

BEFORE THE STATE BOARD OF EQUALIZATION
FOR THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF)
THUNDER BASIN COAL COMPANY, LLC)
FROM A DECISION BY THE DEPARTMENT)
OF REVENUE)

Docket No. **2012-87**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

APPEARANCES

Walter F. Eggers, III and Lawrence J. Wolfe, Holland and Hart, LLP, appeared on behalf of Thunder Basin Coal Company, LLC (Thunder Basin or Petitioner).

John G. Knepper, Deputy Attorney General, Wyoming Attorney General's Office, appeared on behalf of the Wyoming Department of Revenue (Department or Respondent).

STATEMENT OF THE CASE

Thunder Basin owns and operates the Black Thunder Mine, a coal mine in Campbell County, Wyoming. On May 31, 2012, Thunder Basin filed a sales tax refund request and amended returns with the Department, requesting the Department refund sales taxes Thunder Basin paid to the Department for the period of April 2009 through December 2011. On October 12, 2012, the Department denied Thunder Basin's refund request for sales taxes paid in association with a series of extended warranty/service contracts covering fifty-five Caterpillar trucks owned by Thunder Basin.

Thunder Basin appealed the Department's refund denial by letter to the State Board of Equalization (Board) on November 8, 2012. The Board held a hearing on the matter on July 30 and 31, 2013.

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

ISSUES

Petitioner presented a single issue on appeal:

[W]hether a series of Maintenance and Repair Agreements entered into between TBCC and Wyoming Machinery Company (WMC) qualify as “[e]xtended warranties, service and maintenance contracts or similar agreements” under Chapter 2, Section 15(oo)(ii) of the Rules of the Wyoming Department of Revenue (Department).¹

[*Petitioner Thunder Basin Coal Company LLC’s Closing Argument and Post-Hearing Brief, p.1*].

The Department identified one mixed issue of fact and law on appeal: “Is Petitioner entitled to a refund of excise taxes paid upon the ‘Maintenance and Service Agreement’?” [*Wyoming Department of Revenue’s Preliminary Statement, pp. 2-3*].

The Board affirms the decision of the Department denying Petitioner’s sales tax refund request.

JURISDICTION

The Board shall review final decisions of the Department on application of any interested person adversely affected. *Wyo. Stat. Ann. § 39-11-102.1(c)*. A taxpayer’s appeal must be filed with the Board within thirty days of the Department’s final decision. *Rules, Wyoming State Board of Equalization, Chapter 2 § 5(a)*. Petitioners timely appealed the Department’s final decision of October 12, 2012. The Board has jurisdiction to decide this matter.

FINDINGS OF FACT

1. Thunder Basin’s refund request addressed ten distinct issues. The Department agreed with Thunder Basin on nine of the ten issues and granted a refund of sales taxes on those nine issues. [Stipulated Updated Summary of Uncontroverted Facts, p. 1].

¹Throughout this appeal both parties have referenced Chapter 2, Section 15(oo)(ii) of the Department of Revenue Rules. Chapter 2, Section 15(oo) (effective 5/29/2012) was previously numbered Chapter 2, Section 15(mm) (effective 7/10/2006). The language in each rule is identical. Even though Chapter 2, Section 15(mm) was in effect during refund period, all reference in this opinion will be to Chapter 2, Section 15(oo) for consistency and to avoid confusion.

