

BEFORE THE STATE BOARD OF EQUALIZATION  
FOR THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF )  
JEDEDIAH CORPORATION FROM A )  
DECISION BY THE DEPARTMENT OF )  
REVENUE (Audit Assessment, Audit Period )  
01/01/2009-12/31/2011) )

Docket No. 2016-32

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**FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION  
AND ORDER**

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APPEARANCES

Erika M. Nash and Aaron J. Lyttle, Long Reimer Winegar Beppler LLP, appeared on behalf of Petitioner, Jedediah Corporation (Jedediah).

Karl D. Anderson, Senior Assistant Attorney General, Wyoming Attorney General's Office, appeared on behalf of the Wyoming Department of Revenue (Department).

DIGEST

This is the latest in multiple appeals to the Wyoming State Board of Equalization (State Board) involving an assessment of Jedediah from January 1, 2009 to December 31, 2011, by the Department based on an audit conducted by the Wyoming Department of Audit (DOA). The audit revealed Jedediah had failed to remit sales and use taxes due on various business services and purchases it made, but had also erroneously collected and remitted sales tax on non-taxable food and other non-taxable items sold. Initially Jedediah sought to negate its admitted tax liability for the former through an offsetting tax credit for the latter. Subsequently and separately, Jedediah sought a refund of the sales tax amounts improperly collected and remitted.

The Department denied both the offset and the refund request, taking the position that "excess" sales taxes incorrectly collected on non-taxable items could not be refunded to Jedediah nor used as an offset for underpayment of other sales and use taxes, unless Jedediah first refunded the improperly collected taxes to its taxpaying customers. Jedediah challenged both decisions in its first appeals. The State Board consolidated the appeals, disagreed with the Department's position, and remanded the matter to the Department "to

calculate any over-collection and remittance of sales taxes so that the same may be applied as an offsetting credit against Jedediah's sales tax liability." Given the disposition of the offset request, the State Board dismissed as moot the appeal of the refund request. *In re Appeal of Jedediah Corp.*, Docket Nos. 2013-08, 2013-50 (Wyo. State Bd. of Equalization, Oct. 9, 2015) 2015 WL 6121954, ¶ 57, Order page 23 (hereinafter *Jedediah I*).<sup>1</sup> Neither party appealed from that Decision and Order.<sup>2</sup>

In the initial audit, the DOA did not concern itself with the non-taxable sales. It operated under the view that there could be no refund or offsetting credit to Jedediah as a vendor for improperly collected sales taxes not returned to the person originally paying the tax. Further, for approximately the second half of the audit period, Jedediah used a point of sale system (Maitre'D system) which provided a record of taxable and non-taxable sales that is not disputed. During the first portion of the audit period, January 1, 2009 through July 31, 2010 (pre-August, 2010 period), Jedediah's system (Quickbooks system) initially recorded daily sales in paper form. Those sales documents were destroyed in a flood. With this lack of documentation, during the earlier contested case hearing Jedediah offered as evidence a calculation purportedly prepared by its staff and accountant, representing that Jedediah collected \$47,477.29 on "Non Taxable Sales" of \$791,288.82. Jedediah's CEO testified generally concerning the preparation of the document by his staff and the accountant, but otherwise no witness specifically addressed the document's preparation or source information. This Board described Jedediah's evidence offered in support of its offsetting credit claim of \$47,477.29 as "marginal." *Id.* at ¶ 5. In the first appeal the parties stipulated that Jedediah did not provide records for the 2009 tax year because it alleged the records were destroyed in a flood. *Id.* at ¶ 1e (emphasis added).

Following the remand, the Department requested the DOA conduct a supplemental audit of Jedediah's records to determine the tax credit due Jedediah. As noted, Jedediah had produced a one-page document using a comparison approach to estimate the sales tax collected during the pre-August, 2010 period. Jedediah claimed a \$47,477.29 tax credit based on this estimate. The DOA concluded that Jedediah lacked sufficient documentation to substantiate its claim. However, sufficient records existed to document a tax credit of \$23,672.83, resulting in a net credit of \$14,125.72 calculated by the DOA. The Department accepted the net amount and, after adjusting the credit and liabilities and deducting interest owed the State, issued a notice of net credit of \$13,198.56. Jedediah appealed the

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<sup>1</sup> While the Order of the State Board remanding the offset case spoke only of an "offsetting credit," as part of the Decision the State Board took the position that an "offsetting credit is in effect the same as a refund," which also led to the dismissal of the refund claim as moot. *Id.* at ¶¶ 4, 23.

<sup>2</sup> Legislation was enacted in the 2016 Session modifying the law to require that erroneously collected and remitted sales tax be repaid to the taxpayer before the vendor was entitled to seek a refund or credit from the State. 2016 Wyo. Sess. Laws 226. That Act was effective July 1, 2016, with no provision that it be applied retroactively; thus in accordance with Wyoming Statutes section 8-1-107, the 2016 law is not applicable to this proceeding.

Department's determination arguing the DOA failed to apply the "best information available" during its audit to substantiate Jedediah's full \$47,477.29 tax credit claim. More specifically, Jedediah contested the failure of the DOA and Department to give any credit for non-taxable sales during the pre-August, 2010 period, and also alleged the Department miscalculated its crediting of \$21,887.52 for the post-August, 2010 time period, claiming the credit should have been \$23,846. (Jedediah's Case Notice for Review of Final Administrative Decision, Docket No. 2016-32, June 1, 2016).

The Board heard the matter on October 24, 2016. Evidentiary gaps regarding actions of Jedediah and the DOA exist in the record and contested case hearing presented to the Board. In light of this record and the information before the DOA and Department at the time of their determinations, the State Board must reconcile the statutory provisions upon which the Department relies (requiring a vendor to preserve records for a minimum of three years and to bear the burden of proof of any assessment by the Department in their absence, as well as the burden of proof in seeking a refund generally) and the Wyoming Supreme Court opinion in *Wyoming Department of Revenue v. Qwest Corp.*, 2011 WY 146, 263 P.3d 622 (Wyo. 2011), and its interpretation of Wyoming law, relied upon by Jedediah.

#### CONTENTIONS, ISSUES, AND BRIEF ANSWERS

Jedediah states the issues of fact as:

Whether Jedediah has supporting documentation that can be used to determine total sales and over-remittances from non-taxable items between January of 2009 and August of 2010.

Whether the Department accurately calculated the total credits for sales tax erroneously remitted to the Department between August of 2010 and December 2011 [\$21,887.52 versus \$23,846].

Jedediah's Prelim. Statement, 3-4, July 5, 2016.

Jedediah states the issue of law as:

Whether the Department must use the best available evidence to determine Jedediah's total sales and over-remittances from non-taxable items between January of 2009 and August of 2010 to determine the total amount of Jedediah's sales tax credit

*Id.* at 4.

The Department states the issues of fact and law together as follows:

- A. Did the Department properly and correctly calculate the total tax credit for Petitioner?
- B. Does the Petitioner have sufficient supporting documentation for the credit it claims?

Dep't Prelim. Statement, 2-3, July 20, 2016.

In sum, the issues in this appeal concern whether Jedediah provided sufficient supporting documentation to the DOA and the Department to support a tax credit in excess of the amount determined by the Department. Jedediah argues that, despite the loss of its original sales tax records for the pre-August, 2010 period, the Department was obligated to use the best information available to determine the amount of Jedediah's non-taxable sales and the resulting refund or credit. Jedediah reasons that the mandatory language of the refund statutes, and the Wyoming Supreme Court's reasoning in *Wyoming Department of Revenue v. Qwest Corp.*, 2011 WY 146, 263 P.3d 622 (Wyo. 2011), compel this result. (Pet'r's Proposed Findings of Fact & Conclusions of Law, ¶ 33, Nov. 28, 2016).

