BEFORE THE STATE BOARD OF EQUALIZATION

FOR THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF	)	
QEP ENERGY RESOURCES, INC.	)	**Docket No. 2018-47**
FROM A DECISION BY THE	)	
DEPARTMENT OF REVENUE (Audit)	)	

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

APPEARANCES

Rachel Quintana, Jamie Bowden, and Sean Roberts, Ernst & Young LLP, appeared on behalf of Taxpayer, QEP Energy Resources, Inc.

Senior Assistant Attorney General Karl D. Anderson and Assistant Attorney General Rebecca J. Zisch, Wyoming Attorney General's Office, appeared on behalf of the Wyoming Department of Revenue.

DIGEST

[¶ 1] QEP appeals from the Department's decision following a sales and use tax audit. QEP claims that services provided to it at its well sites are not subject to use tax, that it is not liable for sales tax on such services, that it is entitled to a use tax credit, and that the Department improperly imposed – and then failed to waive – a penalty for its tax deficiency.

[¶ 2] The Wyoming State Board of Equalization, Chairman David L. Delicath, Vice-Chairman E. Jayne Mockler, and Board Member Martin L. Hardsocg, held a hearing to receive evidence and hear arguments. Finding no reversible error, the State Board affirms the Department's decision despite its concerns about the methods the Department and the Department of Audit employed. The State Board also declines to address QEP's tax credit request raised for the first time on this appeal.

ISSUES

[¶ 3] QEP articulated four issues:

1. Petitioner is not liable for use tax related to service providers rendering services at Petitioner's oil and gas well sites in Wyoming, but rather owed a credit for use tax accrued and remitted on such services based on the following contentions:

    a. The services rendered for Petitioner by service providers at its oil and gas well sites are not taxable services for use tax purposes under Wyo. § 39-16-103.

    b. Services performed at an [sic] oil and gas well sites are taxable to the vendor rendering such services under Wyo. Stat. Ann. § 39-15-103(a)(i)(K), since Petitioner did not render any services assessed, Petitioner is not liable for any tax related to such services.

    c. Petitioner's service providers were all required to be licensed vendors in Wyoming under Wyo. Rules and Regulation 001.0004.2 § 13(x)(iii), and all vendors are completely liable for use tax under Wyo. Stat. Ann. § 39-16-103(c)(v).

2. Petitioner's request for use tax credits was inside the selected sample scope, and as such, the State Board of Equalization is authorized to require that such credits be used in the sampling methodology as a matter of law.

3. Petitioner's request for use tax credits was within the scope of the audit period, and as such the State Board of Equalization is authorized to credit any overpayment of use tax for the Audit Period as a matter of law.

4. Due to the complexity of issues during the audit and Petitioner's history of being tax compliant, the State Board of Equalization is authorized to waive the penalty assessed in the audit for good cause pursuant to Wyo. Stat. § 39-16-108(c)(xvii).

(Pet'r's Updated Summ. of Contentions, 1).

[¶ 4] The Department also stated four issues:

A. Did the Department properly and correctly assess a penalty of $67,861.45?

B. Is the Department's assessed tax amount a liability of the Petitioner or the liability of the sellers?

C. Does the Board have jurisdiction to consider Petitioner's request for a credit based on transactions outside the sample scope of the audit's sampling methodology?

D. Does the Board have jurisdiction to waive a Department assessed penalty?

(Wyo. Dep't of Revenue's Issue of Fact & Law & Ex. Index, 1-2).

JURISDICTION

[¶ 5] 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). An aggrieved taxpayer may appeal to 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 September 17, 2018. (Ex. 500). QEP filed its appeal on October 15, 2018. (Notice of Appeal). Accordingly, we have jurisdiction to decide this matter.

FINDINGS OF FACT

[¶ 6] The Wyoming Department of Audit conducted an excise tax audit and determined that QEP owed $678,613.73 in sales tax on services that vendors had performed at QEP's well sites in 2015, 2016, and 2017. (Ex. 501). The Department of Revenue then imposed interest in the amount of $113,221.42 and a $67,861.45 penalty. (Ex. 500). QEP did not ask the Department to waive that penalty. (Hr'g recording, vol. 4, at 58:25).

