

BEFORE THE STATE BOARD OF EQUALIZATION

FOR THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF)
BAR S SERVICES, INC., FROM A SALES)
AND USE TAX AUDIT ASSESSMENT BY) Docket No. **2014-09**
THE EXCISE DIVISION OF)
THE DEPARTMENT OF REVENUE)
(Audit period 1/1/10 through 12/31/12))

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

APPEARANCES

Ronald E. Triggs, Law Offices of Ronald E. Triggs, P.C., appeared on behalf of Bar S Services, Inc. (Bar S or Petitioner).

Brenda Yamaji, Senior Assistant Attorney General, Leo Caselli, Assistant Attorney General, and Devin Kenney, Wyoming Attorney General intern, appeared on behalf of the Wyoming Department of Revenue (Department or Respondent).

STATEMENT OF THE CASE

Bar S owns and operates an oil field servicing company headquartered in Laramie County, Wyoming. Bar S's primary work is to transport oil field equipment, rigs and other equipment throughout the United States. On January 2, 2014, the Department issued a final administrative decision and assessment based on a Department of Audit (DOA) audit covering the period from January 1, 2010, through December 31, 2012. The audit resulted in a Department assessment of \$37,589.59 for taxes and \$6,214.40 in interest, for a total owed of \$43,803.99. Bar S remitted a payment of \$28,530.78.

Bar S appealed the Department's final administrative decision to the State Board of Equalization (Board) on January 30, 2014, requesting the Board find the remainder of the purchases exempt from sales or use tax. The Board held a hearing on the matter on July 9 and 10, 2014.

The Board, consisting of Chairman E. Jayne Mockler and Board Member Robin Sessions Cooley, considered the matter.¹

ISSUES

Petitioner presented one mixed issue of fact and law on appeal: Whether the equipment and labor employed to complete two incomplete vehicles for use in interstate commerce was exempt from taxation under Wyoming Statutes section 39-15-105? [Pet'r Prelim. Statement, p. 1; Pet'r Closing Argument Br., p. 5].

The Department identified one mixed issue of fact and law on appeal: "Whether the tangible personal property purchased separately, and the labor to add the tangible personal property to vehicles used in interstate commerce are exempt as a vehicle used in interstate commerce?" [Wyo. Dep't of Revenue Prelim. Statement, p. 2].

The Board restates the issues as follows: 1) Did Petitioner provide sufficient evidence to prove, by a preponderance of the evidence, that the audit findings included tax on tangible personal property and related labor used to complete the incomplete vehicles; and 2) Whether the tangible personal property purchased separately and the related labor required to complete vehicles for use in interstate commerce are exempt from taxation?

The Board affirms the Department's denial of Petitioner's sales tax exemption request based on the failure of Petitioner to meet its burden of proof.

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, Wyo. State Bd. of Equalization, ch. 2 § 5(a) (2006). Petitioner timely appealed the Department's final decision of January 2, 2014, by filing a "Case Notice for Review" with the State Board on January 30, 2014. The Board has jurisdiction to decide this matter.

¹Paul Thomas Glause and Steven D. Olmstead were members of the Board at the time of the hearing. Mr. Glause resigned from the Board, effective January 2, 2015. Mr. Olmstead's term expired March 1, 2015. Martin L. Hardsocg and Robin Sessions Cooley were appointed to the Board effective March 1, 2015. Ms. Cooley reviewed the transcript, exhibits and record and participated in the decision in this matter. Mr. Hardsocg recused himself and did not participate in the consideration of this matter.