The Department disagrees, arguing that under Wyoming's self-reporting sales tax system Jedediah had the burden to provide source documentation to substantiate its estimate of over-collected sales tax for the pre-August, 2010 period. (Wyo. Dep't of Revenue Proposed Findings of Fact, Conclusions of Law & Order, ¶¶ 53–56, Nov. 28, 2016). The Department claims the DOA was unable to use statistically valid sampling techniques to substantiate Jedediah's estimate document. (*Id.* at ¶¶ 59–60). It points to Wyoming Statutes section 39-15-107(a)(iii)(2013),<sup>3</sup> which provides that a vendor who does not preserve suitable records bears the burden of proof regarding the correctness of the Department's assessments. (*Id.* at ¶ 55).

Having reviewed the entire record, the State Board concludes that Jedediah presented no evidence regarding any error by the Department in the credit calculation for the post-August, 2010 period and proposed no finding which asserts any such error. The issues which remain are based only upon the pre-August, 2010 period. The State Board restates those issues as:

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<sup>3</sup> Although the disputed tax years are 2009 through 2011, the State Board cited to the 2013 Wyoming statutory code because the applicable statutes had not changed substantively between 2009 and 2013 and the parties cited the 2013 statutes. The State Board will continue to reference the 2013 statutes for provisions which remained unchanged from 2009 through 2013. For convenience, the State Board will refer to the latest publication for general provisions regarding the Wyoming Administrative Procedure Act and the State Board review functions which have not been amended since the contested case proceeding.

- A. Did Jedediah meet its burden of proof to substantiate its tax credit claims?
- B. Did the DOA's and Department's actions in regard to calculations of tax credits due Jedediah comply with the requirements of law as pronounced in *Wyoming Department of Revenue v. Qwest Corp., supra*?

The State Board answers the first question "no." As to the second question, the State Board finds the DOA and Department acted arbitrarily when they relied upon determinations contradicted by the record and failed to consider information available to the DOA and Department. The Department discounted information that might have supported a credit. Jedediah was also denied a requested informal meeting prior to issuance of final findings, contrary to DOA's adopted procedures. The Board, therefore, again remands this matter to the Department for consideration of the information available to the DOA and information which Jedediah was entitled to provide at the informal meeting. Whether the information is sufficient to establish credit due, in addition to the amount calculated for the post-August, 2010 period, is unknown given the record before the Board.

### JURISDICTION

The State Board shall "review final decisions of the department upon application of any interested person adversely affected," 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) & (c)(viii) (2017). A 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 assessment letter to Jedediah dated May 2, 2016, determining a total sales tax credit of \$21,887.52 (net credit of \$13,198.56) for the improper collection and remittance of sales tax on non-taxable items. (Dep't Ex. 509). Jedediah timely appealed the Department's determination on June 1, 2016. (Case Notice for Review of Final Administrative Decision, June 1, 2016). The State Board has jurisdiction to decide this matter.

### FINDINGS OF FACT

1. Jedediah incorporated as a Wyoming corporation in 1980. It operates a variety of businesses, including coffee shops and a restaurant/bar/gift shop, in the Jackson Hole Airport. Jedediah sells prepared foods, beverages, bottled water and other drinks, candy, snacks, and souvenirs, as well as other items. (Hr'g recording, Gierau testimony).
2. Prior to its airport operations, Jedediah operated a restaurant in Jackson, collecting sales tax on all transactions. After moving to the airport where it operates various

businesses, Jedediah continued to charge sales tax on all transactions. (Hr’g recording, Gierau testimony).

3. Jedediah collected and remitted sales tax on non-taxable items for the entire audit period. *Id.*; *Jedediah I, supra*, ¶ 4; Hr’g recording, Gierau testimony, Lovett testimony).

4. The DOA conducted an initial audit of Jedediah for the period from January 1, 2009, to December 31, 2011, resulting in assessed tax deficiency. That assessment was the subject of an appeal to the State Board filed on February 28, 2013. *Jedediah I, supra*, ¶ 1.

5. The initial audit showed that between 2009 and 2011, in addition to failure to remit a sales tax due on certain items sold and items purchased by Jedediah, Jedediah collected and remitted sales tax on food and other non-taxable items sold to its customers, resulting in an overpayment of sales tax remitted to the Department. The DOA’s initial audit findings indicated Jedediah “is collecting and remitting tax on all sales, including non-taxable items such as bottled water, candy, snacks, etc.” *Id.* at ¶ 2.

6. On September 18, 2013, Jedediah requested a refund of sales tax overpayments resulting from its collection of sales tax on non-taxable tangible food items during the audit period. On September 24, 2013, the Department issued a final administrative decision denying the refund request. *Id.* at ¶ 7.

7. On appeal, the State Board reversed the Department’s denial of Jedediah’s claim for an offsetting credit against its sales tax liability and remanded the audit assessment to the Department for proceedings consistent with its decision, “including Department . . . review of Jedediah’s sales tax remittances during the audit period to calculate any over-collection and remittance of sales tax so that the same may be applied as an offsetting credit against Jedediah’s sales tax liability.” *Id.* at 23.

8. On January 6, 2016, a different auditor from the DOA conducted a supplemental audit of Jedediah to determine the proper tax credit due Jedediah as required by the State Board’s Decision and Order. Among the records requested by the DOA engagement letter, were sales and purchase invoices and general journal entries. (Dep’t Ex. 500, at 01). The engagement letter was mailed by the DOA but returned as it was addressed to Jedediah but mailed to the accounting firm providing services to Jedediah. Ultimately it was delivered to Jedediah at the time of the subsequent audit. (Hr’g recording, McInerney testimony). The DOA was unable to determine exact credits or refunds for pre-August, 2010 non-taxable sales because Jedediah did not have source documents to substantiate exact sales of nontaxable items from January 1, 2009, through July 31, 2010. (Jedediah Ex. 101, Audit Report of January 6, 2016; Hr’g recording, McInerney testimony, Lovett testimony).

9. Jedediah did not have complete source sales documents because, prior to August 1, 2010, Jedediah used QuickBooks software to track its sales. This software only tracked

gross sales; it did not itemize drinks, food or gifts, to allow the DOA to track sales of taxable versus non-taxable items separately. Moreover, Jedediah's paper documents from 2009 that might have provided evidence of such sales were destroyed in a flood of the restaurant's basement prior to the initial audit of Jedediah. (Hr'g recording, Gierau testimony).

10. On August 1, 2010, Jedediah implemented the Maitre'D Point of Sale software to track sales of taxable and non-taxable items. (Dep't Ex. 504 at 0051-0054; Jedediah Ex. 101; Hr'g. recording, Gierau testimony). Unlike the previously used QuickBooks software, the Maitre'D software provided detailed product information. (Hr'g. recording, Gierau testimony). The detailed information allowed the DOA to differentiate between taxable and non-taxable items from August 1, 2010, through December 31, 2011. (*Id.*; Hr'g recording, McInerney testimony).

11. The auditor noted in the supplemental Audit Report: "Only the sales for August 1, 2010 through December 31, 2011 were examined as they [Jedediah] did not have any information available for January 2009 through July 2010." (Jedediah Ex. 101, Audit Report of January 6, 2016 (emphasis added)).<sup>4</sup>

12. Additionally, the supplemental Audit Report stated the following regarding examination of sales:

I looked at the sales receipts during the period of August 1, 2010 through December 31, 2011. The receipts showed they paid tax on everything. I then took their monthly sales per item summary and picked up bottled water, bottled juice, bottled beverages, coconut cranberry cookies, misc. drinks, newspapers, and packaged goods giving credit for all of these items. They did not have any paperwork for the period of the audit January 2009 through July 31, 2010; therefore, no credit was given for this period.

(*Id.* (emphasis added)).

