08-0302
SALES AND USE
TAX YEARS: 2004, 2005, 2006 & 2007
SIGNED: 02-09-2009
COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, M. JOHNSON
PARTIAL CONCURRENCE AND 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. 08-0302 Account No. ##### Tax Type: Sales and Use Tax Audit Period: 04/01/04 – 02/15/07 Judge: Chapman

Presiding:
Kerry Chapman, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER REP. 1, Attorney
PETITIONER REP. 2, Attorney
For Respondent: RESPONDENT REP., Assistant Attorney General

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing on October 29, 2008.

On January 11, 2008, Auditing Division ("Division") issued a Statutory Notice – Sales and Use Tax ("Statutory Notice") to COMPANY A ("COMPANY A"). In the Statutory Notice, the Division imposed additional sales tax of $$$$$, plus interest, for the April 1, 2004 through February 15, 2007 audit period. The assessment has been paid in its entirety.

On February 15, 2007, COMPANY A merged with and into PETITIONER (hereafter "PETITIONER" or "taxpayer"). PETITIONER, as the surviving corporation in the merger, succeeded to all rights, privileges, power, debts, duties and obligations of COMPANY A.

The assessed deficiencies arise from two separate adjustments, specifically for: 1) "Unreported Taxable Purchases," which assessed sales and use tax for the storage, use or other consumption of tangible personal property; and 2) "Additional Taxable Sales Prior to July 2005, Schedule 1" and "Additional Taxable Sales After July 1, 2005, Schedule 2," which assessed the taxpayer with additional sales tax on its sales of (X).

PETITIONER has agreed to the assessed deficiencies for "Unreported Taxable Purchases," which amounts to approximately $$$$$, plus interest. However, PETITIONER is appealing the Division's determination that "Additional Taxable Sales" of (X) are taxable, as shown in Schedules 1 and 2 of the Statutory Notice. This portion of the audit amounts to approximately $$$$$, plus interest. PETITIONER asks the Commission to reverse this portion of the assessment in its entirety.

The Division makes two requests. First, it asks the Commission to determine whether its assessment for "Additional Taxable Sales [of (X)] After July 1, 2005, Schedule 2" should be increased. For this period, the Division excluded from taxation separately stated charges for the "delivery" and "installation" of taxable (X). The Division asks the Commission to determine if it improperly excluded these amounts from taxation. If yes, the Division asks the Commission to find that its assessment should be increased to reflect the improperly excluded amounts. If no, the Division asks the Commission to sustain its assessment in its entirety.

APPLICABLE LAW

I. From the Beginning of the Audit Period Until July 1, 2005.

1. Until July 1, 2005, Utah Code Ann. §59-12-103(1) (2004) provided, as follows in pertinent part:

> (1) 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;
> . . . .

(g) amounts paid or charged for services:
. . . .
(ii) to install tangible personal property in connection with other tangible personal property . . . .

2. Also until July 1, 2005, Section 59-12-102(21) (2004)[1] defined "purchase price" to mean "the amount paid or charged for tangible personal property or any other taxable transaction under Subsection 59-12-103(1), excluding only cash discounts taken or any excise tax imposed on the purchase price by the federal government."

3. Utah Admin. Rule R865-19S-71 ("Rule 71"), which was repealed on July 1, 2005, provides as follows in pertinent part:

. . . .
(B) If shipment of the tangible personal property occurs before the passage of title, shipping costs, to the extent included in the sales price of the item, and regardless of whether they are segregated on the invoice, shall be included in the sales and use tax base.

II. From July 1, 2005 Through the Remainder of the Audit Period.

4. Beginning July 1, 2005 and effective the remainder of the audit period, Section 59-12-103(1) (2008) provides as follows in pertinent part:

(1) 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;
. . . .

5. Also beginning July 1, 2005, the terms "purchase price" and "sales price" are defined in Section 59-12-102(72) (2008), as follows in pertinent part:

(72)(a) "Purchase price" and "sales price" mean the total amount of consideration:
(i) valued in money; and

1 In the 2003 General Session, the Legislature enacted Senate Bill 147 ("S.B. 147"), which included an amendment to the definition of "purchase price" that was to become effective July 1, 2004. In the 2004 Third Special Session, however, the Legislature enacted Senate Bill 3000, which delayed the effective date of the amendment until July 1, 2005. Accordingly, the definition of "purchase price" remained unchanged for that portion of the audit period prior to July 1, 2005.

