

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

IN THE MATTER OF THE APPEAL OF            )  
**BIG AL’S TOWING & RECOVERY**            )     Docket No. **2020-33**  
FROM A DECISION BY THE                    )  
DEPARTMENT OF REVENUE                    )  
(Sales & Use Tax)                            )

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

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**APPEARANCES**

Gay Woodhouse, Christopher M. Brennan, and James O. Bardwell, Woodhouse Roden Nethercott, LLC, appeared on behalf of Big Al’s Towing & Recovery.

Karl D. Anderson, Senior Assistant Attorney General, Wyoming Attorney General’s appeared on behalf of the Wyoming Department of Revenue.

**DIGEST**

[¶ 1] Big Al’s appeals from the Department of Revenue’s decision that unlocking vehicles, changing flat tires, and jump starting vehicles are subject to sales tax. The Wyoming State Board of Equalization, Chairman David L. Delicath, Vice-Chairman E. Jayne Mockler, and Board Member Martin L. Hardsocg<sup>1</sup>, decided the appeal following an evidentiary hearing. After considering the evidence and the parties’ post-hearing submissions, the Board finds that the Department erred when it determined that the services in question are alterations or improvements to vehicles. The Board reverses and remands the Department’s decision.

**ISSUES**

[¶ 2] Big Al’s identifies the issue as “whether or not the services fall within the statutory definition of taxable event.” (Pet’r’s Prelim. Statement, 1).

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<sup>1</sup> As of March 1, 2021, Ms. Mockler is the Board’s Chairman and Mr. Hardsocg is the Vice-Chairman.

[¶ 3] The Department presented this statement of the issues:

- a. Is the Department's audit-based assessment correct, proper, and in accordance with the law?
- b. Are jump starts, unlocking of cars, and installations of spare tires subject to the imposition of Wyoming excise tax?

(Dept. Prelim. Statement, 2).

## **JURISDICTION**

[¶ 4] The 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 Board within 30 days of the Department's final decision. Rules, Wyo. State Bd. of Equalization, ch. 2 § 5(e) (2021). The Department issued its final decision on July 1, 2020. (Ex. 500). Big Al's filed its appeal 22 days later. (Notice of Appeal). Accordingly, we have jurisdiction.

## **FINDINGS OF FACT**

[¶ 5] Big Al's sells car batteries, which both parties agree are subject to sales tax, and provides towing services, which both parties agree are not. (Pet'r's Br. 2-3; Hr'g Tr. at 84). It also provides other services that include unlocking vehicles, changing flat tires, and jump starting vehicles. Big Al's has never collected sales tax on those services. (Hr'g Tr. at 79-82).

[¶ 6] The Department issued written guidance in 2009 declaring that jump starts and tire changes are taxable as repairs. (Ex. 508) (“If the towing company performs repairs on the vehicle, the repairs are taxable. ... These *repairs/services* could include jump starting a vehicle [and] changing a tire.”) (emphasis added).

[¶ 7] In 2017, the Department again published guidance declaring that the services in question are taxable, but didn't say whether they were repairs, alterations, or improvements. (Ex. 507) (“Services which repair, alter, and/or improve tangible personal property are subject to sales tax. For example, jump starts, lock outs, tire changes, adding water to a radiator, etc., are all taxable services.”).

[¶ 8] Following an audit, the Department determined that Big Al's owed \$10,881.66 in excise tax for the period of October 1, 2016 through September 30, 2019. (Ex. 500). Part of that amount is sales tax on items that Big Al's purchased, and that portion is not disputed.

(Hr’g Tr. at 34). But most of the audit assessed taxes arise from jump start, lockout, and tire change services that Big Al’s provided to its customers. (Ex. 501). The Department also assessed \$2,023.35 in interest, for a total of \$12,905.01. (Ex. 500). Big Al’s appealed. (Notice of Appeal).

[¶ 9] Terri Lucero, the Administrator of the Department of Revenue, Excise Division, testified at our hearing that the services in question are *not repairs*, but are nonetheless taxable as alterations or improvements. (Hr’g Tr. at 18).

