08-0952
AUDIT
TAX YEARS: 2004, 2005, 2006
SIGNED: 11-25-2009
COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, M. JOHNSON
EXCUSED: D. DIXON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION** Appeal No. 08-0952 Account No. ##### Tax Type: Sales and Use Tax Audit Period: 05/01/04 – 01/31/06 Judge: Chapman

Presiding:
R. Bruce Johnson, Commissioner
Kerry Chapman, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER REP. 1, Representative
For Respondent: RESPONDENT REP. 1, Assistant Attorney General
RESPONDENT REP. 2, from Auditing Division
RESPONDENT REP. 3, CFO, COMPANY
RESPONDENT REP. 4, Sales Manager, COMPANY A

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on November 18, 2009. Based upon the evidence and testimony presented by the parties, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax at issue is sales and use tax.

2. The audit period is May 1, 2004 through January 31, 2006.

3. On May 25, 2007, PETITIONER ("PETITIONER" or "taxpayer") submitted a refund request to the Tax Commission. PETITIONER requested a refund of sales and use tax in the amount of $$$$$ that it claimed to have erroneously paid on furnish and install contracts during the audit period. Exhibit P-12.

4. On April 11, 2008, Auditing Division (the "Division") issued a Statutory Notice – Sales and Use Tax ("Statutory Notice") to the taxpayer concerning its refund request. The Division determined that the taxpayer was not entitled to the total refund it had requested. The Division determined that the taxpayer was only entitled to a refund of $$$$$ in overpaid tax (plus interest). Exhibit R-1.

5. The taxpayer is appealing the Division's determination and asks the Commission to refund the remaining amount of its refund request.

6. The taxpayer's refund request concerns sales tax that PETITIONER paid on purchases of (X) from COMPANY. ("COMPANY A"). PETITIONER claims that it erroneously paid sales tax on these transactions, arguing that COMPANY A was a real property contractor who sold PETITIONER Home nontaxable real property consisting of (X) *plus* installation.

7. The Division determined that some of the transactions submitted for refund were associated with sales of real property. These transactions are ones for which COMPANY A had billed PETITIONER for both (X) and their installation. Exhibits P-1 and R-1. For these transactions, the Division determined that PETITIONER had purchased nontaxable real property, not taxable tangible personal property. The Division refunded the $$$$$ of tax that PETITIONER had paid on these transactions.

8. The Division determined that the remainder of the transactions submitted for refund were associated with sales of tangible personal property only. These transactions were ones where COMPANY A had billed PETITIONER for (X), but not for their installation. Exhibit P-1. The installation charges associated with these particular (X) were billed to PETITIONER by either COMPANY B

("COMPANY B") or COMPANY C ("COMPANY C") and paid by PETITIONER with checks made out to either COMPANY B or COMPANY C. Exhibits P-1 and R-5. The Division determined that in these instances, PETITIONER had entered into two separate transactions, one to purchase taxable tangible personal property (i.e., the (X)) from COMPANY A and another to purchase nontaxable installation services from COMPANY B or COMPANY C. As a result, the Division determined that PETITIONER properly paid sales tax on the (X) it purchased from COMPANY A and that a refund of such tax was unwarranted.

9. The taxpayer submitted an affidavit from EMPLOYEEt, an employee of COMPANY B and COMPANY C, who stated that COMPANY A "arranged" with COMPANY B and COMPANY C for the installations of the (X) at issue. Exhibits P-11 and R-6. However, EMPLOYEE did not indicate in his affidavit whether COMPANY B and COMPANY C had contracted with PETITIONER or with COMPANY A for the installation of the (X).

10. No employee of PETITIONER testified at the Formal Hearing to explain whether PETITIONER had contracted with COMPANY A or with COMPANY B or COMPANY C to install the (X) at issue. PETITIONER REPRESENTATIVE 1, PETITIONER Home's representative, testified on behalf of PETITIONER. He stated that he believed that an oral contract existed between COMPANY A and COMPANY B or COMPANY C for the installation of the (X) at issue. However, he admitted that he did not know if a contract existed between these parties for the installations.

