

07-1272
AUDIT
TAX YEAR: 2002, 2003, 2004, 2005 & 2006
SIGNED: 10-26-09
COMMISSIONERS: P. HENDRICKSON, M. JOHNSON, D. DIXON
EXCUSED: R. JOHNSON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER,</p> <p>Petitioner,</p> <p>v.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p>Respondent.</p>	<p>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</p> <p>Appeal No. 07-1272</p> <p>Account No. #####</p> <p>Tax Type: Sales and Use</p> <p>Audit Period: 01/01/02 – 12/31/06</p> <p>Judge: Chapman</p>
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Presiding:

D'Arcy Dixon Pignanelli, Commissioner
Kerry Chapman, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP 1, Owner
PETITIONER REP 2, CPA
For Respondent: RESPONDENT REP 1, Assistant Attorney General
RESPONDENT REP 2, from Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on August 24, 2009. Based upon the evidence and testimony presented by the parties, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax at issue is sales and use tax.
2. The audit period is January 1, 2002 through December 31, 2006.
3. On September 17, 2007, Auditing Division (“Division”) issued a Statutory Notice – Sales and Use Tax (“Statutory Notice”) to PETITIONER for the audit period January 1, 2002 through

December 31, 2006. Exhibit R-1. In the Statutory Notice, the Division imposed additional sales and use tax in the amount of \$\$\$\$\$, plus interest in the amount of \$\$\$\$\$ (as of August 28, 2007), for a total assessment of \$\$\$\$\$.

4. The Division determined that the taxpayer owed additional sales and use tax on: 1) unreported taxable sales, specifically the lease of tangible personal property, which accounts for approximately 89.5% of the total assessment; and 2) unreported taxable purchases, which accounts for approximately 10.5% of the total assessment. The taxpayer asks the Commission to abate the entirety of the Division's assessment. The Division, on the other hand, asks the Commission to sustain its assessment with one exception. The Division agrees that an allocation percentage it derived for certain rents associated with the "CITY 1 (X)" should be reduced, which will result in a small reduction in the total assessment.

5. On January 14, 2009, the Commission issued an Initial Hearing Order in the matter.

6. On February 5, 2009, the taxpayer timely requested a Formal Hearing.

7. PETITIONER REP 1 is an owner and manager of PETITIONER, the petitioning entity in this matter. PETITIONER REP 1 also owns several other entities, including COMPANY A ("COMPANY A"), COMPANY B ("COMPANY B") and COMPANY C, Inc. ("COMPANY C"). PETITIONER REP 1 and his CPA, PETITIONER REP 2, both testified that all of these entities are "pass-through" entities for income tax purposes.

8. PETITIONER is a limited partnership that was registered with the Utah Department of Commerce on July 28, 1999. Exhibit R-3. At the time of registration, a Certificate of Limited Partnership of PETITIONER, dated July 19, 1999, ("Certificate") was presented to the Department of Commerce. Exhibit P-17. The Certificate indicates that PETITIONER's general partner is COMPANY C. PETITIONER REP 1 argues that any document signed on behalf of PETITIONER by an entity other than COMPANY C is invalid. The Certificate, however, does not indicate who all of PETITIONER's other partners are.

Paragraphs #6 and #7 of the Certificate make reference to a Limited Partnership Agreement concerning PETITIONER. However, neither party has submitted a copy of the Limited Partnership Agreement or identified the other partners of PETITIONER.

9. Paragraph 7 of the Certificate for PETITIONER indicates that a “Limited Partner may not assign, encumber, give, pledge, transfer, devise, bequeath, or in any manner whatsoever dispose of all or any part of a Partnership interest without complying with the terms of the Limited Partnership Agreement.” Exhibit P-17. However, entities other than COMPANY C, the General Partner identified in the Certificate, have entered into contracts concerning PETITIONER. Most of the documents submitted as evidence that concern PETITIONER were signed by PETITIONER REP 1 as “Manager” of PETITIONER or by PETITIONER REP 1 as a manager of COMPANY B, which is identified as either the “General Partner” or “Partner” of PETITIONER, as follows:

a. On October 27, 1999, PETITIONER REP 1 signed an Agreement for Sale of Assets, in which PETITIONER purchased from COMPANY D (“COMPANY D”), an unrelated entity, the “assets, property, and items as owned by and used in connection with the business” known as COMPANY E in CITY 1, Utah (“CITY 1 (X)”). Exhibit P-1. PETITIONER REP 1 indicated on this Agreement that he was signing for PETITIONER as its “Manager.”

b. On October 27, 1999, PETITIONER REP 1 signed a Covenant Not to Compete between PETITIONER, PETITIONER and PERSON A. Exhibit “C” of Exhibit P-1. PETITIONER REP 1 indicated on the Covenant Not to Compete that he was signing for PETITIONER as its “Manager.”

c. On October 27, 1999, PETITIONER REP 1 signed a Buyer’s Settlement Statement concerning PETITIONER’s purchase of the CITY 1 (X) from COMPANY D. Exhibit P-2. PETITIONER REP 1 indicated on the Statement that he was signing for PETITIONER as its “Manager.”

d. On November 1, 1999, PETITIONER REP 1 signed a Lease Agreement concerning PETITIONER's lease of property and equipment to COMPANY A. Exhibit R-7. PETITIONER REP 1 indicated on the Agreement that he was signing for PETITIONER as "Operating Manager" of COMPANY B, which is identified as PETITIONER's "General Partner."

e. On February 6, 2001, PETITIONER REP 1 signed an Agreement for Sale of Assets, in which PETITIONER purchased from COMPANY D the "assets, property, and items as owned by and used in connection with the business" known as COMPANY E in CITY 2, Utah ("CITY 2 (X)") and COMPANY E in CITY 3, Utah ("CITY 3 (X)"). Exhibit R-4. PETITIONER REP 1 indicated on this Agreement that he was signing for PETITIONER as "Operating Manager" of COMPANY B, which is identified as PETITIONER's "General Partner."

f. In February 2001, PETITIONER REP 1 signed a Buyer's Settlement Statement concerning PETITIONER's purchase of the CITY 2 and CITY 3 (X)s from COMPANY D. Exhibit P-14. PETITIONER REP 1 indicated on the Statement that he was signing for PETITIONER as "Operating Manager" of COMPANY B, which is identified as PETITIONER's "General Partner."

g. On February 15, 2001, PETITIONER REP 1 signed an Agreement for Assignment and Assumption of Lease between PETITIONER, COMPANY D and COMPANY F concerning the assignment of a lease associated with the CITY 3 (X). Exhibit P-16. PETITIONER REP 1 indicated on this Agreement that he was signing for PETITIONER as "Operating Manager" of COMPANY B, which is identified as PETITIONER's "General Partner."

h. On February 15, 2001, PETITIONER REP 1 signed an Agreement for Assignment and Assumption of Lease between PETITIONER, COMPANY D and PERSON B concerning the assignment of a lease associated with the CITY 2 (X). Exhibit P-12. PETITIONER REP 1 indicated on this

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Agreement that he was signing for PETITIONER as “Operating Manager” of COMPANY B, which is identified as PETITIONER’s “General Partner.”

i. On February 21, 2001, PETITIONER REP 1 signed a Commercial Security Agreement concerning a loan received from the BANK. Exhibits P-18 and R-5. In this Agreement, PETITIONER REP 1 indicated that he was signing for PETITIONER as “Manager” of COMPANY B, which is identified as a “Partner” of PETITIONER.