(ii) for which tangible personal property or services are:
(A) sold;
(B) leased; or
(C) rented.

(b) "Purchase price" and "sales price" include:
(i) the seller's cost of the tangible personal property or services sold;
(ii) expenses of the seller, including:
(A) the cost of materials used;
(B) a labor cost;
(C) a service cost;
(D) interest;
(E) a loss;
(F) the cost of transportation to the seller; or
(G) a tax imposed on the seller; or
(iii) a charge by the seller for any service necessary to complete the sale.
(c) "Purchase price" and "sales price" do not include:
. . . .
(ii) the following if separately stated on an invoice, bill of sale, or similar document provided to the purchaser:
. . . .
(D) a delivery charge; or
(E) an installation charge.

6. For purposes of determining the “purchase price” or “sales price” of an item or service, the term “delivery charge” is defined in Section 59-12-102(24) (2008) as follows:

(24) (a) "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 (24)(a)(i) to a location designated by the purchaser.
(b) "Delivery charge" includes a charge for the following:
(i) transportation;
(ii) shipping;
(iii) postage;
(iv) handling;
(v) crating; or
(vi) packing.

7. For purposes of determining the “purchase price” or “sales price” of an item or service, the term “installation charge” is defined in Section 59-12-102(43) (2008) as follows:

> (43) (a) Except as provided in Subsection (43)(b), "installation charge" means a charge for installing tangible personal property.
>
> (b) Notwithstanding Subsection (43)(a), "installation charge" does not include a charge for repairs or renovations of tangible personal property.

APPLICABLE FACTS

1. PARAGRAPH REMOVED

2. PARAGRAPH REMOVED

3. PARAGRAPH REMOVED

4. PARAGRAPH REMOVED

5. PARAGRAPH REMOVED

6. PARAGRAPH REMOVED

7. PARAGRAPH REMOVED

8. PARAGRAPH REMOVED

9. PETITIONER prepares a detailed invoice for each of its clients that may separately state charges for the following, where applicable: a) (X); b) (WORDS REMOVED) c) (X) charge; d) (WORDS REMOVED); e) additional hours; f) mileage-crew truck; g) mileage – (WORDS REMOVED); and h) delivery charge.

10. PARAGRAPH REMOVED

11. The separately stated charge for “additional hours” represents a charge for the number of additional hours PETITIONER’s employees are required to spend at a (X) job site beyond the anticipated or normal amount of time required to perform the job. Invoices show that PETITIONER charged $$$$$ per “additional hour.”

12. The separately stated “mileage - crew truck” represents an amount charged to have the job supervisor drive a pickup truck to the (X) site. Invoices show that this charge is based on a rate of $$$$$ per mile.

13. The separately stated "mileage – (WORDS REMOVED)" represents an amount charged for driving the specialized (X) truck to the (X) site. Invoices show that this charge is based on a rate of $$$$$ per mile.

14. The separately stated "delivery charge" represents the amount charged for delivering the pre-mixed (X) to the (X) site. Invoices show that this charge is based on a rate of $$$$$ per unit of (X).

15. A typical crew may include two to four persons, consisting of someone to drive the (X) transport or transports (if more than one is required for the job), someone to drive and operate the (WORDS REMOVED), and where necessary, a supervisor or operator who drives the "crew truck" and is in charge of the operation.

16. During the audit period, PETITIONER collected and remitted to the Tax Commission the applicable sales tax on: a) (X); b) (WORDS REMOVED); c) the (X) charge; and (d) the delivery charge.

17. During the audit period, PETITIONER did not collect or remit to the Tax Commission any sales or use tax on: a) the (X) charge; b) additional hours; c) mileage - crew truck; or (d) mileage - (WORDS REMOVED).

18. For that portion of the audit period until July 1, 2005, the Division determined that tax was due on all charges shown on PETITIONER's invoices. As a result, the Division assessed sales tax on those charges on which PETITIONER did not collect sales tax; i.e., the charges listed in Applicable Fact #17 above.