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<sup>4</sup> Three different versions of the January 6, 2016 Audit Report were entered into evidence, Department Exhibit 507 and Jedediah Exhibit 100, containing the January 6, Audit Report as an enclosure with the April 25, 2016 transmittal of final audit findings, were the same other than formatting differences. But Jedediah Exhibit 101 also contained the January 6, 2016 Audit Report as an enclosure with a February 8, 2016 transmittal letter of preliminary findings from the DOA to Jedediah. The determination of net credit due was the same in all versions of the report. Language varies between the Department Exhibit 507/Jedediah Exhibit 100 and the Jedediah Exhibit 101 versions, sometimes significantly, but not materially as far as the ultimate determinations made by the State Board. Neither party addressed the differences. In this decision, the Board quotes from Jedediah Exhibit 101 as it more likely was the version transmitted from the DOA to Jedediah with the preliminary findings. Jedediah's opportunity to contest the preliminary audit findings is a material issue in the State Board's decision.

13. During the supplemental Audit: “No purchases were examined as they had been during the first audit.” (*Id.*).

14. Although Jedediah’s sales records from January 1, 2009, through July 31, 2010, were unavailable due to a flood, purchase invoices for 2010 were available to the DOA and were used in the original audit, with that audit report noting: “Purchase invoices were available for the years 2010 and 2011. They were filed alphabetically in folders by vendor and stored in boxes. The records were neat, clean and separated by year. I reviewed all purchase invoices for the two years provided. The majority of the purchases were resale items such as food, beverages, and souvenirs for the gift shop.” Further, noting that he was unable to review the 2009 records because they were destroyed in a flood, the original auditor “reviewed the general journal and picked up the items that were similar to those I picked up for 2010 and 2011.” *Jedediah I, supra* p. 2. (Jedediah Ex. 103).

15. The subsequent audit noted that purchase transactions from the original audit were used in the subsequent audit. (Dep’t Ex. 503, at 0026-27). Exactly what was provided to the second auditor is unclear from the record. Jedediah’s CEO testified that all the information provided for the first audit was provided the second auditor, but at the same time he did not know if all purchase information for the pre-August, 2010 period was provided to the second auditor. (Hr’g recording, Gierau testimony). The second auditor was not called to testify. The audit manager’s testimony was equivocal, as when asked specifically if purchase data from Jedediah’s vendors was provided to the second auditor, the audit manager testified: “No, not to my knowledge.” (Hr’g recording, McInerney testimony.)

16. The DOA provided Jedediah with its preliminary findings from the subsequent audit, by letter dated February 8, 2016, notifying that Jedediah was entitled to respond with a list of disputed items and/or request an informal meeting to discuss the preliminary findings by a response within thirty days from receipt of the February 8, letter. (Jedediah Ex. 101). While the letter carries a “Certified Mail – Return Receipt Requested” notation at the bottom, no documentation of the date of receipt was entered into evidence. The only evidence regarding receipt of the preliminary audit findings was Jedediah’s assertion that it was received February 17, 2016. (Jedediah Ex. 102). The Department also submitted an exhibit which was received into evidence and which duplicated the February 8, 2016 letter exactly, other than it was dated January 22, 2016 with the signature of the Audit Manager differing in each version. (Dep’t Ex. 505). Despite introducing this earlier version into evidence, the Department did not contend the earlier letter was sent. Nor, despite the certified receipt notation, did the Department provide evidence of the receipt date. The State Board finds Jedediah received the preliminary findings on February 17, 2016.

17. The DOA provided Jedediah with a closing conference checklist which noted the opportunity to meet directly with the DOA prior to issuance of the final audit findings,



stating the DOA “would like to be able to settle any questions or discrepancies ... during the review period given.” (Dep’t Ex. 503, at 0016).

18. On March 17, 2016, Jedediah responded to the preliminary audit findings, disputing a number of items and arguing in favor of using other methods to determine tax collected on non-taxable items before August, 2010. (Jedediah Ex. 102; Dep’t Ex. 506). Attached as Exhibit A to Jedediah’s response was Jedediah’s estimated amount of non-taxable sales tax collected for the pre-August, 2010 QuickBooks Period. (Jedediah Ex. 102). The DOA log contains a notation dated March 17, 2016 of an email from a paralegal (apparently with the office of Jedediah’s counsel) noting that the letter was incorrectly addressed to the Department of Revenue, but had been hand delivered to the Cheyenne office of the DOA on that date and requesting acknowledgment of the email. (Dep’t Ex. 501, at 0010).

19. In the March 17, 2016 response, Jedediah also requested an informal meeting to discuss items it disputed in the preliminary audit findings. (Jedediah Ex. 102; Dep’t Ex. 506, at 0060).

20. On March 8, 2016, twenty-nine days after the date the preliminary findings were mailed to Jedediah, the auditor who conducted the subsequent audit entered in the audit log, “No response to prelims. sent to final findings.” (Dep’t. Ex. 501, at 0010; *see also* Dep’t Ex. 502, at 0014). This audit log was approved by the audit manager on March 9, 2016, and by the audit supervisor on March 14, 2016. (Dep’t Ex. 502, at 0015). All entries were less than thirty days before Jedediah’s asserted receipt of the preliminary audit findings.

21. The DOA audit manager testified that he and the auditor reviewed the March 17, 2016 response from Jedediah, and there was no assertion at the contested case hearing that the response was not timely. There appears to have been no informal meeting to discuss the preliminary audit findings. The record discloses no such meeting. Jedediah’s counsel’s assertion that no meeting was held was not contested. Neither of the Department’s witnesses explained why an informal meeting was not held. (Hr’g. Recording, Lovett testimony, McInerney testimony).

22. The Department made no changes to the preliminary findings, and final findings were sent to Jedediah by letter dated April 25, 2016. (Hr’g recording, McInerney testimony; Dep’t Ex. 508).

23. The Department issued a final audit assessment letter on May 2, 2016, finding Jedediah was entitled to a sales tax refund or credit in the amount of \$13,198.56. (Jedediah Ex. 100; Dep’t Ex. 509). The Department did not agree to using Jedediah’s estimate to determine the tax amount collected (and thus potentially subject to crediting) on non-

taxable items before August, 2010. The Department allowed no credit for the pre-August, 2010 period.

24. Jedediah prepared the estimate document because the QuickBooks system did not differentiate between taxable and non-taxable items and its paper documents reflecting the sales for the QuickBooks (pre-August, 2010) period had been destroyed in a flood. (*Supra* ¶ 14). Jedediah's estimate purported to extrapolate sales data backward to reflect the pre-August, 2010 QuickBooks period, using current sales information from the subsequently implemented Maitre'D system in the post-August, 2010 period. Jedediah presented the estimate method as the only option at their disposal given the fact that Jedediah had no records to substantiate. (Hr'g recording, Clary testimony). The estimate document was the attempt of Jedediah's accountant representative to extrapolate from known values, what could be assumed to be for values that Jedediah did not have records for the 2009 calendar year and the first seven months of 2010. (Hr'g recording, Clary testimony; Jedediah Ex. 102). The estimate document was based on the following:

a. Management prepared daily sales tickets from the QuickBooks financial statements. The management-prepared sales tickets were used to calculate the total sales for the pre-August, 2010 period. This figure was subsequently used to produce the estimate document. (*Id.*).

b. The first step in the estimate methodology was to compute a percentage of roughly sixteen percent of non-taxable sales during the post-August, 2010 period. This percentage was then multiplied by the gross sales for the pre-August, 2010 period to calculate an assumed value of \$498,176.10, representing the total non-taxable sales during the pre-August, 2010 period. The \$498,176.10 assumed value was then multiplied by Wyoming's sales tax rate of 6%. The product of \$29,890.57 was the estimated sales tax erroneously collected for the pre-August, 2010 period. (Hr'g recording, Clary testimony).

c. The estimate document assumed the percentage of non-taxable sales for the two time periods were the same. (*Id.*; Jedediah Ex. 102).

d. Jedediah's accountant witness was familiar with various sampling methodologies, but had not made extensive use of sampling methodologies. Traditional sampling methodologies were not used to produce the assumed amount of over collected sales tax for the pre-August, 2010 period. (Hr'g recording, Clary testimony).

e. Purchase totals were included in the estimate document, but were not used to extrapolate the amount of sales tax collected during the pre-August, 2010 period. Only Jedediah's sales information was used in the estimate process. (*Id.*).

