BEFORE THE STATE BOARD OF EQUALIZATION

FOR THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF	)	
ADMIRAL BEVERAGE CORPORATION	)	Docket No. **2014-107**
FROM A DECISION BY THE	)	
DEPARTMENT OF REVENUE	)	

MAJORITY DECISION AND ORDER

APPEARANCES

Matthew J. Micheli, Holland & Hart LLP, appeared on behalf of Petitioner, Admiral Beverage Corporation (Admiral or Petitioner).

Leo Caselli, Assistant Attorney General, and Karl D. Anderson, Senior Assistant Attorney General, appeared on behalf of Respondent, Wyoming Department of Revenue (Department or Respondent).

DIGEST

Admiral purchased an aircraft in December 2013, taking delivery of it in Columbia, South Carolina. The Department requested information from Admiral regarding the purchase, believing Admiral may owe Wyoming sales or use tax on the purchase. Admiral responded it first used the aircraft outside of Wyoming and, therefore, owed no use tax under Wyoming Statutes and Department Rules. After reviewing the information Admiral provided, the Department determined Admiral owed Wyoming use tax on the purchase price of the aircraft. Admiral appealed the Department's decision to the Wyoming State Board of Equalization (State Board).

The State Board, Chairman E. Jayne Mockler, Vice Chairman Martin L. Hardsocg, and Member Robin Sessions Cooley, heard the matter on July 9, 2015, and ordered the parties to file additional briefing. Chairman E. Jayne Mockler and Member Robin Sessions Cooley conclude the Department improperly assessed use tax on the aircraft purchase and reverse the Department's decision. Vice Chairman Martin L. Hardsocg dissents.

ISSUES

Admiral identified one issue on appeal: "[Whether] [t]he Department ignored its 'prior use' rule, Chapter 2, Section 4(i)(v), which was in force at the time Admiral purchased and first used the aircraft at issue in this appeal[?]" (Pet'r Admiral Beverage Corp.'s Updated Summ. of Contentions 1).

The Department identified two issues: "1) Did a taxable event occur when the aircraft was first used and/or stored within Wyoming?" and "2) Did the Department correctly impose use tax under its use tax statutes and/or regulations?" (Wyo. Dep't of Revenue's Issues of Fact & Law & Ex. Index 1).

The State Board restates the issue as follows: Did the Department correctly interpret and apply Wyoming Statutes and Department Use Tax Rules when it assessed use tax on Admiral's aircraft purchase?

JURISDICTION

The State Board shall "review final decisions of the department upon application of any interested person adversely affected," Wyoming Statutes section 39-11-102.1(c) (2013), 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)(viii) (2013). An aggrieved taxpayer must file an appeal with the State Board within thirty (30) days of the Department's final decision. Rules, Wyo. State Bd. of Equalization, ch. 2 § 5(e) (2006).

The Department sent a final determination letter to Admiral dated December 2, 2014, assessing use tax on Admiral's aircraft purchase. (Jt. Ex. 700). Admiral timely appealed the Department's determination on December 31, 2014. (Pet'r's Notice of Appeal). The State Board has jurisdiction to decide this matter.

FINDINGS OF FACT

The parties stipulated, and the State Board accordingly accepts, the following findings of fact:

1. The aircraft at issue in this dispute is a 1993 Canadair LTD CL-2 600 2B16 aircraft (the Aircraft).

2. Admiral paid approximately $4,000,000 for the Aircraft.

3. Admiral purchased the Aircraft in Columbia, South Carolina on December 27, 2013.

4. Admiral paid sales tax of $294 in South Carolina for the purchase of the Aircraft.

5. Upon purchase of the Aircraft, Admiral registered its ownership of the Aircraft with the Federal Aviation Administration, as required by law. The address used on the FAA registration was a Worland Wyoming address.

6. From December 27, 2013 to January 22, 2014, the Aircraft was in South Carolina undergoing repairs.

7. On January 22, 2014, Mr. Kelly Clay, Admiral's President, flew to South Carolina to retrieve the Aircraft and begin his business trip.

8. On January 22, 2014, Mr. Clay and the Admiral pilot began to fly the Aircraft from Columbia, South Carolina to a prearranged business meeting in Addison, Texas.

9. On that flight, the Aircraft filled with smoke and Mr. Clay and the pilot were forced to return to Columbia, South Carolina.

10. In order to make it to his business meetings, Mr. Clay caught a commercial flight from South Carolina to Texas.

11. While in Texas, on January 24, 2014, Mr. Clay met with senior management from Dr. Pepper Snapple Group. Mr. Clay also met separately with management from Reddy Ice Inc. Both meetings were to discuss ongoing business relationships and opportunities.

12. Meanwhile, on January 22 and 23, 2014, further repair work was performed on the Aircraft in South Carolina. The Aircraft took a test flight to Charleston, South Carolina.

13. On January 24, 2014, the Aircraft was flown from South Carolina to Addison, Texas to retrieve Mr. Clay from his business trip in Texas. The Aircraft stayed overnight in Texas.

14. After Mr. Clay's meetings in Texas were completed, on January 25, 2014, Mr. Clay boarded the Aircraft in Addison and was flown to Great Falls, Montana for additional business meetings.

15. On the way to Great Falls, the Aircraft stopped in Nebraska to refuel.

16. The Aircraft reached Great Falls, Montana on January 25, 2014.

17. Mr. Clay spent the day of January 25, 2014 in Great Falls, Montana conducting business meetings. While in Montana, Mr. Clay met with a local grocery market, a brewery and local restaurants to discuss business opportunities and ongoing relationships.

18. The Aircraft and Mr. Clay spent the night in Great Falls.

19. Upon completion of the business meetings in Montana, Mr. Clay boarded the Aircraft and flew to Worland, Wyoming on January 26, 2014.

(Parties' Stipulated Facts 1-2).

20. The Department, after reviewing and considering the documents and correspondence submitted by Admiral regarding the Aircraft purchase, storage, and use, issued a final determination letter on December 2, 2014, informing Admiral it owed use tax on the Aircraft purchase. (Tr. 46-63, 79-81; Jt. Ex. 700 at 001; Jt. Exs. 701-711).

21. John Bair, Admiral's chief pilot, testified at the State Board hearing regarding Admiral's business, its transportation needs, and his responsibilities as the chief pilot for all executive transportation. (Tr. 23-44).

22. Mr. Bair confirmed the stipulated facts. He further explained that Worland is the Aircraft's home base and Wyoming is its domicile state. (Tr. 28, 35). The Aircraft serves Admiral's business travel needs primarily throughout the several states in which it operates, as well as other parts of the country, flying approximately 300 days per year. (Tr. 24, 30, 42-43; *supra* ¶¶ 1-19).

23. Kim Lovett, the Department's Excise Tax Division Administrator, testified on behalf of the Department. She explained the Department's position that Admiral first stored the Aircraft in Wyoming and was, therefore, subject to use tax pursuant to Wyoming Statutes section 39-16-103(a)(i) and the Department's Rule, chapter 2, section 4(i)(i), (ii) & (v) (2012). (Tr. 45-104).

24. Ms. Lovett testified the Department's review began when it received a Consumer Use Federal Aviation Administration (FAA) change of registration form for the Aircraft. The form indicated the Aircraft, with an estimated price of $1,500,000, was registered to Admiral at a Wyoming address. (Tr. 47-49; Jt. Ex. 701 at 003).

25. The Department asked Admiral to confirm the information contained in the FAA report, and to provide the Aircraft flight log, purchase agreement, record of sales/use tax paid, and hangar receipts. The Department also requested that Admiral pay any sales/use taxes due to avoid the imposition of penalty and interest. (Tr. 47-49, 53-54; Jt. Ex. 701 at 003).

26. On June 13, 2014, and July 31, 2014, Admiral provided the requested information, but responded that under the Department's "prior use rule," Admiral did not owe additional Wyoming excise taxes on the Aircraft. (Tr. 49-52; Jt. Exs. 703 at 008-010, 705 at 036-037); *see* Rules, Wyo. Dep't of Revenue, ch. 2, § 4(i)(v) (2012), *infra* ¶ 44.

27. After a series of emails and correspondence between the Department and Admiral's counsel focusing on the Aircraft's intended hangar location (Jt. Ex. 704), the Department sent Admiral a second information request on November 28, 2014. The Department again requested payment of taxes on the Aircraft's purchase price, which Admiral verified at $4,000,000. (Tr. 56-63; Jt. Ex. 702).

28. The Department issued a final administrative decision on December 2, 2014, concluding Admiral owed use tax on the Aircraft purchase pursuant to Wyoming Statutes sections 39-16-101(a)(ix) and 39-16-103(a)(i) (2013). (Jt. Ex. 700).

29. Ms. Lovett explained why the Department determined Admiral owed use tax on the Aircraft's purchase. Ms. Lovett focused on the section of the Department's Use Tax Rule which provided, "[t]he use 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(i)(ii) (2012), *infra* ¶ 44. She testified that the conjunction "or" between each action permitted the Department to identify either the first use, or the first consumption, or the first storage of the Aircraft as the use tax trigger. Ms. Lovett further testified the Department interpreted its rule to indicate that meeting any one of these factors could trigger the tax. (Tr. 65-71, 75, 82).

30. Ms. Lovett further explained the Department also focused on Admiral's intent to permanently hangar the Aircraft in Worland, Wyoming, triggering the statute's storage provision. The Department also recognized that, although it paid a small sales tax in South Carolina, Admiral had not paid use tax in any other state. (Tr. 83).

