

BEFORE THE STATE BOARD OF EQUALIZATION

FOR THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF)
DELCON PARTNERS, LLC) Docket No. 2018-30
FROM A DECISION BY THE)
DEPARTMENT OF REVENUE)
(Sales and Use Tax))

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

APPEARANCES

Matthew W. Kim-Miller, Holland & Hart LLP, appeared on behalf of Petitioner, Delcon Partners, LLC.

Karl D. Anderson and Daniel Solish, Senior Assistant Attorneys General, Wyoming Attorney General's Office, appeared on behalf of Respondent, Wyoming Department of Revenue.

SUMMARY

[¶1] Delcon bought tangible and intangible assets from an electrical service and HVAC business. Those assets constituted 28% of the seller's total Wyoming assets. The Department determined that the purchase was subject to sales tax under Wyoming Statutes section 39-15-101(a)(vii) (2017) and that the exemption provided in Wyoming Statutes section 39-15-101(a)(vii)(N) (2017) did not apply because Delcon purchased less than 80% of the seller's total Wyoming assets.

[¶2] An aggrieved taxpayer may file an appeal with the Wyoming State Board of Equalization 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 May 23, 2018. (Proposed Stipulated Facts, Ex. F). Delcon filed its appeal with the State Board 29 days later. (Notice of Appeal). The appeal was timely and we have jurisdiction to decide this matter.

[¶3] The parties asked the State Board, Chairman Martin L. Hardsocg, Vice-Chairman David L. Delicath, and Board Member E. Jayne Mockler, to decide this matter without an

evidentiary hearing. Rules, Wyo. State Bd. of Equalization, ch. 2 § 15 (2006). After considering the record and the parties' briefs, the Board affirms the Department's decision.

ISSUE

[¶4] Delcon identifies the issue as: "whether the 80% Value Exclusion applies or the transaction between Seller and Petitioner is otherwise exempt because of the nature of the transaction and the structure of Wyoming's sales tax statutes." (Delcon Opening Br. 2).

[¶5] The Department phrases the issue as, "Did the Department correctly determine that the purchaser was not entitled to the sales tax exemption under Wyo. Stat. Ann. § 39-15-101(a)(vii)(N)?" (Dep't Prelim. Statement 2).

[¶6] We believe the question before us is, simply, whether Delcon's purchase of Seller's assets is a "sale" as that term is defined at Wyoming Statutes section 39-15-101(a)(vii) (2017).

FINDINGS OF FACT

[¶7] Because the parties have asked us to resolve this case without an evidentiary hearing, we have only the facts presented in the parties' Proposed Stipulated Facts and the exhibits thereto. These facts are undisputed:

[¶8] Delcon bought tangible and intangible Wyoming assets from an unrelated, existing business, Delcon, Inc. (Seller), for \$1,150,000. (Proposed Stipulated Facts, ¶¶ 1, 4, 7). Delcon did not buy Seller's corporate entity. The assets Delcon bought from Seller included "equipment, vehicles, furniture, fixtures, leases and contracts, inventory, intellectual property, software, post-closing accounts receivable, and goodwill." (*Id.* at ¶ 8). Seller owned other Wyoming assets (all of which were intangible) worth \$3,010,602 that it did not sell to Delcon. Those assets included cash, bank accounts, accounts receivable, promissory notes, and other amounts owed to Seller. (*Id.* at ¶ 9). The total value of Seller's Wyoming assets was \$4,160,602. (*Id.* at ¶ 13). Delcon bought \$1,150,000 of those assets. (*Id.* at ¶¶ 14-16). The parties agree that Delcon bought 28% of Seller's total Wyoming assets. (*Id.* at ¶ 16).

[¶9] Delcon asked the Department to determine whether its purchase from Seller was a taxable sale. (*Id.* at ¶ 11). The Department determined that the purchase was a taxable sale. (*Id.* at ¶ 17, Ex. F). The Department based that determination on Wyoming Statutes section 39-15-101(a)(vii)(N) (2017), which provides that a sale of a business entity's assets is not taxable if the purchaser buys at least 80% of the seller's assets and uses the tangible assets to operate an ongoing business.