19. For that portion of the audit period beginning on July 1, 2005, the Division determined that tax was due on all charges except for the separately itemized "delivery" charge. As a result, the Division assessed sales tax on those charges on which PETITIONER did not collect sales tax; i.e., the

charges listed in Applicable Fact #17. However, for this period, it also gave PETITIONER credit for the sales tax it had collected on the separately itemized delivery charges shown on its invoices.

20. For the entire period, PETITIONER asserts that its separately itemized charges for "delivery," "mileage-crew truck," and "mileage-(WORDS REMOVED)" are all nontaxable *delivery* charges.

21. For the entire period, PETITIONER asserts that its separately itemized charges for "(X) charge" and "additional hours" are nontaxable *installation* charges.

DISCUSSION

I. Audit Period Prior to July 1, 2005.

For this period, the Division assessed tax on all itemized charges shown on PETITIONER's invoices for sales of (X) services. PETITIONER asks the Commission to find that certain of the itemized charges are not subject to taxation, specifically: 1) installation charges described as "(X) charge" and "additional hours;" and 2) delivery charges described as "delivery," "mileage-crew truck," and "mileage-(WORDS REMOVED)."

Effective July 1, 2005, delivery charges and installation charges were excluded from the definition of "purchase price" for Utah sales and use tax purposes. Until this date, however, Section 59-12-103(1)(g) specifically provided that charges "to install tangible personal property in connection with other tangible personal property" were taxable, even if separately itemized. Furthermore, certain delivery charges were also subject to taxation. Rule 71(B) (repealed on July 1, 2005) provided that a charge to deliver tangible personal property before the passage of title was subject to taxation, even if the delivery charge was separately itemized on the invoice.

In *BJ-Titan Servs. v. Utah State Tax Comm'n*, 842 P.2d 822 (Utah 1992), the Utah Supreme Court considered the taxation of services that BJ-Titan performed on (WORDS REMOVED). (SENTENCES REMOVED).

The Commission believes that the ruling in *BJ-Titan* is applicable in determining the taxability of PETITIONER's pumping services transactions that occurred prior to July 1, 2005. First, the statutes applicable in *BJ-Titan* were essentially unchanged until July 1, 2005. Second, (WORDS REMOVED). For these reasons, the Commission finds that all amounts charged by PETITIONER in providing its (X) services prior to July 1, 2005 are subject to taxation.

Moreover, in *Hales Sand & Gravel, Inc. v. Utah State Tax Comm'n*, 842 P.2d 887 (Utah 1992), the Utah Supreme Court considered the taxation of delivery services. In that case, Hales' primary business involved retail sales of sand, gravel, asphalt, and concrete. Although a customer could pick up the materials itself, most customers had Hales deliver their orders. Hales separately itemized its delivery charges and did not charge sales tax on the delivery charges. The Court upheld Rule 71(B) and found that an itemized charge for the delivery of tangible personal property prior to the passage of title is considered part of the sales price of the tangible personal property and, thus, is subject to taxation. Furthermore, the Court found that unless the parties explicitly agree otherwise, "title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods. . ." (citing Utah Code Ann. §70A-2-401(2)).

In this case, there is no evidence to show that PETITIONER's customers explicitly agreed to have title to the (X) pass prior to PETITIONER delivering it to their respective locations. As a result, title is presumed to pass at the point of delivery. For these reasons, the ruling in *Hales* also provides that PETITIONER's delivery charges, though separately stated, are part of the taxable price of the (X) services and, thus, subject to taxation.

In summary, the Commission finds that all amounts charged by PETITIONER for its (X) services that occurred prior to July 1, 2005 are subject to taxation. Accordingly, the Commission sustains the Division's assessment of additional tax as shown on "Additional Taxable Sales Prior to July 2005, Schedule 1" of the Statutory Notice.

II. Audit Period Beginning on July 1, 2005.

Effective July 1, 2005, the definition of "purchase price," as found in Section 59-12-102(72)(c), was amended to exclude "a delivery charge" and "an installation charge." Accordingly, the Commission must consider whether any of the PETITIONER's charges for transactions after this date are nontaxable delivery or installation charges. However, before we address these issues, the Commission will first address two ruling requests made by the Division concerning the July 1, 2005 amendments.

