

06-0538
Sales Tax
Signed 07/23/2007

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,

Petitioner,

vs.

AUDITING DIVISION OF THE UTAH
STATE TAX COMMISSION,

Respondent.

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND FINAL DECISION**

Appeal No. 06-0538

Account No. #####

Tax Type: Sales Tax

Tax Year: 2003

Judge: Phan

Presiding:

D'Arcy Dixon Pignanelli, Commissioner
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER
PETITIONER REPRESENTATIVE

For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, Manager, Tax Auditing

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on May 7, 2007. The Commission requested that Respondent provide posthearing the cases that Respondent had referred to during the hearing. Respondent's Post Hearing Submission was received on May 11, 2007. Petitioner submitted a response on June 7, 2007. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The issue before the Commission in this matter is Petitioner's appeal of a sales tax deficiency

issued against her for the audit period of August 1, 2003 through August 31, 2003. The Statutory Notice of Deficiency before the Commission in the hearing had been issued on April 7, 2006.

2. The amount of the deficiency was \$\$\$\$ in sales tax and \$\$\$\$ in interest. Interest continues to accrue on the unpaid balance. Respondent did not impose a penalty.

3. The sales tax at issue related to one transaction, Petitioner's purchase in Utah of a motor vehicle on August 27, 2003. On that date Petitioner had purchased a 2003 Infiniti FX35 from COMPANY A in CITY, Utah. Petitioner did not pay sales tax on the transaction at the time of the purchase as it was her thought that she would register the vehicle in STATE and pay the taxes in that state, like she had done with previously owned vehicles.

4. At the time that she purchased the vehicle, she told the employee of the dealership that she wanted to tax, tag and license the vehicle in STATE. The employee of the dealer gave her a Nonresident Affidavit for Sales Tax Exemption with the other paperwork that is signed at the time of the purchase. Petitioner filled out the affidavit checking "No" on each of the questions asked and then signing the document and writing in the space provided a STATE address. As stated on the form, if the answer had been yes to any of the questions, Petitioner would have been disqualified from the nonresident sales tax exemption. Petitioner now acknowledges that the answer to some of the questions should have been "Yes." However, she indicates by the time they had gotten to the paperwork in purchasing the vehicle it was late in the evening and she needed pick up her children, so she was pressed for time and did not read the questions thoroughly. She had registered other vehicles in STATE and she assumed that the same would be proper for this vehicle.

5. Petitioner did, in fact, register the vehicle in STATE. The STATE Application for Motor Vehicle Title and Registration was completed on August 30, 2003. The registration was issued to Petitioner on September 17, 2003. In order to register the vehicle in that state Petitioner paid a 3% excise tax to STATE in the amount of \$\$\$\$\$, along with some other smaller fees. The excise tax and other fees totaled \$\$\$\$\$. This

amount is less than half of what it would have cost to register the vehicle in Utah.

6. At the time of the purchase Petitioner was on active duty in the military. She considered herself to be a resident of STATE and had a STATE driver's license. She had entered the military from STATE and had declared that state to be her state of residence for military purchases. However, in August 2003 she was stationed in Utah. She remained in Utah for approximately 14 months after she had purchased the vehicle at issue.

7. In August 2003 Petitioner maintained a residence in the state of Utah with her spouse and children. She used the vehicle in Utah until she left the state. The fourth question on the Nonresident Affidavit had asked "Do you have a residence in Utah?" She had answered "NO" in error to this question. Additionally, at the time of the purchase there was no transfer in process to another duty station, so it was unlikely that she would have been leaving the state within 30 days. She had purchased the vehicle for use in Utah while she was in the state. This meant her answer on another question on the affidavit was in error. However, she indicates in the military there is always the possibility of being transferred.

APPLICABLE LAW

Unless there is an exemption that is applicable, Utah imposes sales tax on purchases made within the state at Utah Code Sec. 59-12-103(1) as follows:

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 law imposes the sales tax on the transaction. Utah Code Sec. 59-12-103(2)(a) provides as follows:

Except as provided in Subsections (2)(b) and (c), beginning on July 1, 2001, a state tax and a local tax is imposed on a transaction described in subsection (1) . . .