## CONCLUSIONS OF LAW

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

[¶ 10] At the request of an adversely affected party, 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 instruction prescribed by the department.” Wyo. Stat. Ann. § 39-11-102.1(c)(iv) (2019). We review the parties’ statutory interpretations 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] 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 (10<sup>th</sup> ed. 2014). The burden of persuasion is “[a] party’s duty to convince the fact-finder to view the facts in a way that favors that party.” *Burden of Persuasion, Black’s Law Dictionary*, 236 (10<sup>th</sup> ed. 2014). If the party with the burden of persuasion does not sustain that burden “by a firm preponderance of the evidence,” it cannot prevail. *Little v. State Dep’t of Workforce Servs., Workers’ Comp. Div.*, 2013 WY 100, ¶¶ 34-35, 308 P.3d 832, 842-43 (Wyo. 2013).

[¶ 12] We also recognize a presumption that statutes imposing taxes are to be construed in favor of taxpayers:

“Tax statutes are to be construed in favor of the taxpayer and are not to be extended absent clear intent of the legislature.” *Chevron U.S.A., Inc. v. State*, 918 P.2d [980,] 985 [(Wyo. 1996)]. In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen. *Amoco Production Co. v. Dept. of Revenue*, 2004 WY 89, ¶ 18, 94 P.3d 430, 438 (Wyo. 2004). Thus, taxes may not be imposed by any means other than a clear, definite and unambiguous statement of legislative authority. *Chevron U.S.A., Inc.*, 918 P.2d at 984; *Amoco Production Co.*, ¶ 18[, 94 P.3d at 438-39]. See also Wyo. Const. art. 15, § 13 (stating “no tax shall be levied, except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied.”).

*Exxon Mobil Corp. v. State, Dep’t of Revenue*, 2009 WY 139, ¶ 47, 219 P.3d 128, 142 (Wyo. 2009) (quoting *Qwest Corp. v. State ex rel. Dep’t of Revenue*, 2006 WY 35, ¶ 9, 130 P.3d 507, 511-12 (Wyo. 2006).

[¶ 13] We apply de novo review to the Department’s findings of ultimate fact:

When an agency’s determinations contain elements of law and fact, we do not treat them with the deference we reserve for findings of basic fact. When reviewing an “ultimate fact,” we separate the factual and legal aspects of the finding to determine whether the correct rule of law has been properly applied to the facts. We do not defer to the agency’s ultimate factual finding if there is an error in either stating or applying the law.

*Britt v. Fremont Cty. Assessor*, 2006 WY 10, ¶ 17, 126 P.3d 117, 122-23 (Wyo. 2006) quoting *Basin Elec. Power Co-op., Inc. v. Dep’t of Revenue, State of Wyo.*, 970 P.2d 841, 850-51 (Wyo. 1998).

[¶ 14] We review the Department’s interpretation of its own rules using a more nuanced approach:

An agency’s own rules and regulations “have the force and effect of law and an administrative agency must following its own rules and regulations or face reversal of its action.” However, “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.”

*Wilson Advisory Comm. v. Bd. of Cty. Comm'rs*, 2012 WY 163, ¶ 22, 292 P.3d 855, 862 (Wyo. 2012) (citations omitted).

B. Applicable statutes and rules

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

(J) The sales price paid for services performed for the repair, alteration or improvement of tangible personal property[.]

Wyo. Stat. Ann. § 39-15-103(a)(i)(J) (2019).

[¶ 16] “Labor or service charges for the repair, alteration or improvement of tangible personal property, as well as charges for materials, supplies and fabrication used in rendering services shall be subject to the sales tax.” Rules, Wyo. Dept. of Revenue, ch. 2, § 13(dd) (2014). The parties agree that vehicles are tangible personal property. (Hr’g Tr. at 49-50, 100). The Department concedes that the services in question are not repairs. (*Id.* at 18). Therefore, our remaining task is to determine whether or not those services are alterations or improvements.