CONCLUSIONS OF LAW

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

[¶ 7] 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). Absent a statute or Board rule providing otherwise, a 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 Petitioner provides sufficient

evidence to suggest the Department determination is incorrect, the burden shifts to the Department to defend its action." *Id.* 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).

[¶ 8] We review questions of statutory construction 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)).

B. Services rendered to QEP at its well sites in Wyoming are subject to sales tax.

[¶ 9] QEP first contends that services rendered to its well sites by vendors are not subject to use tax.[1] We agree that the services rendered by vendors at QEP's well sites are not

[1] Much of the confusion evident in the presentation of this case stems from QEP's mistaken belief that the Department had assessed use tax rather than sales tax. It is easy to see why QEP is confused: the Department of Audit and the Department of Revenue both contributed to the confusion, either by misstating the type of excise tax at issue, or by failing to clarify that sales tax, and not use tax, applied. For example:

- Exhibit 504, a March 23, 2018 letter from the Department of Audit, Excise Tax Division, states the amount of tax due but does not say whether it is sales or use tax. It cites both sales and use tax statutes, so QEP could not have discerned which one was at issue.

- Exhibit 511 is the Department of Audit's Summary of Adjustments by Distribution and Tax Type. This is a month-by-month summary of sales and use taxes. That summary shows only use tax due from QEP. A Department of Audit employee testified that if the vendor is out-of-state, the system defaults to use tax, even if it should be sales tax. (Hr'g recording, vol. 2, at 24:15). Nothing in the document tells the taxpayer that. In other words, the Department of Audit told QEP that it owed use tax, when it knew that QEP actually owed sales tax.

- Ex. 502 is an August 16, 2018 report from the Department of Audit. In the Preliminary Statement of Audit Findings, we read that, "[c]ontributing factors to the overall assessment included the purchase of tangible personal property for own consumption from non-licensed or out-of-state vendors with no *use tax* accrued on services provided during the production phase of oil and gas well sites." (Emphasis added). Again, the Department of Audit misinformed QEP about the type of excise tax it owed.

- Ex. 501, an August 31, 2018 letter from the Department of Audit, states the amount of tax due but does not say whether it is sales tax or use tax.

- Ex. 500, the Department of Revenue's September 17, 2018 audit assessment, does not specify whether the tax due is sales tax or use tax, and does not include statutory references that could help a taxpayer figure it out.

subject to use tax. They are, rather, subject to sales tax. The relevant statute provides that, "[e]xcept as provided by W.S. 39-11-105, there is levied an excise tax upon:"

> The sales price paid for all services and tangible personal property used in rendering services to real or tangible personal property within an oil or gas well site beginning with and including the setting and cementing of production casing, or if production casing is not set as in the case of an open hole completion, after the completion of the underreaming or the attainment of total depth of the oil or gas well and continuing with all activities sequentially required for the production of any oil or gas well regardless of the chronological occurrence of the activity. All services required during the entire productive life of the well, including recompletion, all the way through abandonment shall be subject to this subparagraph. The provisions of W.S. 39-15-301 through 39-15-311 and W.S. 39-16-301 through 39-16-311 shall not apply to this subparagraph[.]

Wyo. Stat. Ann. § 39-15-103(a)(i)(K) (2107). Sales tax and use tax are both types of excise tax. Sales tax is imposed on goods and services sold in Wyoming. Use tax, which the legislature intended to be complementary to the sales tax, "is applied to property purchased outside the state and brought into the state for storage, use or consumption, so as to put that property on an equal footing with property purchased within the state that is subject to the Wyoming sales tax." *Exxon Corp. v. Wyo. State Bd. of Equalization*, 783 P.2d 685, 688 (Wyo. 1989) *citing Morrison-Knudson Co., Inc. v. State Bd. of Equalization*, 135 P.2d 927, 932 (Wyo. 1943). The services at issue in this case were rendered to QEP at QEP's well sites during or after the setting and cementing of production casing. Thus, they are subject to sales tax. We cannot devise a scenario in which services rendered at a well site in Wyoming would, instead, be subject to Wyoming's use tax.

- Jan Garcia, Senior Tax Accountant at QEP, testified – twice – that the Department of Audit auditor told her the tax due was use tax. (Hr'g recording, vol. 1, at 41:22, 1:08:40). The State did not contradict or challenge that testimony.