2. Thunder Basin's refund request on the "Extended Warranties/Service Contracts" issue amounted to a total of \$3,368,433.37 in sales taxes for the refund period. By letter dated October 12, 2012, the Department denied Thunder Basin's refund request relating to the issue, "Extended Warranties/Service Contracts" payments. [Joint Exhibit 700; Stipulated Updated Summary of Uncontroverted Facts, pp. 1-2].
3. Thunder Basin, is a subsidiary of Arch Coal Company and operates the Black Thunder Mine (Mine) located ten miles east of Wright, in Campbell County, Wyoming. [Tr. Vol. I, pp. 8, 36, 95-96]. The Mine is one of the world's largest surface coal mines with six separate pits mined by draglines. The Mine requires more than 20 power shovels, 117 haul trucks and 300 other pieces of support equipment to operate. [Tr. Vol. I, pp. 38-39].
4. Thunder Basin's Maintenance Superintendent of Planning, Seth Buxcel, testified at the hearing. Mr. Buxcel oversaw the planning and scheduling functions of the equipment used at the Mine. Mr. Buxcel also administered the Mine's maintenance contracts on a day-to-day basis. He worked with the contracts between the Mine and the Wyoming Machinery Company (Wyoming Machinery), beginning in June 2008. [Tr. Vol. I, pp. 36-38].
5. Wyoming Machinery is Wyoming's exclusive Caterpillar dealership for large mining equipment. Wyoming Machinery also sells and performs maintenance on trucks, loaders, dozers and other equipment used in the mining industry. [Tr. Vol. I, p. 40].
6. Thunder Basin purchased fifty-five Caterpillar Series 793 trucks (trucks or haul trucks) from Wyoming Machinery for operation at the Mine. The Series 793 trucks are 240 ton haul trucks designated for off-road mining use. [Tr. Vol. I, pp. 40-42, Thunder Basin Exhibit 102].
7. Each haul truck costs \$3.5 million dollars and has an expected operational life span of 12 to 15 years. The cost to maintain each truck for its life is approximately \$10.5 million to \$12.25 million, or 3 to 3.5 times the original price of the truck. [Tr. Vol. I, p. 46].
8. The Mine operates 24 hours per day in two 12 hour shifts, seven days per week. The haul trucks record their hours of operation rather than tracking miles through a typical odometer. The trucks haul between 120 and 140 loads of dirt a day, with each load of weighing up to 240 tons. The trucks operate 6,000 to 6,500 service meter hours per year. [Tr. Vol. I, pp. 43-44].
9. Proper maintenance of the trucks is critical because of the continuous running of the haul trucks, the tonnage each truck is required to transport and the road conditions at the Mine. [Tr. Vol. I, pp. 45-46].

10. Haul trucks acquired by Thunder Basin since 2004 had two warranties issued through the Caterpillar Corporation (Caterpillar), the manufacturer of the trucks. The first was the standard warranty which was included as part of the purchase price for each truck. The second warranty, which Thunder Basin purchased separately from Caterpillar, extended the standard warranty to 10,000 service meter hours for each truck. [Tr. Vol. I, pp 78-80].

11. Prior to 2004, Thunder Basin maintained its haul trucks with its own employees. Beginning in 2004 it contracted directly with Wyoming Machinery to maintain its haul trucks. [Tr. Vol. I, pp. 70-72].

12. In addition to the two warranties obtained directly from Caterpillar, Thunder Basin negotiated two separate and distinct warranty and maintenance contracts with Wyoming Machinery to maintain the haul trucks. The first contract was a “components warranty”. Under this contract Wyoming Machinery removed major components from each truck on an as needed basis and sent them to one of Wyoming Machinery’s rebuild shops for repair. Once rebuilt, those components were guaranteed by Wyoming Machinery to be of quality workmanship, free of defects and guaranteed to work for a specific amount of time. [Tr. Vol. I, pp. 78-80].

13. The second contract was a maintenance and repair agreement contract. In addition to other general services, this contract provided an availability guarantee and extended the meter hour coverage for each truck to a contract determined number of hours. Between 2004 and 2010 Thunder Basin entered into seven separate maintenance and repair agreement contracts. [Tr. Vol. I, pp. 70, 80].

14. Thunder Basin and Wyoming Machinery entered into the first maintenance and repair agreement contract in 2004, and that contract was known as Contract #44. [Tr. Vol. I, pp. 70-72]. As new haul trucks were added, rather than amending Contract #44, Thunder Basin and Wyoming Machinery executed new contracts to include newly purchased haul trucks. [Tr. Vol. I, pp. 71-72].

15. Under each of these maintenance and repair agreement contracts Thunder Basin made monthly payments to Wyoming Machinery. These payments were calculated using the number of hours each haul truck was used during a specific month and multiplying this number by an agreed-upon rate per hour of operation. Each year the parties reviewed the truck usage and adjusted the hourly operation rate. [Tr. Vol. I, p. 67; Joint Exhibit 701, p. JT 0007 ¶ D.2; Exhibit 703].

16. In early 2010, Wyoming Machinery asked Thunder Basin to modify the six existing maintenance and repair agreement contracts, Contracts # 44, 48, 52, 54, 56 and 58. Mr. Buxcel was personally involved in the negotiations and consolidation discussions with

Wyoming Machinery. As part of his involvement in the process, Mr. Buxcel analyzed the performance of each of the prior contracts. [Tr. Vol. I, pp. 72, 76-77].