31. Ms. Lovett testified that the Department did not consider the Aircraft's prior use to fly Admiral's President to business meetings outside of Wyoming. She explained it did not consider the Aircraft's prior use because the Department applied the "prior use" rule only to nonresidents. (Tr. 88-90, 93-94). Consequently, the Department found that Admiral owed use tax on the purchase price of the Aircraft. (Jt. Ex. 700).

CONCLUSIONS OF LAW

A. State Board's Role and the Respective Burdens of Proof

32. Upon application of any person adversely affected, the State Board reviews final Department actions concerning sales and use taxation and holds "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)(viii) (2013).

33. State Board 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 the 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, ch. 2 § 20 (2006). The phrase "a preponderance of the evidence" means " '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 & Comp. 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)).

34. The State Board's role is 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 Prod. Co. v. Wyo. State Bd. of Equalization*, 12 P.3d 668, 674 (Wyo. 2000). In its adjudicatory role, the State 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) (2013).

35. Further, in interpreting statutes, the State Board defers to the statutory interpretation of an agency charged with the administration of those statutes, unless that

interpretation is clearly erroneous. *Buehner Block Co., Inc. v. Wyo. Dep't of Revenue*, 2006 WY 90, ¶ 11, 139 P.3d 1150, 1153 (Wyo. 2006).

36. The rules of statutory interpretation were recently set out by the Wyoming Supreme Court:

> [O]ur 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.
>
> Whether a statute is ambiguous is a question of law. A statute is unambiguous if reasonable persons are able to agree as to its meaning with consistency and predictability, while a statute is ambiguous if it is vague or uncertain and subject to varying interpretations.

Travelocity.com LP v. Wyo. Dep't of Revenue, 2014 WY 43, ¶ 20, 329 P.3d 131, 139 (Wyo. 2014) (quoting *Redco Const. v. Profile Props., LLC*, 2012 WY 24, ¶ 26, 271 P.3d 408, 415-16 (Wyo. 2012) (citations and internal quotation marks omitted)).

37. Rules of statutory interpretation apply to the interpretation of administrative rules and regulations. *Glover v. State*, 860 P.2d 1169, 1173 (Wyo. 1993). If the language of the rule communicates a plain meaning, that meaning will be applied. *Zmijewski v. Wright*, 809 P.2d 280, 282 (Wyo. 1991).

B. Analysis of Wyoming's Use Tax Statutes and the Department's "First Use" and "Prior Use" Rules

38. The question before the State Board is whether the Department correctly applied Wyoming's Use Tax Statutes, which the Department administers through its Use Tax Rules, when it assessed use tax on Admiral's purchase of the Aircraft.

39. Wyoming's use tax applies to "[p]ersons storing, using or consuming tangible personal property or specified digital products[.]" Wyo. Stat. Ann. § 39-16-103(a)(i) or (c)(vi) (2013).[1]

40. "Use" is defined as "the exercise of any right or power over tangible personal property incident to ownership or by any transaction where possession is given by lease or contract[.]" Wyo. Stat. Ann. § 39-16-101(a)(ix) (2013).

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[1] These statutes were amended in 2014 and now provide:

> (a) Taxable event. The following shall apply:
>
> (i) Persons making first use of taxable services or 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[.]
>
> . . .
>
> (c) Taxpayer. The following shall apply:
>
> (vi) Every person making first use of taxable services or storing, using or consuming tangible personal property or specified digital products purchased from a vendor who does not maintain a place of business in this state is liable for the tax imposed by this article[.]

Wyo. Stat. Ann. § 39-16-103(a)(i) & (c)(vi) (2015); 2014 Wyo. Sess. Laws 257-58.

41. The Wyoming Supreme Court explained Wyoming's Use Tax Statutes as follows:

> The Wyoming use tax statutes . . . impose an excise tax upon "persons storing, using or consuming tangible personal property" in Wyoming. The legislature intended that the use tax be complementary to the Wyoming sales tax. The use tax is applied to property purchased outside the state and brought into the state for storage, use or consumption, so as to put that property on an equal footing with property purchased within the state that is subject to the Wyoming sales tax.

Exxon Corp. v. Wyo. State Bd. of Equalization, 783 P.2d 685, 688 (Wyo. 1989) (citations omitted); *see Morrison-Knudson Co. v. State Bd. of Equalization*, 135 P.2d 927, 932 (Wyo. 1943).

42. However, the Wyoming Supreme Court interpreted and implicitly recognized the Department's own "self-imposed limitation" on its general statutory authority to impose use tax only if "first use" of the property occurs in Wyoming:

> Wyoming has placed a self-imposed limitation on the broad authority to tax property bought outside but used inside this state. Through [the Department's Rules], the State is permitted to apply the use tax to particular tangible personal property bought out of state only if the use of the property in Wyoming constitutes its "first use." "Use" is defined in Wyoming as "the exercise of any right or power over tangible personal property incident to ownership or by any transaction where possession is given by lease or contract." W.S. 39-6-502(a)(vii) [currently Wyo. Stat. Ann. § 39-16-101(a)(ix) (2013)]. **By implication, and as a logical extension, if the first use of the property occurs in another state, Wyoming's use tax is inapplicable.**

Exxon, 783 P.2d at 688 (footnote omitted) (emphasis added). *See also Barcon, Inc. v. Wyo. State Bd. of Equalization*, 845 P.2d 373 (Wyo. 1992); *Burlington N.R.R. Co. v. Wyo. State Bd. of Equalization*, 820 P.2d 993 (Wyo. 1991).[2]

[2] The Department's rule in *Exxon* used the phrase "first use" to identify use out-of-state. *Infra* ¶ 43. The Department's rule under consideration in this case refers to "prior use" out-of-state. *Infra* ¶ 44. However, when the Department rules discuss either "first use" or "prior use" out-of-state, the rules are referring to use before the taxpayer brings the purchased item into Wyoming. *See infra* ¶¶ 43-44.

43. The Department's "first use" rules in effect when the Court decided *Exxon*, *Burlington*, and *Barcon* provided:

> Chap. IV, § 3 provides:
>
> > "The purchase or lease of all tangible personal property **outside this state for first use, storage or consumption within this state,** is subject to use tax, providing the same transaction would be subject to sales tax if the transaction had occurred wholly within the State of Wyoming."
>
> Chap. IV, § 8 provides:
>
> > **"When tangible personal property is purchased in another state and is brought into Wyoming for use, the burden is upon the purchaser to show that there was a bona fide first use of the property outside the State of Wyoming."**

Exxon, 783 P.2d at 688 n.3 (emphasis in original deleted) (emphasis added).

44. The Department's "prior use" rule in effect when Admiral purchased the Aircraft included a general provision outlining the purpose of the use tax almost identical to that identified in the rule in effect when *Exxon*, *Burlington*, and *Barcon* were decided, *supra* ¶ 43, and a similar provision indicating that a prior out-of-state use for the item's "manufactured" or "assembled" purpose removed the purchase from the reach of the use tax:

> (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.**
> >
> > . . .
> >
> > (v) **Prior Use of Property Purchased Outside Wyoming. The use tax shall not apply to tangible personal property, which is purchased**

and used in the manner for which it was manufactured or assembled in another state, prior to its use in Wyoming.

Rules, Wyo. Dep't of Revenue, ch. 2 § 4(i) (2012) (emphasis added).

45. The Department considered the Use Tax Rules, *supra* ¶ 44, and found Admiral's first storage of the Aircraft in Worland, Wyoming, triggered a use tax obligation. (Tr. 67-76, 87; Jt. Ex. 712 at 0098). The Department argues:

> Section 4(i)(ii) refers to the timing of the use tax imposition[.]. . . The term "when" is primarily a "temporal limitation." The rule's use of that term establishes that liability for use tax occurs at which time property is first used, *or* first stored, *or* first consumed in Wyoming. . . . First use, first storage, or first consumption are therefore independent grounds for use tax liability in Wyoming, but any of these events must occur *before* the imposition of use tax. *See Barcon, Inc.*, 845 P.2d at 382. ("If the transaction occurs outside Wyoming, the use tax is imposed ... when the goods are stored, used or consumed in Wyoming.").

(Resp. Br. of the Dep't of Revenue 8 (emphasis in original) (internal footnote omitted)).

46. The Department further claimed that use tax is owed under subsection (i)(i) of its rule because Admiral intended to permanently store the Aircraft in Wyoming and because the "same transaction would be subject to the sales tax if the transaction had occurred wholly within Wyoming." Rules, Wyo. Dep't of Revenue, ch. 2 § 4(i)(i) (2012), *supra* ¶ 44.

47. The Department argued Admiral's "prior use" of the Aircraft for business meetings outside of Wyoming did not preclude "storage" as an alternative ground for taxation. (Resp. Br. of the Dep't of Revenue 3, 5-11). It claimed: "The general limitations surrounding 'prior use' under Section 4(i)(v) do not restrict taxation for first storage or first consumption in Wyoming, because those taxable events could occur *after* 'prior use' in other states." (Resp. Br. of the Dep't of Revenue 10, 16 (emphasis in original)).

48. Ms. Lovett explained the Department's interpretation of subsection (v) at the hearing. She testified that the Department historically applied the "prior use" provision to "those cases where individuals who were nonresidents of Wyoming purchased property, used it in that nonresident state, then possibly moving to Wyoming, like bringing their furniture into Wyoming, and that would be a particular use that we would not tax, that it had been used and purchased in the manner for which it had been manufactured." (Tr. 90, 99-101); *supra* ¶ 31.