CONCLUSIONS OF LAW

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

[¶10] This Board shall “review final decisions of the department upon the application of any person adversely affected.” Wyo. Stat. Ann. § 39-11-102.1(c) (2017). 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). 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) (2017).

[¶11] Normally, a party asserting that it should be exempt from a tax has the burden of proof. *PacifiCorp, Inc. v. Dep't of Revenue*, 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); see *Dep't of Revenue v. Bd. of Cty. Comm'rs of Johnson Cty.*, 2019 WY 7, ¶¶ 6, 9, ___ P.3d ___, 2019 WL 192340 *2 (Wyo. 2019). The burden of going forward, also called the burden of production, is “[a] party’s duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as a summary judgment or a directed verdict.” *Burden of Production*, *Black’s Law Dictionary* 236 (10th ed. 2014).

[¶12] None of the facts are disputed. (Proposed Stipulated Facts). This case presents only issues of statutory construction, so our standard of review is de novo. *Town of Pine Bluffs v. Eisele*, 2017 WY 117, ¶ 9, 403 P.3d 126, 128 (Wyo. 2017) (quoting *Bates v. Chicago Lumber Co. of Omaha*, 2016 WY 58, ¶ 27, 375 P.3d 732, 739 (Wyo. 2016)).

[¶13] To determine whether a taxable sale occurred, we must look to Wyoming Statutes section 39-15-101(a)(vii)(N) (2017), which provides:

(vii) “Sale” means any transfer of possession in this state for a consideration ... but excluding an exchange or transfer of tangible personal property upon which the seller or lessor has directly or indirectly paid sales or use tax incidental to:

...

(N) The sale of a business entity when sold to a purchaser of all or not less than eighty percent (80%) of the value of all of the assets which are located in this state of the business entity when the purchaser continues to use the tangible personal property in the operation of an ongoing business entity in this state. As used in subparagraphs (M) and (N) of this section, “business entity” means and includes an individual, partnership, corporation, corporate division, joint stock company or any other association or entity, public or private, or separate business unit thereof.

To qualify for the Subparagraph (N) exclusion, therefore, a purchaser must satisfy three elements, or requirements. First, the purchaser must purchase a business entity.¹ Second, the purchaser must purchase at least 80% of *all* of the seller’s assets located in Wyoming. Third, the purchaser must use the tangible assets purchased from the seller in the operation of an ongoing business entity in Wyoming.² The parties dispute application of the second element only. Consequently, we must decide whether Delcon acquired 80% of Seller’s Wyoming assets, which would exclude the transaction from the statutory definition of “sale.”

B. Delcon did not purchase 80% of Seller’s Wyoming assets.

[¶14] The Department determined that Delcon’s purchase did not satisfy Subparagraph (N) because Delcon did not buy at least 80% of Seller’s Wyoming assets. (Proposed Stipulated Facts, Ex. F). To meet the 80% threshold, Delcon would have had to buy at least \$3,338,481 (80% of \$4,160,602) of Seller’s assets, which it did not do. *Supra* ¶ 8. Delcon urges us to interpret Subparagraph (N) to require a purchase of 80% of a seller’s *tangible personal property* rather than a purchase of 80% of a seller’s *total Wyoming assets*.

[¶15] Our first step in statutory interpretation is to determine whether the statute is ambiguous.

¹ Given the definition of “business entity” in Subparagraph (N), we are not convinced that a business entity was sold in this case. Before the Wyoming Supreme Court issued its decision in *Solvay Chem., Inc. v. Dep’t of Revenue*, 2018 WY 124, 430 P.3d 295 (Wyo, 2018), we ordered the parties to brief that question. But, because the parties did not present that question to us, we recognize that we cannot address it. *Id.* at ¶¶ 26-27, 303-04.

² The parties did not stipulate that Delcon used the assets it bought from Seller to operate an ongoing business entity in Wyoming. But the parties have not made an issue of that element, so we will not address it. *Solvay, supra* n. 1.

A statute is unambiguous if its wording is such that reasonable persons are able to agree as to its meaning with consistency and predictability. Unless another meaning is clearly intended, words and phrases shall be taken in their ordinary and usual sense. Conversely, a statute is ambiguous only if it is found to be vague or uncertain and subject to varying interpretations. In determining whether a statute is ambiguous we begin by making an inquiry respecting the ordinary and obvious meaning of the words employed according to their arrangement and connection. We construe the statute as a whole, giving effect to every word, clause, and sentence, and we construe all parts of the statute *in pari materia*. When a statute is sufficiently clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of statutory construction.

