

BEFORE THE STATE BOARD OF EQUALIZATION

FOR THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF)
L & L ENTERPRISES, LLC, et al.) Docket No. 2018-41
FROM A DECISION BY THE)
DEPARTMENT OF REVENUE)
(Sales and Use Tax))

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

APPEARANCES

J. Kyle Hendrickson and Paul D. Graslie, Lonabaugh and Riggs, LLP, appeared on behalf of Petitioners, L & L Enterprises, LLC, Leon E. Towell, d/b/a L & L Enterprises, and Leon E. Towell and Louree J. Towell, husband and wife (L & L or Seller).

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

SUMMARY

[¶ 1] L & L Enterprises LLC, et al. entered into an agreement to sell an oil and gas equipment fabrication business and business assets, as well as real property located in Douglas, Wyoming to Marchel Morningstar (MM or Buyer). The sale assets constituted 100% of L & L's membership interests, approximately 56 vehicles and heavy equipment, all inventory, all miscellaneous personal property, the goodwill, the name, all purchase orders, and licenses necessary to operate the business. L & L's bank accounts, accounts receivable, a pickup, and a skid-steer were excluded from the sale. The Department of Revenue determined that the purchase was subject to sales tax under Wyoming Statutes section 39-15-101(a)(vii) (2017) and that the exclusion [HM1][MJ2] provided in Wyoming Statutes section 39-15-101(a)(vii)(N) (2017) did not apply because MM did not purchase 80% of the value of all of L & L's Wyoming assets.

[¶ 2] The State Board shall review final decisions of the Department upon application of any interested person adversely affected. Wyo. Stat. Annn. § 39-11-102.1(c) (2017). An aggrieved 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 issued its final decision on August 20, 2018. (Stipulated Facts, Ex. L). L & L filed its appeal with the State Board on September 18, 2018. (Notice of Appeal). We, therefore, have jurisdiction to decide this matter.

[¶ 3] The State Board, Chairman David L. Delicath, Vice-Chairman E Jayne Mockler, and Board Member Martin L. Hardsocg, decided this matter without an evidentiary hearing pursuant to the parties' Joint Motion to Assign Case to Expedited Docket. Rules, Wyo. State Bd. of Equalization, ch. 2 § 15 (2006). After considering the record, the Stipulated Facts and exhibits attached thereto filed by the parties, and the parties' briefs, the Board affirms the Department's decision.

ISSUE

[¶ 4] L & L identifies the issue as: "whether the exclusion to the definition of 'sale', found in Wyo. Stat. 39-15-101(a)(vii)(N), applies to the transaction at issue." (L & L Opening Br. 2).

[¶ 5] The Department identified three issues:

- a) Did the Department correctly determine that Petitioners failed to meet the 80% threshold requirement under Wyo. Stat. Ann. § 39-15-101(a)(vii)(N)?
- b) In making its determination, did the Department apply the correct value to Petitioners' assets?
- c) Was the Department's determination in accordance with the "Selective Sales Tax Act of 1937"?

(Wyo. Dep't of Revenue's Prelim. Statement 2).

[¶ 6] The question before us is, simply, whether L & L's sale of assets to MM is a "sale" as that term is circumscribed by Wyoming Statutes section 39-15-101(a)(vii)(N) (2017).

FINDINGS OF FACT

[¶ 7] By joint motion the parties requested this matter be decided as an expedited contested case, without an evidentiary hearing. We, therefore, rely on the Stipulated Facts and exhibits filed by the parties. These facts are undisputed:

1. Petitioner ("Seller"), and Marchel Morningstar, entered into an Agreement on March 28, 2018 for the sale of a business and business assets, as well

as the real property whereupon the business is located. See, Exhibit A, bates L&L 001-35.

2. The parties amended the agreement twice. See, Exhibit B bates L&L 036-39 (the “First Amendment”) and Exhibit C bates L&L 040-46 (the “Second Amendment”). The amendments when combined with Exhibit A are collectively referred to as the “Purchase Agreement.”

3. The total purchase price was \$3,000,000.00. See Exhibits A, B, and C.

4. There was also an Escrow Agreement that was amended once. See, Exhibit D bates L&L 047-51 and Exhibit E bates L&L 052-54.

