

BEFORE THE STATE BOARD OF EQUALIZATION

FOR THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF THE)
BOARD OF COUNTY COMMISSIONERS)
OF THE COUNTY OF JOHNSON FROM) Docket No. 2017-42
FROM A DECISION BY THE)
DEPARTMENT OF REVENUE (Excise Tax))

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

APPEARANCES

Barry Crago, Civil Deputy, Johnson County and Prosecuting Attorney's Office, appeared on behalf of the Board of County Commissioners of the County of Johnson (Johnson County).

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

DIGEST

The Johnson County Commissioners appeal a decision of the Wyoming Department of Revenue. The Department determined that the Johnson County Fair Board must collect and remit sales and lodging taxes on the fees it charges county fair participants for using campsites at the Johnson County Fairgrounds. The Commissioners contend that: 1) the campsite fees are statutorily exempt from sales tax as "user fee[s] for county or municipal owned recreation facilities"; 2) the fair board is not a "vendor" statutorily required to collect sales tax; and 3) the campsite fees are not subject to sales tax because the fair campers are not "transient guests" as that term is defined in statute.

The Wyoming State Board of Equalization, Chairman Martin L. Hardsocg, Vice Chairman E. Jayne Mockler, and Board Member David L. Delicath, reviewed the parties' briefs and the record to determine whether the Department's final decision was arbitrary, capricious, unsupported by substantial evidence, and/or contrary to law. Rules, Wyo. State Bd. of Equalization, ch. 3 § 9 (2006). The State Board reverses the Department's decision because the fair board is not a "vendor" that is statutorily required to collect and remit sales and lodging taxes on the campsite fees.

ISSUES

The Department states the issue as, “whether the Johnson County Fair Board, a tax-exempt political subdivision of the State of Wyoming, must collect sales and lodging taxes from the rental of campsites to transient guests at its fair grounds during the county fair.” (Dep’t Opening Br. 1).

The Johnson County Commissioners state the issue as, “whether, under Wyoming law, the Fair Board is required to collect sales and lodging tax on the fee charged to fair participants who camp at the Fairgrounds during the Johnson County Fair and Rodeo.” (Comm’rs’ Response Br. 2).

The State Board states the issues raised by the parties as follows:

1. Is the camping fee a “user fee” for a county-owned recreation facility and therefore exempt from sales and lodging taxes under Wyo. Stat. section 39-15-105(a)(iv)(E) (2015)?
2. Is the fair board a vendor under Wyoming Statutes section 39-15-101(a)(xv) (2015)?
3. Are the fair campers “transient guests” as that term is defined at Wyoming Statutes section 39-15-101(a)(xiv) (2015)?

JURISDICTION

An aggrieved taxpayer may file an appeal with this Board within 30 days of the Department’s final decision. Rules, Wyo. State Bd. of Equalization, ch. 2 § 5(e) (2006). The Department issued its final decision on April 25, 2017. (Ex. 500). The Commissioners filed their appeal six days later. Accordingly, this Board has jurisdiction to decide this appeal.

FINDINGS OF FACT

There are no disputes about the material facts of this case, and the parties have stipulated to these facts:

1. The County, through the Johnson County Fair Board, has approximately sixty-nine (69) partially improved camp spots at the Johnson County Fairgrounds. The County rents these spots to participants of the Johnson County Fair and Rodeo for one week each year. These spots, which only have electrical hook-ups and no other amenities, were developed for the

residents of Johnson County to use during the annual Johnson County Fair and Rodeo.

2. For most years, the majority of the spots are rented for fair week. For a fee paid to the County, these spots are made available for fair exhibitors or their families. The County provides the spots during the Johnson County Fair and Rodeo as a service to the Johnson County residents who exhibit at the fair and rodeo.

3. In 2016, sixty-five (65) of the spots were rented for fair week at the price of \$25.00 for the entire week. This resulted in a total income to the Fair Board of \$1,625.00 for the 2016 Johnson County Fair and Rodeo. The monies collected from these rentals are utilized to offset the operating costs of the fairgrounds. The County does not otherwise profit on the rental of the spots during fair week.