Phoenix Vintners, LLC v. Noble, 2018 WY 87, ¶ 15, 423 P.3d 309, 313 (Wyo. 2018) (quoting *Brock v. State ex rel. Wyo. Workforce Servs., Unemployment Ins. Div.*, 2017 WY 47, ¶ 8, 394 P.3d 460, 462-63 (Wyo. 2017)).

[¶16] Delcon contends that the 80% requirement is ambiguous. (Delcon Opening Br. 10). It cites our order for briefing on the question of whether a business entity was sold as evidence of ambiguity. *Id.* We disagree. Our request for briefing did not arise from ambiguity: it arose from our surprise that the Department did not apply the plain requirements of Subparagraph (N).

[¶17] Delcon also finds ambiguity in Subparagraph (N)'s failure to produce results that Delcon deems desirable. (*Id.* at 10-13). That contention misses the point. Our job at this stage is not to determine whether the statute leads to a desirable result. Rather, we must determine whether the statute is "vague or uncertain and subject to varying interpretations." *Phoenix, supra* ¶ 15. It is not. Because the language of Subparagraph (N) clearly requires a purchaser to buy at least 80% of all of the seller's assets in Wyoming, we conclude that Subparagraph (N) is not ambiguous and is, therefore, not subject to further construction. We must give effect to that unambiguous statutory language. We further conclude that the Department's determination is consistent with the unambiguous statutory language.

C. Delcon's purchase was a taxable retail sale.

[¶18] Delcon contends that only retail sales are subject to sales tax, and that its purchase from Seller was not a retail sale. (Delcon Opening Br. 6). Delcon is correct that retail sales of tangible personal property are subject to sales tax. Wyo. Stat. Ann. § 39-15-103(a)(i)(A) (2017). A retail sale is "any sale, lease or rental for any purpose other than for resale, sublease or subrent." Wyo. Stat. Ann. § 39-15-101(a)(vi) (2017). By contrast, a wholesale sale is "a sale of tangible personal property or services to a vendor for subsequent sale." Wyo. Stat. Ann. § 39-15-101(a)(xvi) (2017).

[¶19] Delcon bought “equipment, vehicles, furniture, fixtures, leases and contracts, inventory, intellectual property, software, post-closing accounts receivable, and goodwill” from Seller. (Proposed Stipulated Facts, ¶ 8). The parties have not stipulated that Delcon bought any of the assets for resale, sublease, or subrent, and the evidence does not establish that it did. (*Id.*, passim). Even if we were willing – which we are not – to accept on faith that the “inventory” Delcon bought from Seller was intended for resale, the non-inventory portion of the assets purchased would still be subject to sales tax. Further, the evidence does not tell us how much of the purchase price was attributable to inventory, so we would have no way to distinguish between inventory and non-inventory assets. Delcon has failed to provide evidence to support its contention that its purchase from Seller was not a retail sale. In so failing, Delcon has also failed in its burden of going forward. *Supra* ¶ 11. Accordingly, we will not, and indeed cannot, declare that any portion of Delcon’s purchase from Seller was a non-taxable retail sale.

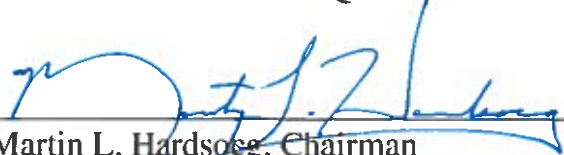
ORDER

[¶20] The Wyoming Department of Revenue’s decision is **affirmed**.

[¶21] Pursuant to Wyoming Statutes section 16-3-114 (2017) 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 18th day of January 2019.

STATE BOARD OF EQUALIZATION



Martin L. Hardsøeg, Chairman



David L. Delicath, Vice-Chairman



E. Jayne Mockler, Board Member

ATTEST:



Nadia Broome, Executive Assistant

CERTIFICATE OF SERVICE

I certify that on the 18th day of January 2019, I served the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER by placing a true and correct copy thereof in the United States Mail, postage prepaid, and properly addressed to the following:

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