

BEFORE THE STATE BOARD OF EQUALIZATION
FOR THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF)	
LUDWIG PHOTOGRAPHY)	Docket Nos. 2023-27
FROM A DECISION BY THE DEPARTMENT)	
OF REVENUE (Excise Tax Division))	

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

APPEARANCES

Anne Brande, owner, appeared on behalf of taxpayer, Ludwig Photography.

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] Taxpayer, Ludwig Photography, appeals a Department of Revenue final determination arising from an audit that revealed a tax deficiency. Ludwig appealed on the basis that its sales taxes are due on a "cash basis" rather than on an "accrual basis." That contention is demonstrably wrong. Ludwig also contends that its "planning fees" or "sitting fees" are not subject to excise tax if the customer doesn't purchase tangible personal property. The Department agreed. Ludwig didn't, however, offer any evidence that the Department imposed tax on such transactions, and the Department contends that it hasn't done so.

[¶ 2] The Wyoming State Board of Equalization, Vice-Chairman David L. Delicath, and Board Member E. Jayne Mockler, held a hearing and received evidence from both parties. Chairman Martin L. Hardsocg, did not attend the hearing, but, has reviewed the evidence and participated in the resolution of this appeal. The Department asked us for a partial remand so it can recalculate a portion of Ludwig's tax in light of a document that Ludwig provided shortly before the hearing and offered as an exhibit at the hearing. Ludwig did not oppose that request, and we will grant it.

ISSUES

[¶ 3] Ludwig identified two issues:

1. Whether revenue anticipated from a transaction that has not been performed or completed must be “accrued” and subject to Wyoming sales tax.
2. Whether “sitting fees” or “planning fees” are tantamount to sales of Tangible Personal Property subject to Wyoming sales tax.

(Ludwig’s Prelim. Statement, 2).

[¶ 4] 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. The Department denies and contests all factual contentions of Petitioner that the Department has not specifically admitted in this Preliminary Statement.

(Dep’t. Prelim. Statement, 3).

JURISDICTION

[¶ 5] 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 June 20, 2023, and Ludwig filed its appeal on July 13, 2023, so the appeal is timely and we have jurisdiction. (Ex. 500; Notice of Appeal).

FINDINGS OF FACT

[¶ 6] Ludwig is a photography business in Laramie. (Ex. 503, p. 1). Ludwig’s clients participate in an initial planning session, for which Ludwig charges a fee. The client can then have photographs taken, and order prints of those photographs for an additional fee. The Department of Audit conducted an excise tax audit of Ludwig’s sales and purchases from August 1, 2019 through July 31, 2022. (Ex. 500). It determined that Ludwig had a tax deficiency of \$9,587.56¹, which was partially offset by a tax credit of \$5,469.67. *Id.* The

¹ \$461.53 of the deficiency arose from Ludwig’s purchases from other vendors. (Ex. 506). Ludwig has not challenged that portion of the deficiency.

Department of Audit also determined that Ludwig had erred by reporting and remitting on a “cash basis²” rather than on an “accrual basis³.” (Ex. 503, p. 2). The Department adopted the Department of Audit’s findings and added \$996.85 in interest for a total due of \$5,114.74. (Ex. 500). Ludwig appealed to us. (Notice of Appeal).

[¶ 7] This Board held a hearing on November 14, 2023. Ludwig offered two exhibits: Ludwig’s Invoice # 33381, and an email exchange between Ludwig and one of its clients regarding that invoice. (Ludwig Hearing Documents). The Department offered 15 exhibits. We admitted all of the offered exhibits. (Hr’g R. 12:20; 2:08:44; 2:13:20).

[¶ 8] Ludwig’s exhibits purportedly demonstrated that Ludwig didn’t give one of its clients any tangible property and didn’t receive any payment from the client. In response to those exhibits – which Ludwig didn’t provide to the auditor, and provided to the Department just six days before the hearing – the Department requested a partial remand to recalculate Ludwig’s tax deficiency. (Hr’g R. 3:01:30). The owner of Ludwig, Ms. Brande, stated (but not while she was under oath) that Ludwig had “many” other clients who had neither paid for, nor received property from Ludwig, and for whom the Department had found sales tax due. (*Id.*, 9:00). She later testified, however, that Ludwig wasn’t going to offer evidence of such instances. (*Id.*, 37:50). Bret Fanning, Administrator of the Department’s Excise Tax Division, testified that the Department was willing to consider any similar evidence, but that Ludwig had not provided any. (*Id.*, 2:19:40).

[¶ 9] Ludwig called Pauline Dunnuck, a Certified Public Accountant, to testify that sales tax should be due on a cash basis (when Ludwig gets paid), rather than on an accrual basis (when Ludwig makes a sale). Ms. Dunnuck, testified:

Under the revenue recognition principles, accrual accounting recognizes revenue when it is realized and earned, not when cash is received.
* * * And revenue is recognized when a critical event has occurred. And that is when the product has been delivered to a customer and the dollar amount is easily measurable. That’s known as the “All Events Test,” and under that test, an item of income is included in revenue when all events occur that fix the right to receive the item and the amount of the item can be determined with accuracy. The revenue generating activity must be fully or essentially

² “Cash-basis” accounting is “[a]n accounting method that considers only cash actually received as income[.]” *Cash-basis accounting method*, *Black’s Law Dictionary* 24 (10th ed. 2014).

