07-0666
SALES TAX
TAX YEARS: 2004, 2005, 2006
SIGNED: 08-13-2008
TAX YEAR: P. HENDRICKSON, R. JOHNSON, M. JOHNSON
EXCUSED: D. DIXON
GUIDING DECISION

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. 07-0666 Account No. ##### Tax Type: Sales Tax Audit Period: 1/04 – 12/06 Judge: Phan

Presiding:
Pam Hendrickson, Commission Chair
Jane Phan, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER REP. 1, Attorney at Law
PETITIONER REP. 2
PETITIONER REP. 3
For Respondent: RESPONDENT REP. 1, Assistant Attorney General
RESPONDENT REP. 2, Deputy Director, Auditing Division
RESPONDENT REP. 3, Manager, Sales Tax Auditing
RESPONDENT REP. 4, Auditor

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on April 16, 2008, on an appeal filed by Petitioner pursuant to Utah Code Sec. 59-1-501. Petitioner is appealing a sales and use tax audit deficiency. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. Petitioner is appealing an audit deficiency issued by Respondent (the "Division") pursuant to a Sales and Use Tax Audit for the period of January 1, 2004 through December 31, 2006. The Statutory Notice of the Sales and Use Tax Audit, which is the subject of this appeal, was issued by the Division on April 26, 2007.

2. The amount of the sales and use tax deficiency was $$$$$ in tax and $$$$$ in interest as of the date the notice was issued. Interest continues to accrue on any unpaid balance. No penalties were assessed with the audit. There was no substantial dispute of facts between the parties, the disagreement was in regards to the application of the facts to the applicable law.

3. PETITIONER REP. 2 was the owner of the business, PETITIONER. He had begun to set up the business in MONTH YEAR and by MONTH YEAR had begun operations. The business was for (SERVICES) by providing (PRODUCT) then (SERVICES) thereof. The business did perform other (SERVICES) including (WORDS REMOVED). Many of Petitioner's customers were governmental entities or nonprofit organizations. For example, Petitioner provided (SERVICES) for (WORDS REMOVED).

4. PETITIONER REP. 2 indicated that, prior to starting the business, he had been working in construction where he (WORDS REMOVED).

5. Petitioner purchased the (PRODUCTS) from out of state and did not pay sales or use tax at the time of the purchase.

6. While setting up the business, PETITIONER REP. 2 applied for a sales tax license. However, his accountant had told him that he was providing a service that was not taxable. Petitioner was aware that (WORDS REMOVED), that company did not charge sales tax. To be certain about the taxability of these transactions, in March 2003, PETITIONER REP. 2 called the Tax Commission and spoke with someone

named EMPLOYEE. He testified that it was his understanding from that conversation that what he was providing was a service and not taxable. At the hearing he did provide letters from a customer and family members who indicate PETITIONER REP. 2 had told them about this conversation with the State Tax Commission and that he understood from the conversation that he did not need to collect sales tax.[1] The Division did not produce a EMPLOYEE or testimony that directly refuted PETITIONER REP. 2's contention that he had this conversation and he had been told it was a service and not taxable by this Tax Commission employee. The Division did suggest that maybe Petitioner had not told the Tax Commission employee all of the facts.

7. The transactions where Petitioner (WORDS REMOVED) were not at issue in this matter, as the Division did not assess a sales tax on those transactions. The Division indicated this was a service. Also the Division indicated that it did try to exclude from the audit deficiency invoices that were clearly to a governmental, or otherwise exempt entity. The primary issue at the hearing was the transactions involving (PRODUCT). The Division considered the transaction to be a lease of tangible personal property and the (SERVICES) to be incidental to the lease.

