

BEFORE THE STATE BOARD OF EQUALIZATION
FOR THE STATE OF WYOMING

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

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

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

APPEARANCES

Luke Krieger and John Lyon, Ryan LLC, appeared on behalf of Albertson's LLC and New Albertson's, Inc. (Petitioners or Taxpayers).

Brenda S. Yamaji, Assistant Attorney General, appeared on behalf of the Department of Revenue (Department).

STATEMENT OF THE CASE

Petitioners, Albertson's LLC and New Albertson's, Inc., operate retail grocery stores in Wyoming. Each Petitioner was audited by the Wyoming Department of Audit for the period from January 1, 2007, through December 31, 2009. During the audits Petitioners each filed sales and use tax refund requests related to advertising supplements inserted in Wyoming newspapers. The Department of Revenue issued an Audit Assessment for additional sales tax to each Petitioner. The Albertson's LLC audit assessment was dated August 21, 2012. The New Albertson's, Inc. audit assessment was dated August 28, 2012. Neither audit assessment granted the refund requests for the sales and use tax related to advertising

supplements purchased by Petitioners for insertion in Wyoming newspapers. Each Petitioner appealed the Department final decision denying their refund requests to the State Board of Equalization (Board) on September 20, 2012.

Petitioners and the Department filed Preliminary Statements and the matters were set for hearing before the Board. Petitioners then filed a Motion to Consolidate Appeals on January 14, 2013, to which the Department did not object. The Board consolidated the appeals on January 30, 2013. On February 25, 2013, the parties filed a Joint Motion to Assign Case to Expedited Docket, each specifically waiving the right to a contested case hearing, and a Stipulation of Facts and Legal Issue. Based on the parties' Joint Motion and Stipulation the Board issued a Briefing Order (Expedited Docket) on March 4, 2013. No contested case hearing was held in this matter.

ISSUES

The parties identified two issues in their Stipulation of Facts and Legal Issue:

1. Issue 1: Whether advertising newsprint purchased from out-of-state printers and distributed within Wyoming newspapers are subject to use tax as "taxable printing," which is the basis cited by the Department of Revenue for denial of the claims for refund and the audit assessments[?]
2. Issue 2: Whether advertising newsprint purchased from out-of-state printers and distributed within Wyoming newspapers are exempt from use tax pursuant to Wyo. Stat. Ann. § 39-15-105(a)(viii)(D), Wyoming Department of Revenue Rules, Chapter 2, Section ("Rule") 3(cc) and Rule 4(i), and related guidance issued by the Wyoming Department of revenue[?]

[*Stipulation of Facts and Legal Issue*, p. 7].

The issue to be decided by the Board ultimately is whether the advertising newsprint are "newspapers" and therefore exempt from taxation. We find the advertising newsprint are "newspapers" as that term has been defined by the Department, and reverse the decision of the Department denying Petitioners' sales and use tax refund requests.

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)*. Each Petitioner timely appealed the final decisions of the Department, sent to Albertson's LLC on August 21, 2012, and to New Albertson's, Inc. on August 28, 2012, by notices of appeal filed with the Board effective September 20, 2012, and the Board has jurisdiction to decide this matter.

The Board, consisting of Chairman Steven D. Olmstead, Vice Chairman Paul Thomas Glause, and Board Member E. Jayne Mockler considered this matter.

FINDINGS OF FACT

The parties requested the Board decide this matter without hearing, and entered into a Stipulation of Facts and Legal Issue, pursuant to Board Rules. *Rules, Wyoming State Board of Equalization, Chapter 2 § 15*. The parties represented the stipulation contained all material facts necessary for the Board to decide the issues presented in this appeal. The following facts were stipulated by the parties:

1. On October 5, 2011, Petitioners filed refund claims with the Department claiming the advertising newsprint it puts in newspapers are not subject to Wyoming sales or use tax. Petitioners' refund claims also included other contentions that were approved by the Department and are no longer at issue. [*Stipulation of Facts and Legal Issue*, p. 1, ¶ 1].
2. The basis for the contested portion of Petitioners' refund claims was that it purchases the advertising newsprint from two out-of-state printers, some of the advertising newsprint were inserted into and distributed within newspapers. Petitioners' contended those flyers, as part of newspapers, were not subject to sales or use tax in Wyoming. [*Stipulation of Facts and Legal Issue*, pp. 1-2, ¶ 2].
3. Petitioner, Albertson's LLC's refund claim was \$49,256.36 and covered the period of January 1, 2007, through December 31, 2009. [*Stipulation of Facts and Legal Issue*, p. 2, ¶ 3].
4. Petitioner New Albertson's Inc.'s refund claim was \$313,354.83 and covered the period from January 1, 2007, through December 1, 2009. [*Stipulation of Facts and Legal Issue*, p. 2, ¶ 4].