FINDINGS OF FACT

1. Bar S operates an oil field personnel and equipment transport company, headquartered in Laramie County, Wyoming. Bar S transports oil field personnel, equipment and rigs for major oil drillers in Wyoming, Colorado, North Dakota, Utah, Pennsylvania and various other states. Bar S has been engaged in this business for about ten and one-half years. [Tr. Vol. I, p. 9; Dep't Ex. 500, p. 01].
2. The DOA performed an audit of Bar S covering the period from January 1, 2010, through December 31, 2012. [Dep't Ex. 500, pp. 01-02].
3. The parties met in early December, 2013 to discuss the audit findings. Any audit items which both parties agreed were not subject to sales tax were removed from the audit. If the parties disagreed on the status of an audit item, the item remained in the audit findings. The parties reached no agreement on the final amount due and disagreed on whether any of the remaining items were tax exempt. [Tr. Vol. I, pp. 135-36, 137-38, 158-64].
4. The DOA final audit findings were issued to Bar S and forwarded to the Department on December 17, 2013. [Tr. Vol. I, pp. 162, 174-79, 186, 190-93; Dep't Ex. 500, p. 01].
5. On January 2, 2014, the Department sent Bar S a final audit assessment of \$37,589.59 in additional taxes, and \$6,214.40 in interest, for a total due of \$43,803.99. Petitioner subsequently made a payment of \$28,530.78, leaving a balance due of \$15,273.21. [Tr. Vol. I, pp. 137, 140-41; Dep't Ex. 502].
6. Bar S did not provide a breakout detailing which items in the Department's final assessment were addressed by the \$28,530.78 payment. The Department applied the payment according to its rules, Rules, Wyo. Dep't of Revenue, ch. 2 § 4(b) (2006, 2012), which required it to first apply the Bar S payment to any interest owed and then to apply the remainder to the oldest tax liabilities. [Tr. Vol. I, pp. 137, 224-25].
7. Patricia Smith, the secretary-treasurer of Bar S, provided testimony regarding the ownership and operations of Bar S, and reviewed the audit performed by the DOA. [Tr. Vol. I, pp. 79-103]. Ms. Smith stated that all trucks used by Bar S are used in interstate commerce. Bar S paid sales tax on all vehicles it purchased which weighed less than 10,001 pounds. Ms. Smith believed a non-taxable event would include any modifications made to a vehicle which were needed to perform their services and a taxable event would include any repairs to a completed vehicle. [Tr. Vol. I, pp. 79-103].
8. Petitioner provided specific testimony concerning the purchase of two "incomplete" trucks from Floyd's Truck Center in Cheyenne. Incomplete trucks require modifications and

installation of equipment so they may be used for their intended purposes. Truck 68 was purchased in May, 2011, and truck 88 was purchased in April, 2012. After purchase, the incomplete trucks were transported to Forbes Certified Welding, LLC (Forbes) in Craig, Colorado, for completion so they could be used by Petitioner in its business. The amounts charged by Forbes for the completion of the two trucks were not included in the audit and were not part of the final assessment. [Tr. Vol. I, pp. 23, 27-28, 34, 63-63, 68, 84-85, 88, 145-46; Pet'r Ex. 101, 102, pp. 06-07].

9. Petitioner provided invoices at the hearing for the work done by Forbes to complete the two trucks. The completion work was done using material and parts provided by Forbes and by Petitioner. Forbes paid sales tax on the parts it purchased and passed those taxes along to Bar S. The amounts charged by Forbes for completing the two trucks, evidenced by the invoices, were not included in the audit. [Tr. Vol. I, pp. 42-51; Pet'r Ex. 102].

10. Petitioner provided no invoices at the hearing for any parts it provided to Forbes for completion of the two trucks, nor was there any testimony directly tying any parts used in completing the trucks to the DOA audit finding. Ms. Smith could not confirm that any of the winches identified in the audit were installed on truck 68 or 88. [Tr. Vol. I, p. 92].

11. The Department offered and the Board agreed to give Petitioner the opportunity to submit evidence tying any amounts included in the audit as taxable to component parts or labor used for completion of trucks 68 and 88. [Tr. Vol. I, pp. 195-211]. Ultimately Petitioner declined the opportunity to present additional evidence. [Tr. Vol. II, pp. 3-4].

12. Mr. Brett Fanning, a senior auditor with the DOA since 2011, presented testimony to support the audit findings. Mr. Fanning was the lead auditor for the Bar S audit. [Tr. Vol. I, pp. 108-34, 151-54].

13. The audit findings were based on a review of one hundred percent (100%) of the available invoices, rather than by sampling. [Tr. Vol. I, p. 189].

14. Mr. Fanning reviewed Petitioner's Exhibit 102, pages 6 and 7, and stated the invoices for fabrication services and components added to trucks 68 and 88 by Forbes were not part of the audit findings. [Tr. Vol. I, pp. 113-19, 124, 145-46; Pet'r Ex. 102, pp. 6-7].

15. Department Exhibit 500 summarized the audit findings by category and issue, and detailed Bar S's tangible personal property purchases and the tax due on those purchases. Mr. Fanning could not identify any specific taxable items which were included in the \$28,530.78 payment made by Bar S. [Tr. Vol. I, pp. 120-25; Dep't Ex. 500, p. 3].

16. Bill McInerney, a twenty year employee with the DOA, and auditing manager for the last six years, outlined his responsibilities regarding the Bar S audit. [Tr. Vol. I, pp. 154-95].