CITY 1 (X)

10. On October 27, 1999, PETITIONER entered into an Agreement for Sale of Assets (“1999 Purchase Agreement”) to purchase the CITY 1 (X) for \$\$\$\$ from COMPANY D. Exhibits P-1 and P-2. The CITY 1 (X) assets that PETITIONER purchased included “[a]ll necessary business furnishings, equipment, leasehold improvements, supplies and appurtenances and accessories thereto as more particularly set forth in the schedule attached hereto.” Exhibit “A” of Exhibit P-1. Included in the 1999 Purchase Agreement is a list of fixed assets, which includes numerous items of furnishings and (X) equipment.

11. PETITIONER REP 1 testified that COMPANY C paid \$\$\$\$ of the \$\$\$\$ purchase price for the CITY 1 (X) and that the \$\$\$\$ payment became a liability on PETITIONER’s books. Exhibits P-2 and P-9.

12. PETITIONER REP 1 also testified that a bank would not loan the remaining \$\$\$\$ of the \$\$\$\$ purchase price for the CITY 1 (X) to PETITIONER alone because PETITIONER did not have sufficient assets to warrant a loan. On October 27, 1999, PETITIONER, COMPANY C and PETITIONER REP 1 (personally) collectively signed a Promissory Note as “Borrower” to borrow \$\$\$\$ from the BANK. Exhibit P-4.

13. PETITIONER reported on its 2001 Balance Sheet that it had a liability in the amount of \$\$\$\$ that was associated with the CITY 1 (X) and owed to the BANK. Exhibit P-9.

14. PETITIONER and COMPANY A entered into a Lease Agreement dated November 1, 1999 (“1999 Lease Agreement”), in which PETITIONER, the lessor, leased to COMPANY A, the lessee, “the property and equipment located at COMPANY E CITY 1” for a period of ten years. Exhibit R-7. The Commission finds that this lease involves the lease of tangible personal property.

15. The rent provision in the 1999 Lease Agreement (Paragraph 7 of Exhibit R-7) provides that COMPANY A:

shall pay rent during the term of the lease as follows: All payments for real and personal property leases **and all loan payments that pertain to the operation of the existing business at the above locations. The monthly rental payments, as set forth above, shall be due in accordance with the existing notes** (emphasis added).

16. Between November 30, 1999 and September 27, 2004, COMPANY A (dba COMPANY E) made monthly payments of \$\$\$\$\$ to the BANK to pay off the \$\$\$\$\$ loan associated with the CITY 1 (X). Exhibit P-5. These monthly amounts were coded as “rent” on COMPANY A’s “QuickReport” accounting records. Exhibit R-14.

17. COMPANY A’s “QuickReport” accounting records also indicate that on November 29, 2004, COMPANY A made a one-time “rent” payment directly to PETITIONER in the amount of \$\$\$\$\$ in regards to the CITY 1 (X). Exhibit R-14 and Schedule 1-A-1 of Exhibit R-1. PETITIONER REP 1 testified that this “rent” payment was associated with the final “payoff” payment of \$\$\$\$\$ that COMPANY A made to the BANK on October 27, 2004 to completely satisfy the Promissory Note associated with the CITY 1 (X). PETITIONER REP 1 submitted a “Paid Note Statement” from the BANK showing that the final payment of \$\$\$\$\$ was made on October 27, 2004 and that the balance on the loan for the CITY 1 (X) was \$\$\$\$\$ as of that date. Exhibit P-5.

18. The 1999 Lease Agreement also provides that COMPANY A shall pay all property taxes on real and personal property associated with the business. Paragraph 9 of Exhibit R-7. PETITIONER

REP 1 testified that COMPANY A paid all property taxes on tangible personal property located at the CITY 1 (X). PETITIONER REP 1 also submitted letters indicating that he informed other parties that COMPANY A had purchased the CITY 1 (X). Exhibits P-3 and P-6. PETITIONER REP 1 testified that COMPANY A operated the CITY 1 (X) and held the COMPANY E franchise for the business.

CITY 2 and CITY 3 (X)s

19. On February 6, 2001, PETITIONER entered into an Agreement for Sale of Assets (“2001 Purchase Agreement”) to purchase the CITY 2 and CITY 3 (X)s for \$\$\$\$\$ from COMPANY D. Exhibits R-4 and P-14. The assets that PETITIONER purchased included: 1) all inventory and merchandise of the businesses; 2) significant amounts of specified furniture and (X) equipment, as listed on Exhibit A on the contract (Exhibit R-8); 3) goodwill; 4) membership rights; 5) franchise rights; 6) lease rights; and 7) certain accounts.

20. PETITIONER REP 1 testified that a bank would not loan the money to purchase the CITY 2 and CITY 3 (X)s to PETITIONER alone because PETITIONER did not have sufficient assets to warrant a loan. On February 21, 2001, the BANK entered into a Commercial Security Agreement with PETITIONER in regards to a loan in the amount of \$\$\$\$\$. PETITIONER is identified in the agreement to be the “Grantor” of “the security interest in Collateral to secure the indebtedness.” The “Borrowers” are identified as: 1) PETITIONER; 2) COMPANY C; 3) COMPANY A; and 4) PETITIONER REP 1 (personally). Exhibits P-18 and R-5.

21. PETITIONER reported on its 2001 Balance Sheet that it had a liability in the amount of \$\$\$\$\$ that was associated with the CITY 2 and CITY 3 (X)s and owed to the BANK. Exhibit P-9.

22. On February 1, 2001, PETITIONER and COMPANY A entered into an Addendum to the 1999 Lease Agreement (“2001 Addendum”). Exhibit R-7. The 2001 Addendum declared PETITIONER to be the owner of property and equipment at the CITY 2 and CITY 3 (X)s. It also provided that PETITIONER, as lessor, would lease to COMPANY A, as lessee, the property and equipment located at these locations for a period of eight years and nine months. The Commission finds that this lease addendum involves the lease of tangible personal property.