17. On April 22, 2010, Thunder Basin and Wyoming Machinery representatives agreed to combine the six maintenance and repair agreements into a single contract, titled "Maintenance and Repair Agreement, between Wyoming Machinery Company and Thunder Basin Coal Company Covering Repairs and Maintenance of Fifty Five Caterpillar 793 (C), (D), & (F) Mechanical Drive Trucks, Contract #60" (Contract #60). [Tr. Vol. I, pp. 47, 70, 75-76; Joint Exhibit 701]. Contract #60 superseded and replaced maintenance and repair agreement contracts #44, 48, 52, 54, 56 and 58 and addressed all fifty-five haul trucks owned by Thunder Basin. [Tr. Vol. I, pp. 71, 77].

18. Contract #60, like the previous six contracts, required Wyoming Machinery to maintain the mechanical availability of each of the haul trucks at the Mine and to control maintenance costs associated with the trucks to meet the "desire of both parties to provide the highest possible availability at the lowest possible cost to each entity". [Tr. Vol. I, pp. 48, 74-75, 105, 142; Joint Exhibit 701].

19. Contract #60 became effective on June 1, 2010. It terminates when all trucks covered by the agreement reach the number of service meter hours of operation agreed upon in the contract. [Tr. Vol. I, p. 56; Joint Exhibit 701, p. JT 0007].

20. Thunder Basin provided confidential copies of Contract #58 and Contract # 60, to the Board. [Joint Exhibits 701, 702].

21. Thunder Basin did not provide copies of the five other contracts that were in effect during the refund period, Contracts # 44, 48, 52, 54 and 56. However, Mr. Buxcel presented a detailed review of the various provisions of the earlier contracts. [Tr. Vol. I, pp. 70-76; Joint Exhibits 701, 702].

22. From April 2009 through December 2011, Thunder Basin paid sales tax to the State of Wyoming based on 100 percent of the invoice amount sent by Wyoming Machinery to Thunder Basin under the maintenance and repair agreement contracts, including Contract #60. [Tr. Vol. I, pp. 96-97].

23. Contract #60 defined Wyoming Machinery's repairs to the haul trucks as either repairs covered by Contract #60, meaning Wyoming Machinery was responsible for the cost of the repairs; or repairs not covered by Contract #60, meaning Thunder Basin paid separately for the repairs. Non-contract work was performed under a separate work order and invoiced separately. [Tr. Vol. I, p. 53].

24. Contract #60 described the specific repairs and services performed under the contract. The repairs and services included were: 1) running repairs; 2) preventive maintenance; 3) rebuilding major components; 4) frame repairs; 5) condition monitoring. Under the contract Wyoming Machinery had the responsibility to perform these repairs and services. [Tr. Vol. I, pp. 52-53; Joint Exhibit 701, pp. 0005-0006].
25. To provide repairs under the maintenance and repair agreement contracts, Wyoming Machinery leased four maintenance bays in a building at the Mine. Wyoming Machinery supplied mechanics on a 24-hour a day basis to repair any of the trucks that experienced mechanical failure. [Tr. Vol. I, p. 51; Joint Exhibit 701, pp. JT 0012, 0060-63].
26. Contract #60 required daily verbal communication between the parties to describe the repairs being done, the number of trucks running and available and the number of trucks not available. It also required Wyoming Machinery to provide detailed written monthly reports to Thunder Basin describing all repairs and the cost for those repairs completed on all trucks covered by the contract and required an annual face to face meeting to discuss contract outcomes. [Tr. Vol. I, pp. 54-55, 82, 86; DOR Exhibit 503; Joint Exhibit 701, p. JT 0007].
27. Contract #60 defined Wyoming Machinery's maintenance costs as the current Wyoming Machinery list price of parts and services, after applicable discounts from part dealers and Caterpillar, as well as any volume discount. [Tr. Vol. I, pp. 55-56, 105-106; Joint Exhibit 701, p. JT 0006].
28. Thunder Basin never paid the repair costs listed on the monthly report. Contract #60 required Wyoming Machinery to list its reported costs so Thunder Basin could review and understand the amount of work being performed by Wyoming Machinery on each truck. [Tr. Vol. I, p. 87; DOR Exhibit 503].
29. Separate from the monthly reports, Wyoming Machinery sent, and Thunder Basin paid, a monthly invoice for the contract price under the maintenance and repair agreement. Wyoming Machinery sent these invoices to Thunder Basin on a truck-by-truck and a month-by-month basis. [Tr. Vol. I, pp. 90-91, 124].
30. Wyoming Machinery provided Thunder Basin with monthly reports and summaries. [Thunder Basin Exhibit 103; DOR Exhibits 500-506]. The parties agreed there is a typographical error in the titles of the reports contained in pages 000005-000012 of DOR Exhibit 500. Those pages are titled "August 2010 Summary" through "January 2010 Summary," but should be "August **2011** Summary" through "January **2011** Summary." [Stipulated Updated Summary of Uncontroverted Facts, p. 2].