5. The Department reviewed Petitioner's refund claims during an audit performed by the Department of Audit. [*Stipulation of Facts and Legal Issue*, p. 2, ¶ 5].

6. On August 21, 2012, the Department denied \$46,216.23 of Petitioner Albertson's LLC's refund claim. A portion of the refund request, \$3,040.13, was approved as it related to non-taxable non-printing services. [*Stipulation of Facts and Legal Issue*, p. 2, ¶ 6; Exhibit A].

7. On August 29, 2012, the Department denied \$42,243.79 of the refund claim of Petitioner New Albertson's Inc. A portion of the refund request, \$271,111.04, was approved as it related to non-taxable non-printing services. [*Stipulation of Facts and Legal Issue*, p. 2, ¶ 7; Exhibit B].

8. The basis for the Department's denials was that a sale of tangible personal property had occurred between Petitioners and the out-of-state printers. [*Stipulation of Facts and Legal Issue*, p. 2, ¶ 8].

9. Petitioner Albertson's LLC filed its Notice of Appeal with the Board on September 20, 2012. [Board Record; *Stipulation of Facts and Legal Issue*, p. 3, ¶ 9].

10. Petitioner New Albertson's Inc. filed its Notice of Appeal with the Board on September 20, 2012. [Board Record; *Stipulation of Facts and Legal Issue*, p. 3, ¶ 10].

11. Petitioner Albertson's LLC is a North American supermarket retailer headquartered in Boise, Idaho. The company has retail locations in a number of states. The company's supermarkets offer a large variety of services, varying by location, which include delis, bakeries, pharmacies, salad bars, bank counters, and fresh meat and seafood counters. Operating under the Albertson's banner, Albertson's LLC sold the eight Petitioner locations in Wyoming to SUPERVALU INC. on January 25, 2008. As a result of this sale, Albertson's LLC no longer had retail operations in the state, but its Wyoming locations were included in the audit period review for activity prior to the sale. [*Stipulation of Facts and Legal Issue*, p. 4, ¶ 14].

12. Petitioner New Albertson's, Inc. is a North American supermarket retailer that is wholly owned subsidiary of SUPERVALU INC. headquartered in Eden Prairie, Minnesota. New Albertson's Inc. has retail locations throughout the western United States. The company's supermarkets offer a large variety of services, varying by location, which include delis, bakeries, pharmacies, salad bars, bank counters, and fresh meat and seafood counters. Operating under the Albertson's banner, SUPERVALU INC. purchased the eight Albertson's LLC locations in Wyoming on January 25, 2008 (the Jackson Hole and Rock Springs stores

were already owned by SUPERVALU INC.) The stores continued to operate under the Albertson's banner and were included in the audit period review for activity after the purchase (the Jackson Hole and Rock Springs stores were audited for the entire period). [*Stipulation of Facts and Legal Issue*, p. 4, ¶ 15].

13. During January 1, 2007, through January 25, 2008, Petitioner Albertson's LLC purchased weekly advertising newsprint from Ilie & Associates, an out-of-state printer. [*Stipulation of Facts and Legal Issue*, p. 5, ¶ 16].

14. The out-of-state printer printed the advertising newsprint and then shipped some of the advertising newsprint to numerous Wyoming newspapers for insertion into and distribution within newspapers. Wyoming use tax was paid by Petitioner Albertson's LLC on its purchases of these advertising newsprint. [*Stipulation of Facts and Legal Issue*, p. 5, ¶ 17].

15. The out-of-state printer shipped some of the advertising newsprint to the various supermarket stores located in Wyoming. Wyoming use tax was paid by Petitioner Albertson's LLC on its purchases of these advertising newsprint. [*Stipulation of Facts and Legal Issue*, p. 5, ¶ 18].

