

06-0978  
Sales and Use  
Signed 11/15/2007

---

BEFORE THE UTAH STATE TAX COMMISSION

---

PETITIONER,

Petitioner,

v.

AUDITING DIVISION  
OF THE UTAH STATE  
TAX COMMISSION,

Respondent.

**AMENDED ORDER\***

Appeal No. **06-0978**

Account No. #####

Tax Type: Sales and Use

Audit Period: 03/01/02 – 05/31/04

Judge: Chapman

---

**Presiding:**

Kerry Chapman, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER REPRESENTATIVE

For Respondent: RESPONDENT REPRESENTATIVE 1, Auditing Division  
RESPONDENT REPRESENTATIVE 2, Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing on October 16, 2007 pursuant to Utah Code Ann. §59-1-502.5.

On June 12, 2006, Auditing Division (“Division”) issued a Statutory Notice of Sales and Use Tax (“Statutory Notice”) to the Petitioner for the audit period March 1, 2002 through May 31, 2004, in which it imposed \$\$\$\$ of additional sales and use tax, plus interest. The only portion of the assessment at issue concerns the Division’s assessment of additional tax on those transactions that the Petitioner sold tax-exempt without retaining adequate records to identify the purchaser. This portion of the assessment resulted in \$\$\$\$ of additional tax, plus interest. The Petitioner asks the Commission to reverse this portion of the assessment because of the circumstances that led to its lack of records. The Division asks the Commission to sustain the assessment in full.

\*The only correction on the Initial Hearing Order is the number of the appeal.

APPLICABLE LAW

During the audit period, Utah Code Ann. §59-12-106(2)<sup>1</sup> provided that a vendor should keep records concerning exempt sales, as follows:

For the purpose of the proper administration of this chapter and to prevent evasion of the tax and the duty to collect the tax, it shall be presumed that tangible personal property or any other taxable transaction under Subsection 59-12-103(1) sold by any person for delivery in this state is sold for storage, use, or other consumption in this state unless the person selling the property, item, or service has taken from the purchaser an exemption certificate signed by and bearing the name and address of the purchaser to the effect that the property, item, or service was exempted under Section 59-12-104. The exemption certificates shall contain information as prescribed by the commission.

The Commission adopted Utah Admin. Rule R865-19S-23 ("Rule 23") to provide guidance concerning a vendor's responsibilities regarding its exempt sales. Although the Rule has since been amended, the rule in place during the audit period provides, in pertinent part, as follows:

- A. Taxpayers selling tangible personal property or services to customers exempt from sales tax are required to keep records verifying the nontaxable status of those sales. Records shall include:
  - 1. sales invoices showing the name and identity of the customer; and
  - 2. exemption certificates for exempt sales of tangible personal property or services if the exemption category is shown on the exemption certificate forms.

....

- E. The burden of proving that a sale is for resale or otherwise exempt is upon the vendor. If any agent of the Tax Commission requests the vendor to produce a valid exemption certificate or other similar acceptable evidence to support the vendor's claim that a sale is for resale or otherwise exempt, and the vendor is unable to comply, the sale will be considered taxable and the tax shall be payable by the vendor.

ANALYSIS

The Petitioner was a retail hardware supply store that sold tangible personal property to customers, many of which were exempt from taxation and which had submitted exemption certificates that

---

1 Since the audit period, the statute has been amended and renumbered UCA §59-12-106(3).

were kept on file. The Petitioner has since sold the assets of the business.

When the Division audited the Petitioner for the period at issue, it discovered that the Petitioner's sales receipt records for exempt transactions did not identify the exempt purchasers. PETITIONER REPRESENTATIVE, who owned PETITIONER, explains that when he or one of his staff made an exempt sale, they verified that a copy of the purchaser's exemption certificate was on file and recorded the transaction as exempt by using a specific function on the computer cash register. The Petitioner explains that since the audit, he has learned that the computer had another function that, if it had been exercised, would have kept a record of the name of the exempt purchaser. However, as he and his staff did not know about this function, the computer records that were created failed to identify the name of the exempt purchasers.

Furthermore, the Petitioner proffers that after he sold the assets of the business, he stored all records in a location that was flooded, thus destroying a portion of the records relating to the audit period. However, among the Petitioner's records that were still legible, the Division auditor discovered accounts receivable ledgers for seven months of the audit period that identified the purchaser for those exempt sales that were charged and not paid for at the time of sale. From these records, the Division was able to identify the purchaser for 70% of the exempt sales the Petitioner made during this seven-month period. The Division applied this sample statistic to the remainder of the audit period and assessed additional sales and use tax on 30% of the Petitioner's exempt sales for the entire period.

The Petitioner assures the Commission that it properly collected and remitted sales tax and that it did not allow a customer to purchase items tax-free unless that customer had a valid exemption certificate on file. For this reason and given the confusion concerning the functions of the computer cash register and the loss of records due to flooding, the Petitioner asks the Commission to reverse that portion of

the Division's audit that imposed additional tax on its exempt sales.

In this case, the Petitioner did not retain information to prove that certain of its tax-exempt sales were actually sold to tax-exempt customers. The Petitioner has explained the circumstances that led to its not having adequate records to prove that these sales were, indeed, exempt. Furthermore, the Commission recognizes that there is no information to suggest that the sales were made to other than exempt customers. Nevertheless, Section 59-12-106(2) and Rule 23 require a vendor to retain information to prove that its tax-exempt sales were sold to exempt customers and place the burden upon the vendor to prove that its sales were exempt from taxation.

Furthermore, in *Tummurru Trades, Inc. v. State Tax Comm'n*, 802 P.2d 715 (Utah 1990), the Utah Supreme Court found that a vendor was liable for sales tax where it failed to keep adequate records with regards to exempt sales and could not uphold its burden of proving the sales to be exempt, even though the Petitioner stated that the sales had been made to entities who, in the past, had provided exemption certificates. The Court stated that the "statutory requirement that merchants keep records of their sales and exemptions is to prevent tax evasion and tax fraud" and that "oral testimony is not an adequate substitute for accurate record keeping." For these reasons, the Commission finds that the Petitioner did not retain adequate records to prove that the sales at issue were exempt from taxation and, as a result, finds the Petitioner responsible, under Utah law, for tax on these sales.

#### ORDER

Based upon the foregoing, the Commission sustains the Division's audit assessment in its entirety and denies the Petitioner's appeal. 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

Appeal No. 06-0978

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.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

\_\_\_\_\_  
Kerry Chapman  
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:** If a Formal Hearing is not requested as discussed above, failure to pay the balance resulting from this order within thirty (30) days from the date of this order may result in a late payment penalty. If the Petitioner decides not to seek a Formal Hearing and wishes to discuss payment options, he may contact Taxpayer Services Division at (801) 297-2200.

*KRC/06-0978.int*