

04-0182
Audit
Signed 08/17/2004

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Petitioner,)	AND FINAL DECISION
)	
v.)	Appeal No. 04-0182
)	Account No. #####
)	
AUDITING DIVISION OF)	
THE UTAH STATE TAX)	Tax Type: Sales Tax
COMMISSION,)	Tax Year:
)	Judge: Davis
Respondent.)	

Presiding:

G. Blaine Davis, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER

For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
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 June 15, 2004. 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 tax.
2. The year in question is 2003.
3. Petitioner is a domicile and a resident of the State of STATE 1. Prior to 2003,

Petitioner had never been a domicile of the State of Utah and had never resided in the State of Utah.

4. Petitioner is a (X) in the (X). During 2003, Petitioner was stationed in COUNTRY 1 with the (X), but received military orders transferring him to the State of Utah.

5. Approximately one month before Petitioner's transfer to Utah, and while the movers were at his house loading up his personal effects to move him to Utah, his wife was in an automobile accident which totaled their existing car.

6. Petitioner went to a company in COUNTRY 1 named COMPANY A, which was an authorized (X) automobile dealer, and negotiated to purchase a new (X) automobile.

7. Petitioner was concerned about the possibility of being required to pay sales tax, so he made a telephone call to the Utah State Tax Commission to see if sales tax would need to be paid if he purchased an automobile and had it delivered in Utah. He testified that the requirement to pay sales tax would have been a "deal breaker". He stated that the division of motor vehicles told him that if the car was purchased and paid for in CONTINENT, he would not be required to pay sales tax on the vehicle when it was registered in Utah. He further stated that the assurance given to him by the Division of Motor Vehicles was the deciding factor in his decision to purchase the new (X).

8. Petitioner then entered into a final agreement with COMPANY A.

9. He arranged the purchase through COMPANY A, an authorized (X) dealer. He made payment in full on July 14, 2003, as evidenced by a receipt for payment of \$\$\$\$\$. The receipt notes "payment in full on (X)." It is silent as to the passing of title.

10. On July 15, 2003, COMPANY A, which does business in COUNTRY 1, issued Petitioner a Bill of Sale. The Bill of Sale listed the price in U.S. dollars as \$\$\$\$\$. It is silent as to the passing of title.

11. The COMPANY A Bill of Sale identified the car by chassis and engine numbers, as well as model, year, make, and color. The Order Confirmation, also dated July 15, 2003, includes a cost breakdown. Included were ocean freight (\$\$\$\$\$) and marine insurance (\$\$\$\$\$). These were included in the total purchase price paid by Petitioner on July 14, 2003. Though the documents do not bear the acronym C.I.F., it is clear the Petitioner paid the cost of the goods, the cost of insurance, and the cost of the freight.

12. On August 20, 2003, Petitioner reported for duty at his Utah duty station.

13. On October 17, 2003, the car was completed. On that date, COMPANY B issued a second Bill of Sale. Near the top, it states, "For the total amount indicated below, COMPANY B CITY 1, COUNTRY 2 does sell and convey to (Petitioner's name and his address in COUNTRY 1) title to the following described (X) automobile:" It describes the car with the same serial and engine numbers listed in the previous Bill of Sale from COMPANY A and Order Confirmation. Costs are itemized. One line states, "CIF duty paid." No dollar figure is listed. The next line is "non-dutiable charges." Below that line is listed \$\$\$\$\$ for ocean freight, \$\$\$\$\$ for marine insurance, \$\$\$\$\$ for broker fee, and \$\$\$\$\$ for terminal fee. Also listed is \$\$\$\$\$ for a climate package. It lists a total price of \$\$\$\$\$. It also says,

COMPANY B hereby warrants that it is the lawful owner of the said above described automobile, that it is free from all encumbrances of whatsoever kind of nature and that it has the right to sell the said automobile as aforesaid.

14. Below that, it lists COMPANY C as the lien holder. (X) signed the Bill of Sale on behalf of COMPANY B. This Bill of Sale is also silent on the passing of title. Sometime thereafter, the vehicle was delivered for shipping.

15. Another document is the Certificate of Origin for a Vehicle. Respondent calls this document the MSO, or Manufacturer's Statement of Origin. This document is also dated October 17, 2003. It also identifies the vehicle by VIN, year, make, and model. It contains the following language:

I, the undersigned authorized representative of the company, firm or corporation named below, hereby certify that the new vehicle described above is the property of the said company, firm or corporation and is transferred on the above date and under the Invoice Number indicated to the following distributor or dealer.