17. Mr. McInerney stated that all items noted on DOR Exhibit 500 were discussed with Petitioner at the December reconciliation meeting. No items reviewed at that meeting were specifically tied to invoices related to component parts attached to trucks 68 or 88. Mr. McInerney could not identify the specific audit assessments paid by Petitioner with its \$28,530.78 payment and the parties did not identify the assessment items in any written agreement that he was aware of. [Tr. Vol. I, pp. 158-61, 164, 174-75, 178, 182-83; Dep't Ex. 500].

18. Mr. McInerney confirmed there is no list which details which items are included in the \$15,273.21 still owed by Petitioner because this amount includes interest, which is applied monthly and is difficult to attach to any one item. [Tr. Vol. I, pp. 184-86].

19. Mr. McInerney speculated that Petitioner probably believed the amount still due related to various components Petitioner added to trucks which it used in interstate commerce. Mr. McInerney stated it would not be relevant whether a component was installed on a truck used in interstate commerce. The DOA, based on guidance from the Department, determined that additional components added to trucks used in interstate commerce are taxable. [Tr. Vol. I, pp. 161, 165-66, 179, 181, 183-84, 194].

20. Kim Lovett, the administrator of the excise tax division of the Department, testified for the Department. Ms. Lovett has been with the Department for eleven months. Prior to that she was the Laramie County Treasurer. [Tr. Vol. I, p. 212].

21. Ms. Lovett stated the Department received the audit findings for Bar S from the DOA, reviewed the audit, accepted its conclusions and issued the final assessment. [Tr. Vol. I, p. 212].

22. Ms. Lovett reviewed Wyoming's statutes relating to sales and use tax exemptions and concluded that Wyoming law exempts only the component parts, alteration or remodeling performed on aircraft and railroad rolling stock. [Tr. Vol. I, pp. 213-19].

23. The Department concluded that had Bar S purchased the trucks after the component parts were added, the entire vehicle would be exempt. However, if the parts were purchased separately and applied after the purchase of the truck, the Department would source the sale and calculate the tax rate when the product was received by the purchaser at the location the vendor sold the product. If the component was not received at a business location, it would be sourced to where the product was delivered and received by the purchaser or his agent. [Tr. Vol. I, pp. 220-22].

CONCLUSIONS OF LAW: PRINCIPLES OF LAW

24. Upon application of any person adversely affected, the Board must review final Department actions concerning state excise taxes and “[h]old hearings after due notice in the manner and form provided in the Wyoming Administrative Procedure Act and its own rules and regulations of practice and procedure.” *Wyo. Stat. Ann. § 39-11-102.1(c) and(c)(viii)*. The Board must “[d]ecide all questions that may arise with reference to the construction of any statute affecting the assessment, levy and collection of taxes, in accordance with the rules, regulations, orders and instructions prescribed by the department.” *Wyo. Stat. Ann. § 39-11-102.1(c)(iv)*.

25. The Board’s Rules provide:

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, Wyo. State Bd. of Equalization, Chapter 2 § 20 (2006).

26. “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)).

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 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).

28. 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, Wyo. Dep't of Revenue, ch. 2 § 9(a.) (2006, 2012).

29. 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. Wyo. Auto. Dealers Ass'n, 395 P.2d 741, 742 (Wyo. 1964).

30. Wyoming Statutes section 39-15-105(a)(vii)(A) exempts the following sales:

(vii) For the purpose of exempting sales of services provided primarily to businesses, the following are exempt:

(A) Interstate or intrastate transportation of drilling rigs, including charges for the movement or conveyance of the drilling rig to or away from the well site and the loading, unloading, assembly or disassembly of the drilling rig;

31. Wyoming Statutes section 39-15-105(a)(ii)(B) exempts the following:

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

. . . .

(ii) For the purpose of exempting sales of services and tangible personal property protected by federal law, the following are exempt:

(B) Sales of railroad rolling stock including locomotives purchased by interstate railroads, aircraft purchased by interstate air carriers which are holders of valid United States civil aeronautics board permits or authorities, and trucks, truck-tractors, trailers, semitrailers and passenger buses in excess of ten thousand (10,000) pounds gross vehicle weight which are purchased by common or contract interstate carriers or which are operating in interstate commerce under exemption clauses in federal law if they are to be used in interstate commerce.

32. Wyoming Statutes section 39-15-105(a)(viii)(P) exempts the following:

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

(P) The sales or lease of any aircraft used in a federal aviation administration commercial operation including the sale of all:

(I) Tangible personal property permanently affixed or attached as a component part of the aircraft, including, but not limited to, repair or replacement of materials or parts;

(II) Aircraft repair, remodeling and maintenance services performed on the aircraft, its engine or its component materials or parts.

