

**BEFORE THE STATE BOARD OF EQUALIZATION
FOR THE STATE OF WYOMING**

IN THE MATTER OF THE APPEAL OF)
AIRGAS USA, LLC) **Docket No. 2019-23**
FROM A DECISION BY THE)
DEPARTMENT OF REVENUE (Excise Tax))

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

APPEARANCES

Walter Eggers, III, Holland & Hart, appeared on behalf of Taxpayer, Airgas USA, LLC.

Senior Assistant Attorney General Karl Anderson and Assistant Attorney General Pat Miller, Wyoming Attorney General’s Office, appeared on behalf of the Wyoming Department of Revenue.

DIGEST

[¶ 1] Airgas appeals the Department’s decision (following an excise tax audit for the years 2015-17) imposing sales tax and interest totaling \$425,455.14 on rental fees that Airgas charged for gas cylinders. The Department of Audit audited Airgas for 2015-17 excise tax and found that Airgas did not collect or remit sales tax on its cylinder rental fees. (Ex. 502, at 2). DOA found a tax deficiency of \$346,539.56, and DOR added interest of \$78,915.58, for a total due of \$425,455.14. (Ex. 500). Airgas paid that amount under protest and appealed to this Board. (Hr’g Tr. at 61).

[¶ 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.

ISSUES

[¶ 3] Airgas presents three issues:

- A. Was the Department’s decision to impose sales tax on the container fee contrary to the Department’s “Demurrage” rule, Ch. 2, § 13(g)?

- B. Did the Department’s decision to impose sales tax on the container fee conflict with the Department’s “Container” rule, Ch. 2, § 7(f)?
- C. Should the Board reject the Department’s imposition of interest in this case?

(Pet’r’s Post-Hr’g Opening Br., 2).

[¶ 4] The Department stated three issues – one of them twice:

Contested Issues of Fact

- a) What are the circumstances of Airgas’ cylinder transactions with its customers?
- b) Was the Department’s audit-based assessment correct, proper, and in accordance with the law? (Mixed question of fact/law)

Contested Issues of Law

- a) Are Airgas’ cylinder transactions subject to Wyoming sales tax?
- b) Was the Department’s audit-based assessment correct, proper, and in accordance with the law? (Mixed question of fact/law)

(Wyo. Dep’t of Revenue’s Issues of Fact and Law and Ex. Index 1).

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) (2019). An aggrieved taxpayer may file an appeal with the State Board within 30 days after the Department’s final decision. Rules, Wyo. State Bd. of Equalization, ch. 2 § 5(e) (2006). The Department issued its final decision on July 1, 2019. (Notice of Appeal, Ex. A). Airgas filed its appeal 24 days later. (Notice of Appeal). Accordingly, we have jurisdiction.

FINDINGS OF FACT

[¶ 6] Airgas sells industrial, medical, and welding gasses. (Tr. 30). Its customers take delivery of the gasses in steel cylinders that Airgas owns. (Tr., 31). Airgas charges a cylinder rental fee of twelve cents per day. (Ex. 101; Tr. 81). Its rental documents do not feature the word “demurrage.” (Ex. 100, 101, 107). Airgas has never collected sales tax on its cylinder rental fees. (Tr. 50-51).

CONCLUSIONS OF LAW

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

[¶ 7] 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 preemptory ruling such as a summary judgment or a directed verdict.” *Burden of Production*, Black’s Law Dictionary 236 (10th ed. 2014).

[¶ 8] The taxability issue is a matter of statutory construction, which we review 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)).

[¶ 9] While the imposition of interest is statutorily mandated, waiver of interest is left to the Department’s discretion, so we review the Department’s decision for an abuse of that discretion. “Discretion generally means ‘sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. An abuse of discretion [is] said to have occurred only when the decision shocks the conscience of the court and appears to be so unfair and inequitable that a reasonable person could not abide it.’ ” *Johnson v. State ex rel. Wyo. Workers’ Safety and Comp. Div.*, 2014 WY 33, ¶ 14, 321 P.3d 318, 322 (Wyo. 2014), (quoting *Airtouch Comm. Inc. v. Dep’t of Revenue*, 2003 WY 114, ¶ 55, 76 P.3d 342, 361 (Wyo. 2003)).