23. The rent provision in the 2001 Addendum (Exhibit R-7) provides that COMPANY A:

shall pay rent during the term of the lease as follows: All payments for real and personal property leases **and all loan payments that pertain to the operation of the existing business at the above locations. All other terms and conditions of the original lease will apply** (emphasis added).

24. PETITIONER REP 1 testified that COMPANY A made payments in the amount of \$\$\$\$ per month to the BANK on the loan associated with the Commercial Security Agreement for the CITY 2 and CITY 3 (X)s. The Division determined that the \$\$\$\$ monthly payments made to the BANK constituted lease payments under the 2001 Addendum. Schedule 1-A-1 of Exhibit R-1. No evidence was submitted to show the loan for the CITY 2 and CITY 3 (X)s was paid off before the end of the audit period.

25. PETITIONER REP 1 testified that COMPANY A paid the personal property taxes on equipment and other personal property located at the CITY 2 and CITY 3 (X)s that PETITIONER owned. In 2002, PETITIONER REP 1 sent letters to COUNTY 1 and COUNTY 2, in which he declared that COMPANY A had purchased the CITY 2 and CITY 1 (X)s and would be paying the personal property taxes associated with these businesses. Exhibit P-19. PETITIONER REP 1 testified that COMPANY A operated the CITY 2 and CITY 3 (X)s and held the COMPANY E franchises for these businesses.

PETITIONER's Federal Income Tax Returns

26. PETITIONER filed federal income tax returns during the audit period on which it identified its principal business activity to be "equipment rental." PETITIONER's federal tax returns for the audit years show "gross receipts or sales" in the amounts of \$\$\$\$ for 2002, \$\$\$\$ for 2003, \$\$\$\$ for 2004, \$\$\$\$ for 2005, and \$\$\$\$ for 2006. Exhibits R-9, R-10, R-11, R-12 and R-13. The "gross receipts or sales" reported during the five-year audit period total \$\$\$\$.

27. On its 2002 federal income tax return, PETITIONER reported that it was liable for "mortgages, notes, [or] bonds payable in 1 year or more" in the amount of \$\$\$\$ at the beginning of the tax year and \$\$\$\$ at the end of the tax year. On subsequent returns, it reported this liability to be: 1) \$\$\$\$ at the end of the 2003 year; 2) \$\$\$\$ at the end of the 2004 year; 3) \$\$\$\$ at the end of the 2005 tax year; and 4) \$\$\$\$ at the end of the 2006 tax year. Exhibits R-9, R-10, R-11, R-12 and R-13.

28. On its federal income tax returns for each year at issue, PETITIONER reported interest expenses that ranged between \$\$\$\$ and \$\$\$\$ per year. In addition, property associated with the CITY 1, CITY 2 and CITY 3 (X)s, including equipment, was reported and depreciated on PETITIONER's federal tax returns for all years at issue. Exhibits R-9, R-10, R-11, R-12 and R-13.

Division's Approach in Determining Liability for "Unreported Taxable Leases"

29. The Division originally audited COMPANY A. Once the Division found that COMPANY A's books contained little or no equipment, it discovered the lease between PETITIONER and COMPANY A and documents showing that the equipment was owned and depreciated by PETITIONER. The Division's assessment for "unreported taxable leases" only concerns the property that PETITIONER purchased in 1999 and 2001 in association with the CITY 1, CITY 2 and CITY 3 (X)s.

30. For the five years comprising the audit period, the Division determined that the taxpayer failed to collect and remit sales tax on taxable lease transactions that totaled \$\$\$\$ per month, which

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equates to \$\$\$\$\$ per year or \$\$\$\$\$ for the entire five-year audit period. The Division determined the monthly lease amount by analyzing the “rent” entries in COMPANY A’s accounting records for the first 11 months of 2004 and determining that PETITIONER failed to collect and remit sales tax on \$\$\$\$\$ of lease transactions during the 11-month “test period,” which equates to \$\$\$\$\$ per month. Schedule 1-A of Exhibit R-1. The \$\$\$\$\$ of unreported lease amounts for the 11-month period was determined by adding the amounts described in Findings of Fact 31 through 36 below, specifically: 1) the \$\$\$\$\$ amount described in Findings of Fact 31 and 32; 2) the \$\$\$\$\$ amount described in Findings of Fact 34 and 35; and 3) the \$\$\$\$\$ amount described in Finding of Fact 36.

31. During the 11-month test period, COMPANY A made 10 “rent” payments of \$\$\$\$\$ to the BANK in regards to the CITY 2 and CITY 3 (X)s. Schedule 1-A-1 of Exhibit R-1. The Division used information from PETITIONER’s 2003 Federal Depreciation Schedule to determine that 76.8898% of each payment was associated with tangible personal property (with the remainder associated with nontaxable real or intangible property). When the Division applied this percentage to each of the 10 payments of \$\$\$\$\$, it determined that the unreported taxable leases for the CITY 2 and CITY 3 (X)s during the 11-month test period totaled \$\$\$\$\$.

32. To develop the 76.8898% rate to apply to the “rent” payments for the CITY 2 and CITY 3 (X)s, the Division considered the cost of the (X)s, as reported and depreciated by PETITIONER on its 2003 federal tax return. Exhibit R-6; Exhibit R-10; and Schedule 1-B of Exhibit R-1. The cost of the CITY 2 and CITY 3 (X)s was segregated into four different types of properties. Of these properties, the Division determined that the “(X) Equipment” and “Master Lease” properties were the only items of tangible personal property and that these two properties accounted for 76.8898% of the total property, as follows:

Column A	Column B	Column C	Column D
Property Type	Value of All Property	Value of Tangible	% of Tangible Personal

	Reported on Tax Return	Personal Property	Prop. (Col. C / Col. D)
(X) Equipment	\$\$\$\$\$	\$\$\$\$\$	
Goodwill	\$\$\$\$\$		
Master Lease	\$\$\$\$\$	\$\$\$\$\$	
Contracts	\$\$\$\$\$		
Totals	\$\$\$\$\$	\$\$\$\$\$	76.8898%

33. PETITIONER REP 1 testified that the “Master Lease” amounts concerned a real property lease, not a lease of tangible personal property. The Division stated that it would agree that the “Master Lease” amounts depreciated on the federal tax returns concerned real property and not tangible personal property.

