

06-0191
Sales and Use Tax Audit
Signed 05/15/2007

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	
)	ORDER
Petitioner,)	
)	Appeal No. 06-0191
v.)	Account No. #####
)	
AUDITING DIVISION OF)	Tax Type: Sales and Use Tax Audit
THE UTAH STATE TAX)	Audit Period: 10/01/02-07/31/05
COMMISSION,)	Judge: Phan
)	
Respondent.)	

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE 1, Attorney at Law
PETITIONER REPRESENTATIVE 2, EA
PETITIONER REPRESENTATIVE 3
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, Assistant Division Director
RESPONDENT REPRESENTATIVE 3, Tax Audit Manager

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 January 9, 2007. Petitioner is appealing an Amended Audit Deficiency, issued by Respondent on March 21, 2006. The amount of the deficiency at issue is \$\$\$\$ in tax. Interest as of the date of the notice of deficiency was \$\$\$\$ and continues to accrue on the unpaid balance. Procedurally, the matter had originally been brought before the Commission as an appeal of the original audit which was issued by Statutory Notice dated

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January 30, 2006. The original audit indicated a tax deficiency in the amount of \$\$\$\$ and interest.

Petitioner filed an appeal of the original audit on February 14, 2006. Subsequently, after the appeal was filed, Respondent issued the amended audit, increasing the tax deficiency.

APPLICABLE LAW

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; . . . (l) amounts paid or charged for tangible personal property if within this state the tangible personal property is: (i) stored; (ii) used; or (iii) otherwise consumed; . . . (Utah Code Sec. 59-12-103(1).)

(A.) "Total sales" means the total amount of all cash, credit, installment, and conditional sales made during the period covered by the return. (B.) Amounts shown on return must include the total sales made during the period of the returns, and the tax must be reported and paid upon that basis . . . (Utah Admin. Rule R865-19S-20.)

Sales of construction materials and other items of tangible personal property to real property contractors and repairmen of real property are generally subject to tax if the contractor or repairman converts the materials of items to real property. (Utah Admin. Rule R865-19S-58 (A).)

Purchasers of tangible personal property-the storage, use, or other consumption of which is subject to tax-must account for the tax liability by paying the tax . . . (Utah Admin. Rule R865-21U-6(A).)

DISCUSSION

Petitioner's contention in this matter regarding the amended audit deficiency was an argument against the appropriateness of the procedural process followed by Respondent in amending its original audit.

Respondent had issued its original audit on January 30, 2006 based on total sales obtained from the invoices provided by Petitioner. For the 2003 year, the total sales amount from the invoices had been \$\$\$\$\$. For the 2004 year, the total sales from the invoices had been \$\$\$\$\$. Respondent used these amounts as the total sales and it was from these amounts that Respondent determined the cost of materials percentages of %%%%%%%%% for 2003 and %%%%%%%%% for 2004.

Petitioner's representative filed the appeal, arguing that the cost of materials percentage was too high. To support this contention, Petitioner's representative indicated that the total sales amount was actually understated. In the Petition for Redetermination, Petitioner's representative pointed to the amount indicated as gross receipt on the business's corporate income tax returns. Respondent had apparently considered this amount in the audit, but during the audit, declined to use the reported corporate income gross receipts because of information received from Petitioner while the audit was taking place that the difference was due to short term loans made by the owner that were improperly booked. In the Petition for Redetermination, Petitioner's representative specifically indicated that this was an error. Although there had been loans, he argued they had not been improperly included in the gross receipts reported on the corporate income tax

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returns. He also pointed to the fact that if the cost of materials percentage were as high as determined by Respondent, Petitioner would be losing money every year and could not survive by operating on the gross margins Respondent used to base its original audit on. So it was Petitioner's contention with the appeal that Respondent should adjust its cost of materials percentage.

After Petitioner had filed the Petition for Redetermination of the original audit and the appeal was opened, Respondent reviewed the information provided by Petitioner and agreed that its cost of materials percentage was overstated. However, Respondent also changed its position regarding the total sales based on the information provided by Petitioner. So that Respondent based its total sales on the amount reported on the corporate income tax returns, instead of the total of all invoices. Additionally, Respondent changed the way it determined the taxable amount from the total sales. Making these changes raised the taxable amount and the resulting tax due. The original audit for the entire audit period had indicated the "Taxable Amount" was \$\$\$\$\$. The amended audit concluded the "Taxable Amount" was \$\$\$\$\$. This resulted in an increase in tax due from the original audit to the amended audit of approximately \$\$\$\$\$.