Other documents show that QEP believed this dispute was about use tax. *See e.g.* Ex. 505, QEP's emails with the Department of Audit before the appeal; Notice of Appeal; QEP's Prelim. Statement; QEP's Updated Summ. of Contentions; and QEP's Issues of Fact & Law & Ex. Index. Yet neither the Department of Audit, nor the Department of Revenue, nor the Wyoming Attorney General's Office (in its capacity as the Department of Revenue's legal representative in this case) attempted to clear up the misconception that both departments created. As a result, QEP's representatives showed up at a sales tax hearing and presented a case about use tax.

C. QEP is liable for the sales tax on services rendered at its well sites.

[¶ 10] QEP argues that Wyoming Statutes section 39-15-103(a)(i)(K) (2107) requires service providers to pay sales tax on personal property used in providing well site services when the service provider *buys* that property, rather than requiring QEP to pay sales tax when the service provider *sells* that property to QEP as part of a transaction for well site services. (Pet'r's Resp. to Dep't's Post-Hr'g Br. 2). That argument is not persuasive. Wyoming Statutes section 39-15-105(a)(iii) (2017) exempts wholesale sales from sales tax. A vendor's purchase of tangible property for subsequent sale (including sale as part of a transaction for services) is a wholesale sale. Wyo. Stat. Ann. § 39-15-101(xvi) (2017).

[¶ 11] In addition, Wyoming Statutes section 39-15-103(a)(i)(K) (2107) imposes sales tax on "services and tangible personal property used in rendering services[.]" In such a transaction, the party selling the "services and tangible property" is the vendor. Rules, Wyo. Dep't of Revenue, ch. 2, § 13(x)(iii) (2014) ("Any person engaged in the business of selling oil or gas services within the well site is a vendor and shall license and report their taxable and non-taxable services to the department."). QEP, as the purchaser of "services and tangible property," is liable for the sales tax levied on the transaction. *See*, Wyo. Stat. Ann. § 39-15-101(a)(x) (2017) (" 'Taxpayer' means the purchaser of tangible personal property, admissions or services which are subject to taxation under this article[.]"); Wyo. Stat. Ann. 39-15-103(c)(ii) (2017) ("Every person purchasing goods or services taxed by this article is liable for the taxes and shall pay any tax owed to the department unless the taxes have been paid to a vendor[.]"). We simply cannot read the relevant law to remove QEP from the transaction.

D. This Board will not consider QEP's request for a tax credit raised for the first time on appeal.

[¶ 12] QEP alleges that it improperly paid use tax on non-taxable services, and wants us to order a tax credit. (Notice of Appeal, 4). Wyoming Statutes section 39-16-109(d)(i) (2017) allows the Department to approve credits for "erroneously paid" use tax. The Department's rules state that "[c]redits shall automatically be applied against the next appropriate liability on the account," but do not explain how a taxpayer is to request a credit. Rules, Wyo. Dep't of Revenue, ch. 2, § 8(a) (2014).

[¶ 13] No statute or rule prescribes a process for requesting a use tax credit or evaluating such a request. But whatever the process for requesting a credit may look like, it cannot begin with an appeal to this Board. We review final decisions from the Department. Wyo. Stat. Ann. § 39-11-102.1(c) (2017). Here, there is no Department decision for us to review: QEP has not produced a final decision denying it a tax credit, has not averred that such a final decision exists, and has not even contended that it ever asked the Department for a credit. Terri Lucero, Administrator of the Department's Excise Tax Division, testified that QEP did not ask DOR for a credit. (Hr'g recording, vol. 4, at 59:00). QEP did not controvert

that testimony in any way. We cannot address an issue raised for the first time on appeal. *State ex rel. Dep't of Family Servs. v. Kisling*, 2013 WY 91, ¶ 14, 305 P.3d 1157, 1162 (Wyo. 2013). Therefore, we will not consider QEP's tax credit request.