34. Also during the 11-month test audit period, COMPANY A made 10 “rent” payments of \$\$\$\$\$ to the BANK in regards to the CITY 1 (X). Exhibits R-14; Schedule 1-A-1 of Exhibit R-1. The Division used information from PETITIONER’s 2003 Federal Depreciation Schedule to determine that 89.4040% of each payment was associated with tangible personal property. When the Division applied this percentage to each of the 10 payments of \$\$\$\$\$, it determined that these unreported taxable lease payments for the CITY 1 (X) during the 11-month test period totaled\$\$\$\$\$.

35. To develop the 89.4040% rate to apply to the “rent” payments for the CITY 1 (X), the Division considered the cost of the (X), as reported and depreciated by PETITIONER on its 2003 federal tax return. Exhibit R-6; Exhibit R-10; and Schedule 1-B of Exhibit R-1. The cost of the CITY 1 (X) was segregated into three different types of properties. Of these properties, the Division determined that “Equipment” was the only item of tangible personal property and that this property accounted for 89.4040% of the total property, as follows:

Column A	Column B	Column C	Column D
Property Type	Value of All Property Reported on Tax Return	Value of Tangible Personal Property	% of Tangible Personal Prop. (Col. C / Col. D)
Equipment	\$\$\$\$\$	\$\$\$\$\$	
Loan Fees	\$\$\$\$\$		
Goodwill	\$\$\$\$\$		

Totals	\$\$\$\$\$	\$\$\$\$\$	89.4040%
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36. 2004 accounting records also show that COMPANY A made a direct “rent” payment of \$\$\$\$\$ to PETITIONER for the CITY 1 (X) during the 11-month test audit period. Exhibit R-14. The Division also applied the 89.4040% rate it derived for the CITY 1 (X) to this payment and determined that the amount of this unreported taxable lease payment was \$\$\$\$\$.

Division’s Approach in Determining Liability for “Unreported Taxable Purchases”

37. For the five years comprising the audit period, the Division determined that PETITIONER failed to pay sales tax on tangible personal property purchases totaling \$\$\$\$\$, or \$\$\$\$\$ per month. Exhibit R-1. The Division calculated this monthly amount by first determining the amount of unreported purchases for the first 36 months of the audit period, specifically January 1, 2002 through December 31, 2004. For these three years, the Division discovered five purchases of tangible personal property on which PETITIONER had not paid sales or use tax. Schedule 2-A-1 of Exhibit R-1. The total amount of these five transactions totaled \$\$\$\$\$. The Division divided this amount by 36 months and arrived at a monthly amount of \$\$\$\$\$ of unpaid purchases that it applied to the entire audit period. The taxpayer did not provide any evidence to contest these five transactions. The taxpayer was given thirty days after the hearing to submit information concerning its purchases during the audit period. However, the taxpayer did not submit any information within the thirty days.

APPLICABLE LAW

1. From the beginning of the audit period until July 1, 2005, Utah Code Ann. §59-12-103(k) (2004) provided that amounts paid for leases or rentals of tangible personal property were taxable, as follows:

- (k) amounts paid or charged for leases or rentals of tangible personal property if:
 - (i) the tangible personal property’s situs is in this state;
 - (ii) the lessee took possession of the tangible personal property in this state; or
 - (iii) within this state the tangible personal property is:

- (A) stored;
- (B) used; or
- (C) otherwise consumed;

2. Effective July 1, 2005, Section 59-12-103(k) (2008) was amended and, through the remainder of the audit period, provided that amounts paid for leases or rentals of tangible personal property were taxable as follows:

(k) amounts paid or charged for leases or rentals of tangible personal property if within this state the tangible personal property is:

- (i) stored;
- (ii) used; or
- (iii) otherwise consumed;

3. The term “lease” or “rental” was not defined in statute until July 1, 2005.¹ From July 1, 2005 through the remainder of the audit period, the term “lease” or “rental” was defined in UCA §59-12-102(44)(a) (2008), as follows in pertinent part:

(44) (a) "Lease" or "rental" means a transfer of possession or control of tangible personal property for:

- (i) (A) a fixed term; or
(B) an indeterminate term; and
- (ii) consideration.

4. From the beginning of the audit period until July 1, 2005, the term “sales price” was not defined in statute. “Purchase price,” however, was defined in Section 59-12-102(21) (2004)² until July 1, 2005 to mean “the amount paid or charged for tangible personal property or any other taxable transaction under Subsection 59-12-103(1), excluding only cash discounts taken or any excise tax imposed on the purchase price by the federal government.”

¹ In the 2003 General Session, the Legislature enacted Senate Bill 147 (“S.B. 147”), which added definitions for the terms “lease” and “rental” that were to become effective July 1, 2004. In the 2004 Third Special Session, however, the Legislature enacted Senate Bill 3000 (“S.B. 3000”), which delayed the effective date for adding these terms until July 1, 2005.

² S.B. 147 (2003) amended the definition of “purchase price” and expanded the term to include both “purchase price” and “sales price.” Originally, the amendments were to become effective July 1, 2004.

5. Effective July 1, 2005 and for the remainder of the audit period, the terms “purchase price” and “sales price” were defined in Section 59-12-102(72)(a) (2008), as follows in pertinent part:

- (72)(a) "Purchase price" and "sales price" mean the total amount of consideration:
 - (i) valued in money; and
 - (ii) for which tangible personal property or services are:
 - (A) sold;
 - (B) leased; or
 - (C) rented.

6. Throughout the audit period, the term “sale” was defined in Section 59-12-102(83) (2008), as follows in pertinent part:

- (83) (a) "Sale" means any transfer of title, exchange, or barter, conditional or otherwise, in any manner, of tangible personal property or any other taxable transaction under Subsection 59-12-103(1), for consideration.
- (b) "Sale" includes:
 -
 - (v) any transaction under which right to possession, operation, or use of any article of tangible personal property is granted under a lease or contract and the transfer of possession would be taxable if an outright sale were made.

7. Throughout the audit period, UCA §59-12-104(25) (2008) provided an exemption from sales and use tax for “property purchased for resale in this state, in the regular course of business, either in its original form or as an ingredient or component part of a manufactured or compounded product[.]”

DISCUSSION

Based on PETITIONER’s arguments at the Formal Hearing, the Commission will address the following issues. First, PETITIONER argues that it should be considered a “disregarded” entity so that the lease between itself and COMPANY A is disregarded for sales tax purposes. Second, PETITIONER argues that the lease between itself and COMPANY A did not result in taxable transactions because COMPANY A did not pay PETITIONER any consideration under the lease. PETITIONER argues that the loan payments paid to a bank are not subject to tax. Third, PETITIONER argues that the lease between itself and

However, pursuant to S.B. 3000 (2004), the effective date of the amendments was delayed until July 1, 2005.

