

05-1035  
SALES AND USE  
TAX YEAR: 2002  
SIGNED: 04-23-2007  
COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, M. JOHNSON, D. DIXON  
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER,	)	<b>FINDINGS OF FACT, CONCLUSIONS</b>
	)	<b>OF LAW, AND FINAL DECISION</b>
	)	
Petitioner,	)	
	)	Appeal No.    05-1035
v.	)	
	)	Tax Type:    Sales and Use
TAXPAYER SERVICES DIVISION,	)	Refund Request
UTAH STATE TAX COMMISSION,	)	Tax Period:    04/02-08/02
	)	Judge:        Phan
Respondent.	)	

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**Presiding:**

Bruce Johnson, Commissioner  
Jane Phan, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER REP. 1, Attorney at Law  
                  PETITIONER REP. 2  
For Respondent: RESPONDENT REP. 1, Assistant Attorney General  
                  RESPONDENT REP. 2, Assistant Director, Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on January 10, 2007. Petitioner is appealing Respondent's denial of a refund request. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. Petitioner had filed a request on December 6, 2004, for a refund of sales tax paid in the period from April through August of 2002. The amount of the refund requested was \$\$\$\$\$. At the Formal Hearing

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Petitioner modified the refund claim to \$\$\$\$ in sales tax. In a Statutory Notice dated June 7, 2005, Respondent denied the refund request. Petitioner has timely filed an appeal of the denial.

2. The refund request was for sales tax paid by Petitioner to various vendors as Petitioner purchased materials which Petitioner then used in the construction of ( WORDS REMOVED )

3. Petitioner manufacturers ( WORDS REMOVED )

4. In January 2002, Petitioner entered into a subcontracting agreement with THE SUBCONTRACT (“the Subcontract”). THE SUBCONTRACT was the general contractor on a project for the UTAH DEPARTMENT (“UTAH DEPARTMENT”). Section 5.8 of the Subcontract provides in part that, “[T]itle to all Work, materials and equipment covered by an application for payment will pass to the [UTAH DEPARTMENT] upon the first to occur of either incorporation in the construction or upon the receipt of payment . . .”

5. UTAH DEPARTMENT is an institution or political subdivision of the State of Utah.

6. In the Subcontract, Petitioner agreed to manufacture ( WORDS REMOVED ). The PRODUCT A Petitioner manufactured for the project were ( WORDS REMOVED ). However, a small portion of the contract required ( WORDS REMOVED ). It is the sales tax Petitioner paid on the materials purchased to manufacture these ( WORDS REMOVED ) that is at issue in the refund request.

7. Petitioner delivered the ( X ) directly to UTAH DEPARTMENT by ( WORDS REMOVED ) they were never in the possession or control of THE SUBCONTRACT. However, the general contract was between UTAH DEPARTMENT and THE SUBCONTRACT. It was THE SUBCONTRACT that paid Petitioner ( WORDS REMOVED ).

8. Petitioner paid the sales tax on the materials it purchased to make the PRODUCT A and did not supply the various vendors with an exemption certificate. Petitioner did not obtain an exemption certificate

from THE SUBCONTRACT. Petitioner did provide an exemption certificate from UTAH DEPARTMENT, but it had not been issued until 2004.

9. ( PARAGRAPH REMOVED ).

10. ( PARAGRAPH REMOVED ).

11. ( PARAGRAPH REMOVED )

12. ( PARAGRAPH REMOVED )

13. ( PARAGRAPH REMOVED )

14. ( PARAGRAPH REMOVED )

15. ( PARAGRAPH REMOVED )

16. As of the date of the Formal Hearing at least %%% of the ( WORDS REMOVED ) at issue has been moved to a location different from where it had originally been positioned by Petitioner. ( SENTENCE REMOVED ).

#### APPLICABLE LAW

1. A tax is imposed on the purchaser as provided in this part for amounts paid or charged for the following transactions: (a) retail sales of tangible personal property made within the state. (Utah Code Ann. Sec. 59-12-103(1) (2002)<sup>1</sup>.)

2. The following sales and uses are exempt from the taxes imposed by this chapter: . . .(2) sale to the state, its institutions, and its political subdivisions; however, this exemption does not apply to sales of : (a) construction materials . . . (26) property purchased for resale in this state, in the regular course of business,

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<sup>1</sup> Statutes in the Sales and Use Tax Act and Administrative Rules have been both revised and renumbered since the period at issue. In this order the Commission cites to the statutes and rules in affect during the relevant period.

either in its original form or as an ingredient or component part of a manufactured or compounded product; . . . (Utah Code Ann. 59-12-104(2) & (26) (2002).)