16. The Certificate of Origin for a Vehicle lists the name of the distributor, dealer, etc. as PETITIONER at his address in COUNTRY 1. It lists the lien holder as COMPANY C. It states, "It is further certified that this was the first transfer of such new vehicle in ordinary trade and commerce." A representative of COMPANY B signed the certificate.

17. The car arrived at COMPANY D on November 18, 2003. On December 3, 2003, an officer employed in the Division of Motor Vehicles signed a Certificate of Inspection for the vehicle. This form is required of units registered for the first time in Utah. New units sold by licensed and bonded Utah dealers are excepted from this requirement.

18. On December 8, 2003, Petitioner received the car. He signed an acceptance certificate stating he had received the car specified on the coupon in satisfactory condition and that he accepted the conditions of the warranty. The acceptance certificate is silent on the passing of title.

19. On December 8, 2003, Petitioner also signed an odometer disclosure statement. It lists the transferor as COMPANY B. (X) signed it on October 17, 2003 on behalf of the COMPANY B. Like the other documents, it is silent on the passing of title.

20. On December 10, 2003, Petitioner registered the car in Utah. Petitioner became aware of a potential issue regarding sales tax being assessed when he registered the car. This prompted Petitioner to request a letter from the seller, COMPANY A.

21. In a letter dated January 29, 2004, M. Penrose, the sales person who assisted Petitioner with the purchase of the car from COMPANY A, wrote a letter on COMPANY A letterhead to clarify the intent of the parties. The letter says,

Please allow me to clarify our intent. PETITIONER paid the balance for the car on the 14th of July 2003 with a cheque issued by 'COMPANY C' as reflected by a sales receipt in PETITIONER'S possession. Our intent was that the title would be passed to him on the 15th of July 2003, as reflected by our company's 'Bill of Sale' bearing the aforementioned date in PETITIONER'S possession.

22. On February 4, 2004, Respondent sent Petitioner a statutory notice informing him that an audit had been performed for the period of November 1, 2003 to November 30, 2003 and it was Respondent's position that Petitioner owed sales tax and interest on the vehicle. Petitioner filed a timely appeal.

APPLICABLE LAW

Utah Code Ann. §59-12-103(1)(a) provides:

(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. §59-12-102(57) defines a "sale" as:

(57)(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.

(1) "Sale" includes:

- (i) installment and credit sales;
- (ii) any closed transaction constituting a sale;

• • • •

- (iv) any transaction if the possession of property is transferred but the seller retains the title as security for the payment of the price; and
- (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.

Utah Code Ann. §59-12-104(25) provides an exemption from sales tax for:

(25) property brought into the state by a nonresident for his or her own personal use or enjoyment while within the state, except property purchased for use in Utah by a nonresident living and working in Utah at the time of purchase;

Utah Administrative Code, Rule R865-19S-31 defines the time and place of a sale,

and states:

A. Ordinarily, the time and place of a sale are determined by the contract of sale between the seller and buyer. The intent of the parties is the governing factor in determining both time and place of sale subject to the general law of contracts. If the contract of sale requires the seller to deliver or ship goods to a buyer, title to the property passes upon delivery to the place agreed upon

unless the contract of sale provides otherwise.

Utah Code Ann. §70A-2-320 sets forth the legal implications and meaning of the terms C.I.F. and C & F as follows:

- (1) The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C&F, or C.F. means that the price so includes cost and freight to the named destination.
- (2) Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to
 - (a) put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and
 - (b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and
 - (c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract shown to cover the same payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and
 - (d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and
 - (e) forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer's rights.
- (3) Unless otherwise agreed the term C&F, or its equivalent has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.
- (4) Under the term C.I.F. or C&F unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

Utah Code Ann. §70A-2-401 provides for the passing of title as follows:

Each provision of this chapter with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies

irrespective of title to the goods except where the provision refers to such title. In so far as situations are not covered by the other provisions of this chapter and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 70A-2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the chapter on Secured Transactions (Chapter 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading

(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) if the contract requires delivery at destination, title passes on tender there.

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

(a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

(b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such reversion occurs by operation of law and is not a "sale".

