

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

IN THE MATTER OF THE APPEAL OF )  
ALBERTSON'S LLC FROM A SALES ) Docket No. **2012-83**  
AND USE TAX AUDIT ASSESSMENT )  
BY THE EXCISE DIVISION OF THE )  
DEPARTMENT OF REVENUE ) (District Court Docket  
(Audit period 1/1/07 through 12/31/09) ) No.183-552)

IN THE MATTER OF THE APPEAL OF )  
NEW ALBERTSON'S, INC. FROM A ) Docket No. **2012-84**  
SALES AND USE TAX AUDIT )  
ASSESSMENT BY THE EXCISE DIVISION )  
OF THE DEPARTMENT OF REVENUE )  
(Audit period 1/1/07 through 12/31/09) )

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**ORDER ON REMAND**

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This matter is before the Wyoming State Board of Equalization (State Board) on remand from the District Court of the First Judicial District, Laramie County, Wyoming, Docket No. 183-552. On June 16, 2016, the District Court issued an Opinion and Order reversing the State Board's decision issued on December 23, 2014, in the above captioned matters. The District Court concluded the initial purchases of advertising flyers by Albertson's LLC and New Albertson's, Inc. were not exempt from taxation under Wyoming's "newspaper exemption." The District Court reversed the State Board decision and remanded the matters to the State Board for findings consistent with its opinion.

THEREFORE, IT IS ORDERED that the Opinion and Order of the District Court of the First Judicial District, attached hereto and incorporated herein by this reference, is adopted as the decision of the State Board; and

IT IS FURTHER ORDERED that this matter is remanded to the Wyoming Department of Revenue for further action consistent with the decision of the District Court of the First Judicial District.

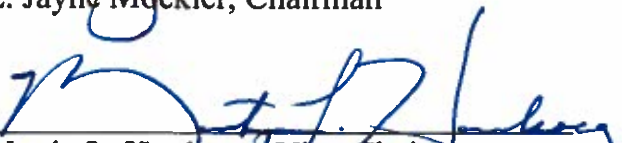
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Dated this 11<sup>th</sup> day of August, 2016.


**STATE BOARD OF EQUALIZATION**

  
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E. Jayne Mockler, Chairman

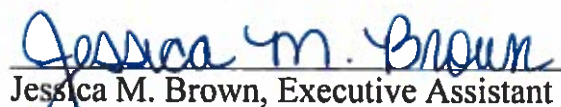
  
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Martin L. Hardsocg, Vice-Chairman

  
\_\_\_\_\_

Robin Sessions Cooley, Board Member

**ATTEST:**

  
\_\_\_\_\_

Jessica M. Brown, Executive Assistant

**CERTIFICATE OF SERVICE**

I hereby certify that on the 14<sup>th</sup> day of August, 2016, I served the foregoing **ORDER ON REMAND** 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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Dan Noble, Director, Department of Revenue  
Kim Lovett, Administrator, Excise Tax Division, Department of Revenue  
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File

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
COUNTY OF LARAMIE, STATE OF WYOMING

Docket No. 183-552

WYOMING DEPARTMENT OF REVENUE, )  
)  
Petitioner, )  
)  
vs. )  
)  
ALBERTSON'S, LLC, and )  
NEW ALBERTSON'S, INC., )  
)  
Respondents. )

**FILED**  
**JUN 28 2016**  
DIANE SANCHEZ  
CLERK OF THE DISTRICT COURT

**OPINION AND ORDER**

Respondents Albertson's, LLC and New Albertson's, Inc. (hereinafter collectively "Albertson's") filed tax refund claims with the Wyoming Department of Revenue ("Department"). The Department partially denied Albertson's refund claims. The Respondents filed notices of appeal with the Wyoming State Board of Equalization (the "Board"), asserting that the purchase of advertising flyers from out-of-state printers is exempt under the Wyoming newspaper tax exemption. The Board agreed with the Respondents and concluded that Albertson's out-of-state purchases of advertising flyers should be exempt from use tax under the newspaper exemption. Because the Board's conclusion was not made in accordance with the law, this court will reverse the Board's order and remand the case back to the Board.