31. Wyoming Machinery calculated the amount for each invoice by multiplying the contract rate by the number of service meter hours each truck operated during the month. [Tr. Vol. 1, pp. 90-91; Joint Exhibit 703].

32. If Wyoming Machinery performed no work on a truck during a month, Wyoming Machinery still sent, and Thunder Basin still paid, the invoice based on the contract rate and service meter hours for the truck. [Tr. Vol. I, p. 92].

33. The rate Thunder Basin paid to Wyoming Machinery under the contracts did not change based on the work Wyoming Machinery performed on a truck, only on the service meter hours a truck operated. [Tr. Vol. I, pp. 69-70].

34. Paragraph D.4. of Contract #60 provided a possible reduction in the total amount Thunder Basin would pay Wyoming Machinery for the maintenance and repairs of the haul trucks. [Tr. Vol. I, pp. 58-62; Joint Exhibit 701, p. JT 0008].

35. Paragraph D.4. of Contract #60, “outlines that at the end of the contract when every truck has come off the contract, the dollar value that Wyoming Machine has reported that it costs them to perform the contract will be compared to the dollar value that Black Thunder has paid in invoices, and if there’s a difference between those two, then there will be a rebate back to Thunder Basin if Wyoming Machine’s input into the contract was less than what was paid.” [Tr. Vol. I, p. 58]. If the costs of the repairs exceeded the amount already provided by Thunder Basin, then no further exchange of compensation would be necessary. [Tr. Vol. I, pp. 58-61, 129; Joint Exhibit 701, p. JT 0008 ¶ D.4].

36. According to Wyoming Machinery’s monthly reports, Thunder Basin believed Wyoming Machinery’s reported costs were greater than Thunder Basin’s payments under Contract #60. Mr. Buxcel believed Wyoming Machinery’s reported costs will continue to exceed Thunder Basin’s payments. If that is the case, the cost reduction provision in the guarantee agreement will never be applied. [Tr. Vol. I, pp. 60, 139, Joint Exhibit 701, p. JT 0017].

37. Contract #60 contained an Availability Guarantee, identified as Exhibit A in the contract. The Availability Guarantee guaranteed that for a contract negotiated service meter hours of operation, or a pre-determined number of months, the fifty-five haul trucks would be maintained and available to haul dirt for a contract specific percentage of time. If the guarantee was not met, Wyoming Machinery was required to pay a penalty. [Tr. Vol. I, pp. 49-50; Joint Exhibit 701, p. JT 0017].

38. Contract #60 contemplated repairs on each haul truck until it operated for the maximum hours or months of service specified by the contract. When a truck reached the contract number of service meter hours, or months, of operation the availability guarantee

was decreased and the penalties were waived. [Tr. Vol. I, pp. 49-50; Joint Exhibit 701, p. JT 0017].

39. If the Availability Guarantee was not met there was a per hour penalty, or charge, to Wyoming Machinery for every hour the truck fleet was less than the contract determined availability percent of operation. Wyoming Machinery provided a credit, in the form of a parts credit on other repairs billed to Thunder Basin, if the fleet-wide average was not met. [Tr. Vol. I, p. 50, Joint Exhibit 701, p. JT 0017]. The availability was calculated by looking at the total number of hours that the haul trucks could have worked in a given month minus the hours that the haul trucks were not available to work as compared to the total hours in the month. Contract #60 anticipated that the fifty-five haul trucks, rather than any particular haul truck, would be available to work for the majority of each month. Contract #60 did not, by its terms, require that all haul trucks be available for the same number of hours in a month. [Joint Exhibit 701, pp. JT 0008, JT 0017].