5. Prior to closing, Marchel Morningstar assigned his rights and obligations under the Purchase Agreement to L & L Fabrication, Inc. (the “Buyer”), pursuant to an Assignment and Assumption Agreement dated July 31, 2018. See, Exhibit F bates L&L 055-56.

6. Seller and Buyer are unrelated entities and do not have any common ownership or subsidiary/parent relationship.

7. The business that was sold is an oil and gas equipment fabrication business operated on the subject real estate in Douglas, Wyoming (the “Business”).

8. Pursuant to the Purchase Agreement, Seller sold to Buyer on August 1, 2018, subject to certain exclusions discussed below, one-hundred percent (100%) of the LLC’s membership interests, approximately fifty-six (56) pieces of titled vehicles and heavy equipment, all inventory, all miscellaneous personal property, the goodwill, the name, all purchase orders, and licenses necessary to operate the Business. The amount paid by Buyer to Seller on August 1, 2018 was \$1,800,000.00. See Exhibit A and Exhibit C at bates 41.

9. The items excluded from the closing on August 1, 2018 were the cash, accounts receivable, a pickup, and a skid-steer. See, Exhibit A, Section 2 at bates 2.

10. Pursuant to the First Amendment to the Escrow Agreement, \$64,310.00 was withheld from the August 1, 2018 closing, pending Seller’s application to the Department for the exclusion provided in Wyo. Stat. § 39-15-101(a)(vii)(N). See, Exhibit E at bates 53.

11. Pursuant to the Second Amendment, the real property will be sold to Buyer on or before August 1, 2019 for a purchase price of \$1,200,000.00. See, Exhibit C at 42.

12. On July 27, 2018, Petitioner's attorney inquired by email with the Department as to whether the sale of the Business would be excluded under the definition of a sale per Wyo. Stat. § 39-15-101(a)(vii), and provided to the Department for review, the Purchase Agreement, the July 31, 2018 Balance Sheet (the "Balance Sheet"), a listing of the assets set forth in the Bill of Sale, copies of certificates of title for the items listed in the Bill of Sale, and income tax receipts for the items listed in the Bill of Sale. See, Exhibit A, Exhibit B, Exhibit C, Exhibit G bated L&L 057-61, and Exhibit H bates L&L 062-65.

13. As of July 31, 2018, the total book value of the Business was \$7,844,434.05. See, Exhibit H at bates 64.

14. Pursuant to the Balance Sheet, the value of the excluded assets included \$2,013,218.12 for the accounts receivable, \$357, 198.91 for the cash, and \$94,154.36 for the pickup and skid steer. See, Exhibit H, items 172 & 175 bates 62.

15. Pursuant to an appraisal of the tangible assets, excluding real property the tangible assets had a value of \$1,286,000.00. See, Exhibit I bates L&L066-96.

16. The Accounts Receivable totaled \$2,013,218.12 and is broken down as follows (See, Exhibit J bates L&L 097):

i.	EOG Resources, Inc.	\$1,866,707.50
ii.	Ballidor Oil and Gas	\$48,286.44
iii.	Karst Industries, Inc.	\$10,552.93
iv.	Matrix Production Co.	\$63,020.25
v.	Oilfield Salvage & Service	\$8,217.83
vi.	RIM Operating	\$720.80
vii.	Road-Runner	\$670.58
viii.	Round Top Pump and Supply	\$400.00
ix.	Samson Resources	\$3,627.29
x.	Southwestern Production Corp.	\$6,300.00
xi.	Wild West Construction	\$787.50
xii.	591 Account	<u>\$3,927.00</u>
	Total	<u>2,013,218.12</u>

17. Out of the \$2,013,218.12 total value of accounts receivable, \$1,866,707.50 of this amount is attributed to receivables owed by EOG Resources, Inc. See, Exhibit J.

18. Seller's accounts receivable would fluctuate as shown by the accounts receivable balance of \$1,077,098.23 as of April 6, 2018. See, Exhibit K bates L&L 098-101.

19. EOG Resources, Inc. is registered as a foreign profit corporation and is incorporated in the State of Delaware with its principal office located in Houston, Texas. See, Wyoming Secretary of State, under Filing ID: 1985-000230585.