**FACTS<sup>1</sup>**

In October 2011, Albertson's filed refund claims with the Department claiming the advertising news prints it puts in newspapers are not subject to Wyoming sales or use tax. Albertson's, LLC's refund claim was for \$49,256.36 and covered the period of January 1, 2007, through December 31, 2009. New Albertson's Inc.'s refund claim was for \$313,354.83 and covered the period from January 1, 2007, to December 1, 2009. After reviewing Albertson's, LLC's claim, the Department denied \$46,216.23 of the refund claim, but approved \$3,040.13 of the request as it related to non-taxable non-printing services. The Department also denied \$42,243.79 of New Albertson's, Inc.'s claim, but approved \$271,111.04 of the refund as it related to non-taxable non-printing services. The basis of the Department's refund claims denials was that a sale of tangible personal property had occurred between Albertson's and the out-of-state printers. Albertson's, LLC sold its eight Wyoming store locations to SUPERVALU INC. in January 2008, so it

<sup>1</sup> The Wyoming Department of Revenue and Albertson's stipulated to the facts and issues that were presented to the Wyoming State Board of Equalization for its review on the matter being appealed. Both parties opted out of a hearing before the Board of Equalization.

no longer has retail operations in the state of Wyoming. Because the Wyoming locations were included in the Department's audit period review (where it reviewed Albertson's refund claims), the applicable period for the refund occurred prior to the sale. New Albertson's, Inc. is a wholly owned subsidiary of SUPERVALU INC.

From January 2007 to January 2008, Albertson's, LLC purchased weekly advertising newsprint from Ilie & Associates, an out-of-state printer. Similarly, from January 2007 to December 2009, New Albertson's, Inc. purchased comparable advertising newsprints from two out-of-state printing companies named Veris, Inc. and World Color USA Corp. After the printing companies printed the advertising newsprint for both Albertson's, LLC and New Albertson's, Inc., the printers would ship some of the newsprint to numerous Wyoming newspapers for insertion into and distribution within newspapers. Wyoming use tax was paid by the Respondents on the purchase of these advertising newsprints. Some of the newsprints that the Respondents had printed were shipped to the Albertson's store locations in Wyoming to be distributed to customers, and these purchases were subject to Wyoming use tax. Albertson's filed refund claims for the taxes paid on both of these transactions. However, Albertson's now concedes that the advertising newsprints shipped directly to its Wyoming stores for distribution to shoppers are taxable.

In August 2012, the Department issued an Audit Assessment for additional sales tax to each of the Respondents. Neither assessment granted the refund requests for the sales and use tax related to the advertising supplements purchased by Albertson's for insertion in Wyoming newspapers. Albertson's appealed the Department's denial of its refund requests to the Board of Equalization on September 20, 2012. The parties filed a joint motion to assign the case to the expedited docket and waived the right to a contested case hearing. The Board issued its *Findings of Fact, Conclusions of Law, Decision and Order*, concerning this matter on December 23, 2014. The Board's order reversed the Department's denial of Albertson's requests for refunds and remanded the action back to the Department for further actions consistent with the Board's findings.

On January 22, 2015, the Department timely filed a petition for review of administrative action. The petition for review challenges the Board's order reversing the Department's denial of Albertson's requests for refunds. The Department seeks reversal of the Board's *Decision and Order*, and that the case be remanded to the Board.

#### ISSUES

- I. Whether the Wyoming State Board of Equalization acted contrary to law when it concluded that advertising newsprint purchased from out-of-state printers and distributed within Wyoming newspapers are exempt from use tax.
- II. Whether the Wyoming State Board of Equalization acted arbitrarily and capriciously.

Because the first issue is dispositive, the court will not address the second issue.

## STANDARD OF REVIEW

Judicial review of agency action is governed by Wyoming Rule of Appellate Procedure 12.09 which limits review to “a determination of the matters specified in Wyo. Stat. § 16-3-114(c).” WYO. R. APP. P. 12.09; *accord Watkins v. State ex rel. Wyo. Med. Comm’n*, 2011 WY 49, ¶ 16, 250 P.3d 1082, 1085–86 (Wyo. 2011). Wyoming Statute § 16-3-114(c) provides that:

The reviewing court shall:

- ...
- (ii) Hold unlawful and set aside agency action, findings and conclusions found to be:
    - (A) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;
    - (B) Contrary to constitutional right, power, privilege or immunity;
    - (C) In excess of statutory jurisdiction, authority or limitations or lacking statutory right;
    - (D) Without observance of procedure required by law; or
    - (E) Unsupported by substantial evidence in a case reviewed on the record of an agency hearing provided by statute.