4. The County has not collected sales and lodging taxes for the rentals of these spots. The Fair Board is not a licensed vendor with the Department for the purposes of the rental of these spots.

5. The sales and lodging tax in controversy is \$113.75 for the 2016 Johnson County Fair and Rodeo.

6. Other groups or organizations rent or lease the entire Fairgrounds for specific events. During these events, the sponsoring groups or organizations do use, and occasionally rent, the camp sites to their patrons. The Fair Board does not rent the camp sites during these events. Rather, it rents the facility as a whole for the particular event.

7. On March 8, 2016, the Department was asked, by a Johnson County Tourism Association board member, for a determination on whether the fairgrounds was required to collect lodging tax on the spot rentals. The Department responded on March 15, 2016 with a determination that rental of the spaces is subject to both sales and lodging taxes.

8. On March 23, 2017, a request on behalf of the Johnson County Tourism Association asked the Department to send a letter to the Fair Board regarding non-collection of sales and lodging taxes on rented spots. On March 29, 2017 the Department sent a letter by email to Mr. William Novotny, Chairman of the Board of County Commissioners and Liaison to the Fair Board, notifying him of the request the Department received from the Tourism Association and requesting additional information. Mr. Novotny responded on April 14, 2017 and provided the information requested by the

Department. On April 25, 2017 the Department issued its determination that the Fair Board is a non-exempt lodging vendor and must obtain a Wyoming Sales/Use Tax License to collect and remit sales and lodging taxes on the fees charged for the rental of the spots.

(Joint Stipulations of Undisputed Facts at 1-2).

9. At the request of both parties, we assigned this case to our expedited docket for a decision without oral argument. *See Rules, Wyo. State Bd. of Equalization, ch. § 15 (2006).*

CONCLUSIONS OF LAW

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

10. 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) (2015). Our role 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).

11. As the adjudicating body, we “[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) (2015).

12. Normally, a party asserting that it should be exempt from a tax has the burden of proof. *PacifiCorp, Inc. v. Dept. of Revenue, State of Wyo.*, 2017 WY 106, ¶ 11, 401 P.3d 905, 909 (Wyo. 2017) (citing *Comm'rs of Cambria Park v. Bd. of Cty. Comm'rs of Weston Cty.*, 174 P.2d 402, 405 (Wyo. 1946)). But, “[i]n 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).*

B. Applicable statutes and rules

13. “ ‘Lodging service’ means the provision of sleeping accommodations to transient guests and shall include the providing of sites for the placement of tents, campers, trailers, mobile homes or other mobile sleeping accommodations for transient guests[.]” Wyo. Stat. Ann. § 39-15-101(a)(i) (2015).

14. “ ‘Transient guest’ means a guest who remains for less than thirty (30) continuous days[.]” Wyo. Stat. Ann. § 39-15-101(a)(xiv) (2015).

15. “ ‘Vendor’ means any person engaged in the business of selling at retail or wholesale tangible personal property, admissions or services which are subject to taxation under this article.” Wyo. Stat. Ann. § 39-15-101(a)(xv) (2015).

16. “Except as provided by W.S. 39-15-105, there is levied an excise tax upon:

...

(G) The sales price paid for living quarters in hotels, motels, tourist courts and similar establishments providing lodging service for transient guests[.]” Wyo. Stat. Ann. § 39-15-103(a)(i)(G) (2015).

17. Wyoming’s sales tax exemption statute provides in pertinent part:

(iv) For the purpose of exempting sales of services and tangible personal property sold to government, charitable and nonprofit organizations, irrigation districts and weed and pest control districts, the following are exempt:

...

(E) Sales price of admission to and user fees for county or municipal owned recreation facilities such as swimming pools, athletic facilities and recreation centers[.]

Wyo. Stat. Ann. § 39-15-105(a)(iv)(E) (2015).

18. Wyoming Statutes also provide for the imposition of an excise tax on lodging services.

(a) In addition to the state tax imposed under W.S. 39-15-101 through 39-15-111 any county of the state may impose the following excise taxes and any city or town may impose the tax authorized by paragraph (ii) of this subsection and any resort district may impose the tax authorized by paragraph (v) of this subsection;

...

