

06-0209
Audit
Signed 11/29/2006

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)		
	)	ORDER	
)		
Petitioner,	)	Appeal No.	06-0209
)		
v.	)	Account No.	#####
)		
AUDITING DIVISION OF THE	)	Tax Type:	Sales Tax
UTAH STATE TAX COMMISSION,	)	Periods:	08/01/02 – 05/31/05
)		
Respondent.	)	Judge:	Robinson

Presiding:

R. Spencer Robinson, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE, CPA
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, 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 July 10, 2006.

On January 25, 2006, Respondent sent Petitioner a Statutory Notice informing it that an audit had determined Petitioner owed additional sales tax for the period of August 1, 2002 through May 31, 2005, in the amount of \$\$\$\$\$. The audit also assessed \$\$\$\$\$ in interest, as of February 24, 2006. Respondent did not seek a penalty. The Statutory Notice gave Petitioner until February 24, 2006, to either submit payment or an appeal.

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On February 20, 2006, Petitioner submitted a timely Petition for Redetermination. The parties participated in a status conference on June 1, 2006. The matter was set for an Initial Hearing, held as noted above.

APPLICABLE LAW

Utah Code Section 59-10-543. Burden of proof.

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.

Utah Code Section 59-12-103 Sales and use tax base – Rates – Effective dates – Use of sales and use tax revenues [Effective until July 1, 2005].

- (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;
 - (b) amounts paid:
 - (i) (A) to a common carrier;

R865-19S-71 Transportation Charges in Connection With the Sale of Tangible Personal Property Pursuant to Utah Code Ann. Sections 59-12-103 and 59-12-104 [Effective from August 20, 1996 until June 2, 2005]

- A. To qualify for the sales tax exemption for movements of freight by common carrier, transportation charges must satisfy all of the following conditions:
1. Shipment must take place by means of a common carrier.
 2. Charges must be segregated and listed separately.
 3. Charges must reflect the actual cost of shipping the particular tangible personal property by common carrier.
 4. Shipment of the tangible personal property must take place after the passage of title.
 - a) Shipment of the tangible personal property takes place after passage of title if the terms of the sale or lease are F.O.B.¹ origin or F.O.B. shipping point.
 - b) If the invoice does not indicate an F.O.B. point, and a common carrier is used, it is assumed the terms are F.O.B. origin.
 - c) In all other cases, the shipment of tangible personal property takes place before passage of title.
- B. If shipment of the tangible personal property occurs before the passage of title, shipping costs, to the extent included in the sales price of the item, and regardless of whether they are segregated on the invoice, shall be included in the sales and use tax base.

R865-19S-31. Time and Place of Sale Pursuant to Utah Code Ann. Section 59-

12-102. [Unchanged from 1990 to the present]

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.

DISCUSSION

The evidence in this case establishes Petitioner used a common carrier to ship goods to customers during the period of the audit, August 1, 2002 through May 31, 2005. The invoices

¹ Freight on board

submitted as examples show separate charges for freight. The freight charges appear to be the actual cost. Respondent did not argue to the contrary.

Petitioner relied on Tax Bulletin 5-91, with an effective date of March 10, 1991. It dealt with sales and use tax on freight. It said,

Many people have difficulty in fully understanding the provisions of Sale Tax Rule R865-19-71S. Simply stated, if the transportation takes place before passage of title, the freight charge is taxable (F.O.B. destination). If the terms are F.O.B. origin or shipping point the freight charge is not taxable. If a sales Invoice does not indicate an F.O.B. point, it is assumed the terms are F.O.B. origin if a common carrier was used.

One invoice, from COMPANY A, dated July 16, 2003, states at the bottom, "Goods remain the property of COMPANY A until this invoice is paid." On that invoice, in a box captioned "Invoice Terms," a type written entry, "COD" is lined out and "VISA" is written in by hand. The invoice also contains a field captioned "freight terms." In this field is the word, "prepaid." U.S. freight is listed as \$\$\$\$\$. The items, two cast iron classic wide urns and one cast iron birdbath, were placed with a common carrier for delivery to CUSTOMER 1, ADDRESS 1, CITY 1, UT #####.

A handwritten notation on the July 16, 2003 COMPANY A invoice states, "Billed #813." Invoice 813, dated July 26, 2003, is for CUSTOMER 1.

Invoice 813 lists items sold and freight charges. Among the items listed are two cast iron urns and one cast iron birdbath. Invoice 813 lists the freight charge for these items as \$\$\$\$\$. Another invoice, number 786, billed to CUSTOMER 1, also list charges for items and freight charges. The invoices do not impose sales tax on the freight charges.

Another invoice, dated February 25, 2003, in a box captioned FOB, shows "STATE". This invoice is for items shipped from COMPANY B, located in CITY 2, STATE, to ADDRESS 2,

CITY 3, Utah #####. This appears to be the address of COMPANY C customers CUSTOMER 2 and CUSTOMER 3, as the ADDRESS 2 address appears on another invoice, numbered 773 and dated February 27, 2003, in which the CUSTOMER 2 AND CUSTOMER 3 are identified. The February 25, 2003 COMPANY B invoice shows payment for the goods in the amount of \$\$\$\$ by check number ##### prior to delivery. The only thing not prepaid on this invoice was the freight charge of \$\$\$\$.

Invoice 773 lists shows a charge for fabric in the amount of \$\$\$\$ and freight in the amount of \$\$\$\$. It does not list any of the items shown on the COMPANY B invoice.

The audit information submitted by Respondent identifies the invoice number, identifies one of four locations to which the items were shipped, identifies the customer, describes the charge as a freight charge, and states the dollar amount in a column headed "taxable amount." This information is silent as to FOB origin or FOB destination.

Respondent argues that Petitioner' practice was to place orders with suppliers on behalf of customers. The suppliers were to ship the goods directly to the customer. This is consistent with the invoices introduced as evidence. Respondent's position is that, under such circumstances, title does not pass until the goods are received by the customer.

Petitioner argues that the goods were shipped via common carrier, the shipping charges were separately stated, and the shipping charges billed to customers were the actual cost of shipping. Thus, Petitioner argues that under R865-19S-71 (A)(4)(b), because the invoices are silent as to a F.O.B point, it must be assumed, at least for sales tax purposes, that the terms are F.O.B origin. In the case of F.O.B origin, title passes when the goods are delivered to the carrier.

The evidence shows Petitioner acted in compliance with R865-19S-71. Petitioner has met its burden of proof. It properly excluded shipping costs from its calculations of sales tax.

DECISION AND ORDER

Based on the foregoing, the Commission abates the audit. 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. Additionally, absent an appeal, payment in full is due within thirty days of this Order. Failure to make payment in full within thirty days may result in the imposition of a late payment penalty.

DATED this _____ day of _____, 2006.

R. Spencer Robinson
Administrative Law Judge

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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

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