

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

IN THE MATTER OF THE APPEAL OF )  
**DEVON ENERGY PRODUCTION CO LP** ) Docket Nos. **2020-34**  
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**

Brian Browdy and Hannah Applewhite, Ryan LLC, appeared on behalf of Devon Energy Production Co. LP.

Senior Assistant Attorneys General, Karl D. Anderson and James Peters, Wyoming Attorney General's Office, appeared on behalf of the Wyoming Department of Revenue.

**DIGEST**

[¶ 1] The Department of Audit conducted an excise tax audit of Devon Energy Production Co. LP's sales and purchases. Devon's sales did not result in any audit findings, but DOA identified a tax deficiency arising from Devon's purchases of fracking and water transportation services. The Department of Revenue accepted that finding and assessed interest. Devon appeals from the Department's final determination.

[¶ 2] Devon contends that the fracking services are statutorily exempt from sales tax because they were services for the alteration or improvement of real property owned by the State of Wyoming. The Department, however, contends that the statutory provision that Devon relies on exempts services sold to the state, but not those sold to private businesses.

[¶ 3] Devon also contends that the water transportation services it bought are statutorily exempt from sales tax as "intrastate transportation" of "freight" or "property." The Department relies on its rule providing that all such services are subject to sales tax if the vendor's invoice doesn't differentiate between on-site and off-site services.

[¶ 4] We will affirm the Department's determination regarding fracking services, and remand that determination with regard to water transportation services. The Department

has asked us to remand so it can issue a revised tax credit assessment. (Dep't Opening Br. 2). Devon hasn't opposed that request, so we will grant it.

## **ISSUES**

[¶ 5] Devon identified two issues:

- I. The Charges For Fracturing The Oil And Gas Wells Are Exempt Under Wyo. Stat. § 39-15-104(a)(iv)(F) Because The Fracturing Services Were For The Alteration And Improvement Of Property Owned By The State.
- II. The Charges For Water Transportation Are Exempt Under Wyo. Stat. § 39-15-105(a)(viii)(A) Because Water Is Property, And, It was Transported Exclusively Within The State.

(Devon Opening Br. 7, 14) (capitalization in original).

[¶ 6] The Department also presented two issues:

- A. Devon's purchases of services and tangible personal property used on well sites under lease from the State of Wyoming are generally subject to Wyoming excise tax. Those transactions are not exempt from taxation under Wyo. Stat. 39-15-105(a)(iv)(F) simply because they occur on property leased from the State.
- B. Devon's purchases of water hauling services contain both taxable and non-taxable components. However, since Devon failed to separately identify and distinguish those components, the entirety of the hauling services are taxable under the Department's rules.

(Dep't. Br. 7, 13).

## **JURISDICTION**

[¶ 7] The State Board shall "review final decisions of the department [of revenue] upon application of any interested person adversely affected." Wyo. Stat. Ann. § 39-11-102.1(c) (2021). An aggrieved taxpayer may file an appeal with this Board within 30 days after the Department's final decision. Rules, Wyo. State Bd. of Equalization, ch. 2, § 5(e) (2021). The Department issued its final decision on July 20, 2020, and Devon

filed its appeal on August 21, 2020, so the appeal is timely and we have jurisdiction. (Ex. 504; Notice of Appeal).

## **FINDINGS OF FACT**

[¶ 8] Devon extracts crude oil on parcels that it leases from the State of Wyoming. (Exs. 220-33). During the audit period, Devon hired contractors to perform hydraulic fracturing (fracking) services to increase the amount of oil recovered from its wells. (Exs. 325-30). Those contractors charged Devon sales tax on some of fracking invoices, but not on others. *Id.*

[¶ 9] Because fracking uses large amounts of water, Devon hired other contractors to transport water to its well sites. (H’rg Video 40:50-41:50; Exs. 331-45). Those contractors transported water to the well sites from as far as 17 miles away. (*Id.* at 42:15-42:25). When the water reached the well sites, it was stored in tanks that were no more than 50 feet inside the perimeter of the well site. (H’rg Video 1:16:30-1:17:25). In other words, the overwhelming majority of the water transportation took place outside the well sites. In their invoices, Devon’s contractors didn’t distinguish between charges for water transportation outside well sites, and charges for water transportation within well sites. (Exs. 331-45). Devon did not pay sales tax on the water transportation services it bought from contractors during the audit period. *Id.*

[¶ 10] In 2019, the Department of Audit conducted an excise tax audit of Devon’s sales and purchases from November 1, 2016 through March 31, 2019. (Ex. 500). It did not find any issues related to Devon’s sales, but identified a deficiency of \$1,095,862.59 arising from Devon’s purchases of fracking services and water transportation. *Id.* The Department adopted that finding and assessed interest in the amount of \$198,949.70, for a total due of \$1,294,812.29. (Ex. 502).