8. Generally, for those transactions that involved (PRODUCT), Petitioner's employees would deliver the (PRODUCTS) to the customer's specified location (WORDS REMOVED) then leave them there. They may be at a single location for a day or up to many weeks. If they were there for an extended period, Petitioner's employees would (WORDS REMOVED). In addition to the time it took the employee to drive (WORDS REMOVED) to the location, the employee would spend about five minutes (WORDS REMOVED). The employee would then spend about one additional minute of time on the (X) of the (PRODUCT). PETITIONER REP. 2 testified that there are regulations on this type of business, so that the customer may not (WORDS REMOVED), this could only be done by Petitioner. After the (WORDS

1Petitioner's Exhibits 1 & 2.

REMOVED), Petitioner's employee would (WORDS REMOVED), which could take several hours of employee time. When the customer no longer needed the (WORDS REMOVED) Petitioner's employee would remove the (PRODUCT) from the site.

9. PETITIONER REP. 2 testified that the (PRODUCT) he purchased for the business cost about $$$$$ each and had a ten-year life span. The EQUIPMENT, however, cost $$$$$ or $$$$$ per truck. He estimated that he associated only 2% of his business costs to the (PRODUCT); the rest was the labor, truck and transportation costs.

10. Petitioner's business was advertised in the Yellow Pages and on business cards as "(SERVICES)," or "((SERVICES))."[2]

11. Several invoices that had been issued by Petitioner to customers during the audit period were submitted in this matter and invoices appeared to be issued in two different formats. The first group was invoices on which Petitioner broke out the different (SERVICES) by amount of employee time ("Separately Stated Invoices"). Listed on these invoices was a separate delivery charge. There was a separate charge for the (WORDS REMOVED), sometimes referred to as "(X)" or "(WORDS REMOVED)." There was also, separately stated, a charge for the final service and removal of the unit.[3] None of these invoices indicated a lease of the (PRODUCT) or an amount charged just for the rental of the (PRODUCT) units. These invoices appear to clearly identify the charges as being charges for the various (SERVICES) listed.

12. Petitioner did issue a second type of invoice during the audit period based on a request by some customers due to the customers' accounting practice. The second type of invoice indicated a day rate for the (SERVICES) ("Day Rate Invoices") rather than hourly rates separately stated for the different (SERVICES) performed. It was PETITIONER REP. 2's testimony that the invoices were prepared in this

2 See Petitioner's Exhibit 3.
3 See Petitioner's Exhibit 6, Invoice Nos.1663, 1544, 42873, 42627, 42627, 715362.

manner because some customers had asked that the rate for (WORDS REMOVED) could be listed as a per day rate due to the way they needed to account for this cost. Generally these invoices were issued to one customer, COMPANY A. These invoices indicated the number of (PRODUCTS), the number of days and the amount charged per day. It was PETITIONER REP. 2's contention that the day rate was a combined rate for all the (WORDS REMOVED), divided by the number of days.[4] Although the invoices did indicated a rate per day for all the (SERVICES) provided, the invoices did not state the amount as rent, nor appear to refer to a lease of the (PRODUCT).

13. It is clear from the testimony and evidence that the major costs of performing the transactions at issue relate to the (SERVICES) provided, and not to the personal property. Respondent did not provide evidence to refute Petitioner's contention that 2% of his costs relate to the (PRODUCT). In both types of invoices, there is no indication of rent being charged for the use of the (PRODUCT). The charges are for delivery, removing the contents, sterilization, and removal of the (PRODUCT). Further, Petitioner had advertised the business as a provider of (SERVICES), not a business that leased out (PRODUCT). The facts support Petitioner's contention that the PRIMARY activity of the business was the removal and disposal of the (X) and the amount charged was primarily for these (SERVICES). The actual physical (PRODUCTS) are clearly essential, but we find they are effectively being used by Petitioner in providing the (SERVICES), rather than being rented as property. Additionally, the small amount of additional time spent in (WORDS REMOVED) is fairly incidental to the SERVICE.

APPLICABLE LAW

4 Respondent's Exhibit 2, Invoice Nos. 1185, 1197,1215,1277 1286 1285, CP567, 1627 and 717.

1. A tax is imposed on the purchaser as provided in this part for amounts paid or charged for the following transactions: (h) except as provided in Subsection 59-12-104(7) amounts paid or charged for cleaning or washing of tangible personal property; (k) amounts paid or charged for leases or rentals of 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).)

