

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

IN THE MATTER OF THE APPEAL OF	)	
<b>TAQUERIA MEXICANA MI TIERRA LLC</b>	)	Docket No. <b>2020-35</b>
FROM A DECISION BY THE DEPARTMENT	)	
OF REVENUE) (Sales & Use Tax)	)	

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**DECISION AND ORDER**

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**APPEARANCES**

Nallely Martinez and Manuel Martinez appeared pro se as owners of Taxpayer, Taqueria Mexicana Mi Tierra, LLC.

Karl D. Anderson, Senior Assistant Attorney General, Wyoming Attorney General's Office, appeared on behalf of the Wyoming Department of Revenue (DOR).

**DIGEST**

[¶ 1] Taqueria Mexicana is a restaurant business operating in Cheyenne. The Department of Audit (DOA) performed an excise tax audit for 2017-19, but Taqueria Mexicana could not provide the business records needed for the audit – despite the statutory requirement to maintain such records. DOA, therefore, used the best information available, primarily bank statements, to complete the audit. DOA determined that Taqueria Mexicana owed \$26,574.04 in excise tax from sales and from untaxed purchases. DOR added interest and penalty. Taqueria Mexicana appealed that decision.

[¶ 2] The Wyoming State Board of Equalization, Chairman David L. Delicath, Vice-Chairman E. Jayne Mockler, and Board Member Martin L. Hardsocg, held an evidentiary hearing. Finding no reversible error, the State Board affirms DOR's decision. Vice-Chairman Mockler joins in the opinion and concurs separately.

## **ISSUES**

[¶ 3] Taqueria Mexicana did not articulate an issue in its Preliminary Statement, but generally disagrees with the excise tax, interest, and penalty assessed by DOR following an audit by the DOA.

[¶ 4] DOR presented this statement of the issues:

- a. Is the Department's audit-based assessment correct, proper, and in accordance with the law? (Mixed question of fact and law).
- b. The Department denies and contests all factual contentions of Petitioner that the Department has not specifically admitted in this Preliminary Statement.

(Dept. Prelim. Statement, 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); 39-14-209(b)(i) (2019). An aggrieved taxpayer may file an appeal with the State Board within 30 days of DOR's final decision. Rules, Wyo. State Bd. of Equalization, ch. 2 § 5(e) (2006). DOR issued its final decision on August 3, 2020. (Ex. 500). Taqueria Mexicana filed its appeal on September 2, 2020. (Notice of Appeal). Accordingly, we have jurisdiction.

## **FINDINGS OF FACT**

[¶ 6] Taqueria Mexicana opened two restaurants in Cheyenne sometime before 2017. (Ex. 503, at A004). It closed one of those restaurants in 2018 and opened another in Colorado. Taqueria Mexicana used a point of sale (POS) system called CAKE. (Ex. 508, at 1). That system sent Taqueria Mexicana emails every month showing its monthly sales. *Id.* It maintained only a month's worth of sales data, and could not run sales or tax reports. *Id.*

[¶ 7] In 2020, DOA selected Taqueria Mexicana for an excise tax audit. (Ex. 503, at A004). The audit was challenging because Taqueria Mexicana could not produce the records that state law requires businesses to maintain. (Ex. 508, at 1-2). For 2017, Taqueria Mexicana had several pages purportedly showing its weekly and monthly sales totals, but nothing in those documents identified where the numbers came from. Taqueria Mexicana reported that the numbers came from its (POS) system. *Id.* DOA asked for sales receipts, but Taqueria Mexicana had none. *Id.*

[¶ 8] Taqueria Mexicana provided its bank statements from 2018 and 2019 that showed the amounts it deposited. (Ex. 508, at 1-2). Lacking actual sales data, the auditor assumed that Taqueria Mexicana's bank deposits were equal to its sales. *Id.* DOA then divided the total sales for 2018 and 2019 by 24 to get an average monthly sales amount. *Id.* That amount was then assumed to be Taqueria Mexicana's monthly sales for each month in 2017. *Id.* The auditor multiplied those monthly sales by the applicable sales tax rate to arrive at the amount of sales tax Taqueria Mexicana should have paid for each month. *Id.* Comparing those amounts to the amounts Taqueria Mexicana actually paid, the auditor determined that Taqueria Mexicana had underpaid by \$26,574.04. *Id.* DOR added \$4,262.95 in interest and a \$2,658.02 penalty, for a total due of \$33,495.01. (Ex. 500).