40. Although Mr. Buxcel estimated Contract #60 will end in approximately 2022-2023, based on the expected life of the newest truck currently covered by the contract, the date is not certain. [Tr. Vol. I, p. 59]. The term could be extended if Thunder Basin purchases new trucks and those trucks are added to Contract #60. In addition, a new contract may be negotiated and all trucks rolled into that contract. [Tr. Vol. I, pp. 130-131].

41. Either party may terminate Contract #60 as to a single truck, or for all trucks, with sixty days notice to the other party. [Joint Exhibit 701, p. JT 0016]. This provision permits Wyoming Machinery to terminate the contract if it concludes the payments under the Agreement are not meeting its costs. [Tr. Vol. I, p. 119].

42. Thunder Basin believed the Department's rule on warranties was met through the maintenance and repair agreement contracts between Thunder Basin and Wyoming Machinery. Petitioner stated the contracts were sold for a cost additional to and separate from the purchase of the haul trucks and therefore, they qualified for the exemption under the Department's rule on warranties. [Tr. Vol. I, pp. 79-80; Joint Exhibit 701, p. JT 0007, ¶ D.2; Joint Exhibit 702, p. JT 0081, ¶ D.2].

43. Thunder Basin maintained the contracts provided additional services not provided by other warranties or agreements between Wyoming Machinery and Thunder Basin. [Joint Exhibit 701, pp. JT 0008-0011; Joint Exhibit 702, pp. JT 0082-0084; Tr. Vol. I, p. 80].

44. Thunder Basin stated the maintenance and repair agreement contracts with Wyoming Machinery extended the timeframe of service coverage for each truck beyond the extended warranty provided by Caterpillar. [Tr. Vol. I, p. 80, Joint Exhibit 701, p. JT 0007, ¶ D.1; Joint Exhibit 702, p. JT 0081, ¶ D.1].

45. On May 31, 2013, Thunder Basin requested a refund of sales taxes accrued on the extended warranties and service contracts. [Thunder Basin Exhibit 100, p. 0002].

46. In its letter dated October 12, 2012, the Department determined Contract #60 did not qualify as an extended warranty and denied the refund request. It was the Department's opinion that fixing an hourly price for service and repairs in advance was not the same thing as a warranty or maintenance contract. The contracts did not guarantee the truck would be free of defects; they simply established a repair rate. [Joint Exhibit 700, JT 0001].

47. Daniel W. Noble² testified for the Department. Mr. Noble was the Administrator of the Excise Tax Division for the Department of Revenue during the refund period. [Tr. Vol. I, pp. 145-146].

48. The Department denied Thunder Basin's refund request because it determined the maintenance and repair agreements did not qualify for a warranty exemption under Chapter 2, Section 15(oo)(ii) of the Department's Rules. [Tr. Vol. I, pp. 101, 179-181; Joint Exhibit 700].

49. The Department determined Thunder Basin's refund request did not comply with the Department's rules regarding warranties. Mr. Noble noted in this case the repairs to the haul trucks were part of what was included in the contract. He did not believe repairs were included in the process typically referred to as a warranty or similar agreement. [Tr. Vol. I, p. 147].

50. Because there was no definition of warranty in the sales tax statutes, Mr. Noble referred to Black's law dictionary for a clearer definition of a warranty. Using Black's definition, he concluded the maintenance and service agreement contracts were not warranties because there is a billing for services rendered in addition to a monthly reconciliation that showed what the actual billing was for those services and who performed them. [Tr. Vol. I, pp. 147-148].

51. Mr. Noble also determined the agreement did not qualify as a service or maintenance contract or similar agreement for the same reasons the contracts did not qualify under the warranty rule. Because there was "actual billing for the services to the party associated with the actual work being done" it was essentially "a billing for service as opposed to the sale of a warranty or like instruments." [Tr. Vol. I, pp. 147-148, 184-186].

² In April 2013, Mr. Noble was appointed Director of the Department of Revenue.

52. Mr. Noble concluded that because the services to repair, alter or improve tangible personal property are a taxable event, the Department can not, through a rule, impose an exemption. [Tr. Vol. I, p. 181].