Utah Code Ann. §70A-2-501 provides for an insurable interest in goods, and the manner of the identification of goods as follows:

(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are nonconforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs.

(a) when the contract is made if it is for the sale of goods already existing and identifiable;

(b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

(c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting whichever is longer.

(2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone he may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.

(3) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

Utah Code Ann. §70A-2-502 provides for the buyer's right to goods if the seller fails

to deliver the goods, as follows:

(1) Subject to Subsections (2) and (3) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if:

(a) in the case of goods bought for personal, family, or household purposes, the seller repudiates or fails to deliver as required by the contract; or

(b) in all cases, the seller becomes insolvent within ten days after receipt of the first installment on their price.

(2) The buyer's right to recover the goods under Subsection (1)(a) vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

(3) If the identification creating his special property has been made by the buyer he acquires the right to recover the goods only if they conform to the contract for sale.

Utah Code Ann. §70A-2-503 provides for the manner of the seller's tender of delivery

as follows:

(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this chapter, and in particular

(a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession, but

(b) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

(2) Where the case is within the next section respecting shipment tender requires that the seller comply with its provisions.

(3) Where the seller is required to deliver at a particular destination tender requires that he comply with Subsection (1) and also in any appropriate case tender documents as described in Subsections (4) and (5) of this section.

(4) Where goods are in the possession of a bailee and are to be delivered without being moved

(a) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgement by the bailee of the buyer's right to possession of the goods; but

(b) tender to the buyer of a nonnegotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the nonnegotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

(5) Where the contract requires the seller to deliver documents

(a) he must tender all such documents in correct form, except as provided in this chapter with respect to bills of lading in a set (Subsection (2) of Section 70A-2-323); and

(b) tender through customary banking channels is sufficient and dishonor of a draft accompanying the documents constitutes nonacceptance or rejection.

Utah Code Ann. §41-1a-102 contains the definitions for the Motor Vehicle Act, and

those relevant definitions are:

(9) "Certificate of Title" means a document issued by a jurisdiction to establish a record of ownership between an identified owner and the described vehicle, vessel, or outboard motor.

••••

(40)(a) "Owner" means a person, other than a lienholder, holding title to a vehicle, vessel, or outboard motor whether or not the vehicle, vessel, or outboard motor is subject to a security interest.

(b) If a vehicle is the subject of an agreement for the conditional sale or installment sale or mortgage of the vehicle with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or mortgagor, or if the vehicle is the subject of a security agreement, then the conditional vendee, mortgagor, or debtor is considered the owner for the purposes of this chapter.

(c) If a vehicle is the subject of an agreement to lease, the lessor is considered the owner until the lessee exercises his option to purchase the vehicle.

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(59) "Title" means the right to or ownership of a vehicle, vessel, or outboard motor.

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(62) "Transferee" means a person to whom the ownership of property is conveyed by sale, gift, or any other means except by the creation of a security interest.

(63) "Transferor" means a person who transfers his ownership in property by sale, gift, or any other means except by creation of a security interest.

Utah Administrative Code, Rule R865-19S-30 provides that value or sales price for sales tax purposes is determined by "the bill of sale or other written evidence of value. . . ."

Black's Law Dictionary, Fifth Edition, defines "Bill of Sale" as follows:

Bill of Sale. In contracts, a written agreement, by which one person assigns or transfers his right to or interest in goods and personal chattels to another. Legal document which conveys title from seller to buyer.

DISCUSSION

The parties agree on two things: First, if Petitioner had purchased the automobile, paid for it and taken possession of the car in COUNTRY 1, he would not owe sales tax on the purchase of the vehicle; second, if Petitioner had ordered the car in COUNTRY 1, paid for it in Utah and took possession of it in Utah, he would owe sales tax on the purchase of the vehicle.

Both parties acknowledge that Utah Code Ann. §59-12-103(1)(a) imposes a sales tax upon the purchase at retail of motor vehicles, and therefore, if this sale was completed in Utah, it is subject to sales tax. However, the critical issue is whether the purchase of this vehicle is exempt pursuant to the provisions of Utah Code Ann. §59-12-104(25) which exempts:

"(25) property brought into the state by a nonresident for his or her own personal use or enjoyment while within the state, except property purchased for use in Utah by a nonresident living and working in Utah at the time of purchase;"

The parties also agree that the sales tax is a transaction tax, and that a purchase by Petitioner is approximately the same thing as a "sale" as defined by Utah Code Ann. §59-12-102(57). Therefore, because the tax is a transaction tax, and is based upon a sale or purchase, it is critical to examine the passage of title and the moment at which such title is transferred. (Hales Sand and Gravel, Inc. v. Utah State Tax Commission, 842 P.2d 887 (Utah 1992).