3. “Construction materials” means any tangible personal property that will be converted into real property. (Utah Code Ann. Sec. 59-12-102(8) (2002).)

4. A taxpayer may obtain a refund under this Subsection (2) of a tax paid under this chapter on a transaction that is taxable under Section 59-12-103 if: (i) the sale or use was exempt from sales and use taxes under Section 59-12-104 on the date of the purchase; and (ii) except as provided in Subsection (2)(c) the taxpayer files a claim for a refund with the commission as provided in Subsections (2)(b) through (d). (Utah Code Sec. 59-12-110 (3)(e).)

5. Sales of construction materials and other items of tangible personal property to real property contractors and repairmen of real property are generally subject to tax if the contractor or repairman converts the materials or items to real property. (1) “Construction materials” include items of tangible personal property such as lumber, bricks, nails and cement that are used to construct buildings, structures or improvements on the land and typically lose their separate identity as personal property once incorporated into the real property . . . (Utah Admin. Rule R865-19S-58(A) (2002).)

6. This rule does not apply to contracts where the retailer sells and installs personal property that does not become part of the real property. Examples of items that remain tangible personal property are: 1) moveable items that are attached to real property merely for stability or for an obvious temporary purpose; . . . (Utah Admin. Rule R865-19S-58(E) (2002).)

7. Taxpayers selling tangible personal property or services to customers exempt from sales tax are required to keep records verifying the nontaxable status of those sales. Records shall include: 1. sales invoices showing the name and identity of the customer; and 2. exemption certificate for exempt sales of

tangible personal property or services if the exemption category is shown on the exemption certificate forms. (Utah Admin. Rule R865-19-23(A) (2002).)

8. A vendor may retain a copy of a purchase order, check, or voucher in place of the exemption certificate as evidence of exemption for a federal, state, or local government entity including public schools. (Utah Admin. Rule R865-19S-23 (C) (2002).)

9. The burden of proving that a sale is for resale or otherwise exempt is upon the vendor. If any agent of the Tax Commission requests the vendor to produce a valid exemption certificate or other similar acceptable evidence to support the vendor's claim that a sale is for resale or otherwise exempt and the vendor is unable to comply, the sale will be considered taxable and the tax shall be payable by the vendor. (Utah Admin. R865-19S-23(E).)

10. Sales made to the state of Utah, its departments and institutions, or to its political subdivisions such as counties, municipalities, school districts, drainage districts, irrigation districts, and metropolitan water districts are exempt from tax if the purchase is for use in the exercise of an essential governmental function. (Utah Admin. Rule R865-19S-42(A) (2002).)

11. A sale is considered made to the state, its department and institutions, or to its political subdivisions if the purchase is paid for directly by the purchasing state or local entity. If an employee of a state or local entity pays for a purchase with his own funds and is reimbursed by the state or local entity, that sale is not made to the state or local entity and does not qualify for the exemption. (Utah Admin. Rule R865-19S-42(B) (2002).)

12. In *Nickerson Pump & Machinery Co. v. State Tax Comm'n*, 361 P.2d 520, at 522 (1961) the Utah Supreme Court set out a test to determine whether an item remained personal property or became part of the real property. The factors the Court considered in that case were: 1) the pumps were removable without

harm to the structures on which they were placed; 2) the pumps were manufactured with the idea that they could be used at different locations; 3) the parties contemplated that the pumps would be removed for repairs or replacement; 4) the primary purpose of the sales agreements was the sale and purchase of the pumps assembled according to specifications and the installation of the pumps was merely incidental to that purpose; 5) the installation was for the convenience of the purchaser because of the great weight of the pumps; and 6) the sales agreement did not indicate that the pumps were intended to be treated as real property upon installation.

#### CONCLUSIONS OF LAW

1. It is clear from applying the facts to the law, the PRODUCT A was not converted to real property and remained tangible personal property. It was not physically attached to the ( X ), it could be moved and repositioned without damage to either the PRODUCT or the ( X ).

2. As the PRODUCT As remained tangible personal property, after manufacturing the PRODUCTS, Petitioner sold the PRODUCTS as items of tangible personal property. Therefore, the materials that Petitioner purchased to use as ingredients or component parts in the construction of the PRODUCTs were items purchased for resale and were exempt from sales tax pursuant to Utah Code Sec. 59-12-104(26) (2002).

3. Utah Admin. Rule R865-19S-91 (2002) clarified that when the government entity makes a direct payment to the vendor for the tangible personal property or services, the sale is made to the government entity. In this case, although Petitioner did deliver the PRODUCTs directly to UTAH DEPARTMENT, UTAH DEPARTMENT did not pay Petitioner for the PRODUCTs. THE SUBCONTRACT paid Petitioner for the PRODUCTs. The transaction for the sale of the completed PRODUCTs between Petitioner and THE SUBCONTRACT is exempt from sales tax as a purchase for resale pursuant to Utah Code Sec. 59-12-104(26)

(2002).