## **CONCLUSIONS OF LAW**

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

[¶ 9] 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).

[¶ 10] "[T]he Petitioner shall have the burden of going forward and the ultimate burden of persuasion, which burden shall be met by a preponderance of the evidence. If Petitioner provides sufficient evidence to suggest the Department determination is incorrect, the burden shifts to the Department to defend its action." 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).

[¶ 11] None of the facts are disputed. This case, therefore, 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 Ohama*, 2016 WY 58, ¶ 27, 375 P.3d 732, 739 (Wyo. 2016)).

B. The “best information available” rule

[¶ 12] Taqueria Mexicana’s failure to maintain sales records was a violation of Wyoming law:

Every vendor and person liable for the payment of sales tax under this article shall preserve for three (3) years at his principal place of business, suitable records and books as may be necessary to determine the amount of tax for which he is liable under this article, together with all invoices and books showing all merchandise purchased for resale. All records, books and invoices shall be available for examination by the department during regular business hours except as arranged by mutual consent[.]

Wyo. Stat. Ann. § 39-15-107(a)(ii) (2019). If the vendor doesn’t have the required records, DOR will base an assessment on the best information available. Wyo. Stat. Ann. § 39-15-108(a)(iv) (2019). “The best information available refers to the information that best allows the Department to make a valid calculation of an assessment[.]” *In re Jedediah Corp.*, 2017 WL 3866885, Docket No. 2106-32, \*18 (Wyo. State Bd. of Equalization, Aug. 28, 2017). A vendor that challenges a BIA assessment has the burden of proving that the BIA assessment is incorrect. Wyo. Stat. Ann. § 39-15-107(a)(iii) (2019).

C. Tax, interest, and penalty

*Tax*

[¶ 13] The plain statutory language controls our decision on DOR’s BIA assessment. That language, as set forth above, requires Taqueria Mexicana to *prove* – not merely contend – that the assessment is incorrect. Taqueria Mexicana simply didn’t present any such evidence. Accordingly, we must affirm the BIA assessment.

*Interest*

[¶ 14] Wyoming Statutes Section 39-15-108(b)(i) (2019) provides that interest *shall* (not may) be paid on delinquent sales tax, and that interest will continue to accrue until paid. Having determined that the BIA assessment must be affirmed, it follows that the amounts owed by Taqueria Mexicana were delinquent. Therefore, DOR was statutorily required to charge interest.

### *Penalty*

[¶ 15] Wyoming Statutes Section 39-15-108(c)(i) (2019) 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[.]” There’s no evidence of intent to defraud, but Taqueria Mexicana was definitely negligent in disregarding the requirement to maintain records, so the penalty is legitimate.

### **DECISION**

[¶ 16] DOR’s imposition of excise tax, interest, and penalty was in accordance with law, and Taqueria Mexicana has not demonstrated error.

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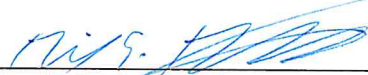
## ORDER

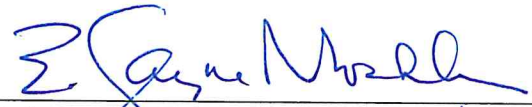
[¶ 17] The Wyoming Department of Revenue's decision is **affirmed**.


[¶ 18] 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 16 day of February 2021.

