

BEFORE THE STATE BOARD OF EQUALIZATION

FOR THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF)
ANCHOR SIGN, INC. FROM A DECISION) Docket No. 2016-51
BY THE DEPARTMENT OF REVENUE)
(Contractor Determination))

DECISION AND ORDER

APPEARANCES

Ken Newhouse, appointed representative, filed a brief on behalf of Anchor Sign, Inc. (Petitioner or Anchor).

Karl D. Anderson, Senior Assistant Attorney General, and Daniel Solich, Assistant Attorney General, filed a brief on behalf of the Wyoming Department of Revenue (Department).

DIGEST

Anchor appeals to the Wyoming State Board of Equalization (State Board) from the Department's determination that Anchor is a contractor. That seemingly unremarkable classification has tax consequences. Anchor manufactures lighted signs for well-known stores, restaurants, and other establishments, and it installs some of those signs in Wyoming. The Department determined that the signs Anchor installs in Wyoming are real property, rather than personal property. That determination makes Anchor a contractor under Wyoming law, which, in turn, makes Anchor responsible for sales and use tax on all materials and supplies it uses to install signs in Wyoming. Because the parties agreed to expedited review under this Board's rules, we decide this case on the written arguments and evidence submitted by the parties without a hearing. Rules, Wyo. State Bd. of Equalization, ch. 2 § 15 (2006). Concluding that Anchor is not a contractor because the signs are not real property, we reverse and remand.

ISSUE

Anchor identified a single issue:

Whether or not the Petitioner becomes a contractor or not through the installation of channel letter signs that they install on to real property.

(Anchor Br. 4).

The Department also identified a single issue:

Anchor utilizes highly trained crews and a national fleet of cranes to professionally install and maintain large signs over the entryways of the premises of nationally known retail, restaurant and other franchise owners. Did the Department correctly determine that Anchor's installation of these signs constitutes the repair, alteration, improvement or construction of real property under Wyoming Statutes § 39-15-301(a)(ii)?

(Dep't Br. 2). The resolution of the Department's issue will determine the answer to Anchor's question.

JURISDICTION

The State Board shall "review final decisions of the department upon application of any interested person adversely affected." Wyo. Stat. Ann. § 39-11-102.1(c) (2017). A taxpayer may file an appeal with the State Board within 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 that Anchor is an out-of-state contractor because the signs Anchor sells and installs in Wyoming are real property. (Dep't R. at 1-6). Due to its designation as a contractor, the Department determined that Anchor is "subject to project registration, reporting and bonding as required by statute." (Dep't R. at 1). Anchor timely appealed the Department's determination. The State Board has jurisdiction to decide this matter.

FINDINGS OF FACT

The parties agree on all the material facts, and have stipulated to these 39 facts:

1. On September 25, 2014, the Department informed Petitioner that because of recent work being done by Anchor in Wyoming, that Petitioner must register in Wyoming as an out-of-state contractor subject to project registration, reporting and bonding requirements.
2. Petitioner requested on November 25, 2014, a classification determination from the Department regarding the requirement to classify Anchor Sign as a contractor. [Certified Record bates pp. 40-55].
3. On December 31, 2014, the Department, in response to an email from Petitioner, issued an initial interpretation letter to Petitioner based on Anchor Sign's prior inquiries. [Certified Record bates pp.29-39].

4. On January 30, 2015, Petitioner responded to the Department's initial letter. [Certified Record bates pp. 26-28]. Based upon this follow-up correspondence the Department amended a portion of its previous determination in a letter dated February 18, 2015. [Certified Record bates pp. 21-25].

5. On February 18, 2015, the Department issued an additional letter to Petitioner stating that: *"With regard to signs installed by your client ("Anchor") at locations that are not owned by the client's customer (i.e. "Customer" is the lessee of the facility) and where the Customer's contract with the landowner expressly states that any signage affixed to the property is returned to its pre-lease condition, we will reconsider our previous determination. After thoughtful review we acknowledge that in such an instance it cannot be the intent of the owner to make the signage part of the real property, therefore we will consider that the signage itself is and continues to be tangible personal property even while installed at the Customer's location and both the sign and the labor or services to the sign are taxable to the Customer."* [Certified Record bates p. 12].