(ii) An excise tax at a rate in increments of one percent (1%) not to exceed a rate of four percent (4%) upon the sales price paid for lodging services as defined under W.S. 39-15-101(a)(i), the primary purpose of which is for local travel and tourism promotion[.]

Wyo. Stat. Ann. § 39-15-204(a)(ii) (2015).

19. “(b) Governmental Entities. The retail sale, lease, or rental of tangible personal property or taxable services by the State of Wyoming or its political subdivisions shall be subject to the sales/use tax. The governmental entity shall be considered a vendor and shall be licensed and collect tax on taxable transactions.” Rules, Wyo. Dep’t of Revenue, ch. 2, § 4(b) (2014).

C. Application of the law to the facts

20. This case requires us to decide whether the fee that the Johnson County Fair Board charges to campers is a “user fee for county or municipal owned recreation facilities,” whether the fair board is a “vendor,” and whether the fair campers are “transient guests.”

In construing a taxing or revenue statute, courts should attempt to ascertain and give effect to the intention of the legislature, and that intention is to be gathered from a consideration of every word in the statute so as to make it harmonious and reasonable in its operation. As a general rule, tax exemptions are given a strict interpretation against an assertion of a taxpayer and in favor of the taxing power. However, the reasons for that rule do not apply in the instance of tax exemptions running to the benefit of the government itself or its agencies. In such a case, the practical effect of an exemption is merely to reduce the amount of money that has to be handled by government in the course of its operations. For these reasons, provisions granting exemptions to government agencies may be construed liberally in favor of such agencies.

E. Laramie Cty. Solid Waste Disposal Dist. v. State Bd. of Equalization, 9 P.3d 268, 271 (Wyo. 2000) (citations omitted).

Is the camping fee a “user fee” for a county-owned recreation facility and therefore exempt from sales and lodging taxes under Wyo. Stat. section 39-15-105(a)(iv)(E) (2015)?

21. Johnson County’s argument here relies on Wyoming Statutes section 39-15-105(a)(iv)(E) (2015), which reads:

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

...

(iv) For the purpose of exempting sales of services and tangible personal property sold to government, charitable and nonprofit organizations, irrigation districts and weed and pest control districts, the following are exempt:

...

(E) Sales price of admission to and user fees for county or municipal owned recreation facilities such as swimming pools, athletic facilities and recreation centers[.]

Wyo. Stat. Ann. § 39-15-105(a)(iv)(E) (2015). The two-part crux of Johnson County's argument is that the campsite fee is exempt from excise tax because it is 1) a "user fee" 2) for a "county ... owned recreation facilit[y]."

22. Johnson County says the campsite fee is a "user fee" because the campsites "are strictly limited to use by fair participants and are not for the use of the general public, as in the case of a for-profit campground." (Comm'rs' Response Br. 4). Johnson County does not explain why that limitation makes the campsite fee a user fee, and indeed, it does not. "User fee" is not defined in any relevant statute or rule, and neither party offers a definition of the term in support of its position.

23. Black's Law Dictionary defines "user fee" as, "a charge assessed for the use of a particular item or facility." *User fee, Black's Law Dictionary* 1777 (10th ed. 2014). That definition is accurate, but not terribly helpful. An alternative definition of "user fee" is, "an excise tax often in the form of a license or supplemental charge levied to fund a public service." *Merriam-Webster's Collegiate Dictionary* 1378 (11th ed. 2003). The campsite fee is not a license, but it is a charge that funds "the operating costs of the fairgrounds." (Joint Stipulations of Undisputed Facts, ¶ 3). That leaves two questions: 1) is the campsite fee "a supplemental charge"? and 2) is the fairground a "public service"?

24. The campsite fee is "supplemental" in the sense that it supplements the county's revenue stream from taxation, and it is also supplemental to any other fee or charge for participating in the Johnson County Fair. A public service is "a service provided or facilitated by the government for the general public's convenience and benefit." *Public service, Black's Law Dictionary* 1427 (10th ed. 2014). The campsites seem to fit that definition. Accordingly, the campsite fee is a user fee. The next question is whether the campsites are a recreation facility?

