

BEFORE THE STATE BOARD OF EQUALIZATION

FOR THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF)	
BP AMERICA PRODUCTION COMPANY)	Docket No. 2020-41
FROM A DECISION BY THE DEPARTMENT)	
OF REVENUE (Sales & Use Tax))	

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

APPEARANCES

Edward J. Fundora, Audit Coordinator, appeared on behalf of BP America Production Company.

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

DIGEST

[¶ 1] BP America appeals from the Department of Revenue's decision to impose a penalty on underpaid sales tax. The Department based that decision on a statute requiring it to impose a penalty when a sales tax deficiency results from negligence. BP America also contends that the Department should have waived the penalty under a statute that allows it to waive penalties for good cause.

[¶ 2] The Wyoming State Board of Equalization, Chairman E. Jayne Mockler, Vice-Chairman Martin L. Hardsocg, and Board Member David L. Delicath, decided the appeal following an evidentiary hearing. After considering the evidence, the Board finds that BP America has not demonstrated reversible error in the imposition of the penalty. The Board further finds that the issue of waiver is not properly before the Board because there is no final, appealable decision addressing waiver. Therefore the Board affirms the Department's decision.

ISSUES

[¶ 3] BP America didn't articulate specific issues. It contended that the Department should not have imposed a penalty because the tax deficiency did not result from BP America's negligence, and that the Department should have waived the penalty because good cause existed to do so.

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

Contested Issues of Fact

Was BP America Production Company's tax deficiency due to unintentional negligence of its reporting and remittance responsibilities under the tax code and the Department's rules and regulations?

Contested Issues of Law

a) Was BP America Production Company's tax deficiency due to unintentional negligence of its reporting and remittance responsibilities under the tax code and the Department's rules and regulations?

b) Is the Department's imposition of a penalty in accordance with law?

c) Can the Board direct the Department to waive properly imposed penalties?

(Dep't Issues of Fact and Law and Exhibit Index, 1).

[¶ 5] We re-state the issues in this way:

Did BP America satisfy its burden of showing that the tax deficiency was not due to its own negligence?

Did the Department issue a final, appealable decision declining to waive the penalty?

JURISDICTION

[¶ 6] 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 September 28, 2020. (Ex. 500). BP America filed its appeal on October 22, 2020. (Notice of Appeal). Accordingly, we have jurisdiction.

FINDINGS OF FACT

[¶ 7] BP America, a subsidiary of British Petroleum, operates oil wells in Wyoming. (Ex. 503, p.1). The Wyoming Department of Audit conducted an excise tax audit and determined that BP America owed \$144,075.86 in sales tax on services that vendors performed at BP America's wellsites between April 1, 2016 and March 31, 2019. (Ex. 500). The Department of Revenue accepted that determination and imposed interest in the amount of \$35,149.19 and a penalty of \$14,407.60. *Id.* BP America appeals only the penalty. (Notice of Appeal, 1; Hr'g Tr. at 50:35).

CONCLUSIONS OF LAW

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

[¶ 8] 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 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)).

[¶ 9] Unless a statute or Board rule provides 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 (2021). "If petitioner provides sufficient evidence to show 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).

B. Applicable statutes

[¶ 10] We believe that the outcome of this appeal depends on two statutory provisions:

- (i) If 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[.]

Wyo. Stat. Ann. § 39-15-103(c)(i) (2019) (emphasis added).

(xv) The department *may* credit or waive penalties imposed by this subsection as part of a settlement or for any other good cause.

Wyo. Stat. Ann. § 39-15-103(c)(xv) (2019) (emphasis added).

C. Analysis

i. Did BP America satisfy its burden of showing that the deficiency was not due to its own negligence?

[¶ 11] Wyoming Statutes section 39-15-103(c)(i) (2019) requires the Department to impose a 10% penalty “if any part of the deficiency is due to negligence or intentional disregard of rules and regulations[.]” The Department concedes there was no intentional disregard of its rules or regulations. (Hr.g Tr. Vol. I, 12:55). Rather, the Department says it imposed the penalty because BP’s negligence led to the deficiency. Specifically, the Department says that BP America was negligent because the audit revealed the same kind of deficiencies found in BP America’s prior audits. BP America’s burden, therefore, is to present evidence sufficient to show that the Department’s determination is incorrect.