25. The accountant who prepared the estimate document did not testify at the hearing; the accountant who did testify on behalf of Jedediah was unable to establish the validity of the methodology used. (*Id.*).

26. The auditor who undertook the field work for the subsequent audit did not testify. An auditing manager with the DOA, who was involved with both the original and subsequent audits, testified on behalf of the Department. (Hr'g recording, McInerney testimony).

27. Testimony of the DOA audit manager contested the statistical validity of Jedediah's method of estimating its pre-August, 2010 non-taxable sales based on the unavailability of raw data showing Jedediah's total sales, as well as an inability to determine that the two data sets were comparable. Without any original source documents supporting the numbers used for the estimate document for the pre-August, 2010 period, and with no verifiable means to track original source information from receipt, through daily, then monthly sheets, then to the estimate document, no reliability testing of that document could be done. (Hr'g recording, McInerney testimony).

28. Generally, reliability is also diminished when the sample population is taken from multiple differing sources, rather than a single similar transaction source. In regard to the estimate document the two data sets were produced from different accounting systems, QuickBooks and Maitre'D. Thus it was unknown whether the estimate document projected like transactions against like transactions. (*Id.*).

29. The DOA audit manager had over twenty years' experience and had conducted thousands of audits while applying industry standard statistical sampling methodologies. He was a certified instructor of statistical sampling courses through the Multi-State Tax Commission. (*Id.*).

30. The testimony of the Department's witness regarding proper sampling methodologies and thus the validity or invalidity of the estimate document was more credible and persuasive than the testimony of Jedediah's witness on the issue.

31. The DOA audit manager testified that had Jedediah produced some supporting documentation for QuickBooks (pre-August, 2010) period transactions, even if they were incomplete, and depending on the quality of the documentation, he could have possibly performed a comparison between the pre and post-August, 2010 systems in order to make a pre-August, 2010 projection. With only the spreadsheet, he could not perform a projection without violating auditing standards. (*Id.*).

32. The DOA audit manager testified that had Jedediah provided purchase invoices from vendors and inventory information, the DOA may have been able to project a

statistically viable figure for the pre-August, 2010 period, after consideration of markups, breakage, spoilage, theft and the like. (*Id.*).

33. Jedediah could provide purchase information for the pre-August, 2010 period. The testimony of Jedediah's CEO that such information was provided to the auditor "as far as he knew," is confirmed by statements in the initial audit. (*Supra* ¶ 14; Hr'g recording, Gierau testimony).

34. The purchase information was used as part of the calculation for the estimate document, even though the greatest reliance was upon the proportional sales between the two periods. (Hr'g recording, Gierau testimony; Jedediah Ex. 102). Jedediah did not establish that the purchase information supporting the estimate document was presented to the auditor at the time of the subsequent audit. (Mr. Clary was "unsure" if Jedediah had provided the Department with any inventory purchase information prior to the supplemental audit). (Hr'g recording, Clary testimony; *see supra* ¶ 15).

35. The DOA used the purchase information in the original audit to identify Jedediah's purchases for which sales/use tax was not paid, and which were assessed pursuant to the audit. These included invoices from vendors during the January 1, 2010 to July 31, 2010 time period. General ledger entries were used for purchases during the 2009 calendar year. (Jedediah Ex. 103). *See Jedediah I, supra* p. 2.

36. Some prices on non-taxable items changed between the pre and post-August, 2010 periods, but the price of bottled water, which made up the largest single item of non-taxable sales, was the same in both periods. (Hr'g recording, Gierau testimony; *see* Jedediah Ex. 101 for non-taxable items reviewed in the post-August, 2010 period.). The price of nontaxable items was available for the pre-August, 2010 period, which Jedediah would have provided to the auditors if requested, although Jedediah's CEO did not know if it was. (Hr'g recording, Gierau testimony).

37. The proportionate sales of taxable and non-taxable items during the audit period had not changed "all that much." (*Id.*). While there was some loss between purchase and sales, shrinkage was negligible and the "vast majority" of what was purchased was sold. (*Id.*).

38. Alternative sampling methodologies are available to the DOA when records are lacking. The DOA will occasionally look at like businesses to determine the relative amount of tax collected. When using a comparative business analysis, the DOA tries to use a similar business with a similar amount of tax collected. The DOA auditors are not looking at accounting systems, they are looking at the tax. (Hr'g recording, McInerney testimony).

39. DOA reviewed the response to the preliminary audit findings, but nothing in the response affected the auditors' preliminary audit findings. (Hr'g recording, McInerney testimony).

40. The Department accepted the DOA audit without changing the net amount of credit, other than calculating interest due from Jedediah and reducing the credit amount accordingly. The Department determined that the estimate method proposed was insufficient. The Department Administrator testified the Department would need to see supporting documentation and that no invoices from Jedediah's vendors had been provided. (Hr'g recording, Lovett testimony).

41. The Department's contention that there was not sufficient information to determine pre-August, 2010 sales overlooks information provided in the original audit and available to the DOA, and is based on a parsing of various items of information provided, and a corresponding failure to address whether the information taken as a whole was sufficient to allow a valid determination of pre-August, 2010 non-taxable sales. The opening and closing statements of the Department emphasized the complete lack of documentation. (Hr'g recording). Specific examples of this contention follow:

a. Addressing the estimate document: "The DOA testified that this single paper was completely insufficient from an audit standard. [Bill McInerney Testimony, October 24, 2016, Hearing Audio]." (Dep't Proposed Finds of Fact, Conclusions of Law, Order at ¶ 56);

b. "While Jedediah offered verbal testimony that its pre-August 1, 2010 sales were similar to its sales thereafter, such testimony alone does not meet Jedediah's burden of proof.... [Bill McInerney Testimony, October 24, 2016, Hearing Audio]." (*Id.* at ¶ 57 (emphasis added));

c. Acknowledgment that "if Jedediah had been able to produce some supporting information for the pre-August, 1, 2010 transactions (even if partial or incomplete)...[the DOA] might have been able to ...make a backward projection. However, with nothing other than the spreadsheet the [DOA] could not perform such a projection without violating auditing standards. [Bill McInerney Testimony, October 24, 2016, Hearing Audio]." (*Id.* at ¶ 60 (emphasis added));

d. "In fact, Jedediah cannot provide any documentation for the [pre-August period] because there are no records." (*Id.* at ¶ 64);

e. "We weren't given any data for that [pre-August, 2010] period." (Hr'g recording, McInerney testimony);

f. In reply to whether Jedediah had ever provided the DOA with “any information” that would pertain to purchases from vendors for the pre-August, 2010 period, the DOA audit manager testified “No. Not to my knowledge.” (*Id.*).

g. In discussions with the auditor conducting the subsequent audit, the audit manager was informed by the auditor that no documentation existed which would allow the DOA to calculate the credit due for the pre-August, 2010 period; at that point the audit manager informed the auditor that credit could not be given for the pre-August, 2010 period because of the insufficient records. (*Id.*).

h. In addressing potential use of post-August 2010 period data to determine sales for the pre-August, 2010 period, the DOA audit manager testified that the DOA did not know if purchases were the same between the pre and post-August, 2010 periods and there was no way for the DOA to test whether they were. (*Id.*).

## **CONCLUSIONS OF LAW**

### **A. State Board’s review function: applicable presumptions and burdens of proof.**

42. 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) (2017).

43. The Department is an agency under the Wyoming Administrative Procedures Act, therefore the State Board acts as an adjudicatory forum for contested hearings of an agency decision. Wyo. Stat. Ann. § 16-3-101(b)(i) (2017).

44. According to the State Board’s Rules,

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, ch. 2, § 20 (2006).

45. “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.’ ” *Landwehr v. State ex rel. Wyo. Workers’ Safety & Comp. Div.*, 2014 WY 25, ¶ 14, 318 P.3d 813, 819 (Wyo. 2014) (quoting *Mitcheson v. State ex rel. Wyo. Workers’ Safety & Comp. Div.*, 2012 WY 74, ¶ 11, 277 P.3d 725, 730 (Wyo. 2012).