The position of Petitioner is that the title to the vehicle at issue passed from COMPANY A to him on July 15, 2003, as evidenced by the Bill of Sale issued to him by

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COMPANY A on that date. His position is that a Bill of Sale conveys the title, because that expresses the manner and conditions agreed to by the parties. Utah Code Ann. §70A-2-401(2), provides:

"(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods. . . ." (Emphasis added).

The position of Petitioner is that he and COMPANY A explicitly agreed that title passed in COUNTRY 1 on July 15, 2003, and the passage of such title was clearly expressed by his complete payment for the car in COUNTRY 1 and the Bill of Sale issued to him by COMPANY A. Thereafter, COMPANY A clearly stated their understanding and intention of the agreement in their letter dated January 29, 2004 which said, "Our intent was that the title would be passed to him on the 15th of July 2003, as reflected by our company's "Bill of Sale" bearing the aforementioned date in PETITIONER'S possession."

Petitioner further argues that the contract is complete upon the agreement of the parties and the identification of the goods to the contract, pursuant to Utah Code Ann. §70A-2-401, and 70A-2-501. Utah Code Ann. §70A-2-501 specifically provides that identification can be made at any time and in any manner explicitly agreed to by the parties, and Petitioner points to the identification by vehicle description, including the year, make, model, color, chasis number, and engine number. Therefore, he argues, there is clearly sufficient identification of the vehicle to the contract and a specific Bill of Sale, constituting the legal title to the vehicle, which were transferred in CONTINENT, and show the sale being made to him on July 15, 2003 at CITY 2 COUNTRY 1.

Petitioner also makes reference to Utah Code Ann. §41-3-408(2)(a), which refers to a

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"Bill of Sale or any other document that transfers title". However, it is noted that that section specifically refers and applies to "nonconforming vehicles", and therefore does not apply specifically to the vehicle purchased by Petitioner. Nevertheless, it is some indication that a Bill of Sale is deemed to be a document which transfers title.

The position of Respondent is that Utah Code Ann. §59-12-104(25) refers to the "time of purchase" of the vehicle as the time when title passes. They also rely upon Hales Sand and Gravel, supra, as well as Matrix Funding Corporation v. Utah State Tax Commission, 52 P.3d 1282 (Utah 2002). Based upon those cases, the Commission has adopted Rule R865-19S-31, (Rule 31) which states:

"Ordinarily, the time and place of a sale are determined by the contract of sale between the seller and buyer. The intent of the parties is the governing factor in determining both time and place of sale subject to the general law of contracts. If the contract of sale requires the seller to deliver or ship goods to a buyer, title to the property passes upon delivery to the place agreed upon unless the contract of sale provides otherwise." (Emphasis added).

Based upon that rule, and Respondent's interpretation of Matrix and Hales, supra, it argues that title passed to Petitioner upon delivery to Petitioner in the State of Utah. Respondent further argues that the vehicle was not yet fully constructed and was not sufficiently identifiable for a title to transfer at the time of the Bill of Sale on July 15, 2003.

In reviewing the respective positions of the parties, it is uncontested that the issue is whether the acquisition of this automobile is exempt pursuant to the provisions of Utah Code Ann. §59-12-105(25) as "property brought into the state by a nonresident for his or her own personal use or enjoyment while within the state," or whether it is subject to tax as "property purchased for use in

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Utah by a non-resident living and working in Utah at the time of the purchase". If the title to the automobile was transferred by the Bill of Sale from COMPANY A to Petitioner dated July 15, 2003, as Petitioner contends, then it was not purchased "by a non-resident living and working in Utah at the time of the purchase". On the other hand, if the title to the vehicle was transferred on the date of delivery to Petitioner in Utah, then it was purchased "by a non-resident living and working in Utah at the time of purchase", and is therefore not exempt and is subject to sales tax.

The term "purchase" is not statutorily defined. Nevertheless, it appears that the term is substantially the reverse side of "sale" which is defined in Utah Code Ann. §59-12-102(57) as:

"Any transfer of title, exchange, or barter, conditional or otherwise, in any manner, of tangible personal property or any other taxable transaction . . . for consideration." (Emphasis added).