11. RESPONDENT REPRESENTATIVE 3, CFO of COMPANY A, testified that for the (X) at issue, COMPANY A did not contract with PETITIONER for the installation of the (X). RESPONDENT REPRESENTATIVE 3 testified that any contract for installation of the (X) would have been between PETITIONER and COMPANY B or COMPANY C. He further testified that had there been a problem with an installation, COMPANY B or COMPANY C, not COMPANY A, would have been responsible for correcting the problem. He also testified that COMPANY A was not responsible for the

payment of the installation amounts that COMPANY B or COMPANY C billed to PETITIONER. He stated that COMPANY A received no consideration from PETITIONER for the installation services performed by COMPANY B or COMPANY C. He confirmed that COMPANY A helped to co-ordinate with COMPANY B or COMPANY C for the installation of the (X) that it had sold to PETITIONER. He stated, however, that COMPANY A did not enter into a contract to install the (X) at issue. RESPONDENT REPRESENTATIVE 3 explained that he is familiar with sales and use taxation, as COMPANY A sells (X) in 23 states and he is responsible for filing sales and use tax returns in the states where they are required.

12. RESPONDENT REPRESENTATIVE 4, Sale Manager of COMPANY A, also testified. On January 24, 2008, RESPONDENT REPRESENTATIVE 4 signed a statement that PETITIONER REPRESENTATIVE 1, the taxpayer's representative, had prepared. Exhibit P-13. In the statement, RESPONDENT REPRESENTATIVE 4 indicated that COMPANY A had contracted to install the (X) at issue. At the hearing, RESPONDENT REPRESENTATIVE 4 testified that he did not know whether COMPANY A contracted with PETITIONER for the installation of the (X). He explained that he thought he was attesting in the statement that COMPANY A installed some of the (X) that it sold and that COMPANY C installed others of the (X) that it sold. RESPONDENT REPRESENTATIVE 4 stated that he now believed that for the transactions at issue, COMPANY A only contracted with PETITIONER for the (X) and not for the installation of the (X).

13. In a letter dated November 17, 2005, COMPANY A informed PETITIONER of a price increase concerning its (X) and that the price increases would become effective December 17, 2005. Exhibits P-4 and R-6. In the letter, COMPANY A also informed PETITIONER of the amounts that PETITIONER would be billed for installation when COMPANY C installed the (X) instead of COMPANY A. The Commission finds that the information in the letter is inconclusive as to whether COMPANY A contracted with COMPANY C for the installation of the (X) it sold PETITIONER beginning December 17,

2005. Regardless, the Division determined through other evidence that sales tax should be refunded on all transactions with an invoice date of December 17, 2005, when the provisions of the letter took effect, or later. In any case, the letter does not contain information that convinces the Commission that COMPANY A had contracted with A&C and COMPANY C to install the (X) that it sold to PETITIONER prior to December 17, 2005.

14. No written contracts were submitted to show whether PETITIONER contracted with COMPANY A or with COMPANY B and COMPANY C to install the (X) at issue. Based on the evidence and testimony available at the Formal Hearing, the Commission finds that no contract existed between COMPANY A and PETITIONER for the installation of the (X) at issue.

APPLICABLE LAW

1. Utah Code Ann. §59-12-103(1)(a) provides that a "tax is imposed on the purchaser . . . for amounts paid or charged for . . . retail sales of tangible personal property made within the state[.]"

2. During the audit period, Utah Admin. Rule R865-19S-58 ("Rule 58")[1] provided, as follows in pertinent part:

> A. Sales of construction materials and other items of tangible personal property to real property contractors and repairmen of real property are generally subject to tax if the contractor or repairman converts the materials or items to real property.
> . . . .
> B. The sale of real property is not subject to sales tax, nor is the labor performed on real property. For example, the sale of a completed home or building is not subject to the tax, but sales of materials and supplies to contractors for use in building the home or building are taxable transactions as sales to final consumers.
> 1. The contractor or repairman who converts the personal property to real property is the consumer of tangible personal property regardless of the type of contract entered into - whether it is a lump sum, time and material, or a cost-plus contract.

1 Subsequent to the audit period, Rule 58 was renumbered and Section (D) of the rule, which is not pertinent to this appeal, was amended.

> 2. . . . , the contractor or repairman who converts the construction materials, fixtures or other items to real property is the consumer of the personal property whether the contract is performed for an individual, a religious or charitable institution, or a government entity.
> . . . .
> 5. Purchases . . . are assumed to have been made by the contractor and are subject to sales tax.
> . . . .
> C. If the contractor or repairman purchases all materials and supplies from vendors who collect the Utah tax, no sales tax license is required unless the contractor makes direct sales of tangible personal property in addition to the work on real property.
> 1. If direct sales are made, the contractor shall obtain a sales tax license and collect tax on all sales of tangible personal property to final consumers.