6. On June 25, 2015, the Department issued a follow-up letter to Petitioner stating that: *"To date we have not received the appropriate licensing forms as requested in our taxability determination letter of February 18, 2015 as required by W.S. 31-16-101(a)(xviii); W.S. 39-15-106(a) to be licensed with the State of Wyoming. We have enclosed the appropriate licensing application for your convenience. In addition, a portion of your business will include work done to real property. The State of Wyoming, through the Department of Revenue has certain requirements of contractors operating within the state as required by W.S. 39-16-301(a)(i); W.S. 39-16-303(b)(i)."* [Certified Record bates p. 20].

7. On July 27, 2015, Petitioner provided the Department with additional legal arguments and case law to support its disagreement with the Department's position. [Certified Record bates pp. 10-11].

8. On October 2, 2015, the Department issued another revised determination letter responding to Petitioner's additional arguments. [Certified Record bates pp. 7-9]. Petitioner timely appealed that determination to the Wyoming State Board of Equalization under SBOE Docket No. 2015-54.

9. During the course of the appeal of SBOE Docket No. 2015-54, the Department further reviewed the facts, statutes and case law and issued a revised (and final) determination letter dated September 28, 2016. [Certified Record bates pp. 1-6]. The Department stated that *"[t]his letter of*

determination supersedes our previous letters dated December 31, 2014, February 18, 2015 and October 2, 2015.” [Certified Record bates p. 1].

10. Based upon the revised September 28, 2016 letter, the Petitioner and the Department jointly moved to dismiss Anchor’s appeal in SBOE Docket No. 2015-54 with the understanding that Petitioner would file a new appeal from the Department’s final determination letter of September 28, 2016.

11. Petitioner timely appealed the Department’s final determination of September 28, 2016, to the Wyoming State Board of Equalization under Docket Number 2016-51.

12. Petitioner is a South Carolina corporation with its principal office at 2001 Summerville Ave, North Charleston, SC 29405. Petitioner’s Employer Identification Number is 57-0933824.

13. Petitioner manufactures, sells, and installs signs for customers in multiple states, including Wyoming.

14. Petitioner’s customers are nationally known retail, restaurant, and other franchise owners, such as Wells Fargo, H & R Block, Petco, Marshalls, Five Guys, The Home Depot, and TJ Maxx who, in the vast majority of occasions, lease their places of business.

15. The sales contracts are national contracts and are agreed upon between Petitioner and the Corporations at the national level.

16. These leased spaces are typically real property located in shopping malls or are stand-alone buildings.

17. The signs Petitioner manufactures have the customer’s names on them, are fashioned in the shape of the customer’s name, are electronically illuminated, and are installed prominently over the entryways of the respective customer’s leased store front or restaurant space. These signs are intended to identify the name of the business, the location of the business and/or the nature of the business to the public, during the period of time that the customers are located at that particular building.

18. Petitioner generally establishes a contract with the customers nationally to install, move, repair and maintain signs that it has manufactured.

19. The signs are manufactured at Petitioner’s facility in Charleston, South Carolina and are shipped either by the Petitioner or by common carrier

to the customer's designated location within different states, including Wyoming.

20. To ship, install, and repair their signs, Petitioner utilizes a national installation fleet of flatbed trucks, enclosed box trucks, customized multi-level transport trailers, and cranes.

21. Under its vertically integrated business model, Petitioner directly employs strategically located, highly trained, crews to install the signs.

22. Once produced in South Carolina, the signs do not undergo any further manufacturing in the state of Wyoming.

23. Petitioner installs signs at the customer's designated location.

24. The signs are bolted to the building, and the wiring to illuminate the sign connects to the building's wiring at a junction box.

25. The signs also contain transformers, conduits, electrical feeds and backboards.

26. The wiring between the junction box and the building's electrical breaker box is not provided by the Petitioner nor is it a part of their installation process.

27. Examples of engineering diagrams and pictures showing before and after installation have been provided to the Department. [Certified Record bates pp. 46-55].