49. Admiral responded that the Department could consider Admiral's storage of the plane in Worland, Wyoming, only after it first considered Admiral's prior use of the Aircraft outside of Wyoming. Admiral claimed the Department's position was contrary to subsection (v) of its use tax rules. (Pet'r Admiral Beverage Corp.'s Opening Br. 8-10); Rules, Wyo. Dep't of Revenue, ch. 2 § 4(i)(v) (2012), *supra* ¶ 44.

50. The Wyoming Supreme Court examined, in detail, the application of the Department's earlier use tax rule in two Wyoming Supreme Court decisions. *Exxon*, 783 P.2d 685; *Burlington*, 820 P.2d 993. In *Exxon*, pipe was purchased in Japan and shipped to Colorado where a coating was applied. The pipe was then shipped to Wyoming for use in constructing a CO_2 pipeline. Exxon argued the coating of the pipe in Colorado constituted the first use, and, therefore, no use tax was due in Wyoming The Supreme Court disagreed, finding the State Board correctly concluded that "**it is a use of the property in the manner for which it was designed, constructed or intended that constitutes a 'first use' as that phrase was intended[.]**" *Exxon*, 783 P.2d at 688 (emphasis added). Consequently, the incorporation of the pipe into the Wyoming pipeline was its first use under Wyoming's use tax statutes, and thus, the pipe was subject to use tax in Wyoming.

51. The Supreme Court revisited the issue in *Burlington*. In that case, railroad car wheel assemblies, identified in Wyoming as needing repair, were removed in Wyoming and shipped to Nebraska for repair. The repaired wheel assemblies were then returned to Wyoming and reinstalled on railroad cars. The Department sought to impose a use tax on the new parts stored and used in Nebraska to make the repairs. *Burlington*, 820 P.2d at 994. The Wyoming Supreme Court held:

> We are convinced, . . . , that the "first use" of the new repair parts took place in Nebraska when they were installed as component parts in Burlington Northern's wheel assemblies. The mere placement in Guernsey of repaired wheel assemblies on Burlington Northern's cars used in interstate commerce is not a "first use[.]"

Id. at 996. *See also Barcon, Inc.*, 845 P.2d at 382 ("For purposes of the use tax, a first use by the new purchaser occurring in Wyoming creates the taxable event.").

52. Admiral notes that the Wyoming Supreme Court recognized "[i]f the first use of the property occurs in another state, Wyoming's use tax is inapplicable." *Burlington*, 820 P.2d at 995 (quoting *Exxon*, 783 P.2d at 688); (Tr. at 111; Pet'r Admiral Beverage Corp.'s Opening Br. 7). Admiral suggests the current rule is "simply an adoption of the *Burlington* decision. Property which is 'used in a manner for which is [sic] was manufactured' in a different state 'prior to its use in Wyoming' is not subject to the Wyoming use tax." (Pet'r Admiral Beverage Corp.'s Opening Br. 7).

53. Under *Exxon* and *Burlington*, Admiral's first use of the Aircraft, or the Aircraft's "prior use[] in the manner for which [the Aircraft] was manufactured or assembled in another state" was to fly Admiral's President to previously scheduled client and customer business meetings outside Wyoming. Rules, Wyo. Dep't of Revenue, ch. 2 § 4(i)(v) (2012); *supra* ¶¶ 8, 13-19, 44.

54. While the Department concedes the first use of the Aircraft occurred outside Wyoming, it found the Aircraft was "first stored" in Wyoming and that use tax was owed. Having made that determination, the Department further concluded that chapter 2, section 4(i)(v) of its rules did not apply to this purchase. *See supra* ¶¶ 28-31. However, the phrase "first stored, or first used or first consumed in Wyoming" under subsection 4(i)(ii) does not indicate that previous uses in another state under subsection 4(i)(v) are irrelevant, nor does the plain language of subsection 4(i)(v) indicate that it only applies to nonresidents.

55. The Department interprets subsection (v) to apply only to nonresidents, who after using an item out of state, then transport the item to Wyoming for use. *Supra* ¶¶ 31, 48. The plain language of the Department's Rule, however, does not indicate subsection (v) only applies to nonresidents. Nor is the Department's interpretation consistent with the definition of a "sale" in the Use Tax Act of 1937. Wyo. Stat. Ann. § 39-16-102(a) (2013). The Act defines a "sale" as a "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) (2013) (emphasis added). Because the example of the nonresident purchase provided by the Department indicates the initial purchase was for storage, use, or consumption outside Wyoming, the use tax statute is not applicable. *See e.g.*, W.E. Shipley, Annotation, *Use tax on property purchased by nonresident in another state*, 41 A.L.R.2d 535 (1955 & Supp. 2016), Westlaw. ("The question on whether property purchased outside the taxing state by one not a resident of that state can be subjected to use tax turns principally upon whether the facts in the particular case support a finding that the property was 'used' in the state, or 'purchased for use' therein, within the terms of the applicable statute."); 2 Jerome R. Hellerstein, Walter Hellerstein, & John A. Swain, *State Taxation*, ¶ 16.03 *Limitation of Use Tax to Property Purchased for Use Within The State* (3rd ed. 2000 & Supp. 2014), Westlaw.

56. Consequently, the majority of the State Board finds the Department's interpretation is not in line with *Exxon*, *Burlington*, and *Barcon*. In all three cases, the Wyoming Supreme Court implicitly accepted as appropriate under the Department's statutory authority the Department's self-imposed limitation on its ability to tax items purchased out of state, and first used out of state.[3]

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[3] In fact, roughly half of all states have some variation of a "first use" or "prior use" statute or rule providing that property purchased and first used in other states but subsequently brought into the state for storage, use, or consumption, is not taxed. 2 Jerome R. Hellerstein, Walter Hellerstein, & John A. Swain, State Taxation, ¶ 16.03 *Limitation of Use Tax to Property Purchased for Use Within The State* (3rd ed. 2000 & Supp. 2014), Westlaw. *Supra* ¶¶ 42, 55.

57. In the earlier Wyoming cases, the Department's Rule required the purchaser to establish a "bona fide" first use of the property out of state. The current rule refers to a "prior use" out of state and requires that the item be "purchased and used in the manner for which it was manufactured or assembled in another state, prior to its use in Wyoming." *Supra* ¶ 44. The State Board finds that these rules use substantially similar language, and were promulgated for the same purpose, which was to establish that the Department would not tax products used outside of Wyoming for their intended purpose or for a bona fide first use before being brought into the state. Even though the language of the rule identified in *Exxon*, *Burlington,* and *Barcon* was slightly different, the State Board finds the rationale from these cases equally applies to the rule in effect when Admiral purchased the Aircraft.

58. Examined *in pari materia*, the first subsection in Rule 4(i) provides generally that upon purchase of personal property or services outside of Wyoming, "for **use, storage, or consumption**" within Wyoming, the purchase is subject to use tax if the transaction would have otherwise been subject to sales tax, had it occurred in Wyoming. Rules, Wyo. Dep't of Revenue, ch. 2 § 4(i)(i) (2012) (emphasis added), *supra* ¶ 44. This initial subsection establishes the basic use tax concept. The legislative intent, as confirmed by the Wyoming Supreme Court, is to ensure that purchasers may not avoid Wyoming's excise taxes by purchasing items in jurisdictions imposing less or no sales tax, when the acquired property is to be used, stored, or consumed in Wyoming. *Supra* ¶ 41.

59. The second subsection, 4(i)(ii), more particularly defines "when" a use tax arises—upon first use, or first storage, or first consumption in Wyoming. Rules, Wyo. Dep't of Revenue, ch. 2 § 4(i)(ii) (2012), *supra* ¶ 44. The Department construes, and the State Board agrees, that these triggering activities are alternative, independent events that *may* create a tax obligation in Wyoming.

60. Thereafter, subsection 4(i)(v) plainly directs that property "used" outside of Wyoming in the manner for which it was manufactured or assembled prior to its first use in Wyoming is not subject to Wyoming's use tax. Rules, Wyo. Dep't of Revenue, ch. 2 § 4(i)(v) (2012), *supra* ¶ 44. The adjective "prior" means "earlier in time or order." Merriam Webster's Collegiate Dictionary 988 (11th ed. 2014). The only reasonable interpretation is that "prior use" out of state under subsection 4(i)(v) is intended to be prior to the item's "first use" in Wyoming under subsection 4(i)(ii). When reconciled with subsection 4(i)(ii), use tax will not apply to out-of-state purchases put to "prior use" in jurisdictions outside of Wyoming. In other words, the intent is to tax first use, storage, or consumption if it occurs in Wyoming relative to other jurisdictions. Such an interpretation gives effect to all portions of the Department's Rule.

61. Although it addressed a different issue, another case before the State Board involved the purchase of an aircraft outside of the state. *In re Ken Koster*, Docket No. 2004-132, ¶ 35, 2005 WL 1911889 (Wyo. State Bd. of Equalization, Aug. 5, 2005). The State Board observed that the aircraft's first use for tax purposes was not in Wyoming: "Mr. Koster's

testimony also established a first use for tax purposes in Missouri as he flew the Cessna in Missouri in conjunction with its purchase." *Id.* at *5. The State Board tacitly recognized in *Koster* that the "taxable event" was the airplane's first use in Missouri. " 'For purposes of the use tax, a first use by the new purchaser occurring in Wyoming creates the taxable event.' *Barcon*, 845 P.2d at 382. Thus, the pivotal question is where the first use occurs. *Burlington Northern R. Co. v. Wyoming State Bd. of Equalization*, 820 P.2d 993, 995 (Wyo. 1991)." *In re Calhoun*, Docket No. 95-124, 1999 WL 495147 *4 (Wyo. State Bd. of Equalization, July 7, 1999) (footnote omitted). In the present case, because the first event that could trigger the imposition of Wyoming's use tax on the Aircraft purchase did not occur in Wyoming, Admiral owes no use tax on the purchase.