16. During January 1, 2007, through December 31, 2009, Petitioner New Albertson's, Inc. purchased weekly advertising newsprint from Veris Inc. and World Color USA Corp., out-of-state printers. [*Stipulation of Facts and Legal Issue*, p. 5, ¶ 19].

17. The out-of-state printers printed the advertising newsprint and then shipped some of the advertising newsprint to numerous Wyoming newspapers for insertion into and distribution within newspapers. Wyoming use tax was paid by Petitioner New Albertson's, Inc., on purchases of these inserts. [*Stipulation of Facts and Legal Issue*, p. 5, ¶ 20].

18. The out-of-state printer shipped some of the advertising newsprint to the various supermarket stores located in Wyoming. Wyoming use tax was paid by Petitioner New Albertson's, Inc. on its purchases of these advertising newsprint. [*Stipulation of Facts and Legal Issue*, p. 6, ¶ 21].

19. The advertising newsprint are distributed within the various Wyoming newspapers. For Petitioner Albertson's LLC, distribution to the newspapers was arranged and paid for by the printer, Ilie & Associates. [*Stipulation of Facts and Legal Issue*, p. 6, ¶ 22].

20. The advertising newsprint were distributed within the various Wyoming newspapers. For Petitioner New Albertson's, Inc., distribution from the printer to the newspapers was

arranged and paid for by Valises Communications, which was separately engaged for this purpose. [*Stipulation of Facts and Legal Issue*, p. 6, ¶ 23].

21. The advertising newsprint were also distributed within the various Wyoming supermarkets free of charge to customers of the supermarkets. [*Stipulation of Facts and Legal Issue*, p. 6, ¶ 24].

22. Petitioners timely filed claims for refund of use taxes paid on these transactions. The claims were reviewed during audits conducted by the Department of Audit and portions of the claims were denied. Where use tax had not been paid by Petitioners on such purchases, use tax was assessed under the audits. [*Stipulation of Facts and Legal Issue*, p. 6, ¶ 25].

23. Information necessary to confirm pertinent facts surrounding these transactions were made available to the Wyoming auditors during the course of the audits. [*Stipulation of Facts and Legal Issue*, p. 6, ¶ 26].

24. 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

25. 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)*.

26. 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.

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

29. Wyoming Statutes section 8-1-103(a)(i) provides:

- (a) The construction of all statutes of this state shall be by the following rules, unless that construction is plainly contrary to the intent of the legislature:
(i) Words and phrases shall be taken in their ordinary and usual sense, but technical words and phrases having peculiar and appropriate meaning in law shall be understood according to their technical import.

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

In interpreting statutes, our primary consideration is to determine the legislature's intent. All statutes must be construed *in pari materia* and, in ascertaining the meaning of a given law, all statutes relating to the same subject or having the same

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

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

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

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

32. 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).

33. Wyoming imposes an excise tax on the sale of tangible personal property, admissions and services. *Wyo. Stat. Ann. §39-15-101, et seq.* The tax is based on “[t]he sales price of every retail sale of tangible personal property within the state.” *Wyo. Stat. Ann. § 39-15-103(a)(I)(A)*.

34. Wyoming imposes a complementary use tax on the transfer of possession of tangible personal property for storage, use or other consumption in Wyoming. *Wyo. Stat. Ann. § 39-16-101, et seq.*

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

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

37. The Department’s rules address the imposition of the use tax:

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

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

Rules, Wyoming Department of Revenue, Chapter 2 § 4(I.)(I.) And (ii.) (7/10/2006) (emphasis added).¹

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

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

40. “‘Taxpayer’ means the purchaser of tangible personal property, admissions or services which are subject to taxation under this article.” *Wyo. Stat. Ann. §§ 39-15-101(a)(x); 39-16-101(a)(vii)*.

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

42. “Persons storing, using or consuming tangible personal property or specified digital products, except as otherwise provided in this paragraph, are liable for the tax imposed by this article.” *Wyo. Stat. Ann. §39-16-103(a)(i)*.

43. Wyoming sales tax statute states: “‘Vendor’ means any person engaged in the business of selling at retail or wholesale tangible personal property, admissions or services which are subject to taxation under the article.” *Wyo. Stat. Ann. §§ 39-15-101(a)(xv); see Wyo. Stat. Ann. § 39-16-101(a)(x) infra*.