WYO. STAT. ANN. § 16-3-114(c).

In a “case submitted on stipulated facts,” the court is “only concerned with the ... Board’s conclusions of law.” *Tollefson v. Wyoming State Ret. Bd.*, 2003 WY 150, ¶ 9, 79 P.3d 518, 522 (Wyo. 2003). To determine whether agency action is in accord with law, the court reviews agency conclusions of law *de novo*. *Diamond B Servs., Inc. v. Rohde*, 2005 WY 130, ¶12, 120 P.3d 1031, 1038 (Wyo. 2005). The court may only affirm agency conclusions of law that are “in accordance with law.” *Id.* The court must correct any misapplication of the law committed by the agency. *Aanenson v. State ex rel. Wyo. Workers’ Safety & Comp. Div.*, 842 P.2d 1077, 1080 (Wyo. 1992) *citing Union Pacific R. Co. v. Wyoming State Bd. of Equalization*, 802 P.2d 856 (Wyo. 1990).

## DISCUSSION

The Wyoming State Board of Equalization acted contrary to law when it concluded that advertising flyers purchased from out-of-state printers and distributed within Wyoming newspapers are exempt from use tax.

The Wyoming Supreme Court discussed the Wyoming Use Tax Act in *Barcon, Inc. v. Wyoming State Bd. of Equalization*. The court’s interpretation of the Use Tax Statutes reads as follows:

After this review, we have no difficulty in agreeing with the Board of Equalization that the Use Tax Act is “poorly worded.” The fact that both interpretations of the language are potentially viable directs our conclusion. The language of the Use Tax Act is ambiguous in proclaiming its intention to tax transactions originating out-of-state involving used property from entities that are not in the business of selling such items. *Tenneco Oil Co.*, 694 P.2d at 100. The ambiguous nature of the Use Tax Act requires a determination of legislative intent as a matter of law. *See Allied-Signal, Inc.*, 813 P.2d at 219 and *Exxon Corp.*, 783 P.2d at 689.

The United States Supreme Court has recognized a normally applied justification for use tax legislation. 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. *D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 32, 108 S.Ct. 1619, 1624, 100 L.Ed.2d 21 (1988); *Williams v. Vermont*, 472 U.S. 14, 24, 105 S.Ct. 2465, 2472, 86 L.Ed.2d 11 (1985) (quoting *Levenson v. Conway*, 144 Vt. 523, 481 A.2d 1029, 1032, appeal dismissed for want of a substantial federal question, 469 U.S. 926, 105 S.Ct. 316, 83 L.Ed.2d 255 (1984)).

Previous decisions of this court have stated the legislative intent of the Use Tax Act, in general.

“The Wyoming use tax statutes, W.S. 39-6-501 through – 518, impose an excise tax upon “persons storing, using or consuming \*379 tangible personal property” in Wyoming. W.S. 39-6-504(b). **The legislature intended that the use tax be complementary to the Wyoming sales tax. *Morrison-Knudson Co., Inc. v. State Board of Equalization*, 58 Wyo. 500, 135 P.2d 927, 932 (1943). See also Chap. IV, § 3, Rules and Regulations of the Wyoming State Tax Commission—Department of Revenue & Taxation. The use tax is applied to property purchased outside the state and brought into the state for storage, use or consumption, so as to put that property on an equal footing with property purchased within the state that is subject to the Wyoming sales tax.”**

*Burlington Northern R. Co.*, 820 P.2d at 995 (quoting *Exxon Corp.*, 783 P.2d at 688). See also *State Bd. of Equalization v. Cheyenne Newspapers, Inc.*, 611 P.2d 805, 809 n. 2 (Wyo.1980). The intent of this state's use tax parallels the usual rationale for similar statutes across the country.

*Barcon, Inc. v. Wyoming State Bd. of Equalization*, 845 P.2d 373, 378-79 (Wyo. 1992) (emphasis added).