B. Are Airgas’s cylinder rentals subject to sales tax?

[¶ 10] Before we address the articulated issues, we need to determine whether – putting aside the Department’s rules – Airgas’s cylinder rental fees are subject to sales tax. Wyoming Statutes section 39-15-101(a)(xxxii) (2019) defines “lease or rental” as “any transfer of possession or control of tangible personal property for consideration for a fixed or indeterminate period of time.” That definition raises four questions:

1. Is possession or control of the cylinders transferred? Yes. From Airgas to the customer. (Ex. 100, Bates 001).
2. Are the cylinders tangible personal property? Yes. Wyo. Stat. Ann. § 39-15-101(a)(ix) (2019).
3. Is consideration given for the transfer of possession or control? Yes. (Ex. 100, Bates 001).

4. Is the transfer for a fixed or indeterminate period? Yes, indeterminate. *Id.*

Therefore, the transaction by which Airgas's customers receive cylinders is a lease or rental.

[¶ 11] Next, Wyoming Statutes section 39-15-103(a)(i)(B) (2019) imposes sales tax on “the gross rental paid for the lease or contract transferring possession of tangible personal property if the transfer of possession would be taxable if a sale occurred[.]” That subparagraph raises five more questions:

1. Is there gross rental paid? Yes. (Ex. 100, Bates 001; Ex. 101, Bates 005).
2. Is that rental paid for a lease or contract? Yes. (Ex. 100).
3. Does that lease or contract transfer possession of property? Yes, possession of the gas cylinders transfers from Airgas to its customer. (Ex. 100, Bates 001).
4. Is that property tangible, personal property? Yes, the gas cylinders are tangible, personal property. Wyo. Stat. Ann. § 39-15-101(a)(ix) (2019).
5. Would the transfer be taxable if it occurred as a sale? Yes, it would be taxable as a retail sale of tangible personal property. Wyo. Stat. Ann. § 39-15-103(a)(i)(A) (2019).

So, leaving the demurrage and container rules out of it for the nonce, Airgas's cylinder rentals are subject to sales tax.

C. Does the Department's “demurrage rule” exempt gas cylinder rentals from sales tax?

[¶ 12] Airgas contends that its cylinder rental fees are demurrage, and, therefore, exempted from sales tax by a Department rule. (Pet'r's Post-Hr'g Opening Br., 12-14). The concept of demurrage originated in maritime law as “[l]iquidated damages¹ owed by a charterer to a shipowner for the charterer's failure to load or unload cargo by the agreed time.” *Demurrage*, *Black's Law Dictionary* 526 (10th Ed. 2014). The idea was to compensate the ship owner for the lost opportunity to earn money, caused by the charterer's delay. By the late 19th century, demurrage was applied to railroads. *See, e.g. Kansas Pac. Ry. Co. v. McCann*, 2 Wyo. 3 (1877). In time, merchants applied the term to shipping via trucks and on inland waterways. *See, e.g. Smart v. Richfood, Inc.*, 5 Va. Cir. 327, *1 (1986); *Pierce v. Walton*, 50 N.E. 309 (Ind. App. 1898). The concept of “demurrage” has expanded beyond the transportation context and can apply to cylinders used to deliver commercial gasses.

¹ “Liquidated damages” are “[a]n amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches.” *Liquidated damages*, *Black's Law Dictionary*, 473 (10th Ed. 2014).

See e.g. *United States ex rel. Chemetron Corp. v. Fuller Co.*, 250 F.Supp. 649, 654 (D. Mont. 1965).

[¶ 13] Airgas looks to a rule providing that “[d]emurrage charges made by vendors selling acetylene, oxygen, nitrogen, helium, and similar gaseous products in returnable containers shall not be subject to the sales tax.” Rules, Wyo. Dep’t of Revenue, ch. 2 § 13(g) (2014). Both of Airgas’s witnesses testified, without contradiction, that cylinder rental fees are commonly referred to as demurrage in the gas industry. Airgas also points to Exhibit 109, which is a document from the Chemistry Department of Purdue University entitled “Gas Cylinders General Info.” It reads in relevant part:

Demurrage: This is a monthly fee for the “rental” of the cylinder. Lecture bottles (and some larger cylinders) are not subject to demurrage, but most are. The vendor charges Purdue Stores or Chem Stores, and the charges are passed along to the account which purchased the cylinder. The demurrage fee stops after the cylinder is returned to the vendor.