33. Wyoming Statutes section 39-15-105(a)(viii)(Q) exempts the following:

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

(Q) Sales of tangible personal property or services performed for the repair, assembly, alteration or improvement of railroad rolling stock. This subparagraph is repealed effective July 1, 2015.

34. The Department's rules provide:

(b.) Payments made for sales/use tax liabilities shall be applied in the following order: fees, interest, tax, penalty.

(i.) 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, Wyo. Dep't of Revenue, ch. 2 § 4(b.) & (i.) (2006, 2012).

35. The Department's rules also provide in part:

Section 9. Non-Taxable Transactions.

(f.) Interstate Commerce. Trucks, truck-tractors, trailers, semitrailers passenger buses in excess of ten thousand (10,000) pounds gross vehicle weight purchased or leased by common or contract interstate carriers shall be exempt from the sales and use tax provided that the vehicles are used in interstate commerce. Purchasers and lessees of such vehicles shall hold valid U.S. Department of Transportation (USDOT) permit or authority as follows to qualify for exemption:

(i.) Common or contract for hire interstate carriers must document their USDOT number, permit and insurance requirements to qualify for exemption.

(ii.) Private carriers not subject to federal regulation shall be subject to the sales or use tax on the purchase or lease of such vehicles.

Rules, Wyo. Dep't of Revenue, ch. 2 § 9(f.) (2006, 2012).

36. Chapter 2, section 15 of the Department's rules addresses specific taxability issues.

(s.) Machine Shops and Welding Services. The gross charges made by machine shops and those engaged in welding upon tangible personal property shall be subject to the sales tax. Gross charges include such charges as labor, parts, and supplies. Purchase of parts, materials, or supplies which become an ingredient of the welding services such as welding rod, acetylene and oxygen, provided by machine shops and welding services when welding upon tangible personal property shall be considered wholesale purchases or sales as defined by W.S. 39-15-101(a)(xvi), and therefore exempt from the sales tax.

Rules, Wyo. Dep't of Revenue, ch. 2 § 15(s.) (2006, 2012).

37. The Wyoming Supreme Court has observed:

Only those questions which are necessary for the decision of the case must be considered, and no attempt should be made to further “lay down” a rule or precedent to the bench and bar of the state. Questions not directly involved in an appeal, or not necessary or relevant to, or material in, the final determination of the cause, will not be considered or decided by an appellate court.

State Bd. of Equalization v. Jackson Hole Ski Corp., 745 P.2d 58, 59-60 (Wyo. 1987).

CONCLUSIONS OF LAW: APPLICATION OF PRINCIPLES OF LAW

38. Petitioner timely appealed the final assessment of the Department which was based on the DOA audit findings for the period of January 1, 2010, through December 31, 2012.

39. In its notice of appeal and pre-hearing documents, Petitioner identified the issue before the Board as whether the equipment and labor employed to complete incomplete vehicles for use in interstate commerce are exempt from taxation under the applicable provisions of Wyoming Statutes section 39-15-105. Petitioner contends that Wyoming Statutes sections 39-15-105(a)(ii)(A) and 39-15-105(a)(vii)(A) exempted various component parts which Bar S added to tax exempt vehicles used in interstate commerce. [Pet’r Notice of Appeal, p. 2; Pet’r Prelim. Statement, pp. 1-2].

40. Petitioner paid the Department \$28,530.78 of the \$43,803.99 final assessment to settle portions of the audit which it conceded were owed. Petitioner claimed that it did not owe the remaining \$15,273.21 from the final assessment because it believed the property being assessed was tax exempt. Petitioner failed to provide sufficient evidence tying the remaining balance owed to any components or labor related to the two trucks it discussed at the hearing. *Supra* ¶¶ 7, 8, 13, 15-16.

41. Petitioner claimed that some of the line items contained in the Department’s spreadsheet, Exhibit 500, were directly related to the fabrication of trucks 68 and 88, and the \$15,273.21 remaining due from the assessment was attached to these items. However, Petitioner provided no evidence from which the Board could determine if Petitioner’s assertions were correct. [Tr. Vol. I, pp. 208-10].

42. Petitioner consistently argued it was unacceptable that the Department only kept track of the amount remaining from the final assessment and could not state which items remained unpaid. However, establishing that the contested items were related to the completion of the

two trucks was not the Department's responsibility. The Department believed the entire amount was owed and was under no obligation to guess which items were covered by the Petitioner's payment. The Petitioner bore the burden of establishing that the items included in the assessment, and not paid, were exempt. *Supra* ¶¶ 7-10, 25-26, 40.

