

Appeal No. 06-0125

06-0125

AUDIT

SIGNED 11-06-2006

COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, M. JOHNSON, D. DIXON

GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

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IN THE MATTER OF:	)	<b>FINAL DECISION</b>
	)	
	)	Appeal No. 06-0125
PETITIONER	)	
	)	Tax Type: Sales Tax
	)	
	)	Judge: Phan
	)	

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**Presiding:** Marc Johnson, Commissioner  
Bruce Johnson, Commissioner  
Jane Phan, Administrative Law Judge

**Appearances:**  
For Petitioner: PETITIONER REP. 1, Attorney at Law  
PETITIONER REP. 2, Attorney at Law  
PETITIONER REP. 3, General Manager, COMPANY 1 DEPARTMENT

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on April 24, 2006, on PETITIONER's ("PETITIONER") Petition for Declaratory Order regarding Tax Commission Private Letter Ruling 05-015, under Utah Admin. Rules R861-1A-31 & 34 and Utah Code Sec. 63-46B-21. In this Declaratory Order process there is no opposing party and the Commission's decision is based on the facts as represented by PETITIONER. Should it be determined that the facts differ from Petitioner's representation in

this matter the Commission's conclusion may change accordingly.

FACTS AS REPRESENTED BY PETITIONER

1. A representative of PETITIONER called and discussed over the telephone with Tax Commission employees whether PETITIONER's proposed activities in Utah would be subject to sales or use tax. From these conversations it was PETITIONER's understanding that its proposed activities in Utah would not be taxable because the ( X ) or repair of real property was a non-taxable event.

2. In reliance on the advice for the Tax Commission, PETITIONER entered into a contract for COMPANY 1 DEPARTMENT services to occur in Utah without the inclusion of sales or use tax charges.

3. Later PETITIONER's accountants sent a letter to the Tax Commission dated DATE requesting a ruling on the sales and use tax implications of the proposed contract charges, so that they would have the Tax Commission's position in writing. Specifically PETITIONER asked about the tax implication of the following: 1) ( X ) charges; 2) ( X ) charges; and 3) ( X ) charges. PETITIONER received a letter dated DATE from EMPLOYEE, Taxpayer Services Division in which she indicated that there would be no sales or use tax imposed upon the ( X ) charges. However, PETITIONER would be required to collect and remit sales taxes on the ( X ) charges and the ( X ) charges.

4. As EMPLOYEE's written advice was different from the advice PETITIONER had received through the telephone conversations, PETITIONER requested a Private Letter Ruling. The Private Letter Ruling was dated DATE and signed by Commissioner Marc B. Johnson. The Private Letter Ruling stated that all three charges, ( X ), ( X ) and ( X ) charges, were subject to sales or use tax. It is the appeal of this ruling on the issues of the ( X ) and ( X ) charges that is the subject of this hearing. PETITIONER did not contest the Commission's ruling in regard to the ( X ) charges.

5. PETITIONER is a STATE 1 limited liability company.

6. The question before the Commission involves PETITIONER's participation in the clean-up of the COMPANY 1 site located in the mouth of CANYON ("COMPANY 1"). PETITIONER subcontracted with COMPANY 2 to ( WORDS REMOVED ). To accomplish this PETITIONER transported a ( PORTION REMOVED ).

7. PETITIONER owns the ( PORTION REMOVED ) that it moves from site to site around the country. This equipment has been owned by PETITIONER for several years and has formerly been used to ( PORTION REMOVED ) in STATE 2 and STATE 3 without collecting sales/use tax. PETITIONER pays Utah sales tax on all parts and materials purchased to repair or replace items of machinery and equipment on the ( X ) delivered to the Utah job site.

8. PETITIONER's activities in Utah are as a subcontractor and have been entered into as part of the overall ( X ) of the COMPANY 1. COMPANY 2 (the general contractor) is obligated to provide the full service of ( PORTION REMOVED ) for a single unit fee. The general contractor is responsible for ( PORTION REMOVED ) from the designated ( PORTION REMOVED ) and moving the ( PORTION REMOVED ) equipment where it is ( PORTION REMOVED ) through its equipment. PETITIONER, acting as the subcontractor, ( PORTION REMOVED ) equipment that ( PORTION REMOVED ). The general contractor then is responsible for ( PORTION REMOVED ) from PETITIONER and returning it to its general point of origin. The ( PORTION REMOVED ) are interim steps to facilitate the ( PORTION REMOVED ). The contract between PETITIONER and the general contractor categorized PETITIONER's charges for the work it performs as two separate types of fees. The charges for moving the (PORTION REMOVED ) are referred to as ( X ) fees. The charge for ( PORTION REMOVED ) are referred to as ( X ) fees.

9. It is not economically feasible to ( PORTION REMOVED ), given the available

technology. ( SENTENCE REMOVED ).