20. The Department found that the sale of the Business did not qualify for the sales tax exclusion because Buyer did not purchase 80% of the value of all the Business' assets in Wyoming. See Exhibit L bates L&L 120-200.

21. The Buyer is currently operating the Business on the Real Property and using all the assets purchased on August 1, 2018 as an ongoing business entity in the state.

Stipulated Facts, 1-4.

CONCLUSIONS OF LAW

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

[¶ 8] 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).

[¶ 9] Normally, a party asserting that it should be exempt from a tax has the burden of proof. *PacifiCorp, Inc. v. Dep’t 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). 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).

[¶ 10] None of the facts are disputed. (Stipulated Facts 1-21); *supra* ¶ 7. 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)).

[¶ 11] 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 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. 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. The parties dispute application of the second element only. Consequently, we must decide whether L & L sold 80% of its Wyoming assets, which would exclude the transaction from the statutory definition of “sale.”

B. L&L did not sell 80% of its Wyoming assets.

[¶ 12] The Department determined that L&L’s sale did not satisfy Subparagraph (N) because L&L did not sell at least 80% of its Wyoming assets. (Stipulated Facts 20), *supra* ¶ 7. To meet the 80% threshold, L&L would have had to sell at least \$4,731,657.71 of its business assets (80% of \$5,914,571.39), which it did not do.

[¶ 13] L & L contends that Subparagraph (N) requires a purchase of 80% of a seller’s *tangible personal property* rather than a purchase of 80% of a seller’s *total Wyoming assets*. (L & L Br. 7-12). That contention is wrong. As the Wyoming Supreme Court recently stated: “The statute plainly conditions exclusion from the definition of ‘sale’ on the purchase of at least 80% of the value of all of a business entity’s assets located in Wyoming.” *Delcon Partners LLC v. Wyo. Dept. of Revenue*, 2019 WY 106, ¶ 11, 450 P.3d 682, 685 (Wyo. 2019) In *Delcon*, the Court faced the same argument that L & L presents here, and found that argument unavailing. Accordingly, we will not, and indeed cannot, declare that any portion of L&L’s sale to MM was a non-taxable sale.

The remainder of this page intentionally left blank.

ORDER

[¶ 14] The Department of Revenue decision is affirmed.

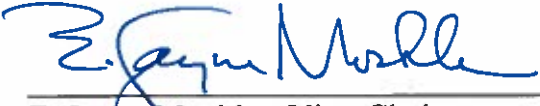
[¶ 15] Pursuant to Wyoming Statutes section 16-3-114 (2017) and Rule 12, Wyoming Rules of Appellate Procedure, any person aggrieved or adversely affected in fact by this decision may seek judicial review in the appropriate district court by filing a petition for review within 30 days after the date of this decision.

DATED this 3 day of December 2019.

STATE BOARD OF EQUALIZATION



David L. Delicath, Chairman



E. Jayne Mockler, Vice-Chairman



Martin L. Hardsøeg, Board Member

ATTEST:



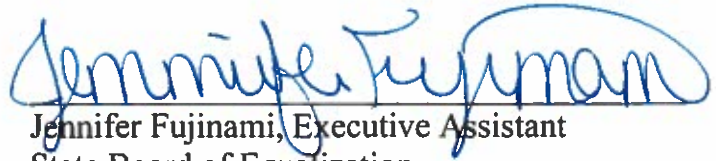
Jennifer Fujinami, Executive Assistant

CERTIFICATE OF SERVICE

I certify that on the 3 day of December 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:

J. Kyle Hendrickson
Paul D Graslie
Lonabough and Riggs, LLC
50 East Louchs Street, Ste. 110
Drawer 5059
Sheridan, WY 82801

Karl D. Anderson
Andrew J. Kuhlman
Senior Assistant Attorneys General
Kendrick Building
2320 Capitol Ave.
Cheyenne, WY 82002



Jennifer Fujinami, Executive Assistant
State Board of Equalization
P.O. Box 448
Cheyenne, WY 82003
Phone: (307) 777-6989
Fax: (307) 777-6363

cc: State Board of Equalization
Dan Noble, Director, Department of Revenue
Terri Lucero, Excise Tax Division, Department of Revenue
ABA State and Local Tax Reporter
CCH
State Library