A. Does the Amended Definition of "Purchase Price" Affect Utah's Sales and Use Tax Base?

The Division explains that the definition of "purchase price" was amended when Utah adopted provisions included in the Streamlined Sales and Use Tax Agreement. The Division argues that some of the adopted provisions are actually for the benefit of states other than Utah and, as a result, have no impact on Utah's imposition of sales and use tax. For these reasons, the Division argues that the exclusion of delivery and installation charges from the definition of "purchase price" may, possibly, not apply to Utah.

Specifically, the Division asks the Commission to rule on whether Utah excludes delivery ands installation charges from the sales tax base beginning on July 1, 2005. The Commission finds the Division's argument to be without merit. The definition of "purchase price" that became effective on July 1, 2005 *is* applicable in determining Utah taxable sales. Accordingly, the Commission finds that on or after July 1, 2005, the portion of a taxable transaction that is separately stated and that qualifies as "a delivery charge" (as defined in Section 59-12-102(24)) or "an installation charge" (as defined in Section 59-12-102(43)) is excluded from the "purchase price" on which sales or use tax is imposed.

B. Is Specific Language Necessary Before a Charge Is a Delivery or Installation Charge?

The Division also asks the Commission to find that an itemized invoice charge that does not have the word "delivery" in its description cannot qualify as a nontaxable delivery charge. The Division contends that such a result is appropriate even if evidence shows that the charge satisfies the Section 59-12-102(24) definition of "delivery charge." The Division argues that it would place an unreasonable burden upon an auditor to have to determine whether a charge without the word "delivery" in its invoice description is, in fact, a "delivery charge."

Furthermore, Section 59-12-102(24)(b) specifically provides that a "delivery charge" includes a transportation charge, a shipping charge, a postage charge, a handling charge, a crating charge and a packing charge. However, the Division states that if one of these specific charges is itemized on an invoice, the Commission should find that it is not a nontaxable delivery charge because its description would not include the word "delivery." Upon questioning, the Division also states that the Commission should consider any itemized charge that includes the word "delivery" to be a nontaxable delivery charge, even if evidence shows that the charge was imposed for an item or service that does not qualify as a "delivery charge" under Section 59-12-102(24).

The Commission rejects the Division's arguments. The Commission will consider all relevant evidence when determining whether an itemized charge qualifies as a Section 59-12-102(24) "delivery charge."[2] Accordingly, the Commission may deem an itemized charge to be a "delivery charge," even if the word "delivery" is not in its invoice description. Moreover, the Commission may deem an itemized charge not to be a "delivery charge," even if the word "delivery" is in its invoice description. The

2 *See Heritage Convalescent Ctr. v. Utah State Tax Comm'n*, 953 P.2d 445 (Utah 1997), in which the Utah Supreme Court found that there had been a sale of "meals" even though this item was not separately itemized on the invoices.

Commission finds the Division's argument concerning the burden it would place on an auditor to investigate and determine whether a charge is a "delivery charge" to be without merit.

For similar reasons, the Commission also rejects the Division's argument that an itemized charge that does not have the word "installation" in its description should not qualify as a nontaxable installation charge, regardless of whether evidence shows that the charge satisfies the Section 59-12-102(43) definition of "installation charge."

C. Charges that PETITIONER Claims to be Nontaxable Installation Charges.

Effective July 1, 2005, Section 59-12-102(43)(a) defines an "installation charge" to mean "a charge for installing tangible personal property." PETITIONER contends that two itemized charges on its invoices qualify as nontaxable installation charges, specifically those charges described as "(X) charge" and "additional hours." The Division determined that these charges were not installation charges and imposed tax on them.

Since *BJ-Titan* was issued, laws affecting the taxation of installation and delivery charges have changed. However, the Court in *BJ-Titan* also ruled on issues concerning the "primary object" of (X) services transactions. These issues have not been affected by the July 1, 2005 amendments. Accordingly, the Commission believes that these aspects of *BJ-Titan* are still controlling.

As discussed earlier, the Court in *BJ-Titan* found that the primary object of (X) services was for the (X) operator to receive (X) in the (X) and that the services required to achieve this purpose were incidental to the final product. Furthermore, the Court also explained:

> Because the essence of the transaction between BJ-Titan and a well operator is tangible personal property, BJ-Titan purchased the raw materials used in producing its cement not for consumption, but for resale, and the labor expended in producing the final product merely increased the sales value of that product. The ultimate consumer is the well operator. In this respect, BJ-Titan is like a concrete mixing company hired to arrive at a site and pour concrete into a hole dug by and between forms erected by the general contractor, who is the consumer of the cement. The contractor purchases delivered and poured concrete and leaves the formulation of

> the blend of ingredients to the concrete provider, as conditions require. The labor expended in producing and pouring the concrete and the cost of delivery are all included in the price.