10. The COMPANY 1 site contains approximately ##### acres. PETITIONER's ( PORTION REMOVED ) to minimize the transportation costs associated with ( PORTION REMOVED ). A reasoned estimate of the distances would approximate the following:

- a. Maximum distance: ##### feet
- b. Minimum distance: ##### feet.
- c. Average distance: ##### tons from the ##### foot range; ##### tons in the ##### foot range.

11. ( PORTION REMOVED ) is delivered to the ( PORTION REMOVED ) and generally completes the ( PORTION REMOVED ) process within ##### to ##### days. ( X ) materials would typically be ( PORTION REMOVED ) and returned to the place of origin within ##### to ##### days following successful ( X ). In order to efficiently run the ( PORTION REMOVED ), it is necessary to maintain a ( X ) in advance of ( X ) to eliminate starting and stopping of the unit. ( PORTION REMOVED ) from one area is generally maintained separate from ( X ) of other areas but such do get ( X ) to a limited extent to meet the operational and ( X ) requirements. Also, the ( PORTION REMOVED ) must proceed through a screening process prior to delivery to the ( PORTION REMOVED ). While this may ( PORTION REMOVED ) to some extent, generally the ( X ) maintains its identity with the area from which it was ( X ).

12. Once the ( X ) has been ( PORTION REMOVED ), confirmation ( X ) must occur before the ( PORTION REMOVED ). Upon confirmation that the ( PORTION REMOVED ). Once the ( X ) is confirmed to be complete through confirmatory ( PORTION REMOVED ), the ( X ) area is ( PORTION REMOVED ). On this project about 90% of the ( X ) requiring ( X ) will come from two areas of the CANYON ( X ) site and certainly 90% of the ( PORTION REMOVED ) will be returned to those areas. Some ( X ) might occur in a small percentage of the ( PORTION REMOVED ) during the transitions

from one are of ( X ) to another.

13. The ( X ) is never removed from the ( X ) site. The sole purpose of ( PORTION REMOVED ) is to allow the ( X ) to be ( PORTION REMOVED ). ( SENTENCE REMOVED ).

APPLICABLE LAW

1. A tax is imposed on the purchaser as provided in this part for amounts paid or charged for the following transactions: . . . (g) amounts paid or charged for services for repairs or renovations of tangible personal property, unless Section 59-12-104 provides for an exemption from sales and use tax . . . (h) except as provided in Subsection 59-12-104(7), amounts paid or charged for cleaning or washing of tangible personal property; . . . (Utah Code Sec. 59-12-103(1).)

2. A rule in effect during a period up through June of 2006 discussed charges for services for repairs of real property or personal property permanently attached to real property. The rule was repealed in June of 2006. Utah Admin. Rule R865-19S-78(2) stated as follows:

Charges for labor to service, repair or renovate real property, improvements, or items of personal property that are attached to real property so as to be considered real property are not subject to sales tax. The determination of whether parts, materials or other items are sold or used in the service, repair or renovation of real property shall be made in accordance with R865-19S-58.

. . .

(e) An item or part of an item may be temporarily detached from real property for on-site repairs without losing its real property status, but an item that is detached from the premises and removed from the site temporarily or permanently reverts to personal property.

3. The language regarding detachment for repairs was codified, effective July 1, 2006, at Utah Code Sec. 59-12-102(58)(b)(2006) which provides:

“Permanently attached to real property” includes: (ii) a temporary detachment of tangible personal property from real property for a repair or renovation if the repair or renovation is performed where the tangible personal property and real property are located . . .

4. Utah Code Sec. 59-12-102(73) (2006) provides that certain transactions are not taxable repairs or renovations as follows:

“Repairs or renovations of tangible personal property” means: (a) a repair or renovation of tangible personal property that is not permanently attached to real property; or (b) attaching tangible personal property to other tangible personal property if the other tangible personal property to which the tangible personal property is attached is not permanently attached to real property.

#### CONCLUSIONS OF LAW

1. There is no provision under Utah Code Sec. 59-12-103(1) that imposes a sales tax for the amount paid or charged for services for repairs or renovations of real property. Nor is a tax imposed on amounts paid or charged for cleaning or washing of real property. This point was reiterated at Utah Admin. Rule R865-19S-78(2) as in effect until June 2006. However, the fact that portions of the rule were repealed does not change whether these transactions are subject to sales tax. Sales tax is simply not imposed on the charges for services for repairs, renovations or cleaning of real property. Therefore, in order to find that the charges for services of repairing, renovating or cleaning the ( X ) at issue are subject to sales tax under Utah Code Sec. 15-12-103, the Commission would have to find that the ( X ) at issue was not real property, but instead tangible personal property that was not permanently attached to the real property.