The term "sale" includes "any closed transaction constituting a sale".

In trying to identify a closed transaction constituting a sale, it is important to identify the transaction at issue. In reviewing the facts of this case, the Commission determines that the transaction that is at issue is the one between Petitioner and COMPANY A. Petitioner had privity of contract with COMPANY A, but Petitioner did not have any privity of contract or other relationship with either COMPANY B or COMPANY D. Petitioner's contract was only with COMPANY A, and COMPANY A then entered into business arrangements with COMPANY B and COMPANY D in order to be able to complete its transaction. Pursuant to Rule 31, the time and place of the sale are determined by the contract between the seller and the buyer. In determining that time and place of the sale, the intent of the parties is the governing factor. If the contract requires the seller to deliver or ship the goods, then the title to those goods passes upon delivery unless the contract provides

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otherwise. The provisions of that contract might be specifically stated, or terms of the contract might be inferred from other provisions of the contract.

In this case, Respondent has argued that the contract requires the seller to deliver or ship the goods, and therefore the title passes on delivery of the goods in Utah. However, an examination of the contract between COMPANY A and Petitioner reveals that the sale was made to Petitioner and was to be delivered to him in CITY 2, COUNTRY 1. COMPANY A forwarded that agreement to COMPANY B, and they issued to him an order confirmation indicating that they had received the order for the car and that it was to be delivered to him in CITY 2, COUNTRY 1. However, they recognized that he may be changing his address, and so they issued to him an address change coupon which authorized him to have the car sent to him at another location and address, and to later provide them with the address to which the car could be shipped based upon later instructions given by Petitioner. Therefore, the contract between Petitioner and COMPANY A did not require COMPANY A to deliver the vehicle to the State of Utah. The only document presented by either party of the agreement between Petitioner is the Bill of Sale which indicates the address of CITY 2, COUNTRY 1. It could be inferred that the document could have been delivered elsewhere in CONTINENT, such as to a port for shipping, but it is clear that COMPANY A was not required to deliver the vehicle to Petitioner in Utah. Petitioner was required to pay the freight and insurance to ship the car from CONTINENT to the United States. If COMPANY A had been required to do the shipping, then it would have also paid for the shipping and insurance. (See Utah Code Ann. §70A-2-320).

In Thriftway Co. v. U.S. Department of Energy, 920 F.2d 23 (Temp. Emer. CT. of

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App. 1990), it is stated:

Without strong evidence to the contrary, title and risk of loss pass to the purchaser at the time of shipment under the "C&F terms". In addition, in Klochner, Inc. v. M/V Faurei, 1982 U.S. Dist. Lexus 9760, the court cited G. Gilmore and C. Black, the Law of Admiralty, Section 3-7, at 106-07 (Second Ed. 1975) as follows:

"The principle shipment term used in overseas transactions has long been C.I.F. (Cost, Insurance, Freight). The C.I.F. term is followed by the name of the port of destination: when goods are shipped from Liverpool to New York, the term reads "C.I.F. New York). A C.I.F. price quotation includes the invoice price of the goods plus insurance and freight to the named port of destination. The seller completes his performance by procuring the necessary documents (bill of lading, insurance policy or certificate and invoice plus any others that may be called for by the particular contract) and forwarding them to the buyer under a C.I.F. term. The buyer (for whose benefit the insurance is carried) bears the risk of loss in transit." (Emphasis added).

Based upon the way in which the parties dealt with the shipping costs and insurance costs for the automobile, it can be inferred that all responsibility for the vehicle was being passed from COMPANY A to Petitioner at the time the vehicle was delivered for shipment in CONTINENT.

Respondent relies upon Utah Code Ann. §70A-2-401(2)(b) which states: "If the contract requires delivery at destination, title passes on tender there." Neither party referred to subparagraph (a) immediately before the above-cited paragraph. Subparagraph (a) says:

"If the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment." (Emphasis added)

An analysis of this statute will reveal why the Matrix and Hales Sand and Gravel

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cases, supra, do not require a finding that title to the vehicle was transferred when Petitioner received the vehicle in Utah. Subparagraph (d) says that the title is passed at the destination "if the contract requires delivery at destination. In this case, there is no evidence that the contract with COMPANY A required delivery in Utah. Instead, the contract with COMPANY A authorized the seller to send the goods to the buyer, but did not require COMPANY A to deliver those goods to Petitioner in Utah. Therefore, under paragraph (2)(a) of §70A-2-401, the title passes to the buyer at the time and place of shipment.