62. The Department also argues that "[t]aken to its logical conclusion, Admiral's argument assumes that any airplanes, boats, or other forms of transportation could escape taxation when they are transported across multiple states on their way home." (Resp. Br. of the Dep't of Revenue 16).[4] The State Board must initially point out that the same argument is true of the previous "first use" rule, especially given the Court's interpretation of the previous rule in *Exxon*, that it is "the manner for which [the property] was designed, constructed or intended that constitutes a 'first use' as that phrase was intended[.]" *Supra* ¶ 50, *Exxon*, 783 P.2d at 688. But also, the State Board has heard a number of "first use" cases involving various types of vehicles, and this claim was never made in any of them. *See In re Frito-Lay, Inc.*, Docket No. 92-105, 1992 WL 277006 (Wyo. State Bd. of Equalization, Oct. 2, 1992) (business vehicle); *In re Debrot*, Docket No. 90-152, 1991 WL 273754 (Wyo. State. Bd. of Equalization, Dec. 13, 1991) (motor home); *In re Calhoun*, Docket No. 95-124, 1999 WL 495147 (Wyo. State. Bd. of Equalization, July 7, 1999) (truck). Considering the rules of statutory construction, which apply with equal force to agency rules, the State Board must "give effect to the most likely, most reasonable, interpretation" of the rule. *Rodriguez v. Casey*, 2002 WY 111, ¶ 20, 50 P.3d 323, 329 (Wyo. 2002). In these cases, the State Board, the Department, and the litigants reasonably considered the vehicles' use for its intended purpose, or in "the manner for which [the property] was designed, constructed or intended[,]" *supra* ¶ 50, *Exxon*, 783 P.2d at 688, such as for various business purposes, and even for everyday personal use, and not for the purpose of return transportation to Wyoming.

63. Indeed, the Nevada Supreme Court discussed this same argument as it related to four aircraft purchased by Harrah's Operating Company for use by its customers and employees. *Harrah's Operating Co., Inc. v. State, Dep't of Taxation*, 321 P.3d 850 (Nev. 2014). Although dealing with a much more defined statutory scheme concerning "first use" in interstate commerce outside Nevada, the Nevada Supreme Court held that use tax did not apply to two aircraft purchased by Harrah's outside Nevada and first flown to another state for business purposes prior to being flown to and hangared in Nevada. The court found Harrah's first use of the aircraft in interstate commerce occurred wholly outside

[4] The dissent makes a similar argument. *Infra* Dissent. Op., ¶¶ 9-10, 22-25.

Nevada, because one aircraft was flown from Oregon to Arkansas and the other from Oregon to California. *Id.* at 852-53. The Court concluded, however, that the other two aircraft purchased in Arkansas were not "first used" in interstate commerce outside Nevada because their first flights terminated in Las Vegas, Nevada. Accordingly, the presumption of nontaxability as it related to interstate commerce did not apply to those two planes. *Id.*

64. Again, although *Harrah's* was decided under a statute defining interstate commerce[5] that more clearly identified when aircraft are taxable, it provides a general framework to address the issue raised by the Department regarding the potential reach of its "prior use" rule. *See supra* ¶ 62. Admiral presented the State Board with sufficient evidence of Admiral's prior out-of-state use of the Aircraft for the Aircraft's manufactured purpose and in fact, for the very purpose that Admiral purchased it. *Supra* ¶¶ 3-19. Admiral purchased the Aircraft for business purposes to fly its employees to and from surrounding states, for interstate commerce business purposes. Its prior use of the Aircraft to fly between South Carolina, Texas, and Montana, and only then to Worland, Wyoming, illustrates a prior use application that dispels the Department's concern discussed in paragraph 62. *See also* Dissent. Op. *infra* ¶¶ 9-10, 22-25.

65. The Department's interpretation of its "prior use" rule disregards subsection (i)(v), giving the Department complete discretion to ignore use of an item purchased out-of-state and first used out-of-state. The State Board rejects the Department's interpretation of subsection 4(i)(v) that the "prior use" rule provision applies only to non-resident purchasers, who first use purchased property outside the state. The Department's construction negates the otherwise clear language of subsection 4(i)(v), contrary to the rules of statutory interpretation. "[W]e must not give a statute a meaning that will nullify its operation if it is susceptible of another interpretation." *Travelocity.com LP* at ¶ 20, 329 P.3d at 139. Moreover, " '[i]n the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen.' " *Chevron U.S.A., Inc. v. State*, 918 P.2d 980, 984-85 (Wyo. 1996) (quoting *Kelsey v. Taft*, 263 P.2d 135, 138 (Wyo. 1953)).

66. The "prior use" rule at subsection 4(i)(v) provides a separate temporal qualification the Department must consider in its decision, *supra* ¶ 44, requiring that use in another state "prior" to the "first use, storage, or consumption" in Wyoming, prevents imposition of a

[5] Interestingly, Wyoming Statutes section 39-16-101(a)(xvii)(K)(2013) defines "interstate" in telecommunications as "telecommunications service that originates in one (1) state of the United States or a United States territory or possession and terminates in a different state of the United States or a United States territory or possession[.]" The Nevada Revised Statutes defined it as " 'Interstate...' means the transportation of passengers or property between[] [a] point in one state and a point in[] [a]nother state[.]" N.R.S. 372.258(2.)(a)(1)(I) (2014).

use tax in Wyoming. Such an interpretation gives effect to all provisions of the Department's rule.

C. Response to Dissent's Analysis

67. While the dissent agrees with the majority that the Department erred in interpreting and applying its "prior use" rule, it argues instead the State Board should refuse to apply the "prior use" rule because "it conflicts with statutory law, undermines the Wyoming Legislature's fundamental tax objective, and promotes arbitrary tax exceptions." *Infra* Dissent. Op. ¶ 2.

68. In support of this argument, the dissent refers to the Wyoming Supreme Court's case law interpreting and approving the Department's previous rule, *supra* ¶ 43, arguing the rule allowed the Department to "vet" whether the "first use" outside of the state was a legitimate or "bona fide" first use. *Infra* Dissent. Op. ¶¶ 3-11. The dissent generally claims that, under the amended rule in effect when Admiral purchased the Aircraft, the Department had no similar ability to consider whether a taxpayer's "prior use" outside of Wyoming was for tax avoidance purposes. For this reason, the dissent claims the State Board must disregard the "prior use" rule entirely. *Infra* Dissent. Op. ¶ 20.

69. However, the amended rule, *supra* ¶ 44, contained language substantially similar to that used by the Court, and this Board, to explain the *Exxon* rationale. In *Exxon*, the Court found:

> The Board properly concluded that it is a use of the property **in the manner for which it was designed, constructed or intended** that constitutes a "first use" as that phrase was intended by the Wyoming Tax Commission in Chap. IV, § 3. When making the determination as to whether the first use of the property occurred in Wyoming or another state, **the Tax Commission looks to the nature of the property, its intended use, and whether the property was actually used in that manner in the other state.** We hold that the Board properly found that the first use in this case was the incorporation of the pipe into the Shute Creek CO_2 pipeline [in Wyoming].

Exxon, 783 P.2d at 688-89 (emphasis added). Similarly, the amended rule required the Department to consider "property, which is **purchased and used in the manner for which it was manufactured . . . prior to its use in Wyoming.**" *Supra* ¶ 44.

70. The dissent notes that the rule in effect when the Wyoming Supreme Court considered the "first use" rule in *Exxon*, *Burlington*, and *Barcon*, required the "purchaser to show that there was a bona fide first use of the property outside the State of Wyoming." *Infra* Dissent. Op. ¶¶ 11, 12. However, amending the rule to use language substantially similar to that used by the Court and this Board in cases interpreting this very rule, *supra*

¶ 68, simply brings the rule more in line with the Court's interpretation – not beyond it as the dissent claims. Considering the amended "prior use" rule and the previous "first use" rule, there simply is no "deviation from past practice[.]" *Infra* Dissent. Op. ¶ 20.

71. The dissent argues the "bona fide" language in the previous rule conferred on the Department the discretion to determine whether the "first use" out-of-state was to evade taxes. *Infra* Dissent. Op. ¶ 21. However, the Court's case law and the State Board's opinions reveal the "bona fide" language in the previous rule does not relate to taxpayer intent to evade taxes, but concerns "the **nature** of the property, its intended **use**, and whether the property was **actually used** in that manner in the other state." *Exxon*, 783 P.2d at 688 (emphasis added), *supra* ¶ 68. In other words, the Department was required to consider whether the "*actual*" and "*intended*" use of the property was "bona fide" in accordance with the "*nature*" of the property, not whether the taxpayer's *intent* was "bona fide" or made to evade taxes. *See e.g. supra* ¶ 42; *In re Frost Constr. Co.*, Docket No. 90-122, 1992 WL 71474, *3 (Wyo. State Bd. of Equalization, March 31, 1992) ("The actual bona fide first use of the equipment occurred in Wyoming upon delivery to and receipt by Petitioner of the equipment, together with its assembly and use to produce a test amount of product pursuant to Petitioner's specifications at its job site near Cheyenne, Wyoming."[6]); *In re Debrot*, Docket No. 90-152, 1991 WL 273754 (Wyo. State Bd. of Equalization, Dec. 13, 1991) (taxpayer showed a bona fide first use of the property outside the State of Wyoming by the continued use of the motor home through California and Oregon, prior to entering Wyoming).

