 60, ¶ 15, 112 P.3d 596, 604 (Wyo.2005). When all of the pertinent statutes are considered, it is clear that T-Joe's was not entitled to the deductions it was taking on the Wyoming Vendor Sales/Use Tax Returns to arrive at its total amount of sales subject to sales tax. *Supra* ¶¶ 15, 17-19, 28, 29.

51. Pursuant to Wyoming Statutes section 39-15-103(a)(i)(F) and (N) the sales price paid for meals at any place where meals are regularly served to the public and the sales price paid for alcoholic beverages are subject to sales tax. Chapter 2, section 15(u)(i) of the Wyoming Department of Revenue Rules reiterates that "[a]ll establishments of any nature which sell and serve food and meals to the general public shall collect tax on the amount charged for all meals sold." It is undisputed that T-Joe's is a vendor engaged in the business of selling meals and alcoholic beverages to the general public. *Supra* ¶¶ 1, 22, 30-33, 36, 40, 41.

52. Additionally, T-Joe's contention that it is not liable for any sales tax deficiency fails to take into account the statutory definition of sales price. Wyoming Statutes section 39-15-101(a)(viii) defines sales price as the total amount or consideration for which personal property or services are sold without any deductions for the seller's cost of property sold or the cost of materials used, labor or service cost, and any other expenses of the seller. This statute specifically disallows the deductions that T-Joe's is attempting to claim. *Supra* ¶¶ 15, 17-19, 34.

53. Chapter 2, section 15(u)(i.) of the Wyoming Department of Revenue Rules also addresses T-Joe's contention it has previously paid sales tax on supplies. This rule states that "napkins, disposable food containers, and similar consumable items sold with the food at no additional charge to the customer shall be considered to be wholesale purchases for resale and exempt from tax." Wyoming Statutes section 39-15-101(a)(xvi) defines wholesale sale as the "sale of tangible personal property or services to a vendor for subsequent sale" and Wyoming Statutes section 39-15-105(a)(ii)(F) exempts wholesale sales from sales tax. *Supra* ¶¶ 18, 19, 31, 33, 36-41.

54. Neither Wyoming Statutes section 39-15-103(a)(i)(F) and (N), nor section 39-15-101(a)(viii) are ambiguous. When these statutes are read together, it is clear that the entire price paid for meals and alcoholic beverages are subject to sales tax. *Supra* ¶¶ 4, 5, 20, 28-30, 34.

55. The DOA compared the amount of sales shown in the profit and loss statements with the amount of sales reported in the Wyoming Vendor Sales/Use Tax Returns filed by T-Joe's for the audit period. The amount of sales shown in the profit and loss statements for T-Joe's matched the total amount subject to sales tax reported in the Wyoming Vendor Sales/Use Tax Returns filed by T-Joe's from July 2008 through August 2010. Beginning in September 2010, T-Joe's began taking a deduction on the Wyoming Vendor Sales/Use Tax Returns which resulted in the reported total amount of sales subject to tax being equal to the costs of goods for restaurant purchases shown on T-Joe's profit and loss statement each month. Based upon the definition of sales price set forth in Wyoming Statutes section 39-15-101(a)(viii), T-Joe's was not entitled to this deduction. It is abundantly clear from the evidence presented by the Department that T-Joe's was not remitting sales tax on the full price it charged the public for meals and alcoholic beverages as required by Wyoming Statutes section 39-15-103(a)(i)(F) and (N). *Supra* ¶¶ 14-20, 30, 32, 34, 36.

56. The Department determined T-Joe's sales tax deficiency was due to its negligence or intentional disregard of the rules and assessed a penalty in the amount of 10% of the deficiency. The Department is authorized to waive interest and penalties "as part of a settlement or for any other good cause." *Supra* ¶¶ 23, 44-46.

57. The phrase "for good cause" defines a standard applicable to the Department's decision to waive interest and penalties in the absence of a settlement. This Board is not authorized to exercise its discretion or usurp the Department's authority to waive interest and penalties. The Board is confined to approving or disapproving the determination by the Department of whether there was "good cause" to waive the interest and penalties. The Department's exercise of discretion must be considered in light of the taxpayer's evidentiary burdens. *Supra* ¶¶ 5, 23, 27, 44-46.

58. The Department was vested with the authority to determine whether T-Joe's contentions established sufficient good cause to waive interest or penalties in light of the other facts known to them. Since T-Joe's did not present any evidence at the hearing before the Board, there is nothing to suggest the Department's determination was incorrect. The Department could have reasonably weighed the facts as they did, and declined to grant a waiver of interest and penalties. *Supra* ¶¶ 9, 10, 13, 23, 35, 44-46.

59. Chapter 2, section 20 of the Rules of the Wyoming State Board of Equalization provides "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's determination is incorrect, the burden shifts to the Department to defend its action." T-Joe's did not present any evidence, let alone sufficient evidence to suggest the Department's assessment of unpaid sales tax, and the imposition of interest and penalties was not correct. *Supra* ¶¶ 5, 9, 10, 19, 25, 26, 37.

60. The Department was correct in the assessment of unpaid sales tax, and the imposition of interest and penalties against T-Joe's was appropriate. *Supra* ¶¶ 4, 5, 11-16, 20, 21, 23, 30-34, 36, 44.

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**ORDER**


**THEREFORE, IT IS ORDERED** the Department's final administrative decision that T-Joe's is legally liable for the sales taxes on the entire price paid to it by its customers for meals and alcoholic beverages, for the tax on the amount paid for the lease or rental of items used in its business, and for accrued interest and penalties is **affirmed**.

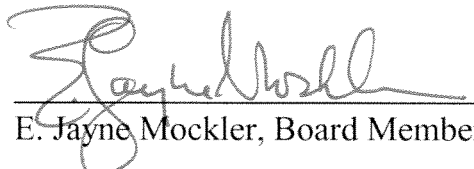
**Pursuant to *Wyoming Statutes section 16-3-114* and *Rule 12, Wyoming Rules of Appellate Procedure*, any person aggrieved or adversely affected in fact by this decision may seek judicial review in the appropriate district court by filing a petition for review within 30 days of the date of this decision.**

DATED this 16<sup>th</sup> day of September, 2013.


**STATE BOARD OF EQUALIZATION**

  
Steven D. Olmstead, Chairman

  
Paul Thomas Glause, Vice-Chairman

  
E. Jayne Mockler, Board Member

**ATTEST:**


  
Jana Fitzgerald, Executive Assistant

**CERTIFICATE OF SERVICE**

I hereby certify that on the 6<sup>th</sup> day of September, 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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Megan L. Nicholas  
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\_\_\_\_\_  
Jana R. Fitzgerald  
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State Board of Equalization  
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Cheyenne, WY 82003  
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cc: State Board of Equalization;  
Dan Noble, Director, Department of Revenue  
Administrator, Excise Tax Division, Department of Revenue;  
CCH  
ABA State and Local Tax Reporter  
State Library  
County Treasure's Association  
File