(Ex. 109, Bates 015).

[¶ 14] An administrative agency has no authority other than that granted by statute. *Hayse v. Wyo. Bd. of Coroner Standards*, 2020 WY 4, ¶ 11, 455 P.3d 267, 273 (Wyo. 2020). The Department created the demurrage rule under its statutory authority to “promulgate rules and regulations *consistent with the provisions hereof* as provided by the Wyoming Administrative Procedure Act, necessary to the enforcement of the provisions of any or all tax and other revenue measures which are administered by the department.” Wyo. Stat. Ann. § 39-11-102(c)(xix) (2019) (emphasis added). That language does not authorize the Department to counteract statutes or create tax exemptions where the Legislature has imposed taxes. “Rules promulgated in excess of an agency’s statutory authority are null and void.” *U.S. West Commc’ns, Inc. v. Wyo. Pub. Serv. Comm’n*, 992 P.2d 1092, 1094 (Wyo. 1999). Thus, if the Department’s rule exempted cylinder rental from sales tax (as Airgas contends it does), the rule would exceed the Department’s statutory authority and would, therefore, be null and void. It would be no different than a Department rule purporting to eliminate the tax on sales or rentals of any other product that the Legislature has subjected to sales tax; it would contradict statute and, thus, exceed the Department’s statutory authority.

[¶ 15] Rather than construe the demurrage rule in a way that conflicts with statute, we construe it to mean that agreed-upon charges for breaching a contract by keeping a cylinder beyond an agreed-upon time (i.e. demurrage) are liquidated damages, not sales, and are not, therefore, subject to sales tax. That interpretation harmonizes the rule with the applicable statutes.

[¶ 16] Airgas argues that its cylinder rental fee is tax-exempt demurrage because it works like a penalty to incentivize quick return of its cylinders. (Pet’r’s Post-Hr’g Opening Br., 12-14). While the fee may motivate some customers to empty and return the cylinders promptly, it is not demurrage. Demurrage charges arise from an agreement between the

parties. Here, we have no evidence that Airgas and its customers entered into a demurrage arrangement, even if Airgas's rental terms share some of the characteristics of traditional demurrage.

[¶ 17] Coming at the issue from another direction, an agency's interpretation of its own rules will usually control over a contrary interpretation. *Wilson Advisory Com'n v. Bd. of Cty. Com'rs*, 2012 WY 163, ¶ 22, 292 P.3d 855, 862 (Wyo. 2012) ("we defer to an agency's interpretation of its own rules and regulations unless that interpretation is clearly erroneous or inconsistent with the plain language of the rules."). The Department's interpretation of "demurrage" to mean liquidated damages for keeping a cylinder past an agreed-upon date is neither clearly erroneous, nor inconsistent with the plain language of the demurrage rule. Accordingly, the Department's interpretation of its rule is entitled to deference.

D. Does the Department's "container rule" exempt gas cylinder rentals from sales tax?

[¶ 18] Airgas next cites the Department's "container rule," which reads:

Sales of containers and packaging, when sold to persons who resell the containers together with their contents, shall be exempt from the sales and use tax. Disposable items purchased by restaurants, drive-ins, lunch counters, motels, hotels, and similar retailers, for their customers' consumption shall be exempt from the sales and use tax. All purchases of reusable products used or directly consumed by vendors shall be subject to sales and use tax at the time of purchase.

Rules, Wyo. Dep't of Revenue, ch. 2 § 7(f) (2014). Neither party claims that the rule is ambiguous, and we find no ambiguity.

[¶ 19] The first sentence of the rule exempts sales of containers that are going to be filled and re-sold. Airgas doesn't re-sell cylinders; it rents them over and over, so this sentence doesn't apply to this case. (Tr. 70). Airgas agrees. (Pet'r's Post-Hr'g Opening Br. 15). The second sentence exempts certain disposable items. Cylinders are not disposable, so this sentence doesn't apply either. Again, Airgas agrees. *Id.*

[¶ 20] The final sentence of the rule declares that "reusable products used or directly consumed by vendors" are subject to excise tax. That sentence raises two questions: First, are the cylinders reusable products? Yes, Airgas fills and rents the cylinders repeatedly. (Tr., 34-35). Second, does Airgas "use or consume" the cylinders? Airgas rents the cylinders to customers to contain the gasses purchased from Airgas. *Id.* But if that constitutes "using," then any other reusable products (like air compressors or tuxedos) that a business buys to rent to others are also "used" and therefore subject to sales tax when the business buys it. That reading of the rule fails for at least two reasons.