28. "*Channel letter signs*" are individually illuminated letters and graphics commonly used in signs for shopping malls and on exterior storefronts. They are installed by being bolted to a wall and connected to the building's electrical system at a junction box. There are three types of channel letter signs:

- a. *Standard channel letters* are made up of a U-channel letterform base with colored Plexiglas faces and are usually backlit;
- b. *Reverse channel letters* have metal faces and returns (sides of the letterforms) and have a clear plastic backing. These letters are designed to be mounted several inches away from the wall (at night, these letters create a halo effect); and

- c. *Open-face channel letters.* Though not actually open, the faces of these letters are clear plastic with the balance of the letters built just like standard channel letters. This allows for raw neon to be seen, as well as the inside of the U-channel letterform itself.

29. The signs manufactured, sold and installed by the Petitioner in Wyoming have all been of the type described above.

30. Once the installation is complete, Petitioner then invoices its customer for the contracted price plus sales tax.

31. Because the majority of Petitioner's customers are leasing their locations, they have specific requirements regarding the nature of the signs they are purchasing which are dictated by their individual lease agreements. Customers in turn make those requirements a condition of their contracts with Petitioner.

32. As required by the customer, the signs must be removable (in the event of repairs or replacement should they decide to change their logo, name, etc.) with no damage to the signs themselves.

33. As required by the landlord, the signs are designed to be removable with little or no damage to the building they are attached to.

34. Customer real property lease agreements generally require the signage to be removed when the lease period is concluded and/or the customer relocates. Such lease agreements typically require the signs to be removed at the end of the lease and any damage to the building repaired and the building conditions restored.

35. When repairs are needed or the sign needs to be removed, Petitioner either provides the service or engages third party subcontractors to perform that service.

36. Petitioner designs the signs so that they can be easily removed and cause little or no damage.

37. Empty bolt holes or exterior discoloration in the façade of the buildings may need to be restored after sign removal. The discoloration can be easily remedied by paint and is not caused by either the sign itself, the sign's installation, or the sign's removal. The discoloration on the façade of the building is in fact, the non-weathered portion of the exterior in the

exterior's original (or near enough) coloration that has been shielded from the elements over time by the presence of the sign.

38. The value or benefit provided by the sign adds value only to the business which purchased the sign and currently leases the building.

39. Petitioner retains all rights to the sign until the purchase is completed, and funds have been received.

(Joint Stipulations of Undisputed Facts, May 4, 2017) (italics and record citations in original) (hereinafter referred to as Jt. Stip. ¶ ___).

CONCLUSIONS OF LAW

A. State Board's review function and burdens of proof

1. Any person adversely affected by any final administrative decision of the department may appeal to the state board of equalization." Wyo. Stat. Ann. §§ 39-11-102.1(c), 39-15-109(b) (2015). The role of the State Board in such matters is to adjudicate the dispute between the parties.

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. The statutory mandate to the Board 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 Prod. Co. v. Wyo. State Bd. of Equalization, 12 P.3d 668, 674 (Wyo. 2000).

2. As the adjudicating body, the State Board "[d]ecide[s] 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) (2015).

3. Unless a statute or Board rule provides otherwise, the Petitioner has the burdens of going forward and of persuasion, and must satisfy those burdens by a preponderance of the evidence. Rules, Wyo. State Bd. of Equalization, ch. 2 § 20 (2006). If the Petitioner provides sufficient evidence that the Department's determination is incorrect, the burden shifts to the Department to defend its action. *Id.* "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)).

4. An administrative agency's long-standing statutory interpretation is entitled to weight if the Legislature has not changed the statute in response, because such legislative inactivity evidences acquiescence to the agency's interpretation. *Seherr-Thoss v. Teton Cty. Bd. of Cty. Comm'rs*, 2014 WY 82, ¶ 14 n. 2, 329 P.3d 936, 943-44 n.2 (Wyo. 2014) (citing *Public Serv. Comm'n v. Formal Complaint of WWZ Co.*, 641 P.2d 183, 186 (Wyo. 1982)). Similarly, when interpreting an ambiguous statute, the State Board "will give some deference to an interpretation by the agency charged with execution of the statute unless its interpretation is clearly erroneous." *Campbell Cty. Sch. Dist. v. Catchpole*, 6 P.3d 1275, 1285 (Wyo. 2000). Still, the State Board is not bound by the Department's interpretation. *Id.*; Wyo. Stat. Ann. § 39-11-102.1(c)(iv) (2015) (State Board decides questions concerning construction of any statute affecting the assessment, levy and collection of taxes).