4. Utah Code Sec. 59-12-110(3)(e) provides that taxpayers may request a refund of taxes overpaid. The statutes contemplate that if a taxpayer makes an error and pays sales tax on items that are exempt, they may later request a refund. As far as the failure to obtain exemption certificates, Utah Admin. Rule R865-19S-23 (E) (2002) contemplates that the taxpayer can support its claim that a sale was for resale or otherwise exempt with evidence other than an exemption certificate. Petitioner has provided evidence that the transactions at issue were exempt from sales or use tax.

#### DISCUSSION

There are two different sets of transactions for the Commission to consider in this matter that potentially could be subject to sales tax. The first are the transactions directly concerned in Petitioner's refund request, Petitioner's purchases of the materials Petitioner used to construct the PRODUCT As. Petitioner paid \$\$\$\$ in sales tax at the time it purchased these materials and asks that the tax be refunded. The second set of transactions are raised by Respondent, that being the transactions between Petitioner and the purchaser of the finished PRODUCT A. Respondent argues that if Petitioner did not owe sales tax on the materials purchased to make the PRODUCTs because the PRODUCTs remained tangible personal property, then Petitioner should have collected and remitted sales tax when it sold the completed PRODUCTs.

The Commission first considers the transactions between Petitioner and its suppliers. Petitioner purchased materials to be used in the manufacturer of the PRODUCT As and paid sales tax at the time of the purchases, as should be done if Petitioner were going to install the PRODUCTS in such a manner that they become part of the real property. Petitioner later concluded that it would not be required to pay sales tax on the materials because the PRODUCTS remained tangible personal property and never became part of the real property.

Upon review of the facts and arguments in this case, it is clear to the Commission that the PRODUCT A was not converted to real property and remained tangible personal property. It was not physically attached to the ( X ), it could be moved and repositioned without damage to either the PRODUCT or the ( X ) and UTAH DEPARTMENT specifically chose the type of PRODUCT because UTAH DEPARTMENT would be able to move it as needed when the planned PROJECT commenced. Utah Admin. Rule R865-19S-58 (2002) clarifies when items become incorporated into the real property or remain tangible personal property. Additionally, considering the six factors listed by the Court in *Nickerson Pump* at 522, it is apparent that the PRODUCT As remained tangible personal property. Applying the *Nickerson Pump* test to the facts in this matter the Commission finds the following: 1) the PRODUCT is removable without harm to the PRODUCT or the ( X ); 2) the PRODUCT was of the type that may be used at different locations; 3) the parties contemplated that the PRODUCTS would be moved and individual damaged PRODUCTS would be replaced; 4) the primary focus of the transaction was the acquisition of the PRODUCTS as indicated by the fact that the cost charged for the positioning of the PRODUCTS was a fraction of the cost for the PRODUCTS themselves; 5) UTAH DEPARTMENT could have positioned the PRODUCTS or had someone else perform this work; and 6) the contract itself was not dispositive of this issue.

Our decision in this matter is also supported by principles of sound administration and compliance. The Division's position would essentially require a contractor or supplier, such as Petitioner, to discern the UTAH DEPARTMENT's intent for particular PRODUCTS on particular projects. PRODUCT Bs, though not the subject of this appeal, are used for many of the same purposes as PRODUCT As. They are also used for ( WORDS REMOVED ). Thus, there are many situations where the Division would presumably agree that PRODUCT Bs remain tangible personal property. Under the Division's rationale, however, which particular PRODUCT Bs are tangible personal property and which become real property may vary within a

single contract and may even vary over the course of a contract, even though there is no difference in product itself or its method of attachment to the ( X ). Tax treatment would vary as the purchaser's intent changes. In our view, it enhances tax compliance and sound administration to find that PRODUCT B are always tangible personal property and that PRODUCT C are always real property. PRODUCT A are more akin to PRODUCT B, both in use, structure, and method of attachment. Thus, they should be treated as personal property as well, as long as their method of placement is consistent with the methods used in this case.