The Wyoming Use Tax Act defines “use” as, “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). Use tax is applied to property purchased out of state and brought into the state for use, so as to put that property in the equivalent position as property purchased in the state of Wyoming. *Barcon, Inc.*, 845 P.2d at 378-79. Wyoming Statute § 39-15-103(a)(i)(A) imposes an excise tax upon the sales price of every retail sale of tangible personal property within the state of Wyoming. A “sale” is “any transfer of possession in this state for a consideration.” Wyo. Stat. Ann. § 39-15-101(a)(vii). Sales of newspapers are exempt from taxation. Wyo. Stat. § 39-15-105(a)(vii)(D). To further clarify the newspaper exemption, the Department defined “newspaper” to mean: “a publication that is printed on newsprint and is distributed daily, weekly, or at other intervals and is used to disseminate news of a general character and of a general interest. This includes ... advertising flyers ... or other such printed materials when they are distributed within the

newspaper.” Rules, Wyoming Department of Revenue, Ch. 2 § 3(gg) (7/10/2006) (emphasis added).<sup>2</sup>

The Wyoming Supreme Court has instructed courts to do the following when interpreting statutes:

[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.

The determination of whether a statute is clear or ambiguous is a matter of law for the court. When the language is clear, we give effect to the ordinary and obvious meaning of the words employed by the legislature. In ascertaining the meaning of a statutory provision, all statutes relating to the same subject or having the same general purpose must be considered in *pari materia* and construed in harmony. We do not apply our rules of statutory construction unless a statute is ambiguous.

These same rules apply when we are asked to interpret an administrative rule.

*State ex rel. Dep't of Workforce Servs. v. Clements*, 2014 WY 68, ¶ 10, 326 P.3d 177, 180 (Wyo. 2014). Another rule of statutory interpretation that the Wyoming Supreme Court has invoked is that, “in construing an ambiguous statute, the administration of which is charged to a particular executive branch agency, [it] will give deference to that agency's interpretation unless it is clearly erroneous.” *Parker Land & Cattle Co. v. Wyoming Game & Fish Comm'n*, 845 P.2d 1040, 1045 (Wyo. 1993).

The Department asserts that the Board failed to apply the correct rule of law when it determined that no statutory interpretation is required in this matter and failed to strictly construe the newspaper exemption with regards to pre-distribution purchases of advertising flyers. The court agrees with the Department and finds that the Board misinterpreted the Department's administrative rule defining newspapers. In its *Findings of Fact, Conclusions of Law, Decision and Order*, the Board stated that, “the issue to be decided ... ultimately is whether the advertising newsprint are “newspapers” and therefore exempt from taxation.” The Board determined that the definition of newspaper clearly and unequivocally includes the advertising flyers purchased by Albertson's for insertion in Wyoming newspapers. The court disagrees.

“[T]ax exemptions are not favored and must be strictly construed.” *Lance Oil & Gas Co. v. Wyoming Dep't of Revenue*, 2004 WY 156, ¶ 29, 101 P.3d 899, 907 (Wyo. 2004). “[G]enerally 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

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<sup>2</sup> The chapter and section number, which defines the word “newspaper” within the Department of Revenue's rules and regulations, have consistently changed throughout the years. The second sentence of the definition was amended in 2012 to read as follows: “[t]his includes magazines, handbills, circulars, advertising flyers, sales catalogs, or other such printed materials when they are distributed and sold as part of the newspaper.” *Rules, Wyoming Department of Revenue, Ch. 2 § 3 (cc) (5/29/2012)*. The definition was renumbered in 2014. *Rules, Wyoming Department of Revenue, Ch. 2 § 2(w) (7/24/2014)*.



power.” *State Bd. of Equalization v. Wyoming Auto. Dealers Ass’n*, 395 P.2d 741, 742 (Wyo. 1964). The Board failed to strictly construe the plain and ordinary meaning of the newspaper exemption. The Department’s definition states that newspaper “includes ... advertising flyers ... or other such printed materials **when** they are distributed within the newspaper.” Rules, Wyoming Department of Revenue, Ch. 2 § 3(gg) (7/10/2006) (emphasis added). The Board did not go into an analysis explaining the significance of the word “when” in its determination that the advertising flyers qualify as a newspaper. The court must give effect to every word of the definition and construe all parts of the rule in *pari materia*. See *BP Am. Prod. Co. v. Dep’t of Revenue, State of Wyo.*, 2005 WY 60, ¶ 15, 112 P.3d 596, 604 (Wyo. 2005).