## **CONCLUSIONS OF LAW**

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

[¶ 11] 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) (2021). 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) (2021). 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)).

[¶ 12] We have described the Petitioner’s burden in this way:

Except as specifically provided by law or in this section, the Petitioner shall have the burden of going forward<sup>1</sup> and the ultimate burden of persuasion, which burden shall be met by a preponderance of the evidence. If Petitioner provides sufficient evidence to show the Department determination is incorrect, the burden shifts to the Department to defend its action.

Rules, Wyo. State Bd. of Equalization, ch. 2 § 20 (2021).

[¶ 13] There are no material issues of fact in this case: it’s all about interpreting statutes and rules. Therefore, 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)). We also 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 Coop., Inc.*, 970 P.2d at 850-51).

B. Are the charges for fracturing exempt from sales tax under Wyoming Statutes section 39-15-105(a)(iv)(F)?

[¶ 14] “Except as provided by W.S. 39-15-105,” Wyoming law imposes sales tax on:

[t]he 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

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<sup>1</sup> 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).

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.

Wyo. Stat. Ann. § 39-15-103(a)(i)(K) (2021). Devon doesn't contest the applicability of Subparagraph (K) to its purchases of fracking services, but contends that a statutory exception also applies. Specifically, Devon contends that Wyoming Statutes section 39-15-105(a)(iv)(F) exempts its purchases of hydraulic fracturing services. That statute provides:

(iv) For the purpose of exempting sales of services and tangible personal property sold to government, charitable and nonprofit organizations, irrigation districts and weed and pest control districts, the following are exempt:

\* \* \*

(F) Labor or service charges, including transportation and travel, for the repair, alteration or improvement of real property or tangible personal property owned by, or incorporated in projects under contract to the state of Wyoming or any of its political subdivisions[.]

Wyo. Stat. Ann. § 39-15-105(a)(iv)(F) (2021).

[¶ 15] Devon contends that the plain language of Subparagraph (F) exempts its purchases of fracking services from sales tax because those purchases were for the alteration and improvement of state property. The Department disagrees, contending that the prefatory language of Paragraph (iv) limits the exemption to sales to “government, charitable and nonprofit organizations, irrigation districts and weed and pest control districts.”

[¶ 16] In reading any statute, our goal is to determine what the legislature intended. *Matter of Longwell*, 2022 WY 56, ¶ 21, 508 P.3d 727, 733 (Wyo. 2022). Our first step in that determination is to consider whether the statute is ambiguous. If the statute is ambiguous, we will employ the rules of statutory construction to discern its meaning. *Id.* But if the statute is not ambiguous, we will give effect to the legislature's intent without resort to the rules of statutory construction. *Id.* The Department says the statute is unambiguous. (Dep't. Br. 9). Devon doesn't clearly take a stance about ambiguity, but it invokes multiple rules of statutory construction, so we can infer that it believes the statute is ambiguous. (Devon Opening Br. 11-13).

[¶ 17] Here, the legislature has clearly stated that its intention was to exempt “sales of services and tangible personal property sold to government, charitable and nonprofit organizations, irrigation districts and week and pest control districts[.]” Wyo. Stat. Ann. §

39-15-105(a)(iv)(F) (2021). We believe that language renders Paragraph (iv) unambiguous and also settles the question of legislative intent. Having thus divined the Legislature’s unambiguous intent, we must abide by it and are not at liberty to expand or restrict it. *Allied-Signal, Inc. v. Wyo. State Bd. of Equalization*, 813 P.2d 214, 219 (Wyo. 1991) (“Strict adherence to our Wyoming constitution demands that [this Board] recognize that it is without discretion, nor does it have any latitude, to apply statutes contrary to legislative intent once that intent has been ascertained”).

[¶ 18] The fracking services at issue here were not, “sold to government, charitable and nonprofit organizations, irrigation districts and weed and pest control districts.[.]” Rather, they were sold to Devon, a private, for-profit business. Accordingly, Wyoming Statutes section 39-15-105(a)(iv)(F) (2021) does not exempt those purchases from sales tax. We will, therefore, affirm the Division’s determination of this issue.