This language shows that the Court considered cementing services to include not only labor to produce the final product, but also labor to pour it. The Commission notes that the word "install" is defined to mean "to set in position or adjust for use" (*Webster's II New Riverside University Dictionary* at p.633 (1988). The Commission believes that the labor to "pour" the cement product is equivalent to labor to "install" it. For these reasons, if PETITIONER's itemized charges for "cement charges" and "additional hours" are determined to be amounts charged to pour or install the cement, the charges will be nontaxable.

1. *(X) Charge*. A "(X) charge" is included and separately itemized on all three invoices that the parties submitted. On these invoices, the "(X) charge" ranges from $$$$$ to $$$$$. The parties jointly stipulated that this charge "represents the amount charged for (X) the (X) between the (X WORDS REMOVED) and the (WORDS REMOVED)." Furthermore, at the Initial Hearing, PETITIONER proffered that the amount also represents the amount charged for the anticipated or normal amount of time required for PETITIONER's employees to perform the job. Based on this explanation, the Commission finds that the "(X) charge" amounts qualify as installation charges that are excluded from the purchase price of the taxable (X) services. Accordingly, the Commission finds that for transactions on or after July 1, 2005, any separately stated "(X) charge" is not subject to tax.

2. *Additional Hours*. An "additional hours" charge of $$$$$ is included on two of the invoices that the parties submitted, which involved jobs using (WORDS REMOVED), respectively. The one invoice without an "additional hours" charge was for a job that only used (WORDS REMOVED) of (X). The parties jointly stipulated that the "additional hours" amount "represents a charge for the number of additional hours PETITIONER's employees are required to spend at a (X) job site beyond the anticipated or normal amount of time required to perform the job." Because this charge was only added for those jobs on

which larger amounts of (X) were used, it is reasonable to assume that it would require more time to pour the (X). There is no indication that the charge would include labor for any other purposes than pouring the (X). Accordingly, the Commission also finds that the "additional hours" charges are "installation charges" that should not be taxed.

3. *Summary*. The Commission finds that on transactions occurring on or after July 1, 2005, any separately itemized charges for "(X) charge" and "additional hours" are not subject to tax.

D. Charges that PETITIONER Claims to be Nontaxable Delivery Charges.

Effective July 1, 2005, Section 59-12-102(24)(a)(ii) defines a "delivery charge" to include one "for preparation and delivery of the tangible personal property or services . . . to a location designated by the purchaser." PETITIONER contends that three itemized charges on its invoices qualify as nontaxable delivery charges, specifically those described as "delivery," "mileage-crew truck," and "mileage-(WORDS REMOVED)." In its assessment, the Division agreed that the charges for "delivery" were nontaxable delivery charges. However, the Division determined that the charges for "mileage-crew truck" and "mileage-(WORDS REMOVED)" did not qualify as "delivery charges" and, as a result, taxed these specific charges.

1. *Mileage-Crew Truck*. A "mileage-crew truck" charge is included and separately itemized on all three invoices that the parties submitted. On the invoices, this charge is based on an amount of $$$$$ per mile to the (X) site. The parties jointly stipulated that this charge "represents an amount charged to have the job supervisor drive a pickup truck to the (X) site." The Commission does not find that this amount is "for preparation and delivery of the tangible personal property or services," as required under Section 59-12-102(24)(a)(ii). Although the charge is for the transportation of the job supervisor and a pickup truck to the (X) site, it is not for the transportation of the (X). Nor does the charge appear to be associated with the installation of the (X). Accordingly, the Commission sustains the Division's determination that this charge is part of the taxable purchase price of the (X) services.

