

07-1239

AUDIT

TAX YEARS: 2003, 2004 & 2005

SIGNED: 03-19-09

COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, M. JOHNSON

PARTIAL CONCURRENCE & PARTIAL DISSENT: D.DIXON

GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,

Petitioner,

v.

AUDITING DIVISION OF THE
UTAH STATE TAX COMMISSION,

Respondent.

INITIAL HEARING ORDER

Appeal No. 07-1239

Account No. #####

Tax Type: Corporate Franchise

Audit Period: 01/01/03 – 12/31/05

Judge: Chapman

Presiding:

Kerry Chapman, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP, Vice-President of PETITIONER.

For Respondent: RESPONDENT REP, Assistant Attorney General
RESPONDENT REP, from Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing on February 3, 2009.

On September 13, 2007, Auditing Division (“Division”) issued a Statutory Notice – Corporate Franchise Tax (“Statutory Notice”) to PETITIONER. (“PETITIONER” or “taxpayer”). In the Statutory Notice, the Division imposed additional corporate franchise tax for the 2003, 2004 and 2005 tax years, as follows:

<u>Year</u>	<u>Tax</u>	<u>Penalties</u>	<u>Interest</u>	<u>Total</u>
2003	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

- (c) an additional credit of \$750 may be claimed if the new position is in a business that adds value to agricultural commodities through manufacturing or processing;
- (d) an additional credit of \$200 may be claimed for two consecutive years for each new employee who is insured under an employer-sponsored health insurance program if the employer pays at least 50% of the premium cost for two consecutive years;
- (e) a tax credit of 50% of the value of a cash contribution to a private nonprofit corporation, except that the credit claimed may not exceed \$100,000:
 - (i) that is exempt from federal income taxation under Section 501(c)(3), Internal Revenue Code;
 - (ii) whose primary purpose is community and economic development; and
 - (iii) that has been accredited by the board of directors of the Utah Rural Development Council;
- (f) a credit of 25% of the first \$200,000 spent on rehabilitating a building in the enterprise zone that has been vacant for two years or more; and
- (g) an annual investment tax credit of 10% of the first \$250,000 in investment, and 5% of the next \$1,000,000 qualifying investment in plant, equipment, or other depreciable property.

....

(5) The tax credits under Subsections (1)(a) through (g) may not be claimed by a business engaged in retail trade

....

During the audit period, Utah Admin. Rule R865-6F-28 (“Rule 28”)² provided, as follow in

pertinent part:

A. Definitions:

1. “Business engaged in retail trade” means a business that makes a retail sale as defined in Section 59-12-102.

....

E. A business firm that conducts non-retail operations and is engaged in retail trade qualifies for the credits under Section [63-38f-413] if the retail trade operations constitute a de minimis portion of the business firm’s total operations.

....

From the beginning of the audit period until July 1, 2004, UCA §59-12-102(26)(a) (2003) defined a “retail sale” to mean “any sale within the state of tangible personal property or any other taxable transaction under Subsection 59-12-103(1), other than resale of such property, item, or service by a retailer or wholesaler to a user or consumer.”

From July 1, 2004 through the remainder of the audit period, Section 59-12-102(69) defined “retail sale” or “sale at retail” to mean “a sale, lease, or rental for a purpose other than: (a) resale; (b) sublease; or (c) subrent.”

DISCUSSION

The taxpayer is primarily in the business of providing printing and copying services to its customers. Once the taxpayer completes a printing or copying order, it sells the printed or copied materials to the final consumer of the product. It also collects and remits sales tax on the amounts charged for these items, except on those items sold to customers exempt from taxation. The sales from these printed and copied items constitute over 97% of the taxpayer’s total sales for each of the three years at issue.

The taxpayer also sells items that it does not manufacture itself. It purchases MATERIALS from a supplier that it also sells to its customers. The taxpayer has determined that its percentage of sales from the MATERIALS constitutes less than 3% of its total sales for each of the years at issue.