E. The Department did not err by imposing a penalty or by not waiving the penalty.

[¶ 14] Wyoming Statutes section 39-15-108(c)(i) (2017) provides that "[i]f any part of the deficiency is due to negligence or intentional disregard of rules and regulations but without intent to defraud there *shall* be added a penalty of ten percent (10%) of the amount of the deficiency plus interest as provided by paragraph (b)(i) of this section." (emphasis added). A subsequent paragraph provides that "[t]he department may credit or waive penalties imposed by this subsection as part of a settlement or for any other good cause[.]" Wyo. Stat. Ann. § 39-15-108(c)(xv) (2017). Taken together, those paragraphs mandate a penalty under certain conditions, and allow (but do not require) the Department to waive that penalty for "good cause." The Department, having determined that a deficiency existed and was due to QEP's negligence or intentional disregard of rules and regulations, imposed a penalty.

[¶ 15] While QEP's statement of this issue contends that the Department erred by not *waiving* the penalty, its argument urges us to declare that the Department erred by *imposing* the penalty. The Department contends both that it properly imposed the penalty and that we lack authority to review its decision to not waive the penalty. (Dep't's Br. 23-25).

i. Imposition of the penalty

[¶ 16] QEP contends that the Department should not have imposed a penalty. (Pet'r's Post-Hr'g Br. 11-12). The Department contends that it properly imposed the penalty. (Dep't's Br. 23-25). It claims both negligence and intentional disregard of rules and regulations based on QEP's history of deficiencies that grew larger over time. (*Id.* at 23). QEP contends that it was not negligent and did not intentionally disregard any rules or regulations. It also contends that, in accordance with Wyoming Statutes section 39-11-102(a)(i)(D) (2017), the Department should not have imposed a penalty because QEP relied on erroneous information that the Department supplied.

a. Negligence

[¶ 17] "Negligence is the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. *Black's Law Dictionary, 7th Ed.*, p. 1056 (West Group 1999)." *In re ExxonMobil Corp.*, 2006 WL 3327974, * 8, ¶ 37, Docket No. 2005-110 (Wyo. State Bd. of Equalization, Sept. 25, 2006). Beyond pointing out that QEP had excise tax deficiencies in multiple years, the Department doesn't present much of a case for negligence. It seems to contend (without actually spelling it out) that QEP was

negligent for simply paying what its vendors charged instead of asking them to collect sales tax on the transactions. But, the burden of persuasion is critical in our analysis of this issue: disproving negligence requires more than mere denial, which is all QEP has provided. When the party with the burden argues, "No way," and the other party responds, "Yes way," neither party proves anything. QEP, as the party with the burden, failed to carry its burden, and the Department essentially wins by forfeit.

b. Intentional disregard of rules and regulations

[¶ 18] The Department contends that QEP's tax deficiency resulted from its intentional disregard of rules and regulations, but has not specified which rules or regulations QEP allegedly disregarded. (Dep't's Br. 23-24). If the Department cannot identify a rule or regulation that QEP allegedly violated, we cannot evaluate its contention.

c. Wyo. Stat. Ann. § 39-11-102(a)(i)(D) (2017)

[¶ 19] Wyoming Statutes section 39-11-102(a)(i)(D) (2017) provides "[a] right, if a tax has accrued penalty and interest because the taxpayer relied on erroneous written information or written answers from the state, that the penalty and interest shall not be assessed[.]" QEP argues that subparagraph (D) applies because it relied on the Department of Audit's erroneous assertions that QEP owed use tax, when it really owed sales tax. (Pet'r's Post-Hr'g Br. 12). We do not find that argument persuasive. While the Department of Audit undoubtedly provided "erroneous written information," QEP's failure to pay sales tax occurred before the Department of Audit did so. Therefore, the penalty did not accrue *because* QEP relied on the erroneous information; it accrued well *before* the information was provided.

ii. Waiver of the penalty

[¶ 20] This Board has, on multiple occasions, reviewed the Department's decisions to not waive interest or penalties. *See, e.g. In re T-Joe's Bar & Lounge*, 2013 WL 5422787, * 11, ¶ 57, Docket No. 2012-64 (Wyo. State Bd. of Equalization, Sept. 6, 2013); *In re ExxonMobil Corp.*, * 11, ¶ 56; *In re Samuel*, 2002 WL 1269647, * 7, ¶ 22, Docket No. 2001-84 (Wyo. State Bd. of Equalization, May 28, 2002). The Department now contends – we believe for the first time – that this Board lacks authority to review such decisions. It argues that the legislature gave waiver authority to the Department alone, and has not specifically authorized this Board to review its use of that authority. (Dep't's Br. 24).