46. In the event a vendor does not keep suitable books and records of transactions related to sales tax, “he shall bear the burden of proof as to the correctness of any assessment of taxes imposed by the department for the period for which records were not preserved in any court action or proceeding[.]” Wyo. Stat. Ann. § 39-15-107(a)(ii) & (iii) (2013).

47. The role of the State 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 Prod. Co. v. Wyo. State Bd. of Equalization*, 12 P.3d 668, 674 (Wyo. 2000).

48. In its adjudicatory capacity, 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) (2017).

49. In any dispute, the State Board’s mission is not to maximize revenue or to punish nettlesome taxpayers, but to assure the equality of taxation and fairly adjudicate disputes brought before it. *Amoco*, 12 P.3d at 674.

50. The State Board will only issue an order after hearing a contested case “upon consideration of the whole record or such portion thereof as may be cited by any party and unless supported by the type of evidence commonly relied upon by reasonably prudent men in the conduct of their serious affairs.” Wyo. Stat. Ann. § 16-3-108(a)(2017). The State Board must use a reasonableness standard when it weighs evidence presented in a contested case hearing of a Department action. *Chavez v. State ex rel. Wyo. Workers’ Safety & Comp. Div.*, 2009 WY 46, ¶ 18, 204 P.3d 967, 971 (Wyo. 2009) (“We do not re-weigh the

evidence, but defer to the agency’s decision so long as it is based on relevant evidence that a reasonable mind might accept as supporting that decision.”).

51. “For evidence to be sufficient to allow a ‘reasonable mind’ to accept an agency’s conclusion, there must appear in the record evidence which allows either a definitive conclusion or a reasonable extrapolation based on the surrounding circumstances.” *Goshen Irrigation Dist. v. Wyo. State Bd. of Control*, 926 P.2d 943, 951 (Wyo. 1996).

52. When conflicting testimony is presented at a contested case hearing, the agency has the responsibility, as the trier of fact, to determine relevancy, assign probative value, and ascribe the relevant weight given to the evidence presented. *Clark v. State ex rel. Wyo. Workers' Safety & Comp. Div.*, 934 P.2d 1269, 1271 (Wyo.1997). The agency acting as the trier of fact is in the best position to judge and weigh evidence and may disregard an expert opinion if it finds the opinion unreasonable or not adequately supported by the facts upon which the opinion is based. *Spletzer v. State ex rel. Wyo. Workers' Safety & Comp. Div.*, 2005 WY 90, ¶ 21, 116 P.3d 1103, 1112 (Wyo. 2005).

53. The State Board’s decision must be supported by substantial evidence in the record. Wyo. Stat. Ann. § 16-3-114(c)(ii)(E)(2017). “Substantial evidence is relevant evidence that a reasonable mind can accept as adequate to support an agency's conclusion.” *Wyo. Bd. of Outfitters & Prof'l Guides v. Clark*, 30 P.3d 36, 45 (Wyo. 2001).

**B. Applicable statutory and regulatory provisions, and other guidelines.**

54. Wyoming’s sales tax, referred to as the “Selective Sales Tax Act of 1937,” is a self-reporting system. Wyo. Stat. Ann. § 39-15-102(a) (2013). It requires vendors to “file a true return showing the preceding month’s gross sales and remit all taxes to the department.” Wyo. Stat. Ann. § 39-15-107(a)(i) (2013); *see* Wyo. Stat. Ann. § 39-15-103(c) (2013).

55. Vendors and others liable for sales tax must preserve suitable records to allow verification of tax liability for at least three years:

(a) Returns, reports and preservation of records. The following shall apply:

...

(ii) Every vendor and person liable for the payment of sales tax under this article shall preserve for three (3) years at his principal place of business, suitable records and books as may be necessary to determine the amount of tax for which he is liable under this article, together with all invoices and books showing all merchandise purchased for resale. All records, books and



invoices shall be available for examination by the department during regular business hours except as arranged by mutual consent[.]

Wyo. Stat. Ann. § 39-15-107(a)(ii) (2013).

56. Failure to preserve suitable records places a burden on the vendor to prove the correctness of an assessment.

(a) Returns, reports and preservation of records. The following shall apply:

...

(iii) If any vendor . . . fails to comply with paragraph (ii) of this subsection [preservation of records], he shall bear the burden of proof as to the correctness of any assessment of taxes imposed by the department for the period for which records were not preserved in any court action or proceeding[.]

Wyo. Stat. Ann. § 39-15-107(a)(iii) (2013).

57. The Act also allows taxpayers and vendors to claim refunds of erroneously paid taxes, penalties, or interest:

(c) Refunds. The following shall apply:

(i) Any tax, penalty or interest which has been erroneously paid, collected or computed shall either be credited against any subsequent tax liability of the vendor or refunded. No credit or refund shall be allowed after three (3) years from the date of overpayment. The receipt of a claim for a refund by the department shall toll the statute of limitations. . . .;

(ii) Any tax erroneously paid by a taxpayer shall be refunded by the vendor who originally collected the tax. No cause of action shall lie against the vendor by the taxpayer until not less than sixty (60) days elapse following a request by the taxpayer for a refund from the vendor.

Wyo. Stat. Ann. § 39-15-109(c)(i), (ii) (2013).<sup>5</sup>

58. The Act provides a nearly identical provision for seeking a credit:

(d) Credits. The following shall apply:

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<sup>5</sup> The statute governing sales tax refunds and credits has since been amended, effective July 1, 2016. 2016 Wyo. Sess. Laws 226.

(i) Any tax, penalty or interest which has been erroneously paid, collected or computed shall either be credited against any subsequent tax liability of the vendor or refunded. No credit or refund shall be allowed after three (3) years from the date of overpayment. The receipt of a claim for a refund by the department shall toll the statute of limitations;

...

(iii) As soon as practicable after the return is filed the department shall examine it and if it appears the tax to be remitted is incorrect it shall be recomputed. If the amount paid exceeds that which is due the excess shall be refunded to the vendor or credited against any subsequent liability of the vendor;

(iv) The taxpayer is entitled to receive an offsetting credit for any overpaid excise tax identified by an audit that is within the scope of the audit period, without regard to the limitation period for requesting refunds.

Wyo. Stat. Ann. § 39-15-109(d)(i), (iii), (iv) (2013).

59. Because the refund and credit provisions are similar, the Department's rules during the relevant period provided for consistent treatment of refunds and credits:

- (a) General. The Department shall issue refunds or credits to the vendor (seller) or taxpayer (purchaser) from whom the original tax payment was received by the department. Vendors are entitled to claim a refund or credit.
- (b) Credit. The Department shall credit accounts for any overpayment of fees, tax, penalty or interest. Credits shall automatically be applied against the next appropriate liability on the account.
- (c) Refunds. Refund claims shall be initiated by the vendor or taxpayer that made the overpayment to the department. The refund request shall be made in writing to the Department and shall explain the basis of the refund request. Supporting documentation evidencing the overpayment must be retained by the vendor. Postmarks shall serve as the date of refund request and shall begin tolling the statute of limitations. The Department shall refund or deny all refund claims within ninety (90) days of the date adequate supporting documentation is received. A taxpayer seeking refund of taxes overpaid to a vendor must seek a refund from the vendor. A cause of action against the vendor for over-collected sales or use tax shall not accrue until the taxpayer has provided written notice to the vendor and the vendor has had sixty (60) days to respond. Such notice to the vendor must contain the information necessary to determine the validity of the request. In connection with the taxpayer's request from the vendor of over-collected sales or use tax, a vendor shall be presumed to

have a reasonable business practice, if in the collection of such sales or use taxes, the vendor:

- (i) Uses either a provider or a system, including a proprietary system, that is certified by the state; and
- (ii) Has remitted to the state all taxes collected less any deductions, credits or collection allowances.

Rules, Wyo. Dept. of Revenue, ch. 2, § 10(a)–(c) (2012).