An exemption is provided for sales of motor vehicles to nonresidents at Utah Code Sec. 59-12-104 (2003)¹ as follows:

The following sales and uses are exempt from the taxes imposed by this chapter: . . . (9) sales of vehicles of a type required to be registered under the motor vehicle laws of this state, which are made to bona fide nonresidents of this state and are not afterwards registered or used in this state except as necessary to transport them to the borders of this state;

Utah law also provides an exemption for taxes for property upon which sales or use tax was paid to another state. The exemption is found at Utah Code Sec. 59-12-104(27) and provides an exemption from sales tax for:

Property upon which a sales or use tax was paid to some other state, or one of its subdivisions, except that the state shall be paid any difference between the tax paid and the tax imposed by this part and Part 2, Local sales and Use Tax Act, and no adjustment is allowed if the tax paid was greater than the tax imposed by this part and Part 2, Local Sales and Use Tax Act;

The exemption for nonresidents is further clarified by Utah Admin. Rule R865-19S-98(B) as follows:

In order to qualify as a nonresident for the purposes of exempting vehicles from sales tax under Subsection 59-12-104(9) and 59-12-104(32), a person may not:

1. be a resident of this state. The fact that a person leaves the state temporarily is not sufficient to terminate residency;
2. be engaged in intrastate business and operate the purchased vehicle as part of the business within this state;
3. maintain a vehicle with this state designated as the home state;
4. except in the case of a tourist temporarily within this state, own, lease, or rent a residence or a place of business within this state, or occupy or permit to be occupied a residence or place of business;

¹ Subsequent to the period at issue both the Utah Code and Administrative rule regarding the exemption was revised. However, the Commission applies the law in effect during the audit period.

5. except in the case of an employee who can clearly demonstrate the use of the vehicle in this state is to commute to work from another state, be engaged in a trade, profession, or occupation or accept gainful employment in this state;
6. allow the purchased vehicle to be kept or used by a resident of this state; or
7. declare residency in Utah to obtain privileges not ordinarily extended to nonresidents, such as attending school or placing children in school without paying nonresident tuition or fees, or maintaining a Utah driver's license. (Utah Admin. Rule R865-19S-98(B).)

CONCLUSIONS OF LAW

1. Unless the transaction fits within a statutory exemption, Petitioner's purchase of a motor vehicle in Utah was a transaction that was subject to sales tax pursuant to Utah Code Sec. 59-12-103(1)(a) as a "retail sale of tangible personal property made within the state."

2. Although at the time of the purchase the transaction was treated by both Petitioner and the dealer as exempt under Utah Code Sec. 59-12-104(9) as a vehicle purchased by a bona fide nonresident, Petitioner did not qualify for that exemption. Section 104(9) providing the exemption states the sale of the vehicle is exempt if "made to bona fide nonresidents of this state and are not afterwards registered or used in this state." Petitioner's purchase was for use in Utah until she was transferred. However, Petitioner avoided paying the sales tax at the time of the purchase by filling out a Nonresident Affidavit for Sales Tax Purposes, answering questions in an incorrect manner. If she had provided the correct answers to the questions the dealer would have been required to collect Utah sales tax from her at the time of the purchase.

3. Petitioner argues that the Servicemember's Civil Relief Act provides that she may retain her status as a resident of STATE, despite that she is stationed in Utah. She also asserts that STATE allows her to register her vehicle in that state. Respondent cites to *Sullivan v U.S.*, 395 U.S. 169, 175-76 (1969) in which the United States Supreme Court held that the Servicemembers Relief Act does not prohibit a state from charging sales tax on purchases by nonresident servicemembers stationed in the state. Sales tax is imposed on

the transaction, which is the purchase of an item of personal property in the state. Regardless of the state in which Petitioner was a resident, Petitioner must pay sales tax in Utah when she purchases an item of personal property in Utah, unless the transaction qualifies for an exemption under Utah Code Sec. 59-12-104.