It is the sale of a newspaper, as tangible personal property, that is exempt from tax. Wyo. Stat. § 39-15-105(a)(vii)(D). The plain and ordinary meaning should be applied to the word “when” in the Department’s definition. The word “when” is used as a conjunction in the newspaper definition. A conjunction is a part of speech that connects other words, phrases, clauses, or sentences. *Webster’s II New College Dictionary*, Houghton Mifflin Company (1999). The word “when” if used as a conjunction may be used to mean, “at the time that.” *Id.* Accordingly, when applying the plain and ordinary meaning of the Department’s rule, the newspaper exemption includes advertising flyers **at the time that** the newspapers are distributed. Consequently, the court finds that the initial purchase of advertising flyers before being inserted into a newspaper is a distinctly separate transaction from when the advertisements are distributed within the paper. The Department’s rule exempts an actual sale of a newspaper with any included advertisements, not any prior transactions.

Albertson’s purchased its advertising flyers from out-of-state printers. The printers shipped these advertising flyers to newspaper companies and Respondents’ retail stores located in the State of Wyoming, for Albertson’s to make use of them. Thus, Wyoming use tax applies to the advertising flyers in the same way a sales tax would apply to them if they were purchased from printers located in the state of Wyoming. Under the newspaper exemption, it is not the purchase of the advertising materials that is exempt, but it is the sale of the newspaper with the flyers included in it.

Not only does this conclusion fall under the general principle that exemptions are not favored, but it also falls in line with the Department’s interpretation of its own rule. The Department of Revenue is the administrative agency that is charged with the power of regulating Wyoming’s tax laws. Therefore, the Board should give deference to the Department’s interpretation because it is not clearly erroneous. *Parker Land & Cattle Co.*, 845 P.2d at 1045.<sup>3</sup>

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<sup>3</sup> As the Board explained in its *Opinion*, both parties cite to cases from other jurisdictions to support their arguments. There is a division of authority on the issue of whether newsprint inserts are exempt from use tax and sales tax. The Board concluded that after reviewing cases from other jurisdictions, the decision of each court rested on the court’s definition of newspaper. This court agrees with the Board’s conclusion and Albertson’s assertion that none of the cited cases involves tax exemptions that are comparable to that of Wyoming. This case is distinguished because the Board does not have to define the term “newspaper”, because the Department has already defined the term in its rules and regulations. Thus, the Department’s rule is entitled to deference under the rules of statutory interpretation.

CONCLUSION


The Board failed to strictly construe the newspaper exemption and extended the scope of the exemption to include prior transactions. Under the plain language of the Department's rules, the initial purchase of advertising flyers cannot qualify as a "sale of newspapers." The court may not affirm an agency's conclusions of law that are not "in accordance with law." *Diamond B Servs., Inc.*, 2005 WY 130, ¶12. The court must correct any misapplication of the law committed by the agency. *Aanenson*, 842 P.2d at 1080. Therefore, the court reverses the Board's *Findings of Fact, Conclusions of Law, Decision and Order* and remands this case to the Board for findings consistent with this opinion.

ORDER

IT IS HEREBY ORDERED that the Board of Equalization's decision is REVERSED.

IT IS FURHTER ORDERED that this case be remanded to the Board for findings consistent with this opinion.

DATED this 28<sup>th</sup> day of June, 2016.

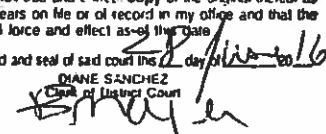
  
STEVEN K. SHARPE  
District Judge

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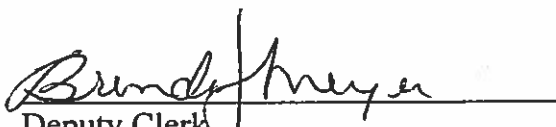
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STATE OF WYOMING COUNTY OF LARAMIE, SS CHEYENNE  
I Diane Sanchez, Clerk of the District Court in and for the County of Laramie, Wyoming, do hereby certify that the within and foregoing is a full true and correct copy of the original thereof as the same appears on file or of record in my office and that the same is in full force and effect as of the date  
Witness my hand and seal of said court this 28 day of June 2016  
DIANE SANCHEZ  
Clerk of District Court  
By   
Deputy

28 I hereby certify that I distributed a true and correct copy of the foregoing on the 28 day of June, 2016, as indicated [M – mail; B – box in Clerk's office; H – hand delivery; F – fax transmission].

  
Deputy Clerk