53. Mr. Noble stated that what is contemplated with a service agreement is not an exemption but rather an identification of the party liable for the tax on the services. [Tr. Vol. I, p. 215].

CONCLUSIONS OF LAW: PRINCIPLES OF LAW

54. 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)*.

55. The Board’s Rules provide:

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.

56. 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 Co. v. Wyo. State Bd. of Equalization, 12 P.3d 668, 674 (Wyo. 2000). See *Amoco Production Co. v. Dep't of Revenue*, 2004 WY 89, ¶ 22, 94 P.3d 430, 440 (Wyo. 2004).

57. “A preponderance of the evidence is ‘proof which leads the trier of fact to find that the existence of the contested fact is more probable than its non-existence.’” *Mitcheson v. State, ex rel. Wyo. Workers’ Safety & Compensation Div.*, 2012 WY 74, ¶ 11, 277 P.3d 725, 730 (Wyo. 2012) (quoting *Kenyon v. State ex rel. Wyo. Workers’ Safety & Comp. Div.*, 2011 WY 14, ¶ 22, 247 P.3d 845, 851 (Wyo. 2011)).

58. 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).

59. 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.

60. 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).

61. 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).

62. 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).

63. “[T]he rules of statutory construction apply to the interpretation of administrative rules and regulations.” *Wilson Advisory Comm. v. Board of County Comm’rs*, 2012 WY 163, ¶ 31, 292 P.3d 855, 863 (Wyo. 2012) (citations omitted).

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

65. “‘Retail sale’ means any sale, lease or rental for any purpose other than for resale, sublease or subrent.” *Wyo Stat. Ann. § 39-15-101(a)(vi)*.

66. Wyoming Statutes section 39-15-101(a)(viii) defines “sales price” in pertinent part as follows:

(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 deduction 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;
- (III) Charges by the seller for any services necessary to complete the sale other than delivery and installation charges;

67. Consideration is “[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something, [especially] to engage in a legal act.” *Black’s Law Dictionary* 324 (8th ed. 2004).

68. Wyoming Statutes section 39-15-101(a)(ix) defines “tangible personal property” as “all personal property that can be seen, weighed, measured, felt or touched, or that is in any other manner perceptible to the senses.”

69. “‘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)*.

70. Wyoming Statutes section 39-15-103(c) provides in pertinent part:

(c) Taxpayer. The following shall apply:

(i) Except as otherwise provided every vendor shall collect the tax imposed by this article and is liable for the entire amount of taxes imposed;

(ii) Every person purchasing goods or services taxed by this article is liable for the taxes and shall pay any 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;

71. Wyoming Statutes section 39-15-103(a)(i) 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;

(J) The sales price paid for services performed for the repair, alteration or improvement of tangible personal property;

72. 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;

73. The Department's rule on repairs of tangible property provides:

Section 15. Specific Taxability Issues.

(dd.) Repairs, Alterations and Improvements. Labor or service charges for the repair, alteration or improvement of tangible personal property, as well as charges for materials, supplies and fabrication used in rendering such services shall be subject to the sales tax. The purchase of materials, supplies and fabrication which become an ingredient of the repair, alteration or improvement of tangible personal property shall be considered wholesale sales as defined by W.S. 39-15-101(a)(xvi). Labor or service charges for repairs, alterations or improvements of real property are not subject to the sales tax.

(i.) Repairs, alterations or improvements performed upon tangible personal property under a warranty, service or similar agreement shall be subject to the sales tax based on the sales price paid for the service. The sale of such an agreement shall not be subject to the sales tax. The consumer shall be liable for the tax on repair charges not covered by the agreement. The issuer of the agreement shall be liable for sales tax on the remainder of the repair charges.

Rules, Wyoming Department of Revenue, Chapter 2, § 15(dd)(i). (Filed 7/10/2006).

74. The Department's rule Chapter 2, section 5(oo)(ii) provides:

(ii) Extended warranties, service and maintenance contracts or similar

agreement: those agreements which are sold for an additional and separate cost and provide additional services or extend the time frame of service coverage.

(A) The cost of an extended warranty, service contract or similar agreement shall not be subject to the sales tax.

(B) Repairs, alterations, or improvements performed upon tangible personal property under an extended warranty, service contract, or similar agreement shall be subject to the sales tax.