2. The ( PORTION REMOVED ) fully incorporated into the ( PORTION REMOVED ) is part of the real property. The ( PORTION REMOVED ) that is part of the ( X ) is distinguishable from a ( PORTION REMOVED ) that is being ( PORTION REMOVED ) for future sale or future use, which would be considered personal property.

3. Utah Admin. Rule R865-19S-78, as in effect until June 2006, provided that an item may be temporarily detached from real property for on-site repairs without losing its real property status. Had the Utah Legislature determined that charges for repairs, renovations or cleaning of real property should be

subject to sales tax they could have adopted legislation that imposed the tax. They have not done so. Accordingly, if the ( X ) in question had remained in place, any ( X ) or renovation of the ( X ) would not have been taxable. We believe the ( PORTION REMOVED ) and its temporary relocation to another place on the ( PORTION REMOVED ) should not alter this result.

4. By analogy, Utah Code Ann. Section 59-2-103(1)(g) directly imposes a tax on the charges for “repairs or renovations of tangible personal property.” However, the tax is not imposed on repairs or renovations of tangible personal property that has been “permanently attached to real property.” See Utah Code Sec. 59-12-102(73). Utah Code Sec. 59-12-102(58) takes this one step further and establishes that charges for repairs or renovations of permanently attached personal property are not taxable even if the property is temporarily detached for purposes of an on site repair. If the Legislature chose not to tax repairs and renovations of personal property temporarily detached from real property, it is difficult to believe the statute should be construed to tax repairs and renovations of ( X ) temporarily ( PORTION REMOVED ) if the ( PORTION REMOVED ).

5. The rules governing “cleaning” of tangible personal property are not congruent with the rules governing “renovations” of tangible personal property. The statute does not clearly exclude “cleaning and washing of tangible personal property permanently attached to real property” from the definition of “cleaning and washing of tangible personal property.” Compare Sections 59-12-103(1)(g), 59-12-103(1) and 59-12-102(73). Thus, if the ( X ) is being “cleaned,” rather than “renovated,” the analogy loses some of its force. Webster’s New Universal Unabridged Dictionary (2003) defines the noun “clean” to mean “free from foreign or extraneous matter: *clean sand*” and the verb “clean” to mean “to make clean.” (Id. p. 383). The same dictionary defines “renovate” as “to restore to good condition, make new or as if new again.” (Id. p. 1632.) Either definition would seem to cover the ( X ) charges in issue. Because we hold that the ( X ), under these unique circumstances, retains its character as real property, we need not decide whether the ( X )

constitutes “cleaning” or “renovation.”

6. It is clear from the statutes imposing sales tax if the ( X ) at issue is considered part of the real property the charge for renovation or repair is not taxable. The Commission concludes that the transaction is ultimately a repair, renovation or cleaning of real property. In so concluding, we note that the sales tax on repairs, renovations or cleaning of tangible personal property is an “imposition” statute. As such, the provision should be construed in favor of the taxpayer.<sup>1</sup> If, on the other hand, the taxpayer was arguing for a statutory exemption from a clearly imposed tax, the exemption would be narrowly construed. Thus, to the extent there is any ambiguity in the statutory treatment of this process the ambiguity should be construed in the taxpayer’s favor.

7. Despite the fact that the transaction at issue involves the charges between PETITIONER and the general contractor and it is the general contractor that ( PORTION REMOVED ) and delivers it to Petitioner in a detached state, the nature of the ( X ) is that it is still part of the real property, although temporarily detached for repair. It does not become personal property merely due to the fact that it is delivered on site to a second party in an already detached condition. As long as the detachment is temporary, the repair is on site and the ( X ) returned to be again incorporated into the real property, the charges for repair, renovation or cleaning are not subject to sales tax.

8. The Commission considers the lump sum ( X ) fee for ( PORTION REMOVED ) to be incidental to the ( X ) fee. As noted in Private Letter Ruling 05-015, the Commission does not believe that the ( X ) stands alone; it is not the ultimate goal of the property owner. Under the facts as described by the parties, as the ( X ) charges are not subject to tax, neither are the ( X ) charges.

#### DECISION AND ORDER

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<sup>1</sup> See *Parsons Asphalt Products, Inc. v. Utah State Tax Comm’n*, 617 P.2d 397, 398 (Utah 1980); *County Bd. Of Equalization v. Utah State Tax Comm’n*, 944 P.2d 370, 374 (Utah 1997)(quoting *Salt Lake County v. State Tax Comm’n* 779 P.2d 1131, 1132 (Utah 1989));



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Based upon the foregoing, the Tax Commission finds that under the facts listed in this decision, the ( X ) and ( X ) charges are not subject to sales tax and reverses Private Letter Ruling 05-015. It is so ordered.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2006.

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

BY ORDER OF THE UTAH STATE TAX COMMISSION:

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

DATED this \_\_\_\_ day of \_\_\_\_\_, 2006.

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

*JKP/06-0125.FOF.DOC*