72. The dissent further argues in favor of examining the circumstances surrounding the aircraft's purchase, its post-purchase use, and its ultimate storage location, like that approved of in an intermediate appellate court in *Guardian Industries Corp. v. Dep't of Treasury*, 621 N.W.2d 450 (Mich. App. 2000). *Infra* Dissent. Op. ¶¶ 26-29. However, the State Board cannot disregard prior precedent from the Wyoming Supreme Court implicitly recognizing and approving the Department's self-imposed limitation in its "first use" and "prior use" rules. Even though the Department amended the rule somewhat after this judicial recognition and approval, the amendment even more closely follows the Court's rationale in its decision, and the concept of "first" or "prior" use outside of the state as a limitation on the Department's authority to impose use tax remains. *Supra* ¶ 56.

73. Nor does the Wyoming Legislature's 2014 amendment to the use tax imposition statute change this analysis. *Supra* ¶ 39 n.2, 2014 Wyo. Sess. Laws 257; *infra* Dissent. Op. ¶ 13. As the dissent notes, when the Legislature added the phrase "first use of taxable services" to the use tax statute, it did not include the word "first" to describe the first use of tangible personal property purchased outside of Wyoming. *Supra* ¶ 39 n.2, *infra*

[6] In fact, in *In re Frost Construction Co.*, the Department argued "the law does not support any element of 'intent' as a consideration in the imposition of use tax, thus Petitioner's 'intent' as to delivery and use is not relevant to the issue of liability." *Id.* *1.

Dissent. Op. ¶ 19 n.16, Wyo. Stat. Ann. § 39-16-103 (2013). The dissent argues this amendment indicates a legislative intent to preclude an exception of first use out-of-state as it relates to tangible personal property. The Legislature enacts laws, however, with full knowledge of the existing condition of the law. *Greenwalt v. Ram Rest. Corp. of Wyo.*, 2003 WY 77, ¶ 10, 71 P.3d 717, 722 (Wyo. 2003); *Almada v. State*, 994 P.2d 299, 306 (Wyo. 1999). When the Legislature amended the language in 2014, it was with full knowledge that the Department's existing rule already contained "first use" and "prior use" language regarding use, storage and consumption of tangible personal property, and that the application of this concept through rule had already been approved by the Wyoming Supreme Court in *Exxon*, *Barcon*, and *Burlington*. In other words, there was no reason for the Legislature to include that language in the statute; for all intents and purposes, it was already there.

74. Finally, the majority of the State Board is sorely aware that, as a result of its decision to follow Wyoming Supreme Court precedent and to give effect to the plain language of the Department's rule, Admiral will have paid a mere $294 in sales tax on the Aircraft's purchase price of $4,000,000. The State Board is also aware that this outcome may not give adequate effect to Wyoming's use tax statute, which is to "put that property on an equal footing with property purchased within the state that is subject to the Wyoming sales tax." *Exxon*, 783 P.2d at 688. Nor does it satisfactorily fulfill the other objective identified in *Barcon*, 845 P.2d at 379 n.5: "As a state which does not impose an income tax, the revenue from the sales tax and the use tax provides indispensable operating revenue for essential state and local governmental services. Sales lost to out-of-state purchases directly affect this revenue stream." Nevertheless, it is not the province of the State Board to disregard properly promulgated rules carrying the full force and effect of the law, *Painter v. Abels*, 998 P.2d 931, 939 (Wyo. 2000), which either expressly or implicitly receive judicial approval from the Wyoming Supreme Court. Nor is it appropriate to do so on grounds not fully argued or briefed by the parties.

D. Conclusions

75. The State Board's Rules provide that when there is a question regarding a taxable event, the taxpayer has the initial burden of going forward, and the Department has the ultimate burden of persuasion. *Supra* ¶ 33. The State Board finds that Admiral met that initial burden, which shifted the burden to the Department to defend its action. After fully considering the Department's argument and analysis of the statute and the rule, the majority of the State Board finds that the Department's interpretation of its "prior use" rule does not fully reconcile and give effect to all of its rule sections, in particular its "first use" rule at Chapter 2, section 4(i)(ii), and its "prior use" rule at Chapter 2, section 4(i)(v). *Supra* ¶ 44.

76. For these reasons, and after fully considering the dissent's thoughtful arguments, the majority of the State Board finds that while the Department correctly determined first

use, storage, or consumption in Wyoming are individual factors upon which a use tax may arise, the Department erred in ignoring and thus voiding subsection 4(i)(v) of its rules in that analysis. The majority of the State Board finds that the Department's analysis and interpretation of its rule is in err and it failed to meet its ultimate burden of persuasion to show a taxable event had occurred. *Buehner Block Co.*, ¶ 11, 139 P.3d at 1153, *supra* ¶ 33, 35.

77. The majority of the State Board finds that the evidence established that Admiral purchased the Aircraft to serve "Admiral's business travel needs primarily throughout the several states it operates in, as well as other parts of the country, flying approximately 300 days per year." *Supra* ¶ 22. Its use of the Aircraft to transport employees, beginning with its President, first occurred outside Wyoming in its travel from South Carolina, to Texas, and then Montana, before landing in Wyoming for the first time. *Supra* ¶¶ 8, 13-19. These business flights constituted "use" of the Aircraft as defined by the Legislature and fell within the purview of "prior use" under section 4(i)(v) of the Department's Rule.

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ORDER

IT IS HEREBY ORDERED by a majority of the State Board that the Department of Revenue's determination that Admiral is liable for payment of use tax on the purchase of the Aircraft is **reversed.**

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 19th day of October, 2016

STATE BOARD OF EQUALIZATION

E. Jayne Mockler, Chairman

Robin Sessions Cooley, Board Member

ATTEST:

Jessica M. Brown, Executive Assistant

DISSENTING

Vice Chairman Martin L. Hardsocg

1. The Department's construction and application of its use tax rules, as a self-contained framework for identifying "first" or "prior" use in this case, is incorrect. *Supra* Majority Op. ¶¶ 45-66.

2. As to reversal of the Department's assessment, however, I dissent. The Department correctly assessed use tax because Admiral purchased "tangible personal property sold by any person for delivery in this state . . . for storage, use or consumption herein and is subject to the tax imposed by this article[.]" Wyo. Stat. Ann. § 39-16-103(b)(i) (2013); *supra* Majority Op. ¶¶ 1-22. The "prior use" rule, in the iteration addressed, conflicts with statutory law, undermines the Wyoming Legislature's fundamental tax objective, and promotes arbitrary tax exceptions. *See infra* Dissent Op. ¶¶ 15-30. The State Board should affirm the Department's use tax assessment, the "prior use" rule notwithstanding.

A. Wyoming's Use Tax Act and the "first use" exception

3. The Legislature enacted the Use Tax Act of 1937 to compliment the Selective Sales Tax Act of 1937. *Barcon, Inc. v. Wyo. State Bd. of Equalization*, 845 P.2d 373, 377-78 (Wyo. 1992); *See also* Phil Roberts, *A History of The Wyoming Sales Tax and How Lawmakers Chose it From Among Severance Taxes, An Income Tax, Gambling, and a Lottery*, 4 Wyo. L. Rev. 157 (2004). In approximately 1974, the Department/State Tax Commission, by rule, created a "first use" exception. Use Tax Regulations, Wyo. Dep't of Revenue & Taxation, §§ 1, 7 (1974). For over twenty years the rule offered a balanced process for applying use taxes, guarding against both departmental overreach and tax avoidance. In 1997, the Department expanded the "first use" limitation, effectively exempting certain out-of-state purchases from use tax. *Infra* Dissent Op. ¶ 12. That rule change, as applied to the facts of this case, compels my dissent. [7]

[7] Admiral relies exclusively on the Department's "prior use" rule and does not argue it purchased the plane for other than business travel to states surrounding its headquarters in Worland, where Admiral intended to permanently hangar, register, and domicile the plane. There is no dispute that Admiral purchased the plane with the specific intention of basing it in Worland, the hub of its business operations. (Tr. 24-44). In essence, the question is whether the rule-based "prior use" exception applies to a plane purchased for primary use in Wyoming *because* Admiral first landed in Texas, refueled in Nebraska, and then landed in Montana before arriving in Worland, where it based, registered, and hangared the plane. These facts aptly illustrate the tension between the Department's current "first use" rule and the fundamental use tax objective. *Compare* Wyo. Stat. Ann. § 39-16-103(a)(i), (b)(i) (2013) and Rules, Wyo. Dep't of Revenue, ch. 2 § 4(i) (2012), *supra* Majority Op. ¶ 43; *see also* Majority Op. ¶ 74, describing settled legislative objective of putting out-of-state property sales on par with in-state property sales; *infra* Dissent Op. ¶¶ 5, 22-23.