44. For purposes of Wyoming’s use tax, vendor is defined as:

[A]ny person engaged in the business of selling at retail or wholesale tangible personal property, having or maintaining within the state directly or by any subsidiary, an office, distribution house, sales house, warehouse or other place of business or any agents operating or soliciting sales or advertising within this state under the authority of the vendor or its subsidiary, regardless of whether

¹The current rule does not contain subparagraph (i.)(i.) and reads: “(h) Use Tax. (i) The use tax shall be determined by when tangible personal property is first stored, or first used or first consumed in Wyoming” *Rules, Wyoming Department of Revenue, Chapter 2 § 3(h)(i) (7/24/2014)*.

the place of business or agent is located in the state permanently or temporarily or whether the vendor or subsidiary is qualified to do business within this state.

‘Vendor’ also includes every person who engages in regular or systematic solicitation by three (3) or more separate transmittances of an advertisement or advertisements in any twelve (12) month period in a consumer market in this state by distribution of catalogs, periodicals, advertising flyers, or other advertising or by means of print, radio, television or other electronic media, by mail, telegraph, telephone, computer data base, cable, optic, microwave, satellite or other communication system for the purpose of effecting retail sales of tangible personal property.

Wyo. Stat. Ann. § 39-16-101(a)(x).

45. Wyoming Statutes section 39-15-101 (a)(viii)(A) provides “[s]ales 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:

(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.

Wyo. Stat. Ann. § 39-15-101(a)(viii)(A)(II).

46. Wyoming Statutes section 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.

47. The complementary use tax provision, Wyoming Statutes section 39-16-104(a) provides:

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

48. Wyoming Statutes provide that “every vendor shall collect the tax imposed by this article and is liable for the entire amount of taxes imposed.” *Wyo. Stat. Ann. § 39-15-103(c)(i)*. The use tax provisions places the liability for the tax on the “[p]ersons storing, using or consuming tangible property.” *Wyo. Stat. Ann. § 39-16-103(a)(i)*.

49. Wyoming Statutes provide a specific sales tax exemption for newspapers.

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

. . . .

(viii) For purposes of exempting sales of services and tangible personal property as an economic incentive, the following are exempt:

. . . .

(D) Sales of newspapers.

Wyo. Stat. Ann. § 39-15-105(a)(viii)(D).

50. The exemption for newspapers applies to use tax transactions through the application of Wyoming Statutes section 39-16-104(a) levying the use tax at the same rate as applied under Wyoming Statutes section 39-15-104(a) which imposes sales tax on non-exempt sales. *Supra* ¶¶ 33, 37, 47.

51. In determining whether a transaction is exempt from taxation we begin with the proposition that exemptions are not favored.

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

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

52. While the Wyoming legislature did not define “newspapers,” the Department defined “newspaper” by rule.

(gg.) “Newspaper” means 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 magazines, handbills, circulars, advertising flyers, sales catalogs, or other such printed materials when they are distributed within the newspaper.

Rules, Wyoming Department of Revenue, Ch. 2 § 3(gg.) (7/10/2006). The second sentence of the definition was amended in 2012 to read as follows: “This includes magazines, handbills, circulars, advertising flyers, sales catalogs, or other 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).

53. The Department has also defined printers. “Printers produce tangible personal property. The printer’s retail sale shall be subject to the sales tax. Printers shall not deduct labor or services charges from the tax base of the sale All charges made for copying or reproduction services shall be subject to the sales tax.” *Rules, Wyoming Department of Revenue, Ch. 2 § 15(z)*.

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

55. The Wyoming Supreme Court has stated that “[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); *See RME Petroleum Co. v. Wyo. Dept of Revenue*, 2007 WY 16, ¶ 44, 150 P.3d 673, 689 (Wyo.2007); and *Olivas v. State ex rel. Wyo. Workers’ Safety & Comp. Div.*, 206 WY 29, ¶15, 130 P.3d 476,484 (Wyo. 2006).

CONCLUSIONS OF LAW: APPLICATION OF PRINCIPLES OF LAW.

56. The parties identified the issues as: whether advertising newsprint purchased from out-of-state printers and distributed within Wyoming newspapers are subject to use tax as “taxable printing,” which is the basis cited by the Department of Revenue for denial of the claims for refund; and whether the audit assessments are exempt from use tax as “newspapers” pursuant

to Wyoming Statutes section and the Department's Rules, Chapter 2, Sections 3(cc) and 4(i). [Stipulation of Facts and Legal Issue, p. 7].