COMPANY A is invalid and, as a result, cannot give rise to sales and use tax liability that might have otherwise been due under the contract. Fourth, PETITIONER agrees that the (X) memberships sold by COMPANY A are taxable “admissions” pursuant to Section 59-12-103(1)(f) (2008). Because COMPANY A’s customers use the equipment at issue in this appeal and because they have paid sales and use tax on their taxable admissions, PETITIONER argues that any lease or purchase of equipment by COMPANY A is exempt from taxation under the sale for resale exemption. Fifth, PETITIONER argues that the Division’s approach in calculating the amounts of unreported taxable leases is incorrect.

I. Should PETITIONER Be Considered a Disregarded Entity for Sales Tax Purposes?

PETITIONER REP 1 argues that just because he made accounting journal entries characterizing COMPANY A’s loan payments as “rent,” one should not conclude, as the Division has, that a lease existed between PETITIONER and COMPANY A. He also asks the Commission to consider that COMPANY A owns the (X) franchises, operates the (X)s, and made the payments on the loans associated with the (X)s to the BANK. In addition, PETITIONER REP 1 has submitted documents to show that any amounts paid by a “co-borrower” on the loans associated with the CITY 1, CITY 2 and CITY 3 (X)s result in a liability that PETITIONER owes that co-borrower. Exhibits P-7 and P-8. He also states that the BANK would not loan money to PETITIONER to purchase the (X)s without co-signers, one of which was COMPANY A. Finally, he states that PETITIONER can refile its income tax returns for the years at issue so that the PETITIONER no longer reports the rental income currently shown on these returns. For these reasons, he asks the Commission to find PETITIONER to be a disregarded entity so that the lease between PETITIONER and COMPANY A is disregarded for sales tax purposes.

The Commission, however, is not convinced that PETITIONER is a disregarded entity for sales tax purposes. First, documents proffered at the Initial Hearing show that PETITIONER, not

COMPANY A, is the owner of the tangible personal property at issue. Furthermore, PETITIONER keeps records to file federal tax returns on which it declares itself to be in the business of “equipment rental.” On its federal tax returns, PETITIONER depreciates the property that is the subject of the lease and shows that it earns significant amounts of “gross receipts or sales.” Finally, it is PETITIONER that appears to have reported the BANK loans associated with the (X)s on its federal returns.

Furthermore, the Commission believes its decision is supported by case law. In *Institutional Laundry, Inc. v. State Tax Comm’n*, 706 P.2d 1066 (Utah 1985), the Utah Supreme Court considered sales made by Institutional Laundry, Inc. (“Institutional”), a wholly-owned subsidiary, to its parent. Institutional existed only to provide laundry services to its parent, services that the Commission deemed taxable. Institutional owned no property and kept no separate corporate records, but argued that “as a wholly owned subsidiary of [its parent], it has no real separate corporate existence and is therefore exempt from tax.” The Court found otherwise, stating that:

A corporation, be it parent or subsidiary, has its own legal identity and existence. Common ownership or control does not automatically destroy that separate identity. Although in appropriate cases equity may look through the corporate shell to its alter-ego to prevent fraud or wrongdoing, the general rule still applies that corporations are separate legal entities bound by the obligations as well as the benefits. . . .

Having elected to operate as a corporation, for whatever benefits that separate status conferred upon Institutional and its parent, Institutional must also accept the tax burden and responsibility attendant to its corporate form. A corporation may not disregard or shed its corporate clothing to avoid tax consequences. *CITY 2 Union Railway and Depot Co. v. State Tax Commission*, 16 Utah 2d 23, 395 P.2d 57 (1964), modified on rehearing, 16 Utah 2d 255, 399 P.2d 145 (1965); *Cal-Metal Corp. v. California State Board of Equalization*, 161 Cal. App. 3d 759, 207 Cal. Rptr. 783 (1984). When a taxpayer has chosen to conduct business under a particular arrangement, it cannot disregard the consequence of that arrangement when it would otherwise be to the taxpayer's disadvantage. 19 Cal. 3d at 219; *Mercedes-Benz of North America, Inc. v. State Board of Equalization*, 127 Cal. App. 3d 871, 179 Cal. Rptr. 758 (1982); *Montgomery Ward & Co. v. State*, {706 P.2d 1068} Colo., 628 P.2d 85 (1981); *Simplicity Pattern Co. v. State Board of Equalization*, 27 Cal. 3d 900, 615 P.2d 555, 167 Cal. Rptr. 366 (1980).

Furthermore, in *SF Phosphates Limited Company v. State Tax Comm'n*, 972 P.2d 384 (Utah 1998), the Utah Supreme Court stated:

Additionally, we note that Phosphates' ownership of Pipeline does not exempt Phosphates from paying sales tax on transactions between the two. Having elected separate corporate forms, Phosphates and Pipeline are bound by the obligations and benefits of those forms. See *Institutional Laundry Inc. v. State Tax Comm'n*, 706 P.2d 1066, 1067 (Utah 1985); see also *Salt Lake Brewing Co. v. Auditing Div.*, 945 P.2d 691, 695 (Utah 1997) ("Clear legal and economic segregation of the activities of the different establishments would give rise to a different [tax] result."). Historically, we have recognized separate corporate forms and imposed sales tax liability on transactions between a parent company and its wholly- or partially owned subsidiaries. See, e.g., *Hales Sand & Gravel, Inc. v. Audit Div.*, 842 P.2d 887, 894-95 (Utah 1992) (holding parent company not entitled to refund of sales tax paid on transactions with subsidiary); *Institutional Laundry, Inc.*, 706 P.2d at 1067 (holding wholly-owned subsidiary liable for sales tax on transaction with parent); *CITY 2 Union Ry. and Depot Co. v. State Tax Comm'n*, 16 Utah 2d 23, 28-29, 395 P.2d 57, 60 (1964) (holding a subsidiary liable for sales tax on transaction with parent) modified in part, 16 Utah 2d 255, 399 P.2d 145 (1965).

The taxpayer correctly points out that in *Institutional*, the Court acknowledged the existence of two cases where courts disregarded an entity for sales tax purposes. However, the unusual and specific reasons that existed in those two cases are not present in this matter.³ Furthermore, the taxpayer has provided no case law showing that an entity such as PETITIONER should be disregarded for sales tax purposes.