³ “Accrual accounting” is “[a]n accounting method that records entries of debits and credits when the revenue or liability arises, rather than when the income is received or an expense is paid.” *Accrual accounting method*, *Black’s Law Dictionary* 24 (10th ed. 2014).

complete and there must be a reasonable level of certainty that the earned revenue will be received.

(Hr’g R. 1:24:38). The Department offered into evidence its contrary guidance, provided to excise tax licensees, that “[t]he Department’s standard for a vendor’s remittance of sales tax collection is on an accrual (as the sale occurs) rather than a cash basis.” (Ex. 510, pp. 1-2; Ex. 511, p.1; Ex. 512, p.2).

CONCLUSIONS OF LAW

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

[¶ 10] 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) (2019).

[¶ 11] 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 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). 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).

B. Did the Department correctly determine that sales tax is due on an accrual basis rather than on a cash basis?

[¶ 12] Ludwig wants to collect and remit sales tax on a cash basis, but the Department wants it done on an accrual basis. A Departmental rule provides:

Sales and use tax shall be collected at the time of the sale or purchase transaction of tangible personal property or taxable services sold on a credit basis if title or possession of the property pass at the time of the transaction.

If title passes at a future date, the vendor shall collect sales tax on each payment that portion of the total tax bears to the purchase price.

Rules, Wyo. Dep't of Revenue, ch. 2, § 13(f) (2014). The Department has interpreted that rule to mean that sales tax must be collected and remitted on an accrual basis, rather than on a cash basis. (Ex. 510, pp. 1-2; Ex. 511, p.1; Ex. 512, p.2). “[W]e 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). The Department’s interpretation isn’t clearly erroneous.

[¶ 13] Ludwig did not address, or even acknowledge, the Department’s written guidance mandating sales tax collection when a sales payment becomes due, i.e. on an accrual basis. And despite Ms. Dunnick’s testimony about the “All Events Test,” she could not identify any statute, rule, or guidance making that test applicable to sales tax in Wyoming. Mr. Fanning testified that, to his knowledge, the Department had not adopted the All Events Test, and that it did not appear in any applicable statute. (Hr’g R. 2:34:35). We conclude that Ludwig has not demonstrated reversible error regarding this issue.

C. Did the Department err in determining the amount of sales tax due?

[¶ 14] Ludwig has been vague about this claim. The audit found that Ludwig had failed to pay sales tax on some transactions, and Ludwig seems to argue that no tax is due on those accounts because there were no sales of tangible personal property. (Ex. 5500; Ludwig Prelim. Statement, 1). The Department agreed that without sales of tangible personal property, there would be no sales tax due, and it offered to consider any proof that Ludwig wanted to submit, even though such had not been disclosed before the hearing. *Supra*, ¶ 8. Ms. Brande claimed that she had such evidence, but did not want to provide it. *Id.*

[¶ 15] Having presented only vague, unsubstantiated claims, Ludwig simply has failed to make its case.

DECISION

[¶ 16] Ludwig has not demonstrated that the Department committed reversible error regarding either of the issues presented.

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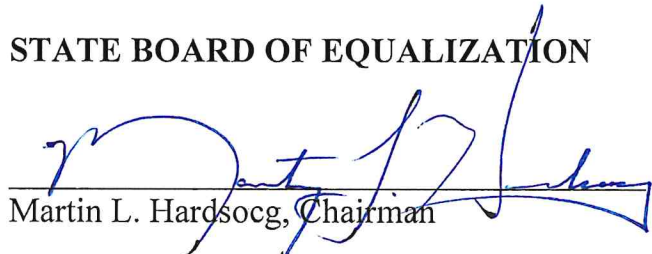
ORDER

[¶ 17] The Wyoming Department of Revenue's decision is **affirmed**. We, nonetheless, remand the assessment to the Department, as requested, so it can recalculate Ludwig's tax liability in light of the exhibits Ludwig offered at the hearing.


[¶ 18] 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 3 day of January 2024.

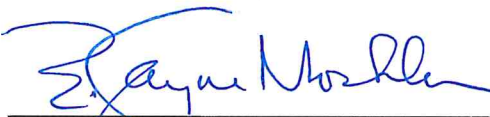
STATE BOARD OF EQUALIZATION



Martin L. Hardsocg, Chairman



David L. Delicath, Vice Chairman



E. Jayne Mockler, Board Member

ATTEST:



Jennifer Fujinami, Executive Assistant

CERTIFICATE OF SERVICE

I certify that on the 3 day of January 2024, 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:

Anne Brande
Ludwig Photography
224 E. Iverson Ave.
Laramie, WY 82070

Karl D. Anderson
James Peters
Wyoming Attorney General's Office
Kendrick Building
2320 Capitol Ave.
Cheyenne, WY 82002



Jennifer Fujinami, Executive Assistant
State Board of Equalization
P.O. Box 448
Cheyenne, WY 82003
Phone: (307) 777-6989
Fax: (307) 777-6363

cc: Brenda Henson, Director, Wyo. Dep't of Revenue
Bret Fanning, Excise Tax Div., Wyo. Dep't of Revenue
Wyo. Dep't of Audit
ABA State and Local Tax Reporter
Wyo. State Library