### C. Analysis.

#### i. Rejection of the amount of credit claimed by Jedediah.

60. The analysis begins with Wyoming Statutes section 39-15-107(a)(ii) and (iii) (2013). *Supra* ¶¶ 55–56. Paragraph (ii) requires the vendor to maintain all “suitable records and books as may be necessary to determine the amount of tax for which he is liable under this article, together with all invoices and books showing all merchandise purchased for resale.” Wyo. Stat. Ann. § 39-15-107(a)(ii) (2013). If the vendor does not do so, the vendor has the burden of proof “as to the correctness of any assessment of taxes imposed by the department.” Wyo. Stat. Ann. § 39-15-107(a)(iii) (2013).

61. In reviewing the Department’s assessment/credit allowed, the State Board may not consider evidence the taxpayer did not make available to the auditors. The State Board must restrict its decision to the record existing at the time of the audit and assessment. *Wyo. Dep’t of Revenue v. Qwest Corp.*, 2011 WY 146 ¶ 30, 263 P.3d 622, 631-632 (Wyo. 2011).<sup>6</sup> The State Board may properly rely upon testimony explaining information available during an audit and conclusions in that testimony about the issues at a contested case hearing. *Id.* at ¶ 29.

62. Due to flooding, Jedediah was unable to produce the necessary records and books it was required to maintain under Wyoming Statutes section 39-15-107(a)(ii) (2013), *supra* ¶ 55. Therefore the burden shifted to Jedediah to provide proof relating to “the correctness of any assessment of taxes imposed by the department.” Wyo. Stat. Ann. § 39-15-107(a)(iii) (2013), *supra* ¶ 56.

63. Jedediah’s one-page estimate document using post-August, 2010 sales information to extrapolate an estimate of erroneously collected sales tax was not sufficient documentation to meet Jedediah’s statutory requirement under Wyoming Statutes section

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<sup>6</sup> The effect of Wyoming Statute section 39-11-109(b)(iv)(2017), on the Qwest opinion, was not addressed by either party. Though not without question, the Board does not find it applicable to this sales tax appeal. For more in depth discussion see, *In re Frontier Refining Inc.*, Docket Nos. 2015-42, 2015-45, 2017 WL 3469015 (Wyo. State Bd. of Equalization, July 3, 2017), Concurring & Dissenting Op. at n. 8.

39-15-107(a)(ii) (2013). *Supra* ¶ 55. In light of our factual finding that the DOA audit manager's testimony regarding the validity of the estimate document was more credible and persuasive than that of Jedediah's witnesses on the issue, the State Board concludes that Jedediah did not carry its burden to overcome the presumption of correctness of the Department's assessment under paragraph (iii) of the statute, which resulted in a rejection of Jedediah's tax credit claim of \$47,477.29. The Department determined that Jedediah's methodology was insufficient to substantiate a tax credit claim of \$47,477.29. *Supra* ¶ 40. The State Board agrees that the estimate document was so lacking in substantiation that it alone did not meet Jedediah's burden and serve "to assure the equality of taxation." *Amoco*, 12 P.3d at 674.

64. This conclusion is consistent with other Board decisions addressing similar situations, where the taxpayer's accounting system was not accurate or did not provide sufficient information for tax reporting.

a. In *In re Goofy's Tavern*, Docket No. 2009-25, 2010 WL 372714 (Wyo. State Bd. of Equalization, Feb. 2, 2010), the "Z" tapes originating from the business's cash registers were destroyed daily after information from the "Z" tapes was inputted to daily cash reports. In an audit, the DOA was unable to ascertain from the daily cash reports whether the business had collected or paid sales tax on tobacco products sold. Goofy's accountant used a daily cash report for a date post-audit to demonstrate the tavern's method for tracking sales information. The State Board found that the accountant's explanation was only speculative, as no actual documentary evidence was provided for any audit date with a comparison of the "Daily Cash Report" with the corresponding "Z" tapes. The State Board held "Goofy's Tavern, in providing only Daily Cash Reports without the additional cash register "Z" tapes, did not maintain the required suitable records necessary to make a clear termination of sales tax liability. *Id.* at ¶ 75. Goofy's failed to meet its burden to substantiate its previously signed and submitted sales/use tax return and was required to pay back-taxes, interest, and a civil penalty. *Id.* at ¶ 89.

b. In *In re Triton Coal Co.*, Docket No. 1999-64, 2000 WL 1419651 (Wyo. State Bd. of Equalization, Aug. 30, 2000), Triton Coal Company attempted to reclassify certain expenses from direct mining costs to indirect mining costs. Triton was given nearly a year to provide the DOA and the Department substantiating documentation to support such a reclassification. Triton, however, could not provide sufficiently detailed records to substantiate a reclassification since its accounting system was unable to differentiate between items that conformed to direct mining costs and those of indirect mining costs. Triton argued that since its accounting system could not distinguish between direct and indirect expenses, it should be allowed to claim all, or a portion, of its costs as indirect mining costs. The State Board found that a taxpayer, such as Triton, which maintains an inaccurate accounting system in violation of Wyoming's mineral taxation code, cannot be permitted to benefit from such action. Such a system would punish taxpayers who abide

by the law and maintain efficient and accurate accounting books and records in accordance with Wyoming law. The State Board held Triton failed to meet its burden to substantiate a reclassification of expenses from direct mining costs to indirect mining costs. The Department of Revenue's refusal to reclassify was affirmed.

ii. Best Information Available Standard.

65. That Jedediah failed to establish the Department was incorrect in rejecting its claimed credit does not end the inquiry. 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). Here the State Board must resolve the issue raised by Jedediah regarding the breadth of the “best information available” standard under Wyoming Statutes section 39-15-107(a)(iv)(2013), as interpreted in *Qwest*, *supra* ¶ 61, and its application to this case.

66. Relying on Wyoming Statutes section 39-15-107(a)(iv) (2013), Jedediah claims the Department must issue a credit based on the best information available to it. This provision states:

(iv) If a vendor fails to file a return as required by this article, the department shall give written notice by mail to the vendor to file a return on or before the last day of the month following the notice of delinquency. If a vendor then fails to file a return **the department shall make a return from the best information available** which will be prima facie correct and the tax due therein is a deficiency and subject to penalties and interest as provided by this article.

Wyo. Stat. Ann. § 39-15-107(a)(iv) (2013) (emphasis added).

67. While by its plain language, the statute does not apply to refunds or credits, the Wyoming Supreme Court held in *Qwest*, a case involving an erroneous payment of sales taxes, that it saw no reason, “when it is clear as it was here that a taxpayer is entitled to a refund, the best information available to the DOR/DOA should not be used to calculate the refund/credit.” *Qwest*, ¶ 31, 263 P.3d at 632.

68. *Qwest* did not present the exact factual situation presented here. As noted by the Department, the main distinction is that in *Qwest* the DOA had previously used a best information available method, agreed to by the taxpayer and the DOA, to determine an asserted sales tax deficiency. After a Court ruling that the sales tax was in fact not due on the service provided, a credit was sought by *Qwest* as the vendor. Rejecting the contention that the actual sales tax data was needed to determine the credit due, the Wyoming Supreme Court determined the same procedure and type of information should have been used by

the DOA to determine the amount of the refund. *Id.* “By refusing to use the data available to it, the DOA/DOR expended significant time and taxpayer money in litigation when it was clear, as a matter of law, the taxpayer was entitled to a refund.” *Id.*<sup>7</sup>

69. Jedediah asserts that despite the loss of its original sales tax records for the pre-August, 2010 period, the Department has an obligation to use the best information available to determine the amount of Jedediah’s non-taxable sales and corresponding refund. It would have this Board remand the case for the Department’s failure to “use its best efforts” to determine the amount of overpayment during the audit period. (Pet’r’s Proposed Findings of Fact & Conclusions of Law, ¶¶ 33, 38). *Qwest* does not support the proposition that a taxpayer is alleviated of its responsibility to produce relevant information to the DOA and Department to enable calculation of sales tax due; the Court reaffirmed that responsibility in the opinion. *Qwest*, ¶ 26, 263 P.3d at 630. *Qwest* does not shift the burden to the DOA and Department, nor impose what Jedediah asserts as a “best efforts” standard upon the DOA and Department. The *Qwest* holding was that the DOA could have used information made available to the auditors to determine the refund due and erred by not using that information to calculate the refund, when that same information had been used by the DOA and Department as the best information available to calculate the tax due in an earlier audit. If records are not provided to support a taxpayer’s assertions, it is not the responsibility of either the DOA or the Department to search out those records.