3. For most of the audit period, Utah State Tax Commission Publication 42 (Revised 6/04) ("Publication 42") explained, as follows in pertinent part:

> A furnish and install contract is a contract under which a person not only sells tangible personal property to a purchaser, but in addition, converts or arranges the conversion of that tangible personal property to real property. Under a furnish and install contract, the seller converts the tangible personal property into real property and as such, becomes a real property contractor. The contractor is the last person to own the materials as personal property, whether the property is installed by the contractor or someone working on the contractor's behalf. The contractor is responsible for paying sales tax on his purchase of the materials from the supplier. Accordingly, the transaction between the contractor and the ultimate purchaser of the real property improvement is not taxable. On the other hand, if the property owner purchases the construction materials directly from the supplier for use by a third party contractor, it is the property owner and not the contractor who is liable for the sales tax. . . . . (Publication 42, p. 13).[2]

4. Utah State Tax Commission Tax Bulletin 11-01 ("Bulletin 11-01") offers guidance concerning the sales and use treatment of "furnish and install contracts," as follows in pertinent part:

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2 Publication 42 was revised in December 2005 and, for the last two months of the audit period, explained that:

> A furnish and install contract is a contract under which a seller not only sells tangible personal property to a purchaser, but in addition, installs or subcontracts the installation of that tangible personal property to real property. Sellers are considered to have subcontracted the installation if they directly pay the third party installers for the work performed.

The current version of Publication 42 (Revised 6/09), however, does not contain the statement that "[s]ellers are considered to have subcontracted the installation if they directly pay the third party installers for the work

A furnish and install contract is a contract under which a vendor not only sells tangible personal property to a purchaser, but in addition, installs or arranges the installation of that tangible personal property to real property.

- **Example**: A vendor agrees to sell and install carpet for Customer A. The vendor will install the carpet in Customer A's home. This is a furnish and install contract, regardless of whether the vendor's charges for the sale and installation of the carpet are billed on a single invoice or on multiple invoices.
- **Example**: A vendor agrees to sell a jetted bathtub to Customer B, and to arrange for the installation of the tub in Customer B's home. The vendor then contracts with a third party to install the tub for Customer B. This is a furnish and install contract.

. . . .

- **Example**: A vendor sells tile to Customer D. The sale does not provide for installation of the tile. Customer D contracts separately with a tile layer to lay that tile in Customer D's home. This is not a furnish and install contract because the vendor that sells the tile to the purchaser does not install the tile for the purchaser.

. . . .

Rule 58 provides that under a furnish and install contract, the vendor converts the tangible personal property into real property and, as such, becomes a real property contractor. . . .

In addition, because real property contracting work in Utah is not subject to sales and use tax, the vendor may not collect sales and use tax on the vendor's sale of the property to the purchaser.

In contrast with a furnish and install contract, a vendor that merely sells items of tangible personal property, and does not install that tangible personal property to real property, is not considered a real property contractor. . . .

- **Example**: A vendor sells fencing materials to Customer D. Customer D, who is not eligible for a sales and use tax exemption, will build the fence himself, or will contract with a third party to build the fence. This is not a furnish and install contract. The vendor should not pay sales and use tax on the vendor's purchase of the fencing materials, but must collect sales and use tax on the sale of the fencing materials to Customer D.
- **Example**: A vendor agrees to sell fencing materials to Customer E and build a fence for Customer E with those fencing materials. This is a furnish and install contract. The vendor must pay sales and use tax on the vendor's purchase of the fencing material, and may not collect sales and use tax on the sale of the fencing materials to Customer E.

. . . .

5. UCA §59-1-1417 (2009) provides that the burden of proof is upon the petitioner in proceedings before the Commission, with limited exceptions as follows:

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performed."

> In a proceeding before the commission, the burden of proof is on the petitioner except for determining the following, in which the burden of proof is on the commission:
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> (1) whether the petitioner committed fraud with intent to evade a tax, fee, or charge;
>
> (2) whether the petitioner is obligated as the transferee of property of the person that originally owes a liability or a preceding transferee, but not to show that the person that originally owes a liability is obligated for the liability; and
>
> (3) whether the petitioner is liable for an increase in a deficiency if the increase is asserted initially after a notice of deficiency is mailed in accordance with Section 59-1-1405 and a petition under Part 5, Petitions for Redetermination of Deficiencies, is filed, unless the increase in the deficiency is the result of a change or correction of federal taxable income;
>
> (a) required to be reported; and
>
> (b) of which the commission has no notice at the time the commission mails the notice of deficiency.

DISCUSSION

During the audit period, COMPANY A sold (X) to PETITIONER. The parties agree that COMPANY A acted as a real property contractor for those (X) that COMPANY A sold and installed itself and for which COMPANY A billed the installation charges to PETITIONER. In the Statutory Notice, the Division refunded the sales tax that was charged and paid on these transactions. Remaining at issue is whether COMPANY A acted as a real property contractor for the (X) that it sold PETITIONER and that COMPANY B or COMPANY C installed. If COMPANY A is a real property contractor for these sales, the sales tax that PETITIONER paid on COMPANY A's charges for the (X) should be refunded. If COMPANY A is not a real property contractor for these sales, the Division properly denied the refund request concerning these transactions.