The taxpayer states that it has taken the enterprise zone credit against its corporate franchise taxes for many years without the Division questioning the credit. The taxpayer acknowledges that Section 63-38f-413(5) provides that a “business engaged in retail trade” is not entitled to take the credits. However, the taxpayer argues that the sale of an item that it itself manufactures is not a “retail sale.” As a result, the taxpayer contends that more than 97% of its sales, specifically its sales of printed and copied materials, are not “retail sales.” The taxpayer further contends that only its sales of MATERIALS are “retail sales.” Because the (X) sales amount to less than 3% of the taxpayer’s total sales, the taxpayer argues that its retail sale business is a de minimis portion of its total business and, as a result, that it qualifies for the enterprise

2 In 2008, Rule 28 was amended and renumbered.

zone credits pursuant to Rule 28(E).

For each of the three years at issue, the taxpayer made total sales ranging between \$\$\$\$ and \$\$. The Division argues that most, if not all of these sales, are “retail sales” because the taxpayer collected and remitted sales tax on the transactions. The Division provided copies of the taxpayer’s sales tax returns for the audit period, which show that the taxpayer reported, for each quarter, total sales ranging from \$\$\$\$ to \$\$\$\$ and total taxable sales ranging from \$\$\$\$ to \$\$\$\$.

As an example, for the 2005 tax year, the taxpayer stated at the hearing that it made total sales of approximately \$. The taxpayer’s four quarterly sales tax returns for 2005 show the following cumulative sales totals:

Total Sales.....	\$\$\$\$
Exempt Sales.....	<u>-\$\$\$\$</u>
Taxable Sales.....	<u>\$\$\$\$</u>

Under either of the Section 59-12-102 definitions of “retail sale” in effect during the audit period, a sale of tangible personal property that is subject to taxation under Section 59-12-103 is a “retail sale,” regardless of whether the vendor manufactured the item itself or purchased it from a supplier. The taxpayer stated that its exempt sales were made to entities that were exempt from taxation, such as schools and government agencies. However, even if all of the taxpayer’s exempt sales were “wholesale sales” made to customers who planned to resell the items, more than 75% of the taxpayer’s total sales would qualify as “retail sales.” Based on the information provided at the Initial Hearing, the Commission finds that the taxpayer is engaged in retail trade and that its retail sales are not de minimis. As a result, the Commission finds that the taxpayer does not qualify for the enterprise zone credits at issue.

ORDER

Based upon the foregoing, the Commission sustains the Division’s audit assessment and denies the taxpayer’s appeal. It is so ordered.

Appeal No. 07-1239

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.

DATED this _____ day of _____, 2009.

Kerry R. 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 _____, 2009.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

PARTIAL CONCURRENCE AND PARTIAL DISSENT

I respectively concur in part and dissent in part with my colleagues' decision. I agree that Rule 28 requires the Commission to find that a printer, such as the taxpayer, who sells his manufactured products to retail customers is engaged in "retail trade" and is not eligible for the enterprise zone credits. However, I believe that the Commission should apply its decision prospectively as it relates to the taxpayer and abate the assessment imposed by the Division.

First, under the NAICS codes, a printer is classified in the manufacturing sector, and an entity that provides photocopying services is classified in the administrative and support services sector. Neither of these activities is classified in the retail trade sector. Second, I believe that the enterprise zone credits are provided to encourage manufacturers, such as the taxpayer, to locate in counties and cities where economic development is needed. Third, I believe that it is illogical to differentiate between a manufacturer that sells its manufactured products at retail to the final consumer and one that sells its manufactured products at wholesale. Fourth, the taxpayer has claimed the enterprise zone credit for many years under identical circumstances without being audited and learning that Rule 28 disqualifies a business such as his from receiving the credits. Fifth, I believe that the only "true" retail trade that the taxpayer engages in is the sale of MATERIALS and that these sales are de minimis when compared to its printing and photocopying sales.

I believe that Rule 28 should be revised to define "retail trade" consistently with the NAICS codes so that the inequities described above are eliminated. However, given the current rule, I would, at the very least, find that the Commission's ruling should only be applied prospectively as to the taxpayer and that the Division's assessment should be abated.

Appeal No. 07-1239

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.

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