70. The mechanisms of Wyoming Statutes section 39-15-107(a) (2013) evince the Wyoming Legislature’s intent for the burden of proof to reside expressly with the taxpayer “as to the correctness of any assessment of taxes imposed by the department for the period for which records were not preserved[.]” Wyo. Stat. Ann. § 39-15-107(a)(iii) (2013). The best information available refers to the information that best allows the Department to make a valid calculation of an assessment or, as in this case, a refund or credit due.

71. The State Board would affirm the Department’s determination that the information made available by Jedediah was insufficient under the best information available standard to allow a valid calculation of the credit due for the pre-August 2010 period, if the Department had based its determination “on relevant evidence that a reasonable mind might accept as supporting that decision.” *Chavez*, ¶ 18, 204 P.3d at 971. But Jedediah presented other evidence suggesting the Department’s determination regarding the lack of information to calculate a valid assessment or credit was incorrect.

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<sup>7</sup> An aspect of *Qwest*, not present here, is that *Qwest* in fact had the actual sales tax information the DOA sought and asserted was needed. It was, however, not produced until after the audit and assessment and the contested case hearing. The Court ruled the State Board erred in subsequently admitting and considering the information not made available to the auditors. That fact did not alleviate the Department’s obligation to use the best information available to determine the credit due under the facts of *Qwest*.

72. Jedediah presented sufficient evidence to show the DOA's conclusion and the corresponding acceptance of that position by the Department, that no credit could be granted based on a complete lack of documents, was in error. The Department's evidence on this aspect was based in part upon inaccuracies and thus failed to overcome that showing. (*Supra* ¶ 41).

73. The DOA's and Department's failure to consider purchase records available for the entire 2010 and 2011 calendar years, including seven months of purchase records for the pre-August, 2010 period, in order to determine if those records supported a reliable calculation of sales tax erroneously collected and remitted, together with the failure to consider general ledger entries for the 2009 period for the same purpose (which were used in the initial audit), was arbitrary.

74. Further, Jedediah was entitled to an informal meeting with the DOA after receipt of the preliminary audit findings and was entitled to be notified in writing of the date, time and place for the meeting. This was in addition to Jedediah's right to submit additional information after receipt of the preliminary findings. Rules, Wyo. Dep't. of Audit, ch. 11, § 17 (1992, superseded, March 12, 2014). Based upon the record before the State Board, the failure to provide that meeting was arbitrary and contrary to law.

75. The Board does not hold that the documents reviewed by the auditors or made available for review are sufficient to establish the credit due for the pre-August, 2010 period. The state of the record does not allow that conclusion. But Jedediah was entitled to auditor review of the purchase data and other documents and information made available to the auditors, and to consideration by the DOA and Department of information which it could have presented at the informal meeting in order to ensure a fair determination of whether that information supported its burden under Wyoming Statutes section 39-15-107(a)(ii)-(iv) (2013), as interpreted by the Wyoming Supreme Court.

76. As noted in the concurring opinion, unlike *Qwest*, *supra* ¶ 61, the true taxpayers in this case will not receive refunds. However, the determination that Wyoming Statutes section 39-11-109(c) and (d) (2013) mandate a refund or credit to the vendor in this case, regardless of payment to the customers, was made by the State Board in the first appeal. The Department did not appeal that determination. The holding in *Qwest* and its interpretation of Wyoming law is not dependent upon whether the "true victims" of an erroneously collected sales tax receive a refund.

## CONCLUSION

77. The Department's tax liability determination of \$7,761.80 for the audit period, together with interest of \$927.16 owed on that liability, are affirmed. Jedediah failed to establish its claim that it was due a credit of \$47,477.29. Jedediah also failed to establish

that the DOA erred in calculating the credit due for the post-August, 2010 period of \$21,887.52.

78. Jedediah did present sufficient evidence that the Department's determination that no credit could be provided for the pre-August, 2010 period due to a lack of information made available to the DOA and Department was incorrect. The Department failed to present evidence to rebut that showing. The Department is required to use the best information made available by Jedediah to it and the DOA, together with any information which Jedediah was entitled to provide prior to the issuance of the final audit findings of April 25, 2016, to determine if Jedediah established a credit due for the period of January 1, 2009 through July 31, 2010, for erroneously remitted sales tax.

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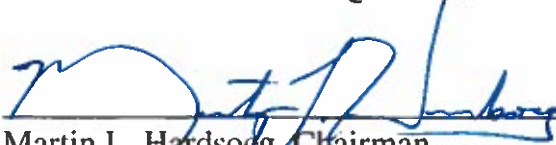
**ORDER**

**IT IS, THEREFORE, HEREBY ORDERED:** The Department of Revenue's audit assessment providing a net credit of \$13,198.56, for that portion of the audit period covering August 1, 2010, through December 31, 2011, is **affirmed**. The Department's determination that no credit was due for the period January 1, 2009 through July 31, 2010, and the audit assessment related to that period is **remanded** to the Department for further proceedings consistent with this decision. Those proceedings shall include the Department or Department of Audit review of Jedediah's sales tax remittances during that portion of the audit period consisting of January 1, 2009 through July 31, 2010, to determine if information previously provided by Jedediah to the DOA or Department, and information which Jedediah was entitled to provide prior to the issuance of the final audit findings of April 25, 2016, is sufficient to allow the Department to make a valid calculation of any over-collection and remittance of sales taxes so that the same may be applied as an additional offsetting credit against Jedediah's sales tax liability and credit otherwise determined by the Department for the audit period.

**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 28<sup>th</sup> day of August, 2017.

**STATE BOARD OF EQUALIZATION**

  
\_\_\_\_\_  
Martin L. Hardsog, Chairman

  
\_\_\_\_\_  
E. Jayne Mockler, Vice-Chairman

  
\_\_\_\_\_  
David Gruver, Board Member

**ATTEST:**

  
\_\_\_\_\_  
Nadia Broome, Executive Assistant

## CONCURRING -- Board Member David Gruver

1. I concur in the remand to the Department under the law of the case as it stands before the Board in this appeal. The result in this case, in which a vendor erroneously collects monies from customers for sales taxes which are not due, dutifully remits those to the State, and then is allowed a credit for those collections against the vendor's separate and distinct liability for sales and use taxes, is incorrect in my view. It will have limited application since legislation addressing the issue was enacted in 2016. As there could be similar cases predating the 2016 enactment, the first part of this concurrence is directed to this issue.

2. The second portion of this concurrence addresses the issue of the best information available standard taken from statutes applicable to the failure of a vendor to file a return and applied by the Wyoming Supreme Court to refund/credit claims by the *Qwest* decision. *Wyo. Dep't of Revenue v. Qwest Corp.*, 2011 WY 146, 263 P.3d 622 (Wyo. 2011).

### **Receiving credit for erroneously collecting and remitting customer's money.**

3. The Wyoming Supreme Court in *M & B Drilling and Construction Co., Inc. v. State Board of Equalization*, 706 P.2d 243, 245-256 (Wyo. 1985) followed the rule that a vendor could not claim tax payments improperly collected from its customers and remitted to the State, as credit for the vendor's tax liability for other transactions. The case followed the holding in *Walgreen Company v. State Board of Equalization*, 62 Wyo. 288, 166 P.2d 960, *reh. denied* 62 Wyo. 336, 169 P.2d 76 (1946). The remitted funds belonged to the customers and, to the extent they could not be returned to the customers, they should escheat to the State. *M & B Drilling*, 706 P.2d at 246 n. 5.