4. The Wyoming Supreme Court decision in *Exxon Corporation v. Wyoming State Board of Equalization*, 783 P.2d 685 (Wyo. 1989) offers a sound understanding of the use tax's historic purpose, as well as the Department's original rule-based "first use" exception. In *Exxon*, Exxon purchased pipe from outside Wyoming. The pipe shipped from Japan, passed through Portland, Oregon, and eventually arrived in Fort Collins, Colorado, where they were inspected and treated in preparation for installation in Wyoming. *Id.* at 686. The Wyoming Department of Revenue determined Exxon was liable for Wyoming use tax because first use of the pipe occurred in Wyoming. *Id.* at 686-87. The State Board affirmed the assessment.

5. Exxon challenged the assessment on several grounds, one of which is pertinent to the present appeal—that first use did not occur in Wyoming. *Exxon*, 783 P.2d at 688. Exxon specifically argued the State Board's ruling was incorrect "in that it alters or impairs 'the statutory definition of "use." ' " *Id.* at 688. The use tax's purpose was "to put that property [purchased outside of, and brought into, the state] on an equal footing with property purchased within the state that is subject to the Wyoming sales tax." *Id.* (citing *Morrison-Knudson Co., Inc. v. State Bd. of Equalization,* 135 P.2d 927, 932 (Wyo. 1943); Rules, Wyo. State Tax Comm'n—Dep't of Revenue & Taxation, Ch. IV § 3; *see also Barcon*, 845 P.2d at 378 (use tax regarded as "necessary complement" to sales tax to protect state from residents purchasing out-of-state for beneficial tax treatment).

6. Discussing the exception, the Court observed that Wyoming had "placed a **self-imposed limitation** on the broad authority to tax property bought outside but used inside this state." *Exxon,* 783 P.2d at 688 (emphasis added). Referring to State Tax Commission/Department Rules applicable at the time, the Court reasoned: "Thus, the question we must determine is whether the activities in Colorado constitute a **bona fide first use of the property** rendering the Wyoming use tax inapplicable." *Id.* (emphasis added). Resolving the matter against Exxon, the Court explained:

> The activities in Colorado were merely processes necessary to prepare the pipe for the use intended, i.e., its installation into and ultimate use as part of the Shute Creek CO_2 pipeline in Wyoming. **The Board properly concluded that it is a use of the property in the manner for which it was designed, constructed or intended that constitutes a "first use" as that phrase was intended by the Wyoming Tax Commission in Chap. IV, § 3.** When making the determination as to whether the first use of the property occurred in Wyoming or another state, the Tax Commission looks to the **nature of the property, its intended use, and whether the property was actually used in that manner in the other state.**

Id. (emphasis added).

7. Thus, the original limitation prevented tax overreach to properties *legitimately* purchased for "first use" outside of Wyoming, but which might later enter Wyoming. Importantly, the Department could consider the legitimacy of a claimed "bona fide first use of the property outside the state of Wyoming," refusing to allow the exception when the circumstances demonstrated a different intended use for the property.[8] *Supra* Majority Op. ¶ 43; *infra* Dissent Op. ¶¶ 8-11. The term "bona fide" shaped the Department's inquiry, and means: "1. Made in good faith; without fraud or deceit. 2. Sincere; genuine." *Bona fide,* Black's Law Dictionary (10th ed. 2014). The term consistently denotes integrity, actuality, and honesty. *See e.g., Gainsco Ins. Co. v. Amoco Prod. Co.*, 2002 WY 122, ¶ 13, 53 P.3d 1051, 1058 (Wyo. 2002) (used to describe a "good faith" claim); *Horse Creek Conservation Dist. v. State ex rel. Wyo. Attorney Gen.*, 2009 WY 143, ¶ 44, 221 P.3d 306, 319 (Wyo. 2009) (characterizing a type of purchaser, one who proceeds in good faith and without knowledge of legal infirmities).[9]

8. Unfortunately, and especially salient to this dissent, the "first use" exception no longer provides for vetting of claimed out-of-state uses.[10] *See supra* Majority Op. ¶ 44. Rather, subsection 4(i)(v) indiscriminately excepts property "purchased and used in the manner for which it was manufactured or assembled in another state, prior to its use in Wyoming." Rules, Wyo. Dep't of Revenue, ch. 2 § 4(i)(v) (2012), *supra* Majority Op. ¶ 44. An incongruence between the statute and rule came into play with that regulatory change. *See infra* Dissent Op. ¶¶ 14-30. The former rule logically required a demonstration that property was actually [bona fide] purchased for first use outside of Wyoming, allowing the Department to reject illusory claims of first use. *Supra* Majority Op. ¶ 43; *infra* Dissent Op. ¶ 12. After 1996 and as applied in this case, the "first use" limitation asks only whether equipment is "used," turning a blind eye to property admittedly purchased "for storage, use or consumption" in Wyoming, but put to some

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[8] E.g. *In re Frost Construction Co.,* Docket No. 90-122, 1992 WL 71474 (Wyo. State Bd. of Equalization, March 31, 1992) (Department rejected taxpayer's mischaracterization of activities as first use outside of Wyoming.).

[9] The Court's subsequent ruling in *Burlington Northern Railroad Co. v. Wyoming State Board of Equalization*, 820 P.2d 993 (Wyo. 1991) (J. Cardine and J. Golden dissenting), a three-two split decision, is less helpful. Without explanation, the Court held that component parts of railroad car wheel assemblies were first used when assembled in Nebraska, even though the repaired wheel assemblies were ultimately installed on railroad cars in Wyoming. *Id.* at 996. The Court speaks directly to application of the commerce clause analysis in *Complete Auto Transit, Inc. v. Brady*, an inquiry applied to resolve whether a tax improperly burdens interstate commerce. *Id.* 995-96.

[10] The Department's present chapter 2 rules, which address both sales and use taxes, were first combined in one chapter in February of 1997. Rules, Wyo. Dep't of Revenue, ch. 2 (1997). Before 1997, use and sales tax regulations fell under separate chapters, sales tax regulations under chapter 3, and use tax regulations under chapter 4. *See e.g.,* Rules, Wyo. Tax Commission, chs. 3 & 4 (1985).

technical "use" before reaching Wyoming. *See* Rules, Wyo. Dep't of Revenue, ch. 2 § 4(i) (2012), *supra* Majority Op. 44; Wyo. Stat. Ann. § 39-16-103(b)(i) (2013).

9. Accordingly, I disagree with the majority's insistence that the present "prior use" rule is essentially the same as the "first use" rule discussed in *Exxon, Burlington*, and *Barcon*. *Supra* Majority Op. ¶¶ 44, 57, 62, 67-74. The present rule requires only that property be used consistent with the manufacturer's guidance. *Supra* Majority Op. ¶ 44. When coupled with the inclusive statutory definition of "use," Wyoming Statutes section 39-16-101(a)(ix) (2013), *supra* Majority Op. ¶ 40, merely possessing, testing, inspecting, cleaning, removing from a container, reading instructions, or any inconsequential operation of property prior to entering Wyoming, would arguably suffice as a prior use under the exception. For property acquired for transportation purposes, any operation between the point of purchase and Wyoming arguably qualifies, even if admittedly acquired for operation in Wyoming, as in this case.[11] (Tr. 24-44).

10. By contrast, the Wyoming Supreme Court distinctly noted in *Exxon* that the "first use" rule required the Department to consider a property's "nature," its "intended use," and whether it was "actually used" that way outside of Wyoming. *Exxon*, 783 P.2d at 688; *supra* Dissent Op. ¶ 6. Indeed, the meaning and practical effect of a "bona fide [i.e. good faith, sincere, or genuine] first use of property outside the State" can hardly be synonymous with the standard set by the verbiage "used in the manner for which it was manufactured[.]" *Compare* Rules, Wyo. Dep't of Revenue, ch. 2 § 4(i) (2012), *supra* Majority Op. ¶ 44, with Rules, Wyo. Tax Comm'n/Dep't of Revenue, Ch. IV §§ 3, 8 (1985), *infra* Dissent Op. ¶ 12. The majority further ignores the former rule's requirement that the *purchaser* affirmatively demonstrate a genuine, good faith first use outside of Wyoming, implying that contrived or trivial first uses were to be rejected. *Supra* Majority Op. ¶ 43; *infra* Dissent Op ¶ 12. The majority bootstraps the new rule to the old, concluding the Wyoming Supreme Court has "accepted" or "approved" the new rule language. *Supra* Majority Op. ¶¶ 57, 62, 68-74. The majority assumes too much.

11. The majority similarly argues that the "prior use" rule at issue in this case tracks with the Wyoming Supreme Court's application of the rule in *Exxon*. *Supra* Majority Op. ¶¶ 69-70 (quoting *Exxon*, 783 P.2d at 688-89). This too is incorrect and ignores the Court's careful application of "bona fide first use" as requiring the Department's inspection of a property's nature and the intended use. *Supra* Dissent Op. ¶¶ 6, 9-10. A property's intrinsic nature and the purpose for which it is acquired, when reconciled with the actual use to

[11] The Department's counsel identified this practical dilemma specific to property designed for transportation: "[W]hat Admiral is saying in this case is, look, you can't tax my property because I used this property on its way home." (Tr. 21-22).

which it is put (as well as trivial uses on the way to Wyoming), is an inquiry far more nuanced and discriminating than that gleaned from a manufacturer's generic guidance to the public. The majority essentially views the phrase "bona fide first use" as extraneous to the original rule.[12] The Court, however, did not. *Exxon,* 783 P.2d at 688; *supra* Dissent Op. ¶¶ 5-6.