[¶ 21] First, that interpretation conflicts with another Department rule providing that “[t]he purchase of tangible personal property which shall be exclusively held for rental, lease or sale shall be considered a wholesale purchase and shall be exempt from the sales tax.” Rules, Wyo. Dep’t of Revenue, ch. 2 § 13(cc) (2014). Reading “use” to exclude owning property to rent it out will avoid that conflict. Also, the rental property rule is more specific than the container rule, and thus should control if they are in conflict. *Rodriguez v. State*, 2019 WY 25, ¶ 33, 435 P.3d 399, 409 (Wyo. 2019).

[¶ 22] Second, Airgas’s reading of the container rule contradicts the statutory provision that subjects rental fees to sales tax. Again, the Department’s rules cannot exempt from taxation what the Legislature has unambiguously made taxable. *Supra* ¶ 14.

[¶ 23] But even if the cylinders are subject to sales tax when Airgas buys them, the container rule doesn’t make them exempt from sales tax when Airgas rents them to its customers.

E. Did the Department abuse its discretion by imposing interest?

[¶ 24] In its final issue, Airgas asks this Board to reverse the Department’s decision to impose interest. (Pet’r’s Post-Hr’g Opening Br. 16-17). Wyoming Statutes section 39-15-108(b)(i) (2019) *requires* the Department to charge interest on overdue sales taxes. A later provision *allows* the Department to “waive interest imposed by this subsection as part of a settlement or for any other good cause.” Wyo. Stat. Ann. § 39-15-108(b)(iii) (2019). It’s not entirely clear, but Airgas appears to argue that the Department abused its discretion by not waiving the interest charge as allowed under Subdivision (iii).

[¶ 25] Airgas contends that the Department abused its discretion by imposing (or by not waiving) interest for the period of 2015-17 because the Department didn’t publicize its interpretation of the demurrage rule until 2018. (Pet’r’s Post-Hr’g Opening Br. 16-17). But Airgas doesn’t cite any authority for the proposition that the Department must give notice of its interpretation before it can enforce that interpretation. At best, Airgas has a sound argument that the Department would not have abused its discretion by waiving the interest. But, that’s not enough. Showing that one decision would have been permissible does not make a different decision impermissible. That’s discretion in a nutshell: when multiple outcomes are reasonable, the Department gets to decide and we won’t second-guess.

[¶ 26] The Department notes that it “does not have a duty to provide unsolicited interpretations to taxpayers.” (Dept. Br. 10). We believe that is correct: if the Department cannot enforce its rules without first issuing an explanatory catechism, the rules themselves will take a back seat to the explanations thereof.

CONCLUSIONS

[¶ 27] The cylinder rental fees that Airgas charges are subject to sales tax, and the Department’s decision to impose – or not waive – interest was not an abuse of discretion.

ORDER

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

[¶ 29] Pursuant to Wyoming Statutes section 16-3-114 (2019) 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 19 day of March 2020.


STATE BOARD OF EQUALIZATION



David L. Delicath, Chairman



E. Jayne Mockler, Vice-Chairman



Martin L. Hardsocg, Board Member

ATTEST:



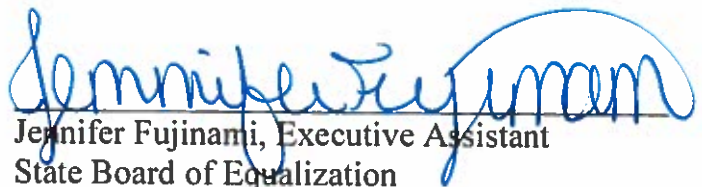
Jennifer Fujinami, Executive Assistant

CERTIFICATE OF SERVICE

I certify that on the 19 day of March 2020, 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:

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