4. Sixteen years after *M & B*, in *Wyoming Department of Revenue v. Buggy Bath Unlimited Inc.*, 2001 WY 27, 18 P.3d 1182 (Wyo. 2001), the Court acknowledged *M & B* and *Walgreen*, but held those cases did not reflect the facts before the Court, nor the applicable credit/refund statute then in effect. The Court distinguished the situation in *Buggy Bath*: (1) the vendor had not violated statute but had relied upon a Department rule later declared void; and (2) the vendor did not ask that the erroneously collected monies be applied to its own distinct tax liability, rather it asked for a refund. Focusing on the credit/refund statute then in effect, the Court held the vendor in *Buggy Bath* was entitled to a refund of sales tax collected from its customers pursuant to the subsequently voided Department rule, as the refund statute was found to mandate return of the funds to the vendor only. *Buggy Bath*, ¶ 22, 18 P.3d at 1188.

5. In the first appeal of this case, this Board referenced all three cases and noted Jedediah's over-collection of taxes was due solely to its own fault. Still, following *Buggy Bath's* reading of identical refund/credit language (*compare* Wyo. Stat. Ann. § 39-6-410(c) (1997) *with* Wyo. Stat. Ann. § 39-15-109(c)(i) & (d)(i) (2013)), the Board concluded the law was an affirmative directive that the refunds or offsetting credits be issued to the vendor, regardless of the vendor's failure to refund those erroneously paid taxes to the customer. *In re Appeal of Jedediah Corp. (Jedediah I)*, Docket Nos. 2013-08 & 2013-50, (Wyo. State Bd. of Equalization, Oct. 9, 2015) 2015 WL 6121954 ¶¶ 50-52. I would have distinguished the instant case from *Buggy Bath*, based upon the fact differences noted in *Buggy Bath*, and concluded the facts appeared more closely aligned with *Walgreen* and *M & B*. That course of action would have rejected Jedediah's credit and refund claims.<sup>7</sup>

**The application of the best information available standard under *Qwest* on remand.**

6. The Decision of the State Board appropriately limits application of *Qwest*, although remanding due to other errors in this case. The application of *Qwest* is sound, but upon remand the difficulty in applying the best information available standard to refund requests remains.

7. In *Qwest*, the Court was confronted with a sales tax refund issue. Relying upon a sales tax statute which authorized the Department of Revenue to use the best information available to make a return on behalf of a vendor when the vendor failed to file a return, the Court held:

Wyo. Stat. Ann. § 39-15-107(a)(iv) states that the DOR should use the best information available to determine an assessment of taxes when the taxpayer has not supplied sufficient information. We see no reason why, when it is clear as it was here that a taxpayer is entitled to a refund, the best information available to the DOR/DOA should not be used to calculate the refund/credit.

*Qwest*, ¶ 31, 263 P.3d at 632.

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<sup>7</sup> The State Board noted, but did not address, the distinction in "refund" versus "credit" against the vendor's own tax liability. *Jedediah I* at ¶ 49. Rather, the Board found Jedediah was entitled to an audit assessment that included a calculation of any offsetting credits due and that finding resulted in the dismissal "as moot, Jedediah's redundant claim for a refund, Docket No. 2013-50." *Id.* at ¶ 57. I see substantive differences in the refund and credit statutes, but with no appeal of the State Board's Order, nor identification of these issues in this appeal, the issues decided are the law of the case, or have been waived by the parties. *Triton Coal Co. v. Husman*, 846 P.2d 664, 667 (Wyo. 1993); *Ultra Res., Inc. v. Hartman*, 2015 WY 40, ¶ 40, 346 P.3d 880, 895-96 (Wyo. 2015).

8. Perhaps the State Board decision could completely limit the best information available standard pronounced in *Qwest* for refund claims to the exact fact situation presented there, i.e., a previously known and used method to calculate a sales tax deficiency was required to be used to calculate a refund of that sales tax when the underlying authority to collect it was subsequently held to be invalid, and when there existed a plan to return refunded amounts to the actual taxpayers. That would be a most narrow, but perhaps begrudging, reading of *Qwest*. Understandably where, like *Qwest*, it is clear that a credit is due the vendor and documentation used in the first audit to establish a tax liability was not reviewed to determine if it could support the establishment of the credit amount, the State Board does not take such a narrow view.

9. Attempting to fairly apply the *Qwest* holding on best information available in the refund context leaves the taxpayer, the DOA, and Department with some lack of clarity. The parties' positions in this case highlight the difficulties as each points to the other, arguing the other's failure to carry their respective burdens. While the *Qwest* case imposes a burden on the Department to use the best information available, it seems the burden of proof should remain with the taxpayer to establish any failure of the Department to do so in determining a refund or credit. That would be the result by resort to the Board's rules generally, and the statutes addressing failure to maintain records and the presumption of correctness given to the Department's determination when an assessment is imposed by means of the best information available. Wyo. Stat. Ann. § 39-15-107(a)(iii), (iv) (2013).

10. Beyond the issue of applying the best information available standard in the refund context, is the question of statutory authority for doing so. The standard is found in eighteen Wyoming statutory tax provisions. All but two address an assessment or a valuation when a taxpayer has failed to make some required filing, whether a listing of property owned, production values, a sales or use tax return generally, or a report of fuel sold and used by certain carriers.<sup>9</sup> The standard does not appear in any tax refund or credit statute. It does appear in the compliance and audit provisions for corrections for use taxes. Wyo. Stat. Ann. §§ 39-16-107(a)(iv) & 39-16-108(a)(i) (2013). But the same correction language does not appear in the sales tax compliance or audit provisions. Wyo. Stat. Ann. §§ 39-15-107(a)(iv) & 39-15-108(a)(i) (2013).

11. A refund/credit for erroneously collected sales taxes was at issue in *Qwest*, and in the instant case. Regardless of one's view on the wisdom of not including the best information available language in the sales tax refund/credit statutes, the wisdom of statutes or expediency of statutes is for the Legislature. *Galesburg Const. Co. Inc., v. Bd. of Trustees of Mem'l Hosp. of Converse Cty.*, 641 P.2d 745 (Wyo. 1982). Adjudicatory

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<sup>9</sup> Wyo. Stat. Ann. §§ 39-13-103(b)(v), 39-13-107(a)(i), 39-14-108(a)(i), 39-14-208(a)(i), 39-14-308(a)(i), 39-14-408(a)(i), 39-14-508(a)(i), 39-14-608(a)(i), 39-14-708(a)(i), 39-15-107(a)(iv), 39-15-108(c)(xii), 39-16-107(a)(iv), 39-16-108(a)(i), (c)(ii) and (iii), 39-17-108(c)(ii), 39-17-208(c)(ii), 39-17-308(c)(ii) (added in 2017).

bodies cannot legislate in the stead of the Legislature's failure to do so; nor, under the guise of interpretation supply omitted provisions in a statute. *Gainsco Ins. Co. v. Amoco Prod. Co.*, 2002 WY 122, ¶ 88, n. 13, 53 P.3d 1051, 1078, n. 13 (Wyo. 2002); *Wetering v. Eisele*, 682 P.2d 1055 (Wyo. 1984). There simply is no "best information available" requirement for sales tax refund or credit claims in statute. Despite the lack of statutory language underlying application of a best information available standard to sales tax credit and refund statutes, the State Board gives *Qwest* a fair reading, and follows its holding on this issue. In so doing, it is fair to note the Legislature has not amended the sales tax credit or refund statutes to negate this aspect of the *Qwest* holding.

Dated this 28<sup>th</sup> day of August, 2017.



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David Gruver, Board Member

**ATTEST:**



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Nadia Broome, Executive Assistant

## CERTIFICATE OF SERVICE

I hereby certify that on the 28<sup>th</sup> day of August, 2017, I served the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER** and **CONCURRENCE** 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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