2. "Delivery charge" means a charge: (i) by a seller of: (A) tangible personal property; or (B) (SERVICES); and (ii) for preparation and delivery of the tangible personal property or (SERVICES) described in Subsection (21)(a)(i) to a location designated by the purchaser. (Utah Code Sec. 59-12-102(21)(a).)

CONCLUSIONS OF LAW

1. If separately stated in the invoices, the (WORDS REMOVED) on its own, is similar to the (WORDS REMOVED), it is a service that is not taxable. See *Utah State Tax Commission, Advisory Opinion 98-031*. Additionally, as Petitioner had pointed out and Respondent had not refuted, sales tax is not charged on garbage removal where the garbage disposal company provides a trash container and then removes and disposes of the garbage from the container according to an established schedule.

2. The Commission concludes from the testimony and evidence submitted in this matter that Petitioner is essentially not leasing the (PRODUCT) to its customers, but is instead providing (SERVICES). Therefore, there is no portion of the fees Petitioner charged that would be subject to sales tax as a lease or rental of tangible personal property under 59-12-103(k). The Tax Commission notes there is a distinction in the facts before it in this matter from those in *Tax Commission Order, Appeal No. 94-0609*,[5] issued on May 25, 1995. From the brief recitation of the facts in that prior appeal, the taxpayer had billed its customers for a

5 The Division also cited to *Tax Commission Order, Appeal No. 89-0033*, but the Commission does not find that case to be relevant as the only issue before the Commission was the penalty.

"rental" or "rental and service." Based on the manner in which Petitioner's transactions were arranged to provide (SERVICES) in this appeal, the way the (SERVICES) were advertised and invoiced and the relatively small cost of the (PRODUCT) verses the large labor and equipment costs to provide the (X) removal (SERVICES), the Commission finds the tangible personal property is incidental to the service. Therefore, the (SERVICES) regarding the (PRODUCT) are not subject to sales tax and the Commission abates this portion of the audit. Of course, if Petitioner changes its business model, the results might be different.

3. In adjusting the audit on this point, as Petitioner is not charging a rental fee subject to sales tax for the (PRODUCT) units, Petitioner is consuming the units in the provision of the (SERVICES). This means Petitioner should have paid either sales tax, or use tax if purchased from out of state, at the time it purchased the units. Petitioner purchased the units from out of state and did not pay a use tax. The Commission orders Respondent to adjust the audit to add the use tax.

4. Additionally, the Commission would note that with the abatement of the sales tax on the (SERVICES), the Division's inclusion of the delivery charges are also abated. If the service is not subject to tax then the delivery to provide the (SERVICES) is not taxable.

5. The transactions are not limited solely to the (WORDS REMOVED). On the invoices where the various charges are broken out into an hourly rate, the charge for "Service" or "Weekly Service" is for the (WORDS REMOVED). It is clear that the cleaning or sterilization of tangible personal property is normally subject to sales tax pursuant to Utah Code Sec. 59-12-103(1)(h). Even on the Separately Stated Invoices, Petitioner combined its charges for (WORDS REMOVED). Because we have found that the (PRODUCTS) are being used by Petitioner in the course of providing a nontaxable service, the (WORDS REMOVED) property is not a retail transaction. The testimony indicates that applicable government regulations require

Petitioner to (X) its (PRODUCTS) on a regular basis. The fact that Petitioner may seek to recover this cost as a separately stated line item on its invoice, does not convert the (X) into a taxable service performed for its customers.

DECISION AND ORDER

Based upon the foregoing, the Tax Commission abates the portions of the audit deficiency as indicated above related to the (WORDS REMOVED). The Commission orders Respondent to add a use tax to the audit on the purchases of the (PRODUCT). Interest is to be adjusted accordingly. It is so ordered.

DATED this ________ day of ______________________, 2008.

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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 _______________________, 2008.

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 Ann. 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.

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