B. Applicable statutory and regulatory provisions

5. The question at the heart of this case is whether the signs Anchor installs in Wyoming are real property:

- (v) "Real property" means land and appurtenances, including structures affixed thereto. An article shall be considered real property if:
 - (A) It is buried or embedded; or
 - (B) It is physically or constructively annexed to the real property;**and**
 - (C) It is adapted to the use of the real property; **and**
 - (D) Considering the purpose for which the annexation was made, one can reasonably infer that it was the intent of the annexing party to make the article a permanent part of the real property.

Wyo. Stat. Ann. § 39-15-101(a)(v) (2015) (emphasis added).

6. If the installed signs are real property, then their installation in Wyoming makes Anchor a contractor according to Wyo. Stat. Ann. § 39-15-301(a)(i) & (ii) (2015):

- (i) "Contractor" means any general or prime contractor or subcontractor.
- (ii) "General or prime contractor" means:
 - (A) Any person who agrees with the owner or lessee or real property in this state to perform services or furnish materials and services for the construction, alteration, improvement or repair of real property in this state; or
 - (B) Any person who acts in behalf of the owner or lessee of real property in this state to arrange for the furnishing of services or the furnishing

of materials and services for the construction, alteration, improvement or repair of real property in this state; or

(C) Any person who owns or leases real property in this state for the purpose of developing that property and in the development thereof alters or makes improvements to the property or contracts for the alteration or improvement of the property.

Wyo. Stat. Ann. § 39-15-301(a)(i), (ii) (2015).

7. If Anchor is a contractor, it is also the end consumer of all materials and supplies it uses to install signs in Wyoming and is, therefore, responsible for sales and use tax on those items. Wyo. Stat. Ann. § 39-15-303(b)(i) (2015). It will also be required to post a surety bond to ensure payment of the sales tax. Wyo. Stat. Ann. § 39-15-303(b)(iii) (2015).

C. Application of law to facts

8. Along with agreeing about the material facts, the parties also agree that this case turns on whether the signs Anchor installs in Wyoming are real property as defined in Wyoming Statutes section 39-15-101(a)(v). *Supra* ¶ 5. The parties also agree that the signs are not land, appurtenances, or structures affixed thereto. Agreeing further that subparagraph (A) does not apply and that subparagraph (B) is satisfied, the parties focus their arguments on subparagraphs (C) and (D). There are no Wyoming Supreme Court opinions applying those subparagraphs.

9. Because we cannot affirm if Anchor prevails on either subparagraph (C) or subparagraph (D), we take a page from the Wyoming Supreme Court's criminal law decisions and determine that we may address those subparagraphs in either order. *Galbreath v. State*, 2015 WY 49, ¶ 5, 346 P.3d 16, 18 (Wyo. 2015). We elect to consider subparagraph (D) which states: “[c]onsidering the purpose for which the annexation was made, one can reasonably infer that it was the intent of the annexing party to make the article a permanent part of the real property[.]” first.

10. Subparagraph (D) “looks to the intent, as determined by reasonable inference, of the party annexing the article to the real property, keeping in mind the purpose for which the annexation was made.” *In re Hanover Compression, LLP*, 2007 WL 24620399, ¶ 107, Wyo. State. Bd. of Equalization, Docket No. 2006-122 (August 24, 2007). ¶ 107, *aff'd sub nom. State ex rel. Wyo. Dep't of Revenue v. Hanover Compression, LP*, 2008 WY 138, 196 P.3d 781 (Wyo. 2008). The intent to permanently annex an article to real property “must be judged from the physical facts and reasonably manifested outward appearances of the property[.]” *Id.* ¶ 113 (citing *Seatrains Terminals of Cal., Inc. v. Cty. of Alameda*, 83 Cal.App.3d 69, 74-75 (1978); *Specialty Restaurants Corp. v. Cty. of Los Angeles*, 67 Cal.App.3d 924, 933-34 (1977)).

11. Anchor contends that the stipulated facts show a clear intent that the signs would not become permanent parts of the real property to which they were attached. (Pet'r Br. at 19-20). Rather, Anchor contends the intent of all concerned was for the signs to be temporary, remaining in place only as long as the businesses they advertise. *Id.*

12. Subsection (D) requires us to first consider the purpose for which the signs were attached to real property. The signs are annexed to buildings for the purpose of identifying "the name of the business, the location of the business and/or the nature of the business to the public, *during the period of time that the customers are located at that particular building.*" (Jt. Stip. ¶ 17) (emphasis added).