12. It is also helpful to understand that the "first use" rule originated in the Department's 1974 Use Tax Regulations. *See* Use Tax Regulations, Wyo. Dep't of Revenue & Taxation, §§ 1, 7 (1974). The use tax statutes, by comparison, included no "first use" exception. *See* 1957 Wyo. State. §§ 39-309 thru 39-335. Almost twenty years later the "first use" rule had changed little and, as applied in *Exxon* and *Burlington,* provided:

> Section 3. Transactions Subject to Tax. The purchase or lease of all tangible personal property outside this state for **first use, storage or consumption** within this state, is subject to use tax, providing the same transaction would be subject to sales tax if the transaction had occurred wholly within the State of Wyoming.
>
> . . .
>
> Section 8. Place of First Use. When tangible personal property is purchased in another state and is brought into Wyoming **for use**, the burden is upon the purchaser to show that there was a **bona fide first use** of the property outside the State of Wyoming.

Rules, Wyo. Tax Comm'n/Dep't of Revenue, ch. 4 §§ 3, 8 (1985) (emphasis added); *supra* Majority Op. ¶ 43. This explains the Court's subtle distinction in *Exxon*—that "**Wyoming** [operating through the executive branch, rather than the legislative] **has placed** a self-imposed limitation on the broad authority to tax[.]" *Exxon*, 783 P.2d 688.

13. Not until 2014 did the Legislature add the word "first" to the use tax imposition statute. The Legislature did not, however, apply the word to describe the first use of property purchased outside of Wyoming, rather, it specified the "first use of taxable

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[12] For example, responding to the Department's argument that vehicles for transportation "could escape taxation when they are transported across multiple states on their way home[,]" the majority reasons, "the same argument is true of the previous 'first use' rule, especially given the Court's interpretation of the previous rule in *Exxon*[.]" *Supra* Majority Op. ¶ 62. The majority concludes the Department would have had no more authority to challenge Admiral's "prior use" claim under the rules in effect during *Exxon, Barcon,* and *Burlington. Id.* The majority's narrow application of "bona fide" ignores the context in which it was used, the burden placed on purchasers, and the clear legislative objective of taxing those who would predictably seek to avoid Wyoming sales tax. See *supra* Majority Op. ¶ 58,; Dissent. Op. ¶ 7; *infra* Dissent. Op. ¶ 21, fn. 14.

services." 2014 Wyo. Sess. Laws 257; *supra* Majority Op. ¶ 39, fn. 1. And so it is today—the use tax imposition statute, Wyoming Statutes section 39-16-103 (2015), does not expressly except from use taxation property purchased outside of Wyoming and "first" used, stored, or consumed outside the state. *Id.* The Department's rule alone imposes the "first use" limitation to property. *Supra* Majority Op. ¶ 44.

B. The Department properly assessed Admiral's purchase of property for delivery to Wyoming for use, storage, or consumption, notwithstanding Admiral's self-delivery of the plane from South Carolina to Wyoming with intervening stops.

14. Given the use tax statutes and "first use" exception confirmed in *Exxon*, could the Department further restrict, without legislative consent, the intended imposition of use taxes as it did by its 1997 rule change and thereafter? The answer is no. "An agency is wholly without power to modify, dilute or change in any way the statutory provisions from which it derives its authority." *Platte Dev. Co. v. State Envtl. Quality Council*, 966 P.2d 972, 975 (Wyo. 1998) (Held Department of Environmental Quality could not, through an erroneous interpretation, alter statutory guidelines); *see also Disciplinary Matter of Billings*, 2001 WY 81, ¶¶ 24-27, 30 P.3d 557, 568-69 (Wyo. 2001) (held State Board of Outfitters and Professional Guides' rules were invalid because they exceeded Board's statutory authority). " 'An administrative rule or regulation which is not expressly or impliedly authorized by statute is without force or effect if it adds to, changes, modifies, or conflicts with an existing statute.' " *Diamond B Servs., Inc. v. Rohde*, 2005 WY 130, ¶ 60, 120 P.3d 1031, 1048 (Wyo. 2005) (quoting *Billings v. Wyo. Bd. of Outfitters & Guides*, 2001 WY 81, ¶ 24, 30 P.3d 557, 568-69 (Wyo. 2001)).

15. Notwithstanding subsection 4(i)(v) of the Department's 2012 use tax Rules, *supra* Majority Op. ¶ 44, I would hold the Department properly assessed use tax pursuant to Wyoming Statutes section 39-16-103 (a)(i) and (b)(i) (2013) on Admiral's nearly tax-free purchase of an aircraft in South Carolina for self-delivery to, and storage/use in, Worland, Wyoming. *Supra* Majority Op. ¶¶ 1-22, 29-30. Respecting the Legislature's clear statutory mandate, Admiral's circuitous delivery route from South Carolina to Wyoming could not relieve it of use tax liability. "A clear statutory direction is enforceable by an agency in accordance with its plain meaning without promulgation of a rule." *Wyo. Mining Ass'n v. State*, 748 P.2d 718, 724 (Wyo. 1988).

16. First, the Legislature directed that "tangible personal property sold by any person **for delivery in this state is deemed sold for storage, use or consumption herein and is subject to the tax imposed**[.]" Wyo. Stat. Ann. § 39-16-103(b)(i) (2013) (emphasis added). Consistent with the pre-1997 "first use" rule, the statute implicitly required that the Department evaluate whether Admiral purchased the airplane for delivery to, and use

in, Wyoming. "Statutes must be interpreted in a fashion which permits an agency to carry out its legislative mandate." *Basin Elec. Power Coop. v. Bowen*, 979 P.2d 503, 509 (Wyo. 1999); *See also Exxon*, 783 P.2d at 688. The Department could not then broadly overwrite that legislative directive by the 1997 and subsequent rule changes. *Diamond B Servs.*, ¶ 60, 120 P.3d at 1048; *Wyo. Downs Rodeo Events, LLC v. State*, 2006 WY 55, ¶ 14, 134 P.3d 1223, 1230 (Wyo. 2006) ("An agency may not rewrite a statute through its rulemaking power.").

17. The 1997 rule change rendered inoperable the language "is deemed sold for . . . use . . . herein." By expanding the "first use" exception in 1997, *supra* Dissent Op. ¶¶ 3, 7-8, and abandoning its ability to question non-bona fide first uses, the Department rewrote the use tax imposition statute. The rule change also violated the general presumption against granting exceptions and in favor of taxation. *Laramie Cty. Bd. of Equalization v. Wyo. State Bd. of Equalization*, 915 P.2d 1184, 1190 (Wyo. 1996).

18. Second, we must logically presume the Tax Commission/Department "first use" rules from 1974 to 1996 were consistent with statutory intent. Courts defer to the statutory construction of an agency charged with the statute's execution, if consistent with legislative intent. *Qwest Corp. v. Wyo. Dep't of Revenue*, 2006 WY 35, ¶ 8, 130 P.3d 507, 511 (Wyo. 2006). Moreover, "administrative interpretations are entitled to deference particularly when, following those interpretations, the legislature has failed to make changes in the statute." *State Bd. of Equalization v. Tenneco Oil Co.*, 694 P.2d 97, 99 (Wyo. 1985). Before the Department rewrote the "first use" rule in 1997, the Court discussed **that earlier version of the rule** in *Exxon, Burlington*, and *Barcon*. We presume the Legislature enacts statutes with full knowledge of existing law, including related statutes and court decisions. *Yeager v. Forbes*, 2003 WY 134, ¶ 13, 78 P.3d 241, 246 (Wyo. 2003).

19. It should not be presumed the Legislature intended to further restrict the scope of Wyoming's use tax consistent with the Department's 1997 and subsequent rule changes. The Legislature has not expressly adopted the "first use" rule applied to property. Even considering subsequent statutory changes, the 2014 use tax imposition statute says nothing about the first use of property acquired outside Wyoming—only the first use of **services** acquired outside the state.[13] *See* 2014 Wyo. Sess. Laws 257-58; *supra* Dissent Op. ¶ 13.

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[13] The majority infers that the Legislature consciously chose not to address by statutory amendment the "prior use" of property already covered in the "prior use" rule. *Supra* Majority Op. ¶ 73. Given the remarkable ease with which the Legislature could have also addressed the "first" use of property in the same statutory section it addressed the "first use of taxable services," simultaneously approving the Department's existing rule, I am not comfortable presuming the Legislature implied such approval by omission.

> Where the legislature has specifically used a word or term in certain places within a statute and excluded it in another place, the court should not read that term into the section from which it was excluded. A word or words appearing in one section of a statute cannot be transferred into another section.

Spreeman v. State, 2012 WY 88, ¶ 13, 278 P.3d 1159, 1163 (Wyo. 2012) (quoting *In re Adoption of Voss*, 550 P.2d 481, 484-85 (Wyo. 1976)).

20. Because the "first use" rule, as the majority construes it, reflects a significant deviation from past practice and the statutory language itself, the State Board should critically examine its effects vis-à-vis the underlying use tax statutes. And, to the extent the "first use" rule conflicts with the use tax statutes and deprives the Department of necessary discretion to scrutinize purchase transactions, the State Board should temper its reliance on the rule. *See RME Petroleum Co. v. Wyo. Dep't of Revenue*, 2007 WY 16, ¶ 42, 150 P.3d 673, 688 (Wyo. 2007) (Department of Revenue's rule, to the extent in conflict with statute, must be disregarded).