2. *Mileage-(WORDS REMOVED).* A "mileage-(WORDS REMOVED)" charge is included and separately itemized on all three invoices submitted. On the invoices, this charge is based on an amount of $$$$$ per mile to the (X) site. The parties jointly stipulated that this charge "represents an amount charged for driving the specialized (X) truck to the (X) site." The Commission notes that another charge, the separately stated "delivery" charge, "represents the amount charged for delivering the pre-mixed (X) to the (X) site." The Commission does not find that the charge for "mileage-(WORDS REMOVED)" to be "for preparation and delivery of the tangible personal property or services," as required under Section 59-12-102(24)(a)(ii). Accordingly, the Commission does not believe that the charge qualifies as a delivery charge.

Furthermore, the Commission does not consider this charge to be a nontaxable "installation charge" for several reasons. To begin, PETITIONER did not classify or even describe this as an installation charge. Most importantly, Section 59-12-102(72)(b) defines purchase price to mean "(ii) expenses of the seller, including: . . . a service cost [and] the cost of transportation . . ." as (X) as "(iii) a charge by the seller for any service necessary to complete the sale." This charge, as described by both parties, is clearly to recoup the expense to drive this piece of equipment to the (X) site and falls under this section of the Code. Furthermore, installation charges have already been accounted for under "(X) Charge" and "Additional Hours." Finally, even if there were an installation application, because one of the functions of the (WORDS REMOVED), the Commission finds that the (WORDS REMOVED) is used for a manufacturing purpose, not just an installation purpose.

3. *Summary*. For transactions occurring on or after July 1, 2005, the Commission sustains the Division's decision that the itemized "delivery" charges on PETITIONER's invoices are nontaxable. However, the Commission finds that the itemized charges for "mileage-crew truck" and "mileage-(WORDS REMOVED)" are taxable.

ORDER

Based upon the foregoing, the Commission finds that on (X) services transactions occurring on or after July 1, 2005, the separately stated charges for "(X) charge" and "additional hours" are not subject to taxation and should be removed from the Division's assessment. Otherwise, the Division's assessment is sustained. 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.

_____
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 dissent from the majority decision on one important point. I hold the separately itemized charges for "mileage-(WORDS REMOVED)" transactions occurring on or after July 1, 2005 are nontaxable.

My fellow commissioners determined the mileage-(WORDS REMOVED) charge was taxable for three reasons: (1) another separately stated charge, the "delivery" charge, represented the amount charged for delivering the (WORD REMOVED) to the (X) site; (2) the charges for mileage-(WORDS REMOVED) were not for preparation and delivery of the tangible personal property or services and therefore did not qualify as a delivery charge; and (3) it is not an "installation charge" because one of the functions of the (WORDS REMOVED) is to mix the (X) and water into a proper consistency which indicates the (WORDS REMOVED) is also used for a manufacturing purpose and not just an installation purpose. I disagree with the conclusion of the majority on these points.

A review of the pertinent facts in this case shows the (X) has not been received until the (X) truck delivers the (WORDS REMOVED) to the (X). In addition, the (X) truck itself, for which

the mileage-(WORDS REMOVED) charge is imposed, is required to complete both the delivery and installation of the (X).

PETITIONER (WORDS REMOVED) at its facility. The (WORDS REMOVED) and driven to the job site. (WORDS REMOVED) is provided by the (X) owner at the (X) site. A separate specialized (X) truck is driven to the job site (WORDS REMOVED). SENTENCES REMOVED.

The facts of the case make it clear the (X) is not completely delivered until the (X) truck delivers the (WORDS REMOVED) to the (X). In addition, the facts of the case make it clear the (X) truck is essential to installation of the (WORDS REMOVED).

State statute and case law supports the nontaxability of the separately itemized charges for "mileage-(WORDS REMOVED)" transactions occurring on or after July 1, 2005. The Court in *BJ-Titan* found that the primary object of cementing services was for the well operator to receive cement at a designated location. The mileage-(WORDS REMOVED) charge falls within the definition of delivery charge in 59-12-102(24)(a)(ii) which says a "delivery charge" is "preparation and delivery of the tangible personal property or services . . . to a location designated by the purchaser." In addition, Section 59-12-102(43)(a) defines an "installation charge" to mean "a charge for installing tangible personal property". The mileage-(WORDS REMOVED) charge is imposed because the (X) truck is used on site to deliver the (X) in a proper consistency and to install the (X) in the (X).

Therefore, I hold the separately itemized charges for "mileage-(WORDS REMOVED)" transactions occurring on or after July 1, 2005 are nontaxable.

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.