

08-0247
SALES TAX
TAX YEAR: 2004, 2005, 2006, 2007
SIGNED: 04-27-2009
COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, M. JOHNSON
EXCUSED: D. DIXON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER</p> <p>Petitioner,</p> <p>v.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p>Respondent.</p>	<p>INITIAL HEARING ORDER</p> <p>Appeal No. 08-0247</p> <p>Account No. #####</p> <p>Tax Type: Sales and Use Tax</p> <p>Audit period: 8/1/04 – 6/30/07</p> <p>Judge: Phan</p>
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Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER
For Respondent: RESPONDENT REP. 1, Assistant Attorney General
RESPONDENT REP. 2, Assistant Director, Auditing
RESPONDENT REP. 3, Manager, Sales Tax Auditing

STATEMENT OF CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Sec. 59-1-502.5, on January 26, 2009. Petitioner (the “Taxpayer”) is appealing Respondent’s (the “Division’s”) audit determination of additional sales and use tax deficiency for the period of August 1, 2004 through June 30, 2007. The amount of the additional tax from the audit is \$\$\$\$\$, along with the interest accrued thereon. Interest continues to accrue on the unpaid balance.

APPLICABLE LAW

Utah Code Ann. § 59-12-103(2)(b) imposes tax on:

(a) retail sales of tangible personal property made within the state; . . . (e) sales of prepared food; . . . (l) amounts paid or charged for tangible personal property

if within this state the tangible personal property is: (i) stored; (ii) used; or (iii) consumed . . .

Utah Code Sec. 59-12-102(34) defines “food and food ingredients” as:

[S]ubstances . . . (ii) that are (A) sold for (I) ingestion by humans; or (II) chewing by humans; and (B) consumed for the substance’s: (I) taste; or (II) nutritional value . . . (c) “Food and food ingredients” does not include: (i) alcoholic beverage; (ii) tobacco; or (iii) prepared food.

Utah Code Sec. 59-12-102(34) defines “prepared food” as:

(i) food: (A) sold in a heated state; or (B) heated by a seller; or . . . (iii) food sold with an eating utensil provided by the seller, including a: (A) plate; (B) knife (C) fork; (D) spoon (E) glass; (F) cup; (G) napkin; or (H) straw.
(b) “Prepared food” does not include: . . . (C) a bakery item, including: (I) a bagel; (II) a bar; (III) a biscuit; (IV) bread; (V) a bun; (VI) a cake; (VII) a cookie; (VIII) a croissant; (IX) a Danish; (X) a donut; (XI) a muffin; (XII) a pasty; (XIII) a pie; (XIV) a roll; (XV) a tart; (XVI) a torte; or (XVII) a tortilla.

DISCUSSION

The Taxpayer had three issues with the audit deficiency. The first was the additional tax assessed in the audit for the set up on the alcoholic beverage sales. The Taxpayer explained that they were aware of the tax that they had paid when they purchased the alcoholic beverages. He was unaware that he should have charged tax on the ‘set up’. The ‘set up’ was the additional amount the Taxpayer charged to the customers above his purchase amount. He explained that this was just an oversight as it was an honest mistake.

Upon review of this issue, the Tax Commission notes that no penalties were assessed with the audit and sales tax is due and owing on these charges regardless of whether the Taxpayer was aware of the sales tax requirement. The Taxpayer provides no basis to abate the audit assessment of tax on the alcoholic beverage sales.

The second issue that the Taxpayer addressed with the audit was use tax assessed on purchases of machinery and equipment he acquired over the Internet. He pointed out that these vendors never charged him sales tax when he purchased this equipment and they shipped it to Utah. He also indicates that when he contacted the primary vendor after the audit had commenced, the vendor indicated they did not charge him tax because they had to pay tax when they purchased the items. The Taxpayer did not provide a letter or any other documentation from the vendor regarding what tax was paid at the time of purchase and tax laws in the other

states may be different from Utah.