57. Ultimately, the issue to be decided is whether or not the advertising supplements purchased by Taxpayers out-of-state and shipped to Wyoming for insertion in Wyoming newspapers qualify for an exemption as a "newspaper" as that term is used in Wyoming Statutes and defined by the Department. *Supra* ¶ 37, 49-52.

58. Petitioners were supermarket retailers with retail locations in Wyoming during the audit period of January 1, 2007, through December 31, 2009. Both Petitioners were included in the audit because of New Albertson's purchase of eight Wyoming locations from Albertson's LLC during the audit period. *Supra* ¶ 3-4, 11-12.

59. During the audit period, Petitioners purchased advertising newsprint from out of state printers which were distributed either to Wyoming newspapers for distribution as part of the newspapers or to Petitioners' retail locations for distribution to customers free of charge. *Supra* ¶¶ 2, 13, 17, 19-20. Petitioners concede the advertising newsprint shipped directly to their Wyoming stores for distribution to shoppers were taxable. *Supra* ¶¶ 18, 21, [Petitioners' Opening Brief, p. 7].

60. Each party called the Board's attention to cases from other jurisdictions which they argue support their respective positions. Petitioners cited *Sears Roebuck & Co. v. State Tax Commission*, 370 Mass. 127, 345 N.E.2d 893 (1976); *Friedman's Express, Inc. v. Mirror Transp. Co.*, 71 F.Supp. 991 (D.N.J. 1947, aff'd, 169 F.2d 504 (3d Cir. 1948); *Daily Record Company dba Mid-American Printing Company v. Ray S. James*, no. 62245, 629 S.W.2d 348 (1982); and *Appeal of K-Mart Corp.*, 238 Kan. 393, 710 P.2d 1304 (1985). [Petitioners' Opening Brief, pp. 10-13]. The Department cited *Collins v. J.C. Penney Co., Inc.*, 461 S.E.2d 582 (Ga.App. 1996); *Mervyn's v. Ariz. Dep't of Revenue*, 845 P.2d 1139 (Ariz. Tax 1993); *Ragland v. K-Mart Corp.*, 624 S.W.2d 430 (Ark. 1981); *Caldor, Inc. v. Hefferman*, 440 A2d 767 (Conn. 1981); *Sears, Roebuck & Co. v. Lindley Tax Comm'r*, 436 N.E.2d 1029 (Ohio 1982); and *Sears, Roebuck & Co. v. Woods*, 708 S.W.2d 374 (Tenn. 1986). [Wyoming Department of Revenue's Reply Brief, pp. 6-8, 10-11]. More comprehensive listing of cases may be found in *Collins v. J.C. Penney Co., Inc.*, *supra* 461 S.E.2d at 410, and generally in Alois Valerian Gross, Annotation, *State or local sales, use or privilege tax on sales of, or revenues from sales of, advertising space or services*, 40 A.L.R.4th 1114, § 16 (1985 & Supp. 2013) and Jay. M. Jitter, Annotation, *What constitutes newspapers, magazines, periodicals, or the like, under sales or use tax law exemption*, 25 A.L.R.4th 750 (1883 & Supp. 2013).

61. The cases cited by the parties and the Board's review of the annotations and supporting case law from other jurisdictions, establish that there is a sharp division of authority on the

issue of whether advertising newsprint, commonly referred to as newspaper inserts or supplements, are exempt from sales or use tax. It is clear from that review, the decision of each court rested on the court's definition of "newspaper." *Compare Sears Roebuck & Co. v. State Tax Commission*, 370 Mass. 127, 345 N.E.2d 893 (1976) (newspaper exemption available to advertising supplements) *with Collins v. J.C. Penney Co., Inc.*, 461 S.E.2d 582 (Ga.App. 1996) (applying six part test, determined newspaper inserts did not become component of newspapers).

62. In this case, the Board is not required to define "newspaper." The definition was supplied by Department rule. The rule has the force and effect of law and must be interpreted using the same analytical framework used for a statute. *Supra* ¶¶ 52, 55. The Department's rule is entitled to deference. *Supra* ¶ 31.