C. Are the charges for water transportation exempt from sales tax under Wyoming Statutes section 39-15-105(a)(viii)(A)?

[¶ 19] In its second issue, Devon contends that its purchases of water transportation services were exempt from sales tax. The Department, however, maintains that those purchases were taxable under Wyoming Statutes section 39-15-130(a)(i)(K) (2021):

(i) Except as provided by W.S. 39-15-105, there is levied an excise tax upon:

\* \* \*

(K) 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) (2021) (emphasis added).

[¶ 20] The Department concedes that payments for water hauling services performed outside well sites are exempt from sales tax, but says that once water enters a well site, the “hauling service metamorphoses itself into an essential and indispensable production function because it is now being prepared for use as an essential element of fracking.” (Dep’t. Opening Br. 14-16). That “metamorphosis,” according to the Department, renders the tiny portion of the transportation service that takes place within the well sites subject to sales tax. *Id.* However, the invoices from Devon’s contractors don’t differentiate between the tax-exempt water transportation services provided outside of well sites and the (allegedly) taxable water transportation services provided within well sites. Unable to tell taxable from tax-exempt, the Department looks to its own rules for guidance:

Non-taxable transactions, including sales made for resale, shall be shown separately from taxable charges on sales invoices. *The entire invoice amount shall be subject to the sales/use tax if the nontaxable or exempt charges are not separately shown and distinguishable from taxable charges.*

Rules, Wyo. Dep’t of Revenue, ch. 2, § 7(a) (2014) (emphasis added). Thus, contends the Department, the last 50 feet (at most) of a miles-long transit makes the entire trip taxable.

[¶ 21] Devon looks to the first words of Paragraph (i), and contends that there is, in fact, an exception “provided by W.S. 39-15-105.” Specifically, Devon directs our attention to this language:

(viii) For the purpose of exempting sales of services and tangible personal property as an economic incentive, the following are exempt:

(A) Intrastate transportation of:

\* \* \*

(II) Freight and property including oil and gas by pipeline.

Wyo. Stat. Ann. § 39-15-105(a)(viii)(A)(II) (2021). Devon reasons that the water was both freight and property, and was transported exclusively intrastate, and is thus exempt.

[¶ 22] We agree. Charges paid for interstate transportation of freight or property are unambiguously exempted from sales tax. Wyoming Statutes section 39-15-105(a)(viii)(A)(II) (2021). The statute does not condition that exemption on the subsequent use to be made of the freight or property. There is no doubt that the water in question was transported exclusively within the state, and the Department concedes that the water was freight. (Dep’t Br. 14) (“The Department generally considers the movement of water to fall within the confines of intrastate transportation of freight[.]”). There is also support for the idea that water is property. *In re Big Horn River System*, 2004 WY 21, ¶ 56, 85 P.3d 981,

997 (Wyo. 2004) (“[A]ll water is the property of the state[.]). Thus, we’re dealing solely with intrastate transportation of freight or property.

[¶ 23] We hold that the charges in question were for intrastate transportation of water that was both freight and property. Accordingly, those charges were exempt from sales tax, regardless of the purpose for which the water was later used by Devon or its vendors. We will reverse the Department’s determination on this issue.

### **DECISION**

[¶ 24] The Department correctly determined that the charges Devon paid to vendors for hydraulic fracturing services were subject to sales tax. The Department, however, erred in determining that the charges Devon paid to vendors for water transportation services were not exempt from sales tax.

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**ORDER**


[¶ 25] The Wyoming Department of Revenue’s decision is **affirmed in part and reversed in part**. We further **remand** to the Department, as requested, so it can issue a “revised tax credit assessment.”

[¶ 26] Pursuant to Wyoming Statutes section 16-3-114 (2021) 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 1 day of December 2022.

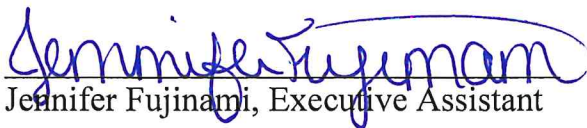
**STATE BOARD OF EQUALIZATION**

  
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ATTEST:

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

**CERTIFICATE OF SERVICE**

I certify that on the 1 day of December 2022, 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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