(I) The consumer shall be liable for the tax on repair services not covered by the agreement. The issuer of the agreement shall be liable for the sales tax on the repair charges covered by an extended warranty.

(II) The taxable basis is the sales price of the service performed, consistent with rule 15 (dd) of this chapter.

Rules, Department of Revenue, Chapter 2 § 15(oo)(ii), see fn. 1 supra.

75. “[W]ritten warranty. A warranty made in writing; specif., any written affirmation or promise by a supplier of a consumer product to a buyer (for purposes other than resale), forming the basis of the bargain and providing that the material or workmanship is free of defects or will be repaired or replaced free of charge if the product fails to meet the required specifications. 15 USCA § 2301.” *Black’s Law Dictionary* 1620 (8th ed. 2004).

76. “[I]mplied warranty of fitness for a particular purpose. A warranty - implied by law if the seller has reason to know of the buyer’s special purposes for the property - that the property is suitable for those purposes.” *Black’s Law Dictionary* 1619 (8th ed. 2004).

77. “[E]xtended warranty. An additional warranty often sold with the purchase of consumer goods (such as appliances and motor vehicles) to cover repair costs not otherwise covered by a manufacturer’s standard warranty, by extending either the standard-warranty coverage period or the range of defects covered.” *Black’s Law Dictionary* 1619 (8th ed. 2004).

78. “[M]aintenance. . . . The care and work put into property to keep it operating and productive; general repair and upkeep.” *Black’s Law Dictionary* 972 (8th ed. 2004).

79. The Department’s rules address non-taxable transactions.

(a) General. Non-taxable transactions, including sales made for resale, shall be shown separately from taxable charges on sales invoices. The entire invoice amount shall be subject to sales/use tax if the exempt charges are not separately shown and distinguishable from taxable charges.

Rules, Department Revenue, Chapter 2, § 9(a).

80. Exemptions from taxation are not favored.

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

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

CONCLUSIONS OF LAW: APPLICATION OF PRINCIPLES OF LAW

81. The primary issue in this appeal is whether the monthly payments Thunder Basin made to Wyoming Machinery Company under a series of maintenance and repair agreements qualify as “[e]xtended warranties, service and maintenance or similar agreements” under Chapter 2, Section 15(oo) of the Department’s Rules.

82. Over the last twenty years the Department has struggled with the warranty issue and it has made multiple attempts to clarify the intent of the warranty rule through bulletins. As Mr. Noble stated, this effort often led them to look to other sources, including Black’s Law Dictionary for guidance. *Supra* ¶¶ 49-50, 75-78.

83. Wyoming Statutes section 39-15-103(a)(i)(J) imposes a tax on the repair, alteration or improvement of tangible personal property. The Department has promulgated rules to implement the statute. *Supra* ¶¶ 71-73. The Wyoming Supreme Court has noted, “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.” *Supra* ¶ 80.

84. This appeal is focused on the Department’s interpretation of Department of Revenue Rule, Chapter 2, section 15(oo)(ii) which reads in part: “[e]xtended warranties, service and maintenance contracts or similar agreements are those agreements which are sold for an additional and separate cost and provide additional services or extend the timeframe of service coverage.” *Supra* ¶ 74.

85. Petitioner argued the maintenance and repair agreement contracts qualified for an exemption from sales taxes under Chapter 2, section 15(oo)(ii), consequently the payments

made to the Department should be refunded. Petitioner argued the Department's rule on warranties was met because the contracts were sold for a cost additional to and separate from the purchase of the haul trucks; the agreements provided additional services not provided by other warranties or agreements between Wyoming Machinery and Thunder Basin, and the contracts extended the timeframe of service coverage for each truck beyond the extended warranty provided by Caterpillar. *Supra* ¶¶ 42-45.

86. The Department contended the maintenance and repair agreement contracts do not qualify under the rule or as a matter of law and no refund is due. *Supra* ¶¶ 46-53.

87. The Department did not challenge Petitioner's assertion the contracts "provide additional services" and "extend the timeframe of service coverage." Mr. Noble disagreed with the premise the contracts were "sold for an additional and separate cost" because the monthly payment made by Thunder Basin to Wyoming Machinery was an "actual billing for those services." *Supra* ¶¶ 50-51.

