

04-0222
SALES AND USE
TAX YEARS: 2000, 2001, 2002, 2003
SIGNED: 02-25-2005

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	ORDER TO VACATE PRIOR
)	ORDER AND TO WAIVE TAX
Petitioner,)	
)	Appeal No. 04-0222
v.)	
)	Account No. #####
AUDITING DIVISION OF)	Tax Type: Sales and Use Tax
THE UTAH STATE TAX)	Audit Period: 10/01/00 - 3/31/03
COMMISSION,)	
)	Judge: Chapman
Respondent.)	

On February 25, 2005, the Tax Commission issued an Order in an Initial Hearing in this matter. In that Order, the Commission sustained the assessment that the Division had imposed on the Petitioner concerning its sales of coin-operated car washes. Commissioner Marc Johnson filed a dissenting opinion. The Petitioner chose not to request a formal hearing.

On June 20, 2005, after the decision became final, Commissioners Marc Johnson and Bruce Johnson met with various industry representatives who expressed concerns over their practical ability to comply with the ruling. They also presented certain factual information regarding industry practices that they felt the Commission did not consider in its ruling. (This Commission has repeatedly encouraged taxpayers to express their concerns about the administration of the tax laws to the Commission, provided that no adversarial proceeding is pending before the Commission.) The Commissioners also met with the Respondent to discuss the Respondent's ability to fairly implement the ruling. Respondent does not dispute the industry

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practice as represented in the June 20, 2005 meeting. As a result of those discussions, Commissioner Hendrickson now believes that the position stated in Commissioner Marc Johnson's opinion is correct. Pursuant to Utah Code Ann. § 59-1-205(c), if a Commission vote results in a tie, the position of the taxpayer is considered to have prevailed. Accordingly, if this issue were presented to the Commission by another taxpayer, the taxpayer's position would prevail.

The Commission believes that it is not in the interest of justice to require other taxpayers to expend their time and resources to pursue administrative appeals when the Commission has already effectively redetermined its position. Nor is it in the interest of justice to subject Petitioner in this case to a ruling that the Commission believes it would overturn on a subsequent appeal, even though the taxpayer chose not to pursue a formal hearing. Accordingly, the Commission believes it is appropriate, in these extraordinary circumstances, to vacate the February 25, 2005, decision and to find for Petitioner for the reasons set forth in Commissioner Marc Johnson's dissent, a copy of which is attached hereto and is incorporated herein in its entirety. Any tax, penalty, and interest that was imposed by the audit assessment at issue that is associated with sales of cleaning or washing of tangible personal property by a coin-operated car wash machine, regardless of whether any particular sale was actually paid for by coin, currency, credit card, token, code, or a cashier-assisted sale, is abated.

The Commission will propose an administrative rule to implement this decision and hereby instructs the Division to amend all current audits in accordance with this decision.

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BY ORDER OF THE UTAH STATE TAX COMMISSION.

DATED this _____ day of _____, 2005.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Palmer DePaulis
Commissioner

Marc B. Johnson
Commissioner

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BEFORE THE UTAH STATE TAX COMMISSION

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Presiding:
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER REP. 1, PETITIONER
PETITIONER REP. 2, PETITIONER
For Respondent: RESPONDENT REP. 1, Assistant Attorney General
RESPONDENT REP. 2, Auditing Division
RESPONDENT REP. 3, Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5 on August 11, 2004.

This matter is based upon a sales tax audit for the period October 1, 2000 through March 31, 2003. The Petitioner disagrees with the amounts of sales tax found due by Auditing Division (“Division”) on its car wash sales. The Petitioner operates its car wash service with

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machines that may be coin-operated and that are attached to its convenience stores. The car wash machines are operated by the customer either inserting coins or bills into the machine or inputting a code received after paying at the cash register or at the gas pump.

The Petitioner did not collect tax on its sales associated with its coin-operated car wash machines, believing any sales associated with a car wash machine that could be coin-operated was exempt. The Division, however, assessed tax on those sales where the customer operated the car wash machine by inputting a code bought at the cash register or at the gas pump. The Division did not assess tax on those sales where the customer operated the car wash machine by inserting coins or other money into the car wash machine.

APPLICABLE LAW

Utah Code Ann. §59-12-103(1) provides that a tax is imposed on the amounts paid or charged for the following transactions, including “except as provided in [Subsection 59-12-104\(7\)](#), amounts paid or charged for cleaning or washing of tangible personal property[.]” UCA §59-12-103(1)(h).

The Legislature has exempted from taxation certain sales. Utah Code Ann. §59-12-104(43) provides that “sales of cleaning or washing of tangible personal property by a coin-operated car wash machine” are exempt from taxation.

In 1998, the Commission issued two private letter rulings, Tax Commission Private Letter Rulings 97-082 (“PLR 97-082”) and 98-003 (“PLR 98-003”), concerning the car wash exemption provided in Section 59-12-104(43). The Commission found that the exemption

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did not apply to car wash sales where the customer paid a cashier or paid at the gas pump and received a code or a token to operate the coin-operated car wash machine.

Tax Commission Publication 25, Sales and Use Tax General Information, Revised 10/04 (“Publication 25”) provides general information about Utah sales and use tax to persons who collect and remit such taxes. Page 9 of the publication provides a list of product-based sales that are exempt from taxation, which includes “[s]ales through coin-operated car washes and dry cleaning and laundry machines.”

DISCUSSION

At issue are sales to clean or wash motor vehicles, which are tangible personal property. Such sales are taxable under Section 59-12-103(1)(h), which provides that all sales to clean or wash tangible personal property are taxable, except for those sales described in Section 59-12-104(7) (sales made with a coin-operated laundry or dry cleaning machine). Were Section 59-12-103(1)(h) read in isolation, all sales made with a coin-operated car wash machine would be taxable because they are not described in the exception from taxation provided for coin-operated laundry and dry cleaning machines.