43. Petitioner was given the opportunity to present additional evidence identifying the items it claimed were exempt and tying those items to the completion of the two trucks. Petitioner chose not to supplement the record and submitted the matter to the Board without this additional evidence. *Supra* ¶¶ 18-19. [Tr. Vol. I, pp. 210-11, Tr. Vol. II, p. 3].

44. This Board's rules assign the Petitioner "the burden of going forward and the ultimate burden of persuasion, which burden shall be met by a preponderance of the evidence. . . . For all cases involving a claim for exemption, the Petitioner shall clearly establish the facts supporting an exemption." Rules, Wyo. State Bd. of Equalization, ch. 2 § 20 (2006); *supra* ¶ 25. The burden of proof in this case squarely rested with the Petitioner and that burden was not met.

45. The Department's rules also address non-taxable transactions and specifically require that all non-taxable transactions must be shown as such on sales invoices. If the non-taxable items are not shown separately then the entire amount on the invoice is subject to the tax. *Supra* ¶¶ 28, 40. In this case, the only invoices related to various component parts, added to the two trucks Petitioner believed were tax exempt, were not included in the audit because the work was performed, and sales tax paid in Colorado. Petitioner did not provide any other evidence separating taxable items from non-taxable items, nor did Petitioner demonstrate any component parts added to the two trucks were included in the DOA findings. *Supra* ¶¶ 15-17, 20, 30.

46. Petitioner had the burden to provide invoices establishing components used to complete the two trucks were part of the audit findings. Because Petitioner's evidence was limited to two invoices and Petitioner failed to establish that the invoices, or the two trucks identified in the invoices, were included in the DOA audit findings, there exists no evidence in the record to support Petitioner's contention that the \$15,273.21 balance remaining from the assessment is related to either the two trucks or the components added to complete those trucks. In fact, it is unclear why Petitioner believed these two trucks were included in the audit at all because Petitioner failed to tie these two trucks and their completion in Colorado to anything in the audit. *Supra* ¶¶ 6-13, 17, 25-27.

47. Because Petitioner did not present sufficient evidence to prove by a preponderance of the evidence that the Department's assessment was incorrect, the Board will not address the legal issue raised by the parties. *Supra* ¶¶ 37, 42-43, 46.

48. Petitioner failed to meet its burden of proof; therefore, the Board affirms the Department's final audit assessment.

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ORDER

THEREFORE, IT IS ORDERED the Wyoming Department of Revenue's final administrative decision and audit assessment to Bar S Services, Inc., for the period of January 1, 2010 through December 31, 2012, is **affirmed**.

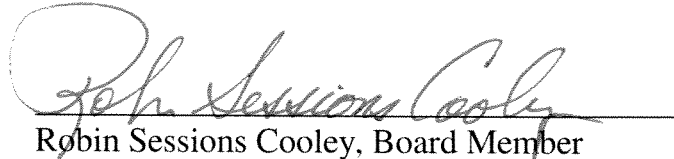
Pursuant to *Wyo. Stat. Ann. § 16-3-114* and *Rule 12, Wyoming Rules of Appellate Procedure*, any person aggrieved or adversely affected in fact by this decision may seek judicial review in the appropriate district court by filing a petition for review within 30 days of the date of this decision.

DATED this 31st day of March, 2015.

STATE BOARD OF EQUALIZATION

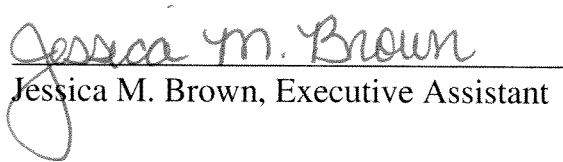


E. Jayne Mockler, Chairman



Robin Sessions Cooley, Board Member

ATTEST:



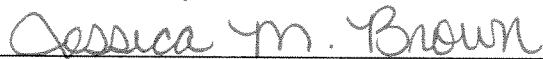
Jessica M. Brown, Executive Assistant

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of March, 2015, 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:

Ronald E. Triggs, Esq.
Law Offices of Ronald E. Triggs, PC
1912 Capitol Ave., #317
Cheyenne WY 82001

Leo Caselli, Esq.
Assistant Attorney General
Pioneer Building, 3rd Floor
2424 Pioneer Ave.
Cheyenne WY 82002



Jessica M. Brown
Executive Assistant
State Board of Equalization
P.O. Box 448
Cheyenne, WY 82003
Phone: (307) 777-6989
Fax: (307) 777-6363

cc: SBOE
Dan Noble, Director, Department of Revenue
Kim Lovett, Excise Division, Department of Revenue
CCH
ABA State and Local Tax Reporter
State Library
County Treasurer's Association
File