25. The Department contends that the campground is not a recreation facility because it is a sleeping accommodation, and sleep is not recreation. (Dep't Opening Br. 7). Johnson County responds that campers use the campsites recreationally for meals and socializing, and that many of them do not sleep at the campsites at all. (Comm'rs' Response Br. 5). None of that information is in the stipulated facts or in the record, and we will not consider

factual contentions that the record does not support. Rules, Wyo. State Bd. of Equalization, ch. 2 § 34(a) (2006) (“The findings of fact shall be derived from the evidence of record in a proceeding, matters officially noticed in that proceeding, and matters within the Board’s knowledge as acquired through performing its functions and duties.”).

26. Johnson County also contends that the campsites are recreational facilities because campsite rental “is connected to the fair itself.” (Comm’rs’ Response Br. 5). In other words, the fair is a recreational activity, so the related campsite must also be recreational. We agree that there is a relationship between the campsite and the fair, but for the campsite to be recreational, there must be recreation at the campsite. No evidence supports that conclusion.

27. Therefore, even though the campsite fee is a “user fee,” it is not exempt under subparagraph (E) because the campground is not a “recreational facility.” The Department has satisfied its burden of proof on this issue.

Is the fair board a vendor under Wyoming Statutes section 39-15-101(a)(xv) (2015)?

28. “Vendors” are required to collect and remit sales and lodging taxes. Wyo. Stat. Ann. § 39-15-103(c)(i) (2015). A vendor is “any person engaged in the business of selling at retail or wholesale tangible personal property, admissions or services which are subject to taxation under this article.” Wyo. Stat. Ann. § 39-15-101(a)(xv) (2015).

29. The Department bypasses the statutory “engaged in the business of” language and declares that the campsite revenue is taxable under Chapter 2, section 4(b) of its own rules. (Dep’t Opening Br. 3). That rule reads, “The retail sale, lease, or rental of tangible personal property or taxable services by the State of Wyoming or its political subdivisions shall be subject to the sales/use tax. The governmental entity shall be considered a vendor and shall be licensed and collect tax on taxable transactions.” Rules, Wyo. Dep’t of Revenue, ch. 2, § 4(b) (2014).

30. The Department reads its rule in a way that renders moot the “engaged in the business” clause of Wyoming Statutes section 39-15-101(a)(xv) (2015). The Department cannot unilaterally declare that such sales are subject to the tax: if the legislature hasn’t subjected a class of transactions to sales and lodging tax, the Department has no power to do so. *In re National Park Adventures, Inc.* 1999 WL 370030, Docket Nos. 96-19, 96-22, 96-121, ¶ 21 (Wyo. State Bd. of Equalization, May 28, 1999) (“Taxation is solely a legislative function and an administrative agency does not have the authority to impose, levy or collect a tax absent clear statutory authority.”). Thus, the “engaged in the business of” clause of Wyoming Statutes section 39-15-101(a)(xv) (2015) must be satisfied before we can determine that the fair board is a “vendor.”

31. There is no question that for one week each year the fair board charges for the use of its campsites. (*Supra*, ¶ 1). The question is whether that fact means the fair board is “engaged in the business of selling” use of the campsites. The parties have not directed us to a decision from the Wyoming Supreme Court or from this Board that answers that question, nor have we found one. Because there is no statutory definition of “engaged in the business,” we look to the plain meaning of those words. *Riddle v. State*, 2017 WY 153, ¶15, 407 P.3d 392, 395 (Wyo. 2017) (“Unless another meaning is clearly intended, words and phrases must be taken in their ordinary and usual sense.”) (citing *Yager v. State*, 2015 WY 139, ¶ 11, 362 P.3d 777, 780 (Wyo. 2015)).

32. “Engage” means “to employ or involve oneself; to take part in; to embark on.” *Engage*, *Black’s Law Dictionary* 646 (10th ed. 2014). “Business” means “a commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain.” *Business*, *Black’s Law Dictionary* 239 (10th ed. 2014). Combining those definitions, “engaged in the business of” requires a continuing effort to make a profit. Faced with a federal tax statute that used, but did not define, the phrase, “attributable to a trade or business carried on by the taxpayer,” the United States Supreme Court said:

We accept the fact that to be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity and that the taxpayer’s primary purpose for engaging in the activity must be for income or profit.