PETITIONER REP 2, PETITIONER REP 1's CPA, testified that PETITIONER REP 1 would have "split" the transactions to purchase the three (X)s and made COMPANY A the owner of the tangible personal property at issue had the sale and use tax consequences been anticipated. However, the

³ In *Valier Coal Co. v. Department of Revenue*, 11 Ill.2d 402 (Ill. 1957), the Illinois Supreme Court disregarded a wholly-owned subsidiary that was inhibited by its charter and by orders of the Illinois Public Utilities Commission from engaging in general trade and selling at a profit to its parent company. No such restrictions are present in the matter currently before the Commission. In *Mapo, Inc. v. State Board of Equalization*, 53 Cal.App.3d 245 (Cal. Ct. App. 1975), a California Court disregarded a wholly-owned subsidiary that was created to simplify union negotiations and resolve multi-union jurisdictional problems involving diverse motion picture unions and guilds. Furthermore, the subsidiary owned no materials, kept no books, bore no liability for its operations and recorded no profits. Those circumstances do not apply to PETITIONER.

parties did not transact the purchases of the three (X)s in this manner. Instead, PETITIONER became the owner of the tangible personal property, and COMPANY A entered into an agreement to lease the tangible personal property from PETITIONER.

Based on the foregoing, the Commission finds that PETITIONER and COMPANY A have their own separate legal identities and existences. PETITIONER keeps its own books and files federal returns on which it claims income and depreciates the property that it leases to COMPANY A. The Division also explains that PETITIONER REP 1 may benefit from having the equipment used by COMPANY A owned by a separate entity. For example, if a customer of COMPANY A sues COMPANY A, the property at issue may be protected because it is owned by a separate entity. Based on these facts and the available case law, the Commission finds that PETITIONER is not a disregarded entity for sales tax purposes.

II. Are the Loan Payments Paid by COMPANY A to the BANK Consideration on its Lease of Tangible Personal Property From PETITIONER?

PETITIONER argues that the lease between itself and COMPANY A did not result in a taxable transaction because it did not receive any “consideration” under the lease. The rent COMPANY A paid PETITIONER consisted of loan payments made directly to the BANK. Because PETITIONER did not “directly” receive these payments from COMPANY A, the taxpayer argues that the loan payments made by COMPANY A did not constitute “consideration.” In addition, the taxpayer argues that loan payments are not subject to taxation. For these reasons, the taxpayer argues that no taxable sale has occurred.

“Purchase price” is defined in Section 59-12-102(72) (2008) to mean the total amount of “consideration” for which tangible personal property is sold, leased, or rented. In addition, Section 59-12-102(44) provides that a “lease” or “rental” is a transfer of possession or control of tangible personal property for “consideration.” Accordingly, “consideration” must exist before a transaction is a taxable sale. Nevertheless, the Commission believes that the lease between PETITIONER and COMPANY A was entered into for consideration and, as a result, is subject to taxation.

First, although PETITIONER contends that it received no lease payments, its federal returns show “gross receipts or sales” in excess of \$\$\$\$ for each year of the audit period. PETITIONER does not indicate that it leases equipment to any other entity other than COMPANY A.

Second, under the 1999 Lease Agreement and 2001 Addendum between PETITIONER and COMPANY A, COMPANY A agreed to lease property owned by PETITIONER, specifically property associated with the three (X)s in CITY 1, CITY 2, and CITY 3. In return for obtaining the possession or control of this property, the 1999 Lease Agreement provided that COMPANY A would pay as “rent” the following: “All payments for real and personal property leases and all loan payments that pertain to the operation of the existing business at the above locations. The monthly rental payments, as set forth above, shall be due in accordance with the exiting notes.” The 2001 Addendum also provides that COMPANY A would pay “all loan payments that pertain to the operation of the existing business at the above locations” and that “all other terms and conditions of the original lease will apply.”

The lease contracts specifically provide that COMPANY A shall pay “rent” by paying “loan payments that pertain to the operation of the existing businesses” and that the “monthly rent payments . . . shall be due in accordance with the existing notes.” PETITIONER admits the COMPANY A paid the monthly amounts due on the BANK notes associated with the (X)s.

For these reasons, COMPANY A fulfilled its “rent” obligations by making payments on the BANK loans associated with PETITIONER’s property. Although the taxpayer argues otherwise, the Commission does not believe that money must be paid directly to PETITIONER for consideration to exist. Black’s Law Dictionary defines “consideration” to be “[t]he inducement to a contract. The cause, motive, price, or impelling influence which induces a contracting party to enter into a contract. The reason or material cause of a contract. Some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.” Black’s Law Dictionary 277

(5th ed. 1979). PETITIONER was not only the grantor, but also a borrower on the loan procured to purchase the (X)s. PETITIONER was induced to enter into the lease and allow COMPANY A to have possession of its property in return for COMPANY A paying the loan amounts for which PETITIONER was legally obligated. As a result, inducement, or consideration, existed for the parties to enter into the lease. Nowhere does the definition in Black's Law Dictionary suggest that consideration is present only if money is exchanged between the two parties that have entered into a contract.

In addition, Restatement (Second) of Contracts, section 71 provides that "to constitute consideration, a performance or a return promise must be bargained for." This section further provides that "the performance or return promise may be given to the promisor or to some other party." Restatement (Second) of Contracts §71 (1981). It does not, however, provide that consideration must consist, as PETITIONER argues, of a money payment from one of the parties of the contract to another. In fact, the performance or return promise may be given to someone who is not a party to the contract. For these reasons, the Commission rejects PETITIONER's argument that the lease is not subject to taxation because of a lack of consideration. Because PETITIONER did not collect and remit sales tax on its taxable lease of tangible personal property to COMPANY A, the Commission sustains the Division's determination that PETITIONER owes tax on the transactions that occurred under the lease.

III. PETITIONER Argues that the 1999 Lease Agreement and 2001 Addendum Between Itself and COMPANY A Are Invalid, Thus Absolving PETITIONER of Any Sales and Tax Liability That Would Have Arisen Under these Leases.

PETITIONER REP 1 points out that COMPANY C is identified as the "General Partner" of PETITIONER on the July 19, 1999 Certificate presented to register PETITIONER with the Department of Commerce. Exhibit P-17. On the 1999 Lease Agreement and 2001 Addendum, which give rise to the taxable leases at issue, PETITIONER REP 1 signed for PETITIONER as "Operating Manager" of COMPANY B, which is identified as PETITIONER's "General Partner." Paragraph 7 of PETITIONER's Certificate

indicates that a “Limited Partner may not assign, encumber, give, pledge, transfer, devise, bequeath, or in any manner whatsoever dispose of all or any part of a Partnership interest without complying with the terms of the Limited Partnership Agreement.” Because an entity other than COMPANY C signed the leases on behalf of PETITIONER, PETITIONER REP 1 contends that the leases are invalid, thus precluding the existence of a taxable transaction under the leases.