C. Analysis

i. Is section 39-15-103(a)(i)(J) ambiguous?

[¶ 17] Our analysis begins with determining whether the statute is ambiguous. *BP Am. Prod. Co. v. Dep’t of Revenue*, 2006 WY 27, ¶ 20, 130 P.3d 438, 464 (Wyo. 2006). If a statute is unambiguous, we give effect to its plain language. *State ex ret. Wyo. Dep’t of Revenue v. Union Pac. R.R. Co.*, 2003 WY 54, ¶ 12, 67 P.3d 1176, 1182 (Wyo. 2003). If a statute is ambiguous, we will resort to principles of statutory construction to determine the intent of the legislature. *Qwest Corp. v. Wyo. Dep’t of Revenue*, 2006 WY 35, ¶ 8, 130 P.3d 507, 511 (Wyo. 2006). The Division contends that the statute is unambiguous. (Post-hearing Memoranda, p. 4). Big Al’s tells us, quite correctly, that we must resolve the ambiguous/unambiguous question, but doesn’t suggest an answer. (Pet’r’s Br. 4). Big Al’s doesn’t rely on any rules of statutory interpretation, from which we conclude that it also believes the statute is unambiguous.

[¶ 18] To determine whether a statute is ambiguous, we begin by considering “the ordinary and obvious meaning of the words employed according to their arrangement and connection.” *In re Delcon Partners, LLC*, 2019 WL 1780379, \*3, ¶ 15, Docket No. 2018-30 (Wyo. State Bd. of Equalization, Jan. 18, 2019) (*citing Phoenix Vintners, LLC v. Noble*, 2018 WY 87, ¶ 15, 423 P.3d 309, 313 (Wyo. 2018)). “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.*” *Id.*

[¶ 19] Any argument that the statute is ambiguous has to rest on the idea that the words “alteration” and “improvement” are ambiguous: those are the words upon which the parties disagree, and nothing else in the statutory language is subject to varying interpretations. That argument “loses the forest for the trees.” *BP America Prod. Co. v. Dep’t of Revenue, State of Wyo.*, 2005 WY 60, ¶ 15 112 P.3d 596, 604 (Wyo. 2005). We must consider the entire statute to determine whether it is ambiguous. *Id.* Viewed as a whole, the obvious purpose of Wyoming Statutes section 39-15-103(a)(i)(J) (2019) is to impose excise tax on “services performed for the repair, alteration or improvement of tangible personal property[.]” The parties’ inability to agree about the meaning of “alteration” and “improvement” does not confuse that purpose or render the statute ambiguous. *State ex rel. West Park Hosp. Dist. v. Skoric*, 2014 WY 41, ¶ 11, 321 P.3d 334, 339 (Wyo. 2014) (Differing opinions as to a statute’s meaning are not conclusive of ambiguity). We find the statute is unambiguous.

**ii. Are the services at issue “alterations” or “improvements”?**

[¶ 20] Having found the statutory language unambiguous, we must next apply that language to the facts, without resort to the rules of statutory construction, to determine whether Big Al’s services fall under the heading of “alteration or improvement.” Neither of those words is defined in any relevant statute or rule. Accordingly, we must give them their ordinary meanings “unless the statute clearly intends otherwise.” Wyo. Stat. Ann. § 8-1-103(a)(i) (2019); *Penny v. State*, 2005 WY 117, ¶ 44, 120 P.3d 152, 174 (Wyo. 2005).