At the hearing Petitioner points out that the difference between total sales from the invoices as reported on the original audit and the total gross receipts from the corporate franchise tax returns had been approximately \$\$\$\$\$ and yet the tax increase had been approximately \$\$\$\$\$ which is 12%, regardless of the fact that the applicable tax rate was 6.60%. It was Petitioner's position that Respondent should have relied on the original audit and then added its changes from there. Petitioner argued that this presented a question of fairness. Petitioner did not present case

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law or statutes that would support its contention that once a sales tax audit has been issued it cannot be amended based on subsequent information or using a different approach.

Respondent's representatives argued that for the amended audit they had concluded there had been a large amount of sales unaccounted for in comparing the gross sales in the corporate tax return and the sales reported on the sales tax return. Respondent's representative argued that they had made some assumptions with the original audit. When amending the audit, the Division had the information that there had been the unreported sales and reached a different conclusion as to which portion of the total sales was taxable.

DECISION AND ORDER

Upon review of the information presented at the hearing, Petitioners did not establish that the amended audit was incorrect, or that the underlying assumptions were erroneous. Petitioner argues that the amended audit should have begun with the assumptions of the original audit, and at the most, the tax increase should be around \$\$\$\$ based on 6.60% of the \$\$\$\$ increase in gross sales. Petitioner did not brief this issue and did not present cases or statutes that would support its position on this point. The Commission is not aware of any that would suggest that Respondent is limited in the manner it may amend an audit once one has been issued.

Based on the forgoing, Petitioner's appeal in this matter is denied. 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:

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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.

DATED this _____ day of _____, 2007.

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 _____, 2007.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

DISSENT

I respectfully dissent from my fellow commissioners. Although the statute is silent on who has the burden of proof in sales and use tax cases as it relates to amended audits that does not mean the silence effectively places the burden on the taxpayer to disprove the amended audit. The audit upon which the deficiency notice was issued and the hearing was requested should have the presumption of correctness at the

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hearing. If the primary motivation behind an audit is to obtain future compliance, then the primary purpose of the hearings should be to address any disputed methodology and facts in an audit, accept evidence on an amended audit if applicable, and determine if an amount is owing and the correct amount. Although the Burden of Proof Statute 59-10-543 for Income Tax cases does not apply to Sales and Use Tax Cases, the section serves as a guidepost for consistency in determining who has the burden of proof on amended audits in a tax commission hearing.

Without statutory directive otherwise, I hold the burden of proof remains with the Respondent -- especially when amending audits after the filing of a petition for redetermination. It is a sound principal to place the burden of proof on the State in that it has the resources and ability to change audit methodology after a petition is filed, which imposes a new obligation on the taxpayer. It is clear both Petitioner and Respondent agree an amount is owed; however, I am not persuaded as to the proper amount. As such, I sustain the original audit.

D'Arcy Dixon Pignanelli, Commissioner

59-10-543. Burden of proof. Income tax. Statute text

In any proceeding before the commission under this chapter, the burden of proof shall be upon the petitioner except for the following issues, as to which the burden of proof shall be upon the commission:

- (1) Whether the petitioner has been guilty of fraud with intent to evade tax;
- (2) whether the petitioner is liable as the transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax; and
- (3) whether the petitioner is liable for any increase in a deficiency where such increase is asserted initially after a notice of deficiency was mailed and a petition under Title 59, Chapter 1, Part 5 is filed, unless such increase in deficiency is the result of a change or correction of federal taxable income required to be reported, and of which change or correction the commission had no notice at the time it mailed the notice of deficiency.

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History: L. 1973, ch. 147, § 94; 1983, ch. 283, § 5; C. 1953, 59-14A-94; renumbered by L. 1987, ch. 2, § 251.

Notice Regarding Payment: If a party does not request a Formal Hearing in this matter, failure to pay the balance due within thirty days from the date of this order may result in a late payment penalty.

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