The Commission is not convinced that a taxable transaction has not occurred under the leases. First, the Commission is not convinced that an entity other than COMPANY C could not enter into contracts on behalf of PETITIONER. Most of PETITIONER’s contracts that were submitted at the Formal Hearing were signed by PETITIONER REP 1 as “Manager” of PETITIONER or by PETITIONER REP 1 as a manager of COMPANY B, which is identified as either the “General Partner” or “Partner” of PETITIONER. They were not signed by PETITIONER REP 1 as “President” or “Manager” of COMPANY C. Furthermore, Paragraph 7 of the Certificate suggests that a Limited Partner may enter into leases if the Limited Partnership Agreement so allows. Neither party has submitted a copy of the Limited Partnership Agreement or identified the other partners of PETITIONER. For this reason, the Commission is not convinced that PETITIONER REP 1 improperly entered into the leases at issue or that improperly entered into these various other contracts.

Second, even had the taxpayer provided sufficient documents to show that COMPANY C was the only entity expressly allowed to enter into contracts for PETITIONER, the Commission is still not convinced that the leases are invalid. PETITIONER REP 1 appears to be able to sign on behalf of all entities that he owns and manages. The taxpayer has not presented any case law that shows a contract signed under similar circumstances and involving similar parties to be invalid. Without such precedent, the Commission does not find the 1999 Lease Agreement and the 2001 Addendum to be invalid.

IV. Is the Tangible Personal Property Leased by PETITIONER to COMPANY A Exempt from Taxation Under the Resale Exemption? Similarly, Are PETITIONER’s Purchases of Tangible Personal Property Exempt from Taxation Under the Resale Exemption?

The taxpayer argues that any lease or purchase of (X) equipment is exempt under the sale for resale exemption because it is used to provide taxable (X) memberships. Utah Code Ann. §59-12-104(25) (2008) provides an exemption from sales and use tax for “property purchased for resale in this state, in the regular course of business, either in its original form or as an ingredient or component part of a manufactured or compounded product[.]” The Commission finds that PETITIONER has failed to show that the any lease or purchase at issue qualifies for the resale exemption.

First, the amounts paid by COMPANY A to lease tangible personal property from PETITIONER do not qualify for the resale exemption because COMPANY A “consumes” the equipment in providing its taxable (X) memberships. This conclusion is supported by the Utah Supreme Court’s ruling in *Sine v. Utah State Tax Comm’n*, 390 P.2d 130 (Utah 1964). In *Sine*, the Court found that a motel business could not purchase tax-free towels, blankets, soap, and other similar types of tangible personal property used in providing its taxable accommodations. The Court found that these items did not qualify for the resale exemption because the motel business did not “manufacture or compound” these items for resale. The Court concluded that business was the ultimate consumer of the items in providing its taxable accommodations.

The Commission has applied this reasoning to taxable admissions, as well. For example, in *Private Letter Ruling 98-009* (Utah State Tax Comm’n Feb. 17, 1998), the Commission considered whether the amounts paid by a sports team to have its tickets printed qualified for the resale exemption. The Commission explained that the sports team’s customer receives the ticket when he or she purchases a taxable admission to the sporting event (i.e., purchases the right to enter into the event). Because the ticket is used to confirm that the customer has paid for the right to enter into the event, the Commission concluded that the sports team consumes the tickets in providing its taxable admissions. For these reasons, the Commission finds that COMPANY A consumes any equipment it leases or purchases. Accordingly, the Commission finds that the equipment does not qualify for the resale exemption.

The taxpayer argues that COMPANY A's lease of the (X) equipment at issue should be exempt because an entity that rents golf carts or skis is entitled to buy those golf carts or skis tax-free under the resale exemption. The Commission disagrees with the taxpayer's reasoning. COMPANY A charges its members an admissions fee. It does not charge a fee specifically to rent a piece or pieces of equipment.

Finally, the taxpayer argues that the equipment at issue is exempt under Utah Admin. Rule R865-19S-83, which provides that tangible personal property "held for display, demonstration or trial in the regular course of business is not subject to tax." The Commission disagrees. This provision concerns wholesalers or retailers who are in the business of selling or leasing the tangible personal property that is held for display. The tangible personal property at issue in this appeal is not held for display, demonstration or trial by an entity desiring to lease or sell the equipment. It is already leased to COMPANY A, which is consuming the equipment in providing its taxable admissions.

Second, the Division determined that PETITIONER failed to pay tax on five purchases of equipment. If PETITIONER purchased the equipment in order to lease it to COMPANY A or another entity, then it could purchase the equipment tax-free under the resale exemption. However, no evidence exists to show that this specific equipment was subsequently leased. In fact, PETITIONER contends that it paid sales tax on these purchase, which would suggest that it did not purchase the equipment for resale. However, PETITIONER has produced no evidence to show that it paid sales tax on the equipment. Accordingly, the Commission sustains the Division's determination that sales tax was due on these purchases.

V. Has PETITIONER Shown that the Division's Approach for Determining the Amounts of Unreported Taxable Leases Is Incorrect?

The 1999 Lease Agreement and 2001 Addendum between PETITIONER and COMPANY A do not provide for specific lease payments. Nor do they specify how much of the lease payments will be allocated between tangible personal property, the lease of which is taxable, and other property, the lease of which is nontaxable. As a result, the Division used the "rent" amounts shown on COMPANY A's accounting

ledgers to determine the lease amounts that it paid to PETITIONER during an 11-month test period. To allocate each payment between tangible personal property and other property, the Division used the amounts allocated to each type of property by PETITIONER on its federal tax returns for depreciation purposes. Once the Division calculated the taxable lease payments for the 11-month test period, it applied these amounts to the entire audit period. The Commission finds the Division's approach in determining the amounts of unreported taxable lease payments to be supported by the information available at the Formal Hearing, with the following exceptions:

a. Payments Made on the Loan for the CITY 1 (X). During the 11-month test audit period, the Division determined that COMPANY A made 10 "rent" payments each in the amount of \$\$\$\$\$ and one "rent" payment in the amount of \$\$\$\$\$, to the BANK in regards to the CITY 1 (X). Schedule 1-A-1 of Exhibit R-1. The total of the 10 payments of \$\$\$\$\$ each and the 1 payment of \$\$\$\$\$ is \$\$\$\$\$. The Division determined that 89.4040% of these payments were associated with tangible personal property. When the Division applied this percentage to the total payments of \$\$\$\$\$, it determined that there were unreported taxable lease payments for the CITY 1 (X) during the 11-month test period that totaled \$\$\$\$\$ (\$\$\$\$\$x 89.4040%). \$\$\$\$\$ in unreported lease payments over the 11-month test month equates to \$\$\$\$\$ in unreported lease payments per month (\$\$\$\$\$/ 11 months). The Division used this methodology to "project" that COMPANY A made a taxable lease payment of \$\$\$\$\$ for each of the 60 months in the audit period for personal property located at the CITY 1 (X). 60 monthly payments of \$\$\$\$\$ equates to approximately \$\$\$\$\$ over the entire audit period.