[¶ 21] When this Board has doubts about the ordinary meaning of a word, we look to common dictionary definitions. *In re Patterson*, 2019 WL 6284339, \*3, ¶ 16, Docket No. 2018-28 (Wyo. State Bd. of Equalization, Oct. 28, 2019) (citing *Kebschull v. State ex rel. Dep’t of Workforce Serv.s, Workers’ Comp. Div.*, 2017 WY 94, ¶ 39, 399 P.3d 1249, 1258 (Wyo. 2017)). “Alteration” means “[t]he act or process of altering: the state of being altered” or “the result of altering[.]” *Alteration, Meriam Webster’s Collegiate Dictionary* 35 (11<sup>th</sup> ed. 2014). “Alter” means “to make different without changing into something else[.]” *Alter, Meriam Webster’s Collegiate Dictionary* 35 (11<sup>th</sup> ed. 2014).<sup>2</sup>

[¶ 22] David Rose, the owner of Big Al’s and a self-identified “car guy,” testified that none of the services at issue alter vehicles. (Hr’g Tr. 77-78, 88). Ms. Lucero testified that they all do. She opined that unlocking a vehicle is an alteration “because that vehicle is now

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<sup>2</sup> Black’s Law Dictionary doesn’t include a definition of “alteration” or “alter” that is relevant to this case.



unlocked and the owner can now access the vehicle.” *Id.* at 19. She similarly opined that jump starting a vehicle “alter[s] the vehicle from a vehicle that didn’t start to a vehicle that did,” and that changing a tire is an alteration “because the inflated tire is now on that vehicle, and the vehicle driver can now drive it.” *Id.* at 23, 25.

[¶ 23] “Improvement” is “[a]n addition to property, usu. real estate, whether permanent or not; esp., one that increases its value or utility or that enhances its appearance.” *Improvement, Black’s Law Dictionary* 875 (10<sup>th</sup> ed. 2014). Citing that definition, we have found that cleaning upholstery and area rugs constituted “improvement” because it increased the value of those items. *In re Mathews*, 2005 WL 1464852, p. 4, ¶ 20, Docket No. 2004-139 (Wyo. State Bd. of Equalization, June 2005). We continue to believe that an increase in value is a hallmark of improvement; otherwise, “improvement” would merely mean any change for the better, which is just a subset of “alteration.”

[¶ 24] Mr. Rose testified that none of the services at issue improve a vehicle or increase its value. (Hr’g Tr. 77-78, 88, 90). Ms. Lucero disagreed. She said lockout service improves a vehicle “because it’s unlocked, and they couldn’t unlock it themselves.” *Id.* at 21. She also testified that a jump start is an improvement because “[s]ometimes jump starting a car will reenergize the battery and you don’t have to replace that battery.” *Id.* at 23. Finally, Ms. Lucero testified that a tire change improves a vehicle “because I can now drive it, where I couldn’t drive it on a flat tire.” *Id.* at 58.

[¶ 25] Neither the language of the statute, nor the Department’s rules promulgated to enforce the statute, can stretch as far as the Department wants them to. We believe the Department’s interpretations of “alteration” and “improvement” run afoul of the judicial injunction against expanding statutes “beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out.” *Exxon Mobil Corp. supra* ¶ 12.

[¶ 26] In short, we have dueling opinion testimony from Mr. Rose, an expert on automobiles, and Ms. Lucero, an expert on taxation. At best, for the Department, it’s a draw. As such, the Department didn’t bear its burden of proof by a preponderance of the evidence. We believe the Department simply asks too much of the words “alteration” and “improvement,” as evidenced by Ms. Lucero’s testimony that there is an alteration every time someone starts a car. *Id.* at 73.

## **DECISION**

[¶ 27] The Department’s imposition of excise tax on jump starts, tire changes, and lock out services was not in accordance with law.

**ORDER**

[¶ 28] The Wyoming Department of Revenue's decision is **reversed**.


[¶ 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 22 day of March 2021.

**STATE BOARD OF EQUALIZATION**

  
\_\_\_\_\_  
E. Jayne Mockler, Chairman

  
\_\_\_\_\_  
Martin L. Hardsocg, Vice Chairman

  
\_\_\_\_\_  
David L. Delicath, Board Member

ATTEST:

  
\_\_\_\_\_  
Jennifer Fujinami, Executive Assistant




## CERTIFICATE OF SERVICE

I certify that on the 22 day of March 2021, 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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