However, the Commission must also consider that the Legislature has specifically exempted from taxation in Section 59-12-104(43) those “sales of cleaning or washing of tangible personal property by a coin-operated car wash machine.” While this exemption appears to be in direct conflict with the Legislature’s language in Section 59-12-103(1)(h), it is nevertheless a specific exemption on certain sales made taxable under that section. For this reason, the Commission finds, upon considering the whole of the tax code to determine the Legislature’s

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intent, that the exemption provided in Section 59-12-104(43) is specific and valid, so that “sales of cleaning or washing of tangible personal property by a coin-operated car wash machine” are exempt from taxation.

The Commission finds that Section 59-12-104(43) clearly limits the sales tax exemption at issue to those “sales of cleaning or washing by a coin-operated car wash machine.” Before enacting this exemption, the Revenue and Taxation Interim Committee was told that it is much easier for a cashier to collect the sales tax than to adjust the coin-operated machines. Only when a customer operates a car wash machine by inserting coins or other money into it is it considered a coin-operated machine. When a customer purchases a code to operate the machine instead, the machine is a code-operated machine. The exemption is clearly not extended to sales of washing and cleaning by a code-operated car wash machine. When one machine has the capability of being both a coin-operated machine and a code-operated machine, as in this case, the seller is required to collect sales tax when the machine is used to sell non-exempt car washes. Because the Petitioner did not collect sales tax when it sold car washes by a machine that was not coin-operated, the Division’s audit assessment is correct.

Nor does the Commission find the language of Publication 25 to be confusing or misleading, as the Petitioner contends. The publication adequately paraphrases the statute when it provides that “sales through coin-operated car washes” are exempt. For these reasons, the Petitioner’s appeal is denied. Nevertheless, the Commission does not find the Petitioner’s confusion between a coin-operated car wash machine and a code-operated car wash machine to

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be totally without merit or unreasonable. For this reason, the Commission waives any penalties or interest associated with the audit.

DECISION AND ORDER

Based upon the foregoing, the Commission waives any penalties and interest associated with the audit assessment. The remainder of the audit assessment is sustained. It is so ordered.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed to the address listed below and must include the Petitioner's name, address, and appeal number:

Utah State Tax Commission
Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

BY ORDER OF THE UTAH STATE TAX COMMISSION.

DATED this _____ day of _____, 2005.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

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Palmer DePaulis
Commissioner

DISSENT

I respectfully dissent from my colleagues in this matter. I do not believe that the exemption found in Section 59-12-104(43) is correctly interpreted in either the majority decision or in PLR 97-082 and PLR 98-003. The statute specifically exempts “sales of cleaning or washing by a coin-operated car wash machine.” I believe that the term “coin-operated car wash” has a plain meaning known to the general public and that it identifies a particular type car wash facility or machine. In fact, the Dex/Qwest Official Directory (Salt Lake City through September 2005), on page 12 of the Yellow Pages Index, lists two categories for car washes: 1) Car Wash & Polish; and 2) Car Wash & Polish – Coin Operated. In standard terms, a car wash machine or facility is either coin-operated or not coin-operated. A coin-operated car wash does not lose its identify as such should a customer purchase a token or a code to operate the machine instead of inserting coins.

In contrast to car washes, UCA §59-12-104(42) provides an exemption for “sales or rentals of the right to use or operate for amusement, entertainment, or recreation a coin-operated amusement device as defined in Section 59-12-102[.]” UCA §59-12-102(13)(b) specifically excludes from the term “coin-operated amusement device” those devices that allow the seller to collect the sales tax at the time the device is activated and operated by a person inserting coins into the device.” While the Legislature has specifically excluded the coin-

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operated amusement device sales from exemption when the seller has an opportunity to collect the sales tax, it provided no such exclusion for coin-operated car wash machines. When the seller has an opportunity to collect the sales tax.

The majority opinion, as well as the private letter rulings, take the term “coin-operated car wash,” a term that is generally known, and defines it in such a way that coin-operated car washes are not coin-operated car washes under certain circumstances. Such a decision amends the statute to differentiate between certain coin-operated car wash machine sales and other coin-operated car wash machine sales. Such an addition to the statutory language was not included by the Legislature, unlike its addition for “coin-operated amusement devices.” It may well be good policy, and might possibly implement the Legislature’s intent. Nevertheless, the additional language is not in the statute, and, as a result, a generally recognized term is not afforded its plain and ordinary meaning. Accordingly, I would find that the audit assessment is inappropriate, given that it imposes a tax contrary to the plain meaning of Section 59-12-104(43).

Even had I agreed with the interpretation found in the majority decision, I would not have imposed the audit assessment under these circumstances. Rather, I would have waived the entire assessment and required prospective compliance only. Although I believe Section 59-12-104(43) has a clear meaning that is different than my colleagues’ interpretation, at the very least, the language is confusing and ambiguous. Parties unclear about the exemption have requested clarification in the past through private letter rulings. The Commission had an opportunity to explain its interpretation in Publication 25, but instead published a paraphrase of the statute that was no less confusing or ambiguous.

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Rather than imposing a tax based on its view of changes in the industry, the Commission had better options. First, we could have sought legislative change, similar to the language provided in Section 59-12-102(13)(b). In the alternative we could have entered into rule making, to clarify the statute. Such changes could have been incorporated into Publication 25. Instead we chose to expect taxpayers to understand our thinking. I believe the Petitioner's reliance upon Publication 25, to be reasonable and the imposition of tax to be unreasonable.

Marc B. Johnson
Commissioner