21. Consistent with the Tax Commission/Department former rule, and relying on contemporaneous court interpretations confirming the Department's discretion to evaluate the circumstances surrounding a claimed exception, I would affirm the Department's implied authority to ascertain whether a claimed first use of property outside of Wyoming is the actual, intended use under the circumstances. A rule eliminating that discretion allows purchasers to easily evade taxation, a consequence entirely at odds with the use tax's basic purpose.[14] *Infra* Dissent Op. ¶ 3; *supra* Majority Op. ¶¶ 58, 74.

22. Third, the State Board must presume the legislature intends that no part of its enactments are inoperative, superfluous, futile, or absurd. *RT Commc'ns, Inc. v. Pub.*

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[14] I cannot agree with the majority's inference that the term "bona fide" under the previous "first use" rule afforded no authority to question a taxpayer's intent to avoid taxation. *Supra* Majority Op. ¶ 71. Given the universal definition of "bona fide," *supra* Dissent Op. ¶ 7, and keeping in mind the use tax's fundamental purpose from inception in 1937, *supra* Majority Op. ¶ 74, the term naturally and logically prompted an inquiry consistent with the tax's objective—determining whether property destined for use in Wyoming was purchased outside of Wyoming for tax purposes. That Wyoming's courts have resolved past cases without explicitly referring to evasive intent does not somehow change the contextual and literal connections between the term "bona fide" and the tax's universal purpose. Contrary to the majority's suggestion otherwise, *supra* Majority Op. ¶¶ 71-72, the State Board has denied a taxpayer's claim of "first use," at least implying a taxpayer's questionable motives. *See In re Frost Const. Co.*, Docket No. 90-122, 1992 WL 71474, * 2-3 (Wyo. State. Bd. of Equalization, March 31, 1992) ("The unlikely and contradictory positions taken by Petitioner destroy its credibility as to both what may have been 'intended' when the equipment was ordered, and what actually happened at the delivery location." The State Board concluded: "The **actual bona fide first use** of the equipment occurred in Wyoming upon delivery[.]" (emphasis added)).

Serve. Comm'n for State of Wyo., 2003 WY 145, ¶ 20, 79 P.3d 36, 44 (Wyo. 2003). Yet, in accordance with subsection 4(i)(v) of the Department's 2012 chapter 2 use tax Rules, a wide range of property purchases in tax-friendly jurisdictions (i.e. airplanes, mobile machinery, etc.) may routinely escape taxation, even in the face of unmistakable evidence that the property is purchased for immediate delivery into Wyoming for use, storage, or consumption. Wyo. Stat. Ann. § 39-16-103(b)(i) (2013). The present dispute is such a case, as Admiral admits the plane was purchased with the intent of basing, registering, hangaring, and operating the plane from its Worland, Wyoming, headquarters. (Tr. 24-44). In effect, Admiral's scheduling of stops between South Carolina and Wyoming rendered irrelevant Admiral's admitted intent to base and operate the plane from Worland, Wyoming.

23. At the same time, out-of-state property purchases not immediately operable in other states are taxed. Those purchasers are denied the same opportunity to operate equipment "on the way home," or to otherwise avail themselves of the "prior use" exception. A consistent and effective application of use taxes—one that places properties purchased out-of-state on par with in-state purchases—is not achievable. *See supra* Majority Op. ¶¶ 58, 74. Nor is this construct of the use tax complimentary to Wyoming's sales tax. *Supra* Dissent Op. ¶ 3; Majority Op. ¶¶ 58, 62, 74.

24. Finally, when construing the Use Tax Act, the Wyoming Supreme Court has explained:

> Wyoming initially adopted a sales tax with the passage of the Emergency Sales Tax Act of 1935, 1935 Wyo.Sess.Laws ch. 74. The emergency act was in effect for only two years until a comprehensive sales tax and use tax were imposed. The Selective Sales Tax Act of 1937, 1937 Wyo.Sess.Laws ch. 102, and the Use Tax Act of 1937, 1937 Wyo.Sess.Laws ch. 118, were passed during the same legislative session as obvious complements to each other. In *Morrison-Knudson Co.*, this court stated a rule which should guide our efforts to determine legislative intent. "In the absence, then, of a contrary indication in the Use Tax Act, **the intention evidently was to apply the same rules and principles, as nearly as possible, to both taxes.**" *Morrison-Knudson Co. v. State Board of Equalization*, 58 Wyo. 500, 135 P.2d 927, 932 (1943).

Barcon, Inc., 845 P.2d at 379 (emphasis added).

25. Under the sales tax statutes, licensed motor vehicles are taxed in the county where they are registered, generally preventing tax-avoidance. Wyo. Stat. Ann. §§ 39-15-103(a)(M), (b)(ii); 39-15-107(b)(i) (2013). While the Legislature did not classify airplanes as motor vehicles within the sales or use statutes, the Legislature's intent to require

payment of sales taxes in a vehicle owner's resident county, regardless of whether purchased or used outside Wyoming, is undeniable. Both are registered transportation vehicles, easily used for their manufactured purpose the moment acquired. Whether cars, boats, aircraft, ATVs or any other personal property used as vehicles for transport, Wyoming's use tax statutes do not exempt purchases of these properties. Contrary to the Legislature's implicit guidance derived from the sales tax statutes, the Department's "first use" rule does so in this case by operation.

26. Other courts have addressed issues similar to those before this Board. The court's approach in *Guardian Industries Corp. v. Department of Treasury*, 621 N.W.2d 450 (Mich.App. 2000), reflects a common sense, practical application of Michigan's use tax laws. In that case, a Michigan company purchased a jet airplane tax free, received delivery in Delaware, and did not enter Michigan with the airplane for more than ninety days after purchase. *Id.* at 452. Over that period of time, the purchaser flew from Delaware to Georgia, from Georgia to Ohio, back to Georgia, and then to seven European cities before arriving in Michigan more than ninety days later, where the airplane was based and hangared. *Id.* Michigan's use tax statutes established a presumption that property brought into the state within ninety days of purchase was "considered as acquired for storage, use, or other consumption in this state." *Id.* at 453 (*citing* Mich. Comp. Laws Ann. § 205.93(1) (West 2000)).

27. Disagreeing that the statutory ninety-day presumption, if not applicable, created an exemption, the court observed:

> [W]e note that plaintiff's proposed construction would cause property owners seeking to avoid the use tax to engage in a cost-benefit analysis before transferring purchased goods into this state. That is, if a purchaser of goods is not required to pay a sales tax in the purchasing state, the purchaser may delay any transfer of goods destined for use in this state for ninety days if the cost of storage of the goods elsewhere is significantly less than the applicable use tax.

Id. at 455; *see also Blue Yonder, LLC v. State Tax Assessor*, 17 A.3d 667, 673 (Me. 2011) ("It would be absurd to interpret the statute to exempt property from use taxation based on *any* use of the property outside of Maine within the first twelve months after purchase . . . . Such a reading would permit avoidance of the use tax simply by transporting property outside of Maine once within twelve months after its out-of-state purchase." (emphasis in original)).

28. In *Guardian,* the taxpayer additionally argued that a Michigan Department of Treasury Rule established an exemption for out-of-state property purchases when "first use

occurs outside this state." *Guardian*, 621 N.W.2d at 455-56. The court again disagreed: "interpretative rules are invalid when they conflict with the governing statute, extend or modify the statute, or have no reasonable relationship to a statutory purpose." *Id.* at 456 (citing *Clonlara, Inc. v. State Bd. of Ed.*, 501 N.W.2d 88 (Mich. 1993); 1 Cooper, State Administrative Law, pp. 252-59)). The court explained that the rule, to the extent contrary to statutory intent, afforded the taxpayer no exception from Michigan's use tax. *Id.*

29. Perhaps most compelling, the court in *Guardian* stressed the importance of examining the circumstances surrounding the aircraft's purchase, post-purchase use, and evidence that the plane was purchased for the company's Michigan operations. *Id.* at 456-57. The court observed, "the most probative evidence of intent consists of objective evidence of what actually happened rather than descriptive evidence of the subjective state of mind of the actor." *Guardian,* 621 N.W.2d at 456. The court cited a host of circumstances evidencing the purpose for which the plane was actually acquired: 1) plane was hangared at the Detroit Metropolitan Airport; 2) Michigan served as airplane's "home base"; and 3) flights originated from, and returned to, Michigan, where the airplane was sheltered. *Id.* at 456-57.

30. I do not casually opine the State Board should disregard Department of Revenue rules. This case, however, requires such. A rule, the effect of which extends beyond the pale of statutory intent, is entitled little or no deference under the law; a rule thwarting expressed legislative objectives cannot be sustained. *Supra* Dissent Op. ¶¶ 14-16, 18-19.

Conclusion

31. The Department incorrectly applied its "prior use" rule.

32. The Department could not, by rule, restrict application of the use tax as it did subsequent to 1996. *See supra* Dissent Op. ¶¶ 3, 8, 12. Nor could the Department intentionally or negligently abandon statutory authority required to effectively apply Wyoming's use tax laws. By statute, the Department had authority to conclude, as it did in this case, that Admiral purchased the plane for self-delivery to, and use in, the State of Wyoming. Admiral's necessary use of the plane to travel from South Carolina to its home base in Wyoming, indirect as it was, should not exempt it from taxation. I would affirm.

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Dated this 19th day of October, 2016

Martin L. Hardsocg, Vice Chairman

ATTEST:

Jessica M. Brown, Executive Assistant

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of October, 2016, I served the foregoing DECISION 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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