### STATE BOARD OF EQUALIZATION

  
\_\_\_\_\_  
David L. Delicath, Chairman

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

  
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Martin L. Hardsocg, Board Member

ATTEST:

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

**CONCURRING – Vice-Chairman Mockler,**

[¶ 19] Although, I begrudgingly concur with the Board’s decision, I am not convinced that the State’s use of the “best information available” failsafe for the full three year audit period accurately, or genuinely, estimated the tax liability of Petitioner’s business interests in Wyoming. I am also not convinced that the departments did their best to fully consider the impact of the closure of one of the two Wyoming locations on Petitioner’s tax liability for the audit years 2018 and 2019.

[¶ 20] There is no dispute that the Petitioner in this case kept inadequate records. They mixed their Wyoming and Colorado records, and used a sales tax reporting and collection system whose data downloads were apparently indecipherable to both the Petitioner and the Auditor. Because Petitioner did not keep hard copies of receipts, and because neither the taxpayer nor the DOA were able to access the records through the cash register remittance system, the DOA used the alternative method of “best information available” to determine the taxes owed. This review included bank account records, IRS records, previous sales tax information submitted by the Petitioner, and food and supply purchases. That review, for the three year audit period, showed a significant tax liability, which the department supported by noting that while there was essentially no drop in income over this period, there was a significant drop in taxes remitted to the State. (Ex. 506).

[¶ 21] The Petitioner is certainly liable for taxes owed for the businesses located in Wyoming. For tax year 2017, prior to opening the Colorado location and while there were two businesses in Wyoming, the best information available does appear to show that taxpayer failed to fully remit the taxes owed, and for that he is certainly liable. (Ex. 506). And indeed a case might be made that this trend continued for the single Wyoming location through 2019.

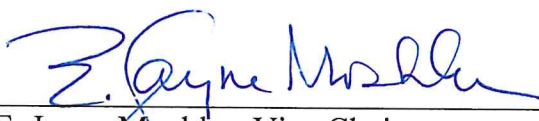
[¶ 22] However, and this is my concern, it does not appear that the department fully considered Petitioner’s claim that the dramatic change in taxes remitted was partially caused by the closure of one Wyoming location, and the opening of a location in Windsor, Colorado. The Auditor implied that the Colorado business might have an impact, but because Petitioner co-mingled purchases, used one bank account, filed one federal return, and was unable to provide records to support that impact (Ex. 503, p.3), the Colorado location was not factored into the final analysis; thus all purchases, and all revenue noted in the IRS filings and the bank statements, were applied to the remaining Wyoming location, and the taxes were extrapolated from there.

[¶ 23] Petitioner’s frustration was quite evident in his statement supporting his appeal, and during the Board hearing, where under oath he stated that because he closed one of the Wyoming locations he shouldn’t have to pay taxes for a business he no longer has. As part of the “best information” analysis, his statements should have been given greater

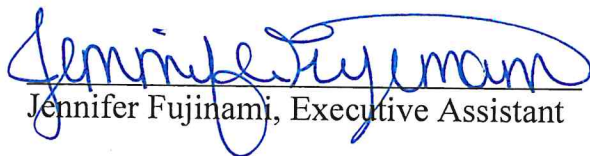


consideration. Indeed, this seemed like a good place to work with the taxpayer and try to ferret out the consequences of the closure and relocation. When you review Ex. 506 it is pretty obvious that after Petitioner closed one of the Wyoming locations at the end of 2017, the ratio of taxes paid to taxes owed switched quite dramatically. That the income, federal tax information and food purchases did not change does not support the departments' conclusions that the sales, from which the taxes are estimated, were all generated from the sole Wyoming location. A better course would have been to look more closely at the Colorado records that Petitioner provided to determine what percentage of the sales were from each location.

DATED this 16 day of February 2021.

  
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E. Jayne Mockler, Vice Chairman

ATTEST:

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



## CERTIFICATE OF SERVICE

I certify that on the 16 day of February 2021, I served the foregoing **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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Terri Lucero, Excise Tax Div., Dep't of Revenue  
CCH  
ABA State and Local Tax Reporter  
State Library