88. The Department's warranty rule, Chapter 2, section 15(oo) was promulgated by the Department to address two types of agreements: 1) "Standard or mandatory warranties and maintenance contracts" (subsection 15(oo)(i)); and 2) "Extended warranties, service and maintenance contracts or similar agreements" (subsection 15(oo)(ii)). *Supra* ¶ 74.

89. The Department's warranty rule has multiple layers. When read in whole the warranty rule requires that the cost of an extended warranty or similar agreement must be distinguishable or for an "additional and separate" cost from the "sales price of the tangible personal property." It then further refines the structure of the extended warranty provision to require the "cost of an extended warranty, service contract or similar agreement" under Chapter 2, section 15(oo)(ii)(A) must be distinct from the "sales price" of the "repairs, alterations or improvements performed upon tangible personal property under an extended warranty, service contract, or similar agreement" under Chapter 2, section 15(oo)(ii)(B). *Supra* ¶ 74.

90. To qualify for the exemption, this two part test must be met in its entirety. Applied to this case, the warranty must first be sold separately from the property itself, in this case the haul trucks. Second, the cost of the warranty must be distinguishable from cost of the repairs to the property, again the haul trucks. While the contracts met the first criteria, they did not satisfy the second. The two contracts presented by Petitioner do not have a "sales price" for the services performed, specifically the costs to repair the haul trucks, that is separate or distinguishable from the "cost" of the contract. Under Contract #60, Wyoming Machinery is required to track the precise cost of every repair that falls under its contract responsibilities and report the "costs" of parts and repairs on monthly spreadsheets. At the conclusion of the contract, the parties will reconcile the cost of the repairs with the monthly installment

payments made by Thunder Basin. If the aggregate cost of repairs is less than the aggregate total of the monthly payments, then Wyoming Machinery will refund a portion of the difference to Thunder Basin. The contracts also allowed either party to terminate the contract with sixty days notice, for a single truck or all trucks. Wyoming Machinery could terminate the contracts if their costs exceed the payments made by Thunder Basin. *Supra* ¶¶ 26-36, 39, 41.

91. While the contracts impose a limit on how much Thunder Basin must pay for the repairs to its haul trucks, the payments will never be more than the aggregate total of monthly payments. The contracts are essentially a very precisely negotiated cap or prepayment for services. Because there is no delineation between the costs of repairs and other non-taxable components of the contract responsibilities, the monthly payments are properly understood to be partial payments for the cost of repairs to tangible personal property. The contract set the monthly price and this price, the “sales price,” set for the repair and maintenance of the haul trucks, is in its entirety a taxable transaction under Wyoming law and is supported through the Department’s warranty rules. *Supra* ¶¶ 73, 74, 79.

92. The Department was correct and within its authority to conclude that the maintenance and repair agreement contracts did not qualify as “an extended warranty, service and maintenance contract, or similar agreement” under the provisions of Chapter 2, section 15(oo)(ii)(A) and were, therefore, taxable.

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ORDER


THEREFORE, IT IS ORDERED the Wyoming Department of Revenue's final administrative decision denying Thunder Basin Coal Company, LLC's sales tax refund claims related to "service and maintenance agreements" for the period of April 2009 through December 2011 is **affirmed**.

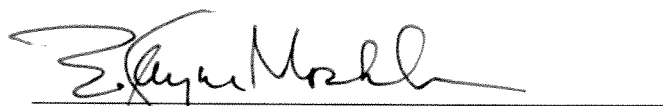
Pursuant to Wyo. Stat. Ann. § 16-3-114 and Rule 12, Wyoming Rules of Appellate Procedure, any person aggrieved or adversely affected in fact by this decision may seek judicial review in the appropriate district court by filing a petition for review within 30 days of the date of this decision.

DATED this 3rd day of December, 2014.


STATE BOARD OF EQUALIZATION


Steven D. Olmstead, Chairman


Paul Thomas Glause, Vice-Chairman


E. Jayne Mockler, Board Member

ATTEST:

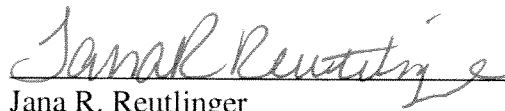

Jana R. Reutlinger, Executive Assistant

CERTIFICATE OF SERVICE

I hereby certify that on the 30th 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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