As noted in our Findings of Fact, the Commission finds that for the transactions at issue, COMPANY A entered into a contract to sell the (X) to PETITIONER, but did not enter into a contract to install the (X). COMPANY A admitted that it helped co-ordinate or arrange installations of the (X) that it sold and COMPANY B or COMPANY C installed. The taxpayer argues that Publication 42 provides that

COMPANY A is a real property contractor if it "arranges" the installation of the (X), regardless of whether it is the party who contracted to install the (X). The Commission disagrees.

A version of Publication 42 in effect during the audit period contains a statement that "[a] furnish and install contract is a contract under which a person not only sells tangible personal property to a purchaser, but in addition, converts or **arranges** the conversion of that tangible personal property to real property" (emphasis added). COMPANY A may have arranged for PETITIONER to have COMPANY B or COMPANY C install the (X) at issue. COMPANY A may have also communicated with COMPANY B or COMPANY C when a door was complete and ready for installation. However, the evidence does not show that COMPANY A converted the (X) to real property. Nor does the evidence show that COMPANY A contracted with PETITIONER to install the (X) and subcontracted the installation to COMPANY B or COMPANY C. Moreover, the same paragraph of Publication 42 provides that "if the property owner [PETITIONER] purchases the construction materials directly from the supplier [COMPANY A] for use by a third party contractor [COMPANY B or COMPANY C], it is the property owner [PETITIONER] and not the contractor who is liable for the sales tax . . . (Publication 42, p. 13.). The Commission believes that when Publication 42 and Bulletin 11-01 are read in their entirety, along with all examples found in both documents, it is clear "arranging" for two other parties to enter into an installation contract and coordinating and facilitating the delivery of the materials to the appropriate sites and parties does not make the seller of tangible personal property a real property contractor.

The Commission acknowledges that this case involves the imposition of sales tax, not an exemption from sales tax. The Commission also acknowledges that when language in tax imposition statutes is ambiguous, the Commission is required to "construe taxation statutes liberally in favor of the taxpayer, leaving it to the legislature to clarify an intent to be more restrictive if such intent exists.'" *County Bd. of Equalization of Wasatch County v. Utah State Tax Comm'n*, 944 P.2d 370, 373-74 (Utah 1997) (*quoting Salt*

Lake County v. State Tax Comm'n, 779 P.2d 1131, 1132 (Utah 1989)). Although one sentence in Publication 42, when read alone, may be ambiguous or confusing, the Commission does not believe that those portions of Utah law that impose tax in this instance are ambiguous. Section 59-12-103(1) clearly imposes tax on sales of tangible personal property. Rule 58 clearly provides that sales of real property are nontaxable and that sellers of tangible personal property who **convert** the tangible personal property to real property are real property contractors who have sold real property. The Commission has found that COMPANY A and PETITIONER did not contract for COMPANY A to install the (X) at issue. As a result, COMPANY A did not convert the (X) into real property. Accordingly, the transactions at issue are ones in which COMPANY A sold taxable tangible personal property to PETITIONER.

Finally, the Commission notes that the taxpayer argued that the burden of proof is on the Division because the tax at issue concerns a tax imposition statute, not a tax exemption statute. The Commission disagrees. Section 59-1-1417 provides that the burden of proof is on the petitioner in matters before the Commission, with limited exceptions. The limited exceptions cited in Section 59-1-1417 do not include the circumstances of this case. Accordingly, the Commission finds that the taxpayer has the burden of proof in this matter.

CONCLUSIONS OF LAW

1. PETITIONER, the Petitioner, has the burden of proof in this matter.

2. The Commission finds that the COMPANY A and PETITIONER did not contract for the installation of the (X) at issue. Accordingly, the Commission finds that COMPANY A sold taxable tangible personal property, not nontaxable real property, when it sold these (X) to PETITIONER.

DECISION AND ORDER

Based upon the foregoing, the Commission finds that the Division's decision not to refund sales tax on the transactions at issue is correct. The Division's Statutory Notice is sustained. It is so ordered.

DATED this _____ day of _____, 2009.

_____
Kerry R. Chapman
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION:

DATED this _____ day of _____, 2009.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Notice: 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. §63G-4-302. 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 Ann. §§59-1-601et seq. and 63G-4-401 et seq.

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