In addition, Utah Code Ann. §70A-2-401(1) specifically provides that "title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties". The only evidence presented in this proceeding is that both the buyer and the seller agreed that title to the goods was transferred at the time of the Bill of Sale from COMPANY A to Petitioner on July 15, 2003. Respondent has argued that the goods were not sufficiently completed to be "identified" and therefore could not be conveyed by the Bill of Sale on July 15, 2003. However, Utah Code Ann. §70A-2-401 specifically provides that:

"(1) Title to goods cannot pass under a contract . . . (Section 70A-2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions . . . title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties." (Emphasis added).

While the parties did not specifically state in the writings provided in evidence that title would pass on the delivery of the bill of sale, Petitioner testified that it did so, and the letter presented and signed by COMPANY A on January 29, 2004 confirmed the representations of

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Petitioner. While Respondent argued that this was not sufficient evidence of intent, it did not present any evidence that the agreement of the parties (Petitioner and COMPANY A) was contrary to the representations of Petitioner. Therefore, the evidence presented by Petitioner of his intent and the intent of COMPANY A is unrefuted.

Utah Code Ann. §70A-2-501 also provides that identification of goods to a contract "can be made at any time and in any manner explicitly agreed to by the parties". In the absence of an explicit agreement, identification occurs (a) when the contract is made if it is for the sale of goods already existing and identified; (b) if the contract is for the sale of future goods . . . when goods are shipped, marked, or otherwise designated by the seller as goods to which the contract refers. Therefore, even if the goods were not sufficiently in existence at the time of contracting between Petitioner and COMPANY A, then sufficient identification occurs "when the goods are shipped, marked, or otherwise designated by the seller as goods to which the contract refers". The latest time at which that could have occurred would have been the date on which they were shipped, but more likely the date on which the automobile was completed, which was October 17, 2003 while the car was still in CONTINENT.

At the time of the contract between Petitioner and COMPANY A, the goods were sufficiently identified to be a "special property" and for Petitioner to obtain an insurable interest. Therefore, if there was an insurable interest, then the Commission finds they were sufficiently identified. Also, once the buyer has a "special property", he may recover them from the seller if the seller fails to deliver. (Utah Code Ann. §70A-2-502)

Based upon all of the foregoing, the Commission finds that Petitioner received the

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"title" to the vehicle from COMPANY A pursuant to the bill of sale from COMPANY A dated July 15, 2003. Although the "Certificate of Title" was not issued until after the vehicle reached Utah, the certificate is only evidence of the title and does not in and of itself convey title. Utah Code Ann. §41-1a-102 specifically provides that a "certificate of title" is a document "issued by a jurisdiction to establish a record of ownership between an identified owner and the described vehicle, vessel, or outboard motor". (Emphasis added). Therefore, the Certificate of Title is a record of ownership, but the Bill of Sale, in this case, was the document which conveyed the title from COMPANY A to Petitioner.

In this matter, a second Bill of Sale was also issued by COMPANY B on October 17, 2003 in which COMPANY B represented that it was the lawful owner of the automobile and that it was free of encumbrances and that it had the right to sell the automobile. While that is an important document, in this matter the Commission finds that it was much like a Quit-Claim Deed in which COMPANY B transferred any interest it may have in and to the vehicle to Petitioner, but the right to the vehicle was transferred to Petitioner by way of the Bill of Sale from COMPANY A to Petitioner on July 15, 2003.

One other small factor is that when Petitioner tried to register his automobile, he was required by the Division of Motor Vehicles to get a Certificate of Inspection before the automobile could be registered. Such a Certificate of Inspection is not required for automobiles purchased from a motor vehicle dealer within the State of Utah. Therefore, if the Commission were to rule in favor of Respondent, there would be one division of the State Tax Commission (Auditing Division) finding that the sale had occurred within the State of Utah, and another division of the State Tax

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Commission (Motor Vehicle Division) finding that the vehicle was not sold within the State of Utah. The Commission determines that such contrary actions by two separate divisions in the same agency would not be appropriate unless such a result was clearly required by statute.