4. Petitioner points to the Multistate Tax Compact to support her position that at the very least she should receive a credit for the taxes she paid to STATE. The Multistate Tax Compact was adopted by Utah and codified at Utah Code sec. 59-1-801. Additionally, Utah Code Sec. 59-12-104(27)(2003) provides an exemption when sales and use tax have already been paid to another state. In considering this argument, the Commission would point out that the tax Petitioner paid to STATE was listed as an “excise tax.” If the other criteria of the exemption were met, further review should be made to determine if this “excise tax” was truly a sales tax, or if it was for a tax on the transfer of property into that state. However, the Commission does not need to make this determination as a number of cases make it clear that Petitioner is not entitled to a credit against the Utah sales tax. Pursuant to both the Multistate Tax Compact and the exemption at 59-12-104(27)(2003) the tax should have been paid first to Utah. It would be STATE that could have allowed the credit if it participated in the Multistate Tax Compact and if it considered its tax to be a sales tax. In *Chicago Bridge & Iron Co. v. State Tax Comm’n*, 839 P.2d 303, 309 (Utah 1992), the Court held, “precedence in liability shall prevail over precedence in payment.” The Commission notes that in *Broadcast International, Inc., v. State Tax Comm’n*, 882 P.2d 691 (Utah Appeals 1994), the court applied the same standard to both the credit under the Multistate Tax Compact and the exemption at Utah Code Sec. 59-12-104(27). In this case it was the sales tax to Utah that would have precedence over the tax paid to STATE.

ANALYSIS

The parties were not in disagreement as to the facts in this matter. The issue before the Commission was whether there was any basis to apply either a sales tax exemption to the transaction at issue or to allow Petitioner a credit for taxes that she has already paid to STATE and for which she is not now able to

obtain a refund. It was clear from the facts and as discussed above that Petitioner did not qualify for the nonresident exemption set out at Utah Code Sec. 59-12-104(9). Further, pursuant to the statute, Petitioner did not qualify for credit for taxes paid to STATE because she was liable for sales tax first in Utah, before being liable for tax upon registration of the vehicle in STATE.

Petitioner did point out in her post hearing filing that the motor vehicle dealer would not have been required to pay over the tax to Utah until after she was required to register the vehicle in STATE. Petitioner points to Utah Code 59-12-107(3)(a) which states, "Except as provided in Subsection (4) and Section 59-12-108, the sales or use tax imposed by this chapter is due and payable to the commission quarterly on or before the last day of the month next succeeding each calendar quarterly period." She represents that STATE law requires registration of the vehicle within 30 days of the purchase.² Therefore, it is her position that the excise tax was due to STATE prior to when the dealership was required to pay the sales tax over to Utah.

Although this is an interesting argument, Petitioner became liable for sales tax in Utah at the time she purchased the vehicle, not when the dealership was required to remit the funds. The purchase occurred prior to her registration of the vehicle in STATE. The precedence as to liability is the Utah sales tax over STATE. Additionally, although the Respondent did not assert fraud or request that penalties be assessed against Petitioner, these circumstances occurred because Petitioner filled out and signed the affidavit to claim the tax exemption with erroneous information. Petitioner is responsible in this matter for not correctly filling out the affidavit. Even her argument that the dealership should be held liable for the tax is misplaced because Petitioner was the one who knew what her personal circumstances were at that time regarding the questions on the affidavit. Had Petitioner filled out the affidavit in a manner that accurately reflected her circumstances, she

would have been required to pay the sales tax at the time of her purchase.

DECISION AND ORDER

Based on the foregoing, the Tax Commission sustains the audit deficiency of additional sales tax and interest arising from Petitioner’s August 27,2003 purchase of a motor vehicle in Utah. It is so ordered.

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

D’Arcy Dixon Pignanelli
Commissioner

Notice: Failure to pay within thirty days the balance that results from this order may result in additional penalties and interest. 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. & 63-46b-13 et seq.

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² Petitioner made this representation, but it is unlikely that she was required to register the vehicle in STATE at that time, as the vehicle was purchased in Utah, located in Utah and being used in Utah.