[¶ 21] The Department cites *Amoco Prod. Co. v. Wyo. State Bd. of Equalization*, 12 P.3d 668, 673 (Wyo. 2000) and *Solvay Chemicals, Inc. v. Dep't of Revenue*, 2018 WY 124, ¶¶

43-45, 430 P.3d 295, 308-09 (Wyo. 2018) (Boomgaarden, J., dissenting)[2] in support of its contention that we may not review its waiver decisions. (Dep't's Br. 25). The Department does not explain how *Amoco* and *Solvay* apply to this case – which is kind of understandable, because they don't. In *Amoco*, the Court ruled that this Board exceeded our authority when we prescribed a method for establishing the fair market value of mineral production, instead of simply determining whether the Department erred in determining whether certain deductions were allowable. In *Solvay*, the dissenting justices said that this Board did not exceed our authority when we determined that a taxpayer was not entitled to a certain deduction even though the Department and the taxpayer had agreed that the deduction was available. At most, those opinions stand for the proposition that we may not exceed our authority, but they do not help us identify the limits of that authority.

[¶ 22] Our own past decisions are also not much help in deciding whether we have authority to decide this issue. We have said that "[t]his Board is not authorized to exercise its discretion or usurp the Department's authority to waive interest and penalties. The Board is confined to approving or disapproving the determination by the Department of whether there was 'good cause' to waive the interest and penalties." *In re T-Joe's Bar & Lounge*, * 11, ¶ 57. *See also*, *In re Sidelines Sports Bar*, 2011 WL 3103852, * 11, ¶ 71, Docket No. 2010-83 (Wyo. State Bd. of Equalization May 24, 2011); *In re ExxonMobil Corp.*, * 11, ¶ 56. We mean no disrespect to former iterations of this Board, but that passage contradicts itself and, ultimately, doesn't make sense. The first quoted sentence says that we cannot review the Department's refusal to waive a penalty. What point, then, is there in disapproving (as the second sentence says we can) the Department's determination that there was not good cause to waive a penalty? Whatever that passage might be interpreted to mean, we believe that our authority to decide this question comes from Wyoming Statutes section 39-11-102.1(c) (2017), which charges us to "review final decisions of the department upon application of any interested person adversely affected[.]"

[¶ 23] Having determined that we have authority to decide this question, we nonetheless decline to. Neither party has presented cogent argument or cited relevant authority on this issue, so we will not consider it. *MSC v. MCG*, 2019 WY 59, ¶ 8, 442 P.3d 662, 665 (Wyo. 2019) ("Essential to appellate review, under any applicable standard of review, is the requirement that an appellant must present cogent argument and authority to support his claim[.]").

CONCLUSIONS

[¶ 24] The Department did not err in determining that services rendered to QEP at its well sites are subject to sales tax and that QEP is liable for that tax.

[2] The Department's brief does not acknowledge that it is citing a dissenting opinion, and treats the dissent as if it were the Court's opinion. We encourage parties to adhere to the standard rules of legal citation.

[¶ 25] This Board will not address QEP's tax credit issue because it is raised for the first time in this appeal, or its penalty waiver issue because it is not supported by cogent argument or relevant authority.

ORDER

[¶ 26] The Wyoming Department of Revenue's decision is **affirmed**.

[¶ 27] **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 17th day of September 2019.

STATE BOARD OF EQUALIZATION

David L. Delicath, Chairman

E. Jayne Mockler, Vice-Chairman

Martin L. Hardsocg, Board Member

ATTEST:

Nadia Broome, Executive Assistant

CERTIFICATE OF SERVICE

I certify that on the 17th day of September 2019, 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:

Rachel Quintana
Ernst & Young LLP
Re: QEP Energy Resources
370 17th Street, Suite 4800
Denver, CO 80202

Karl D. Anderson
Senior Assistant Attorney General
Rebecca J. Zisch
Assistant Attorney General
Kendrick Building
2320 Capitol Ave
Cheyenne, WY 82002

Nadia Broome, 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, Administrator, Excise Tax Division, Department of Revenue
Department of Audit
ABA State and Local Tax Reporter