However, for Utah sales or use tax purposes the tax is on the transaction, which was the Taxpayer's purchase of the equipment. Although these items were purchased from an out of state vendor they were shipped to the Taxpayer in Utah. Utah Code Sec. 59-12-103(1)(l) makes it clear that the tax is imposed on the purchaser for amounts paid or charged for tangible personal property that is stored, used or consumed in this state. It is clear that these items were stored, used or consumed in Utah. The Taxpayer provided no statutory support or case law that would provide a basis for abatement of the tax assessment on these Internet purchases.

The third issue the Taxpayer contested in the audit arose from the difference in sales tax treatment between 'food and food ingredients' and 'prepared food.' These items are statutorily defined at Utah Code Sec. 59-12-102. The Taxpayer operated a (X) which provided a restaurant setting where customers purchased 'prepared food' items to eat immediately on the premises and also sold 'food' items like (X) or (X) to customers who took these items home to consume later. The 2% credit was allowed for the sales of 'food' or "food ingredients" and not the 'prepared food' items.

The Taxpayer explained that he was unsure of how to fill out his sales tax return to claim the 2% credit. He states that he called the Tax Commission for help and spoke with Tax Commission employee, EMPLOYEE. The Taxpayer stated that EMPLOYEE told him to claim his total of all food sales on Line 13 of the Sales Tax Return. The Taxpayer understood this to mean to include both the 'food' and 'prepared food' sales, which was his total sales figure from Line 7 of the Sales Tax Return. Therefore, he claimed the 2% rebate on the 'prepared food' sales, when it should have been only on the 'food' sales.

The Division has two arguments on this issue. First the Division does point out that the instructions for the Sales Tax Return for Line 13 explains that the credit is only for 'food.' The instructions state:

Determine any credit to which you are entitled for sales of food and food ingredients by multiplying the amount of these sales included on Line 7 by .02. Only retailers making sales of food and food ingredients may claim this credit. Food and food ingredients do not include alcoholic beverages, tobacco or prepared food.

Based on this it is the Division's position that the Taxpayer should have known that it could not claim the rebate for the prepared food items that the Taxpayer sold to customers to consume as part of the restaurant side of the business. In addition to this factor, the Division explained that the Taxpayer continued to collect the full sales tax rate on the sales of 'food.' It was the Division's position that if the tax was collected the Taxpayer was required to remit it to the State of Utah. The Division points to R865-19S-4(C) which states, "A vendor that collects an excess amount of sales or use tax must either refund the excess to the purchasers from whom the

vendor collected the excess or remit the excess to the Commission.” The purpose of the reduction in tax rate was so that the customers paid less in sales tax on ‘food’ items, and not to give the seller the 2% because they collected the tax and then kept the difference.

The Taxpayer presented copies of two cash register tapes that showed the daily total of sales, as well as taxes that were charged on the sales. It was his position during the hearing that the tapes showed that he had collected a reduced tax amount on the ‘food’ sales. However, upon review the lower tax amount, shown as “Tax 2” on the tapes, does not seem to relate to any amount that would be a food item, like sale of (X) or (WORDS REMOVED). The two cash register tapes were the only information submitted in this matter so there was insufficient evidence to show that the Taxpayer had not collected the additional tax from his customers on the ‘food’ items.

Regarding the Taxpayer’s representation that he spoke with EMPLOYEE over the telephone and he was following EMPLOYEE’s instructions when filling out his sales tax return, the Commission generally does not find a verbal conversation basis to abate tax or interest, because the accuracy of the advice given is based on the accuracy and completeness of the information provided by the requesting taxpayer. Further, there is in this case the possibility of the Taxpayer not understanding the difference between ‘food’ and ‘prepared food’ and, therefore, taking the credit for both. It appears that EMPLOYEE is still a Tax Commission employee and could be called as a witness by either party, should the matter proceed to a Formal Hearing.

DECISION AND ORDER

Based upon the foregoing, the Commission sustains the audit assessment of sales and use tax and interest for the period of August 1, 2004, through June 30, 2007. 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.

DATED this _____ day of _____, 2009.

Appeal No. 08-0247

Jane Phan, Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION:

The Commission has reviewed this case and the undersigned agree with this decision.

DATED this _____ day of _____, 2009.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Notice: Unless a party requests a Formal Hearing, the balance of tax and interest resulting from this decision must be paid within thirty days from the date this decision is issued or an additional late payment penalty may be assessed.

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