The Commission finds that the taxpayer has submitted information to show that the Division's total amount of "projected" unreported taxable lease payments for the CITY 1 (X) over the audit period is incorrect. First, the CITY 1 (X) "rent" payments are equal to payments made on an October 27, 1999 loan, a loan for \$\$\$\$\$. Exhibit P-4. It is highly unlikely that the payments made during the audit period

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on a \$\$\$\$ loan were equal to or even close to the Division's "projected" payments of \$\$\$\$.

Second, the taxpayer has submitted a record of all payments made on the \$\$\$\$ loan for the CITY 1 (X), including those payments made during the audit period. Exhibit P-5. This document shows that 33 monthly payments of \$\$\$\$ were made between January 25, 2002 and September 27, 2004 and that a "payoff" payment of \$\$\$\$ was made on October 27, 2004, which reduced the loan's balance to \$\$\$\$. From this evidence, the Commission finds that there is no need to "project" the payments made on this loan. The number and amounts of payments made during the audit period are known. 33 payments of \$\$\$\$ and 1 payment of \$\$\$\$ equate to total payments of \$\$\$\$ during the audit period. The Division determined that 89.4040% of the payments associated with the CITY 1 (X) concerned tangible personal property. When the \$\$\$\$ in actual payments made during the audit period is multiplied by 89.4040%, the total amount of unreported taxable lease payments is \$\$\$\$ (\$\$\$\$ x 89.4040%). Based on this information, the Commission finds that the Division's assessment should be revised to reflect \$\$\$\$ in unreported taxable lease payments associated with the CITY 1 (X).

The Division argues that the Commission should not reduce the amount of unreported lease payments that it determined for the CITY 1 (X) because the \$\$\$\$ in total unreported lease payments that it derived is already less than the \$\$\$\$ of "gross receipts or sales" that PETITIONER reported on its federal income tax returns during the audit period. However, it has already been shown that the \$\$\$\$ amount includes "gross receipts or sales" for real property and intangibles that is not subject to taxation. Furthermore, the only taxable payments on which the Division assessed tax concern the "rents" paid in association with loan payments for all three (X)s. The taxpayer's information concerning the CITY 1 (X) shows that the Division's "projected" payments on this loan are too high. The Division's assessment does not address any other lease payments other than those associated with the loans on the three (X)s. Without additional information that other payments associated with personal property were included in the taxpayer's "gross

receipts or sales,” the Commission rejects the Division’s request not to adjust the assessment.

b. Percentage of Lease Payment Pertaining to Tangible Personal Property. For the “rent” payments associated with the CITY 2 and CITY 3 (X)s, the Division determined that 76.8898% of each lease payment should be allocated to tangible personal property. The Division determined that each lease payment involved four different types of property, specifically: 1) (X) Equipment; 2) Goodwill; 3) Master Lease; and 4) Contracts. The Division calculated the 76.8898% rate after determining that two of the four property types involved tangible personal property, specifically (X) Equipment and Master Lease (see Finding of Fact #26 for the calculation). The taxpayer, however, asserts that the property described as Master Lease concerns real property, not tangible personal property. For this reason, the taxpayer contends that the amount of Master Lease property should be removed from the calculation of the allocation percentage rate. This revision would reduce the allocation percentage rate from 76.8898% to 69.7690%. The Division agrees that the Master Lease represents real property and that the allocation percentage rate for lease payments made on the CITY 2 and CITY 3 (X)s should be reduced to 69.7690%.

CONCLUSIONS OF LAW

1. The Commission finds that PETITIONER is not a “disregarded entity” for purposes of any sales and use tax due on the 1999 Lease Agreement and 2001 Addendum that it entered into with COMPANY A.

2. The Commission finds that the loan payments made by COMPANY A to the BANK on loans associated with the CITY 1, CITY 2 and CITY 3 (X)s constitute taxable lease payments under the 1999 Lease Agreement and 2001 Addendum. The Commission also finds that the payments made by COMPANY A to the BANK to satisfy loan obligations owed by PETITIONER constitute “consideration” paid for the “rent” due under the leases.

3. The Commission finds that sales and use tax is due under the 1999 Lease Agreement

and 2001 Addendum, even though PETITIONER REP 1 signed these documents on behalf of PETITIONER as “Operating Manager” of COMPANY B, which is identified as PETITIONER’s “General Partner.”

4. The Commission finds that the tangible personal property leased by PETITIONER to COMPANY A is not exempt from taxation under the sale for resale exemption. Because COMPANY A consumes the tangible personal property that it purchases or leases to provide taxable (X) “admissions,” its purchase or lease of such property is taxable.

5. The Commission finds that the taxpayer has not shown that the Division’s determination of PETITIONER’s unreported taxable purchases is incorrect. Accordingly, the Commission sustains this portion of the Division’s assessment.

6. The Commission finds that the Division’s determination of PETITIONER’s unreported taxable leases is correct, with the following two exceptions. First, the Commission finds that the unreported taxable lease payments associated with the CITY 1 (X) should be reduced from approximately \$\$\$\$\$, as reflected in the Division’s assessment, to \$\$\$\$\$. Second, the Commission finds that the allocation percentage used to determine the taxable portion of the lease payments received for the CITY 2 and CITY 3 (X)s should be reduced from 76.8898% to 69.7690%.

DECISION AND ORDER

Based upon the foregoing, the Commission sustains the Division’s assessment with the following exceptions. First, the Commission finds that the unreported taxable lease payments associated with the CITY 1 (X) should be reduced from approximately \$\$\$\$\$, as reflected in the Division’s assessment, to \$\$\$\$\$. Second, the Commission finds that the allocation percentage used to determine the taxable portion of the lease payments received for the CITY 2 and CITY 3 (X)s should be reduced from 76.8898% to 69.7690%. It is so ordered.

Appeal No. 07-1272

DATED this _____ day of _____, 2009.

Kerry Chapman
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION:

DATED this _____ day of _____, 2009.

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. §63G-4-302. 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 Ann. §§59-1-601 et seq. and 63G-4-401 et seq.

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