63. The Department's definition of "newspaper" clearly and unequivocally includes "circulars, advertising flyers, sales catalogs, or other such printed materials when they are distributed within the newspaper." Rules, Wyoming Department of Revenue, Ch. 2, § 3(gg.). *Supra* ¶ 52. This definition encompasses the advertising newsprint purchased by Petitioners for insertion in Wyoming newspapers. No statutory interpretation is required; the definition provided by the Department clearly encompasses the advertising newsprint purchased by petitioners and inserted in Wyoming newspapers. The Board concludes Petitioners have met their initial burden of production of evidence establishing the advertising newsprint are included within the definition of "newspaper" promulgated by the Department.

64. The Board carefully reviewed the Department's brief for a cogent argument supporting a conclusion that advertising newsprint purchased by Petitioners and inserted in Wyoming newspapers were not covered by the Department's definition of "newspaper" and, therefore, taxable. None was found.

65. The Department offered four arguments to support the taxability of the advertising newsprint: 1. The printing of advertising newsprint created taxable tangible personal property; 2. The transaction was a taxable purchase by Petitioners from the printers; 3. The advertising newsprint were not components of the newspapers; or 4. The advertising newsprint were not a component of a manufacturing process. [Wyoming Department of Revenue's Reply Brief, pp. 2-11.] These arguments generally track alternate arguments made by Petitioners to support their position and discuss the statutory provisions set out in paragraphs 37 through 48, *supra*. The Department's arguments, however, do not persuade the Board that the purchases of advertising newsprint for insertion in Wyoming newspapers were taxable.

66. The Department's arguments implicitly ask the Board to ignore the statutory exemption for newspapers and the Department's own definition. To accept the Department's arguments

would first require the Board to ignore the statutory “newspapers” exemption. The Board is required to read the statutes *in para materia* and give each word its plain and ordinary meaning. *Supra* ¶¶ 28-30. While the Board starts with the general proposition that all sales transactions are taxable, the Board may not ignore a clear statutory exemption merely because a transaction would be taxable otherwise. *Supra* ¶¶ 51.

67. The Department’s arguments generally track arguments made and addressed by the Board in *Yellow Book Sales & Distribution Co. (Sales and use tax)*, Docket No. 2010-65, April 29, 2011, 2011 WL 3103850 (Wyo. St. Bd. Eq.). In *Yellow Book* the Board held telephone directories printed out-of-state and distributed in Wyoming by Yellow Book were tangible personal property, not exempt as the production of a new product. The Board further held the purchases were taxable “because a non-exempt service produced the tangible personal property subject to the use tax.” *Id.* at ¶ 84. There is, however, a fundamental difference between *Yellow Book* and this case, the existence of a specific statutory exemption for newspapers and by definition, advertising newsprint. While we might agree with the Department’s arguments in another context, we may not ignore the clear statutory exemption for “newspapers.” *Supra* ¶ 63.

68. Petitioners purchase and distribution of advertising newsprint in Wyoming newspapers was exempt from use tax. The Department failed to establish the purchase of advertising newsprint was taxable in light of the Department’s definition of newspaper. The Board, therefore, concludes the Petitioners met their burden of proof. The Department’s denial of Petitioners’ refund requests was incorrect and its decision is reversed.

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ORDER


THEREFORE, IT IS HEREBY ORDERED the Wyoming Department of Revenue's denial of Petitioners' requests for refunds is **reversed** and this matter is remanded to the Department for further action consistent with this opinion.

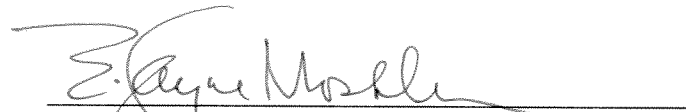
Pursuant to *Wyo. Stat. Ann. § 16-3-114* and *Rule 12, Wyoming Rules of Appellate Procedure*, any person aggrieved or adversely affected in fact by this decision may seek judicial review in the appropriate district court by filing a petition for review within 30 days of the date of this decision.

DATED this 23rd day of December, 2014.

STATE BOARD OF EQUALIZATION


Steven D. Olmstead, Chairman


Paul Thomas Glause, Vice-Chairman


E. Jayne Mockler, Board Member

ATTEST:


Jana R. Reutlinger, Executive Assistant

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of December, 2014, 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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