The Commission next considers Respondent's argument regarding the second set of transactions in this matter, Petitioner's sale of the completed PRODUCT to the purchaser. Respondent argues if the PRODUCT A remained tangible personal property, then Petitioner should have collected and reemitted to the state sales tax when it sold the PRODUCT to the purchaser, or provided an exemption certificate. There was considerable discussion between the parties on whether the purchaser of the PRODUCT A was UTAH DEPARTMENT, or whether the purchaser was THE SUBCONTRACT. Utah Admin. Rule R865-19S-91 clarifies that when the government entity makes a direct payment to the vendor for the tangible personal property or services, the sales is made to the government entity. In this case, although Petitioner did deliver the PRODUCTS directly to UTAH DEPARTMENT, UTAH DEPARTMENT did not pay Petitioner for the PRODUCTS. The PRODUCTS were part of a general contract with THE SUBCONTRACT. THE SUBCONTRACT subcontracted for the PRODUCTS from Petitioner and THE SUBCONTRACT paid Petitioner for the PRODUCTS.

However, whether the purchaser was UTAH DEPARTMENT or the purchaser was THE SUBCONTRACT is immaterial to the refund request before the Commission. If the transaction for the sale of the completed PRODUCTS was between Petitioner and THE SUBCONTRACT it would exempt from sales tax as a purchase for resale pursuant to Utah Code Sec. 59-12-104(26) (2002). If the transaction for the sale of

the completed PRODUCTS had been between Petitioner and UTAH DEPARTMENT it would be exempt as a sale to the state, its institutions or political subdivisions pursuant to Utah Code Sec. 59-12-104(2) (2002).

Respondent argues that Petitioner should not be allowed to claim a refund because Petitioner has not provided exemption certificates acceptable to Respondent. On the first set of transactions Petitioner paid sales tax at the time it purchased the materials, rather than provide exemption certificates to the vendors and request that the transactions be treated as tax-free purchases. For the second set of transactions, when Petitioner delivered the PRODUCT A and received payment, Petitioner did not obtain an exemption certificate from THE SUBCONTRACT or UTAH DEPARTMENT and did not collect sales tax on the transaction. At the time these transactions occurred Petitioner had treated them essentially as they should have treated an item of tangible personal property that Petitioner installed and converted to real property. Later, two years after the period at issue, Petitioner did obtain an exemption certificate from UTAH DEPARTMENT. Respondent argues that Petitioner's failure to treat these original transactions correctly for tax purposes or obtaining exemption certificates at the time of the transactions precludes Petitioner from being able to obtain a refund of the taxes overpaid.

The Commission disagrees with Respondent on this point. Utah Code Sec. 59-12-110(2)(e) provides that taxpayers may request a refund of taxes overpaid and specifically refers to this situation where the sales were exempt from sales and use tax under Utah Code Sec. 59-12-104. Petitioner may request a refund if the transaction was exempt from tax as long as the request is filed within the statutory period.

Considering the argument that Petitioner is not entitled to the refund because it did not obtain appropriate exemption certificates at the time of the transactions, Utah Admin. Rule R865-19S-23 (E) (2002) contemplates that the taxpayer can support its claim that a sale was for resale or otherwise exempt with evidence other than an exemption certificate.

In the case before the Commission there is no factual dispute regarding the transactions themselves. All the PRODUCT at issue was delivered to UTAH DEPARTMENT. THE SUBCONTRACT paid for all the PRODUCT. The contracts establish how much PRODUCT was delivered. The invoices indicate how much material went into the construction of the PRODUCT at issue. This matter is distinguishable from the more typical audit situation where a retailer had a stockpile of goods that were sold to numerous buyers, some of them exempt and some not. Exemption certificates and other specific documentation tying the exemption to the particular items sold is necessary. In this matter all of the PRODUCT A at issue was sold to one entity and all were exempt transactions. Respondent did not claim that some of this PRODUCT was sold to other purchasers, nor did Respondent refute that all the PRODUCT was delivered to UTAH DEPARTMENT, but paid for by THE SUBCONTRACT. Respondent argues for a different legal conclusion from facts that are not in dispute. However, the Commission concludes that Petitioner has submitted sufficient evidence and documentation to support its contention in this matter that its purchase of materials and subsequent sales of the PRODUCT were exempt from sales and use tax pursuant to Utah Code Sec. 59-12-104.

DECISION AND ORDER

Based upon the foregoing, the Tax Commission orders Respondent to issue to Petitioner a refund of sales tax paid in the principal amount of \$\$\$\$\$. It is so ordered.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

\_\_\_\_\_  
Jane Phan  
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION:

The Commission has reviewed this case and the undersigned concur in this decision.

Appeal No. 05-1035

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

Pam Hendrickson  
Commission Chair

R. Bruce Johnson  
Commissioner

Marc B. Johnson  
Commissioner

D'Arcy Dixon Pignanelli  
Commissioner

**Notice of Appeal Rights:** You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. Sec. 63-46b-13. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Sec. 59-1-601 et seq. and 63-46b-13 et seq.

*JKP/05-1035.fof*