The Commission also determines that Hales Sand and Gravel does not require a contrary decision, and that this decision is not inconsistent with the ruling of the Utah Supreme Court or the Tax Commission in Hales Sand and Gravel, *supra*, because both holdings are consistent with Utah Code Ann. §70A-2-401. In Hales Sand and Gravel, the contract required the delivery at the destination by Hales Sand and Gravel. In this case, the agreement authorized the seller to send the goods to the buyer, but it did not require the seller to deliver the goods at the destination. Therefore, the title in this matter passed to the buyer at the time and place of shipment if not previously passed by the Bill of Sale, i.e., by the specific agreement of the parties.

The decision in this case is also consistent with the holding of the Supreme Judicial Court of Massachusetts in Circuit City Stores, Inc. v. Commissioner of Revenue, 790 N.E. 2d 636, 439 Mass. 629 (Mass. 2003) in which it was held that the title to goods sold by a store in Massachusetts, and fully paid for in Massachusetts was a sale within the State of Massachusetts, notwithstanding that the goods were actually picked up in New Hampshire specifically to avoid tax thereon.

The Commission also believes that the automobile was clearly identifiable and identified to the contract which occurred within COUNTRY 1. Utah Code Ann. §70A-2-501(1)(a) specifically provides that in the absence of an explicit agreement, "identification occurs when the contract is made if it is for the sale of goods already existing and identified.

In Holstein v. Greenwich Yacht Sales, Inc., 404 A.2d 842 (Rhode Island 1979), the Rhode Island Supreme Court held that a yacht, identified by hull number, model, and length was sufficient identification to a contract, even though the yacht was not completed to the purchaser's specifications.

In Kinetics Technology International Corp. v. Fourth National Bank of Tulsa, 705 F.2d 396 (10th Cir. 1983), the court dealt with whether title had passed to Kinetics, thus trumping the security interest asserted by the bank when it seized assets located at a business to which the bank had loaned money. Some of those assets were the subject of a contract between Kinetics and the debtor. Some of the assets had been supplied by Kinetics, while Kinetics had made progress payments on others. The court said,

Accordingly, we hold that a sale of goods as defined by the UCC had occurred by the time the Bank seized the Box Units and the KTI Goods, the goods having been identified to the contract and title having passed for a price. n7 See Jones v. One Fifty Foot Gulfstar Motor Sailing Yacht, Hull No. 01, 625 F.2d 44 (5th Cir. 1980) (title to boat passed to buyer and sale occurred when boat although incomplete was identified to contract); Draper v. Minneapolis-Moline, Inc., 100 Ill. App. 2d [**20] 324, 241 N.E.2d 342 (1968) (sale occurred when tractor identified to buyer although no payments had been made and work on the tractor remained to be done); Russell v. Transamerica Insurance Co., 116 Mich. App. 93, 322 N.W.2d 178 (1982) (title to boat passed when identified although not deliverable); Holstein v. Greenwich Yacht Sales, Inc., R.I., 122 R.I. 211, 404 A.2d 842 (1979) (buyer obtained special property interest when boat identified to contract although incomplete).

Kinetics, supra, at 402.

DECISION AND ORDER

Based upon the foregoing, the Tax Commission determines that the only evidence

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presented was that the intent of both Petitioner and COMPANY A was that the title of the vehicle at issue was conveyed to Petitioner by way of a Bill of Sale on July 15, 2003. The Bill of Sale adequately identified the vehicle to be sold, and payment was made in full in COUNTRY 1. The Bill of Sale indicated that the automobile was transferred to Petitioner in CITY 2, COUNTRY 1 and the purchase price was tendered and paid in full in COUNTRY 1. On July 15, 2003, Petitioner was not living and working in Utah.

Even if it is assumed that the vehicle did not pass on July 15, 2003, the very latest time it would have passed was October 17, 2003 when the car was completed in CONTINENT. The title to the vehicle did not pass on delivery in Utah, because the contract was with COMPANY A and was not with either the COMPANY B or COMPANY D. Accordingly, pursuant to the provisions of Utah Code Ann. §59-12-104(25), the purchase of the (X) automobile by Petitioner was exempt from Utah sales tax. It is so ordered.

DATED this _____ day of _____, 2004.

G. Blaine Davis
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 _____, 2004.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

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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.

GBD/ssw/04-0182.fof