Comm’r of Internal Revenue v. Groetzinger, 480 U.S. 23, 35, 107 S.Ct. 980, 987 (1987).

33. The fair board’s “primary purpose” for engaging in campsite rental is not “for income or profit.” If it were, we would expect the fair board to seek other opportunities throughout the year to generate rental income from the campsites.

34. The fair board uses the income from campsite rentals to offset the operating costs of the fairgrounds and does not otherwise profit from renting the campsites. *Supra*, ¶ 3. Rather than profit, the primary purpose of the campsite rentals is to provide a service to county fair participants. *Supra*, ¶ 1.

35. Similarly, the Department’s reading of Wyoming Statutes section 39-15-101(a)(xv) (2015) renders superfluous the phrase “engaged in the business.” (Comm’rs’ Response Br. at 9). Again, the Department’s argument glosses over that phrase and seeks to impose the sales and lodging taxes on “any person ... selling at retail or wholesale tangible personal property, admissions or services which are subject to taxation under this article.” Wyo. Stat. Ann. § 39-15-101(a)(xv) (2015).

36. Because the Department has failed to satisfy its burden of proof on this issue, we find that the Johnson County Fair Board is not a vendor under Wyoming Statutes section 39-15-101(a)(xv) (2015) when it rents campsites to fair participants during fair week. Recognizing that this finding makes decisions on the first and third issues unnecessary, we nonetheless have addressed them for the sake of completeness.

Are the fair campers “transient guests” as that term is defined at Wyoming Statutes section 39-15-101(a)(xiv) (2015)?

37. The sales and lodging taxes at issue here are imposed on “lodging services.” Wyo. Stat. Ann. §§ 39-15-103(a)(i)(G), 39-15-204(a)(ii) (2015). “Lodging service” means “the provision of sleeping accommodations to transient guests and shall include the providing of sites for the placement of tents, campers, trailers, mobile homes or other mobile sleeping accommodations for transient guests[.]” Wyo. Stat. Ann. § 39-15-101(a)(i) (2015). Johnson County contends that the campsite rentals are not “lodging services” because the people who use those campsites are not “transient guests.”

38. The County contends that the campers are not “transient” because they live in Johnson County. That contention, however, ignores the statutory definition of “transient guest”: “a guest who remains for less than thirty (30) continuous days[.]” Wyo. Stat. Ann. § 39-15-101(a)(xiv) (2015). Thus, if the campers are “guests” at all, then they are, by definition, “transient guests” because they remain for fewer than 30 days.

39. Neither party cites a definition of “guest” in statute or rule, nor do they attempt to otherwise define the word. Johnson County asserts that the campers are not “guests,” but does not support that assertion. (Comm’rs’ Response Br. 12). A “guest” is “someone who pays for services at an establishment, esp. a hotel or restaurant.” *Guest, Black’s Law Dictionary* 823-24 (10th ed. 2014). The campers pay a fee for use of the campsites and electricity. We believe that makes them guests.

40. Because the campers are guests who stay for fewer than 30 days, they are “transient guests.” Because the campers are transient guests, the county engages in “lodging services” by providing them sleeping accommodations. Accordingly, the Department has satisfied its burden of proof on this issue.

CONCLUSION

41. The Department correctly determined that the fair board’s nominal charge for campsites during fair week is a “user fee” and that the fair campers are “transient guests.” However, the Department has not satisfied its burden of proving that the fair board is a vendor under Wyoming Statutes section 39-15-101(a)(xv) (2015).


ORDER

IT IS HEREBY ORDERED the Department's decision is **reversed and remanded** for issuance of a decision in keeping with the findings and conclusions of this Decision and Order.

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 after the date of this decision.

DATED this 31st day of January, 2018.

STATE BOARD OF EQUALIZATION



Martin L. Hardsocg, Chairman



E. Jayne Mockler, Chairman



David L. Delicath, Board Member

ATTEST:



Nadia Broome, Executive Assistant

CERTIFICATE OF SERVICE

I certify that on the 31st day of January, 2018, I served the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, 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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