

03-1152
Audit
Signed 09/26/2005

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	FINDINGS OF FACT, CONCLUSIONS
)	OF LAW, AND FINAL DECISION
)	
Petitioner,)	Appeal No.: 03-1152
)	
v.)	Account No.: #####
)	Tax Type: Sales Tax
AUDITING DIVISION OF THE)	Audit Period: 5/13/02 – 9/30/02
UTAH STATE TAX COMMISSION,)	
)	Judge: Chapman
Respondent.)	

Presiding:

Marc B. Johnson, Commissioner
Kerry Chapman, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER
For Respondent: RESPONDENT REPRESENTATIVE 1, Utah Attorney General's Office
RESPONDENT REPRESENTATIVE 2, from the Auditing Division
RESPONDENT REPRESENTATIVE 3, from the Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on July 19, 2005. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax in question is sales and use tax.
2. The audit period in question is May 13, 2002 through September 30, 2002.
3. The Auditing Division issued a Statutory Notice of audit assessment for the audit period to the Petitioner on June 9, 2003, which assessed tax on certain transactions on which

the Petitioner had not collected and remitted sales taxes to the Tax Commission.

4. The Petitioner, PETITIONER, owns and operates the PETITIONER, a retail establishment that sells numerous types of items for use in the home, many medically-related, including mattresses, beds, chairs, and pillows.

5. The Division contends that the items on which it assessed tax were taxable because they were not eligible for the home medical equipment or supplies exemption and because the Petitioner did not obtain exemption certificates from his customers.

6. PETITIONER admits that, subsequent to the audit, he has learned that the items at issue were not eligible for exemption. PETITIONER admits that he did not obtain exemption certificates from each of his customers who purchased the items at issue.

7. PETITIONER contends, nevertheless, that it would be unfair to sustain the audit assessment, claiming that his competitors were also selling the same items tax-free and that he believes they continue to do so as of the Formal hearing. PETITIONER states that although he has discontinued the practice of selling the items at issue tax-free, he believes he is losing customers to other competitors who do so.

8. Although PETITIONER conducted an informal survey of some of his competitors in December 2003 and found six of them selling the items at issue tax-free, he has not collected any additional information since that time to support his claim. On this basis, PETITIONER asks the Commission to waive the taxes at issue because of the hardship the assessment will cause him and his business and in order to provide a level playing field for him and his competitors during the audit period.

9. The Division states that it cannot confirm or deny whether the Petitioner's competitors were in compliance during the audit period or as of the date of the hearing. Regardless, even if the competitors sell the items at issue tax-free, the Division argues that such a fact should not affect its assessment of tax to the Petitioner because he was caught.

APPLICABLE LAW

Under Utah law applicable to the audit period, Utah Code Ann. §59-12-104(39) provides that sales or rentals of home medical equipment or supplies are exempt from taxation. For purposes of this exemption, UCA §59-12-102(12)(a) defines "home medical equipment or supplies" to mean equipment or supplies that:

- (i) a licensed physician prescribes or authorizes in writing as necessary:
 - (A) for the treatment of a medical illness or injury; or
 - (B) to mitigate an impairment resulting from illness or injury;
- (ii) are used exclusively by the person for whom they are prescribed to serve a medical purpose; and
- (iii) are listed as eligible for payment under:
 - (A) Title XVIII, Social Security Act; or
 - (B) the state plan for medical assistance under Title XIX, Social Security Act."

The Commission has adopted Utah Admin. Rule R865-19S-23 ("Rule 23") to administer exemption transactions, which sets forth certain a vendor's responsibility concerning its exempt sales. Although the Rule has since been amended, the rule in place during the audit period provides, in pertinent part, as follows:

- A. 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 certificates for exempt sales of tangible personal property or services if the exemption category is shown on the exemption certificate forms.

....

E. 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.”

ANALYSIS

The parties do not dispute that the items at issue were taxable because they were not eligible for exemption as home medical equipment or supplies and because the Petitioner did not obtain an exemption certificate from each of his customers. The only dispute is whether the Petitioner should be relieved of his duty to pay the assessment because of his contention that his competitors also sold the items tax-free and that the industry was unaware of the need to collect tax on such sales.

The Division has submitted no evidence to advance a clear understanding of the industry's taxation practices. Although the Petitioner conducted an informal survey of several competitors in 2003, he has not conducted any follow-up surveys or provided any other evidence to show that they have sold or continue to sell the items at issue tax-free. Nor is there information available to show how many retailers in Utah sell items similar to those at issue to know whether the Petitioner's survey was statistically large enough to be persuasive. Furthermore, there is insufficient evidence to show that the industry as a whole was unaware of the need to collect tax on the items at issue. For these reasons, the Commission does not find the evidence sufficient to show that the Petitioner was treated differently than other retailers or that the industry, as a whole, was unaware of the need to collect tax. Accordingly, the Commission denies the Petitioner's claim for relief.

DECISION AND ORDER

Based upon the foregoing, the Commission sustains the Respondent's audit assessment and denies the Petitioner's request for the Commission to waive the taxes due. It is so ordered.

DATED this _____ day of _____, 2005.

Kerry Chapman
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION:

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

DATED this _____ day of _____, 2005.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Palmer DePaulis
Commissioner

Marc B. Johnson
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. §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 Ann. §§59-1-601 and 63-46b-13 et. seq.