13. Bearing that purpose in mind, we note that the signs are designed to be easily removed with little or no damage to the building. (Jt. Stip. ¶¶ 36-37). Anchor, its customers, and their landlords all recognize that the signs will be removed when the businesses they promote no longer need them. (Jt. Stip. ¶¶ 31-34). Thus, the demonstrated intent of the parties annexing the signs to real property is for each sign to remain where it is installed only so long as the business it serves remains in place and wants the sign to remain. Given that demonstrated intent, we find that Anchor has borne its burden of proving by a preponderance of the evidence that the Department's determination is incorrect. Accordingly, the burden shifts to the Department to defend its action. *Supra*, ¶ 3.

14. The Department relies on this Board's *Hanover* decision for the proposition that "an article is permanent if it is intended 'to remain where affixed until worn out, until the purpose to which the realty is devoted is accomplished or until the item is superseded by another item more suitable for the purpose.'" (Dep't Br. at 7, citing *Hanover*, ¶ 116). That quoted language went farther than was necessary to decide that case, and, it originated in a decision of a Pennsylvania court that, obviously, was not interpreting the relevant Wyoming statute. Rather than rely on other states' courts interpreting other states' laws, we believe the wiser course is to look to the plain language of subparagraph (D) and ask whether we can reasonably infer that Anchor's customers intended to make the signs a permanent part of the real property to which they were attached. We have already answered that question in the negative. *Supra* ¶¶ 12-13.

15. The Department acknowledged the impermanence of the signs in a February 18, 2015 letter to Anchor's representative:

With regard to signs installed by [Anchor] at locations that are not owned by [Anchor's customer] and where the Customer's contract with the landowner expressly states that any signage affixed to the property must be removed so that the property is returned to its pre-lease condition, we will reconsider our previous determination. After thoughtful review we acknowledge that in such an instance it cannot be the intent of the owner to make the signage part of the real property, therefore we will consider that the signage itself is and

continues to be tangible personal property even while installed at the Customer's location[.]

(Dep't R. at 21). For reasons not reflected in the record, the Department had departed from that seemingly reasonable position by the time it issued its final determination on September 28, 2016. (Dep't R. at 1).

16. Unlike other personal property that is attached to real property (lighting fixtures, plumbing fixtures, counters, flooring, water heaters, etc.), the signs that Anchor installs are useful to only the businesses that buy them. (Jt. Stip. ¶ 38). By their very nature, in other words, the signs cannot provide value to subsequent tenants or owners of the real property to which they are attached. Accordingly, we conclude that neither Anchor, nor its customers, nor the property owners have demonstrated any intent to make the signs a permanent part of the real property they are attached to. Any inference to the contrary is unreasonable. We find, therefore, that the Department has not borne its burden of defending its actions.

17. Because subparagraph (D) is not satisfied, the Department cannot prevail regardless of what we might decide regarding subparagraph (C). Accordingly, we need not address subparagraph (C). *Webb v. State*, 2071 WY 108, ¶ 34, 401 P.3d 914, 926 (Wyo. 2017). *See supra* ¶ 9.

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ORDER

IT IS HEREBY ORDERED that the decision of the Department of Revenue is reversed.

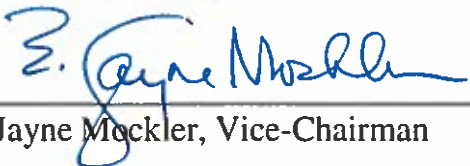
Pursuant to Wyo. Stat. Ann. §16-3-114 and Rule 12, Wyoming Rules of Appellate Procedure, any person aggrieved or adversely affected in fact by this decision may seek judicial review in the appropriate district court by filing a petition for review within 30 days of the date of this decision.

DATED this 28th day of November 2017.

STATE BOARD OF EQUALIZATION



Martin L. Hardsocg, Chairman



E. Jayne Mockler, Vice-Chairman



David L. Delicath, Board Member

ATTEST:



Nadia Broome, Executive Assistant

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of November 2017, 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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