[¶ 12] The Department of Audit’s Grant Gibbard was the lead on the BP America audit. He testified that he reviewed the records from BP America’s 2012 audit, and learned that the primary issue found in 2012 was untaxed services performed at the wellsite during the production casing phase. (Hr.g Tr. Vol. II, 4:50). Mr. Gibbard further testified that the primary issue found in the current audit was also untaxed services performed at the wellsite during the production casing phase. (*Id.* at 11:28). He later confirmed, lest there be any doubt, that the primary issue found in both audits was untaxed services performed at the wellsite during the production casing phase. (*Id.* at 26:20).

[¶ 13] Mr. Gibbard’s testimony supports the Department’s determination of negligence by showing that BP America persisted in its failings even after they were revealed years earlier. Even without Mr. Gibbard’s testimony we would probably still affirm because BP America didn’t present evidence sufficient to carry its initial burden of proving that the Department’s determination was error.

ii. Did the Department issue a final decision to not waive the penalty?

[¶ 14] The Department’s written decision was certainly a “final decision” ripe for our review. But, it wasn’t a “final decision” to not waive the penalty. It just doesn’t address waiver at all. (Ex. 500). We’ve been here before: in 1989, the Department imposed a penalty on General Chemical Corporation, which appealed to us and argued that the

Department should have waived the penalty under a statutory provision allowing it to do so “as part of a settlement or for any other good cause.” *In re Gen. Chem. Corp.*, 1990 WL 284554, *2, ¶ 9, Docket No. A-89-205 (Wyo. State Bd. of Equalization, Dec. 3, 1990); Wyo. Stat. Ann. § 39-6-307(f) (1977 as amended). The applicable statute in the case before us now also allows the Department to waive a penalty “as part of a settlement or for any other good cause.” (*Supra*. ¶ 11). The Department’s final decision in that case, like the one in the case before us now, did not address waiver of the penalty. We said:

The record herein indicates no discussion or determination by the Department under subsection (f) as to whether or not the penalty assessed should be credited “for any other good cause.” Until a determination by the Department has been made on that question and detailed in writing as a “final decision,” it is inappropriate for this Board to exercise its judgment to credit or waive penalties on appeal.

In the future, the Department may wish to issue “proposed” assessments with a defined time frame in which a taxpayer would have the opportunity to show “good cause” and attempt to fall within the provisions of W.S. 39-6-307(f). The subsequent “final” assessment by the Department should then specifically address the issue of “good cause” and thus provide a complete decision for Board review if there is an appeal.

Id., ¶¶ 10-11. We then remanded “to the Department for consideration of ‘good cause’ ... with the resulting ‘final decision’ subject to appeal to this Board within the usual thirty-day limit.” *Id.* Seeing no distinction between *General Chemical* and the case at hand, we opt for the same resolution, and will remand for consideration of waiver for good cause.

DECISION

[¶ 15] BP America has not demonstrated that the sales tax deficiency was not due to its own negligence, so we will not reverse the Department’s decision to impose a penalty. The Department’s final decision did not address waiver of the penalty, so there is no decision for us to review on that subject.


ORDER

[¶ 16] The Wyoming Department of Revenue’s decision to impose a penalty is **affirmed**. The case is nonetheless remanded for the Department to consider waiver under Wyoming Statutes section 39-15-103(c)(xv) (2019) and issue a new decision that explicitly waives the penalty or declines to do so. That final decision shall be subject to appeal.

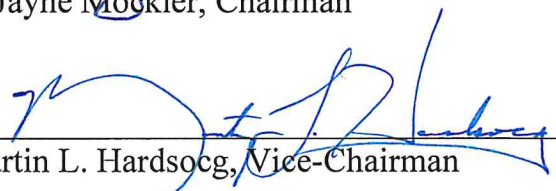
[¶ 17] Pursuant to Wyoming Statutes section 16-3-114 (2019) and Rule 12, Wyoming Rules of Appellate Procedure, any person aggrieved or adversely affected in fact by this decision may seek judicial review in the appropriate district court by filing a petition for review within 30 days after the date of this decision.

DATED this 3 day of May 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 3 day of May 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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