08-1683
REFUND REQUEST
10-01-09

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, vs. TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**INITIAL HEARING DECISION** Appeal No. 08-1683 Account No. ##### Tax Type: Sales Tax Tax Years: 2006, 2007 Judge: Jensen

Presiding:
Clinton Jensen, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER REP
For Respondent: RESPONDENT REP 1, Assistant Attorney General
RESPONDENT REP 2, from the Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing on January 20, 2009 in accordance with Utah Code §59-1-502.5.

The above-named Petitioner (the "Taxpayer') is appealing a decision by the Taxpayer Services Division (the "Division') denying a sales tax refund. On March 7, 2008, the Taxpayer requested a refund of $$$$$ in sales taxes that a sign company, COMPANY A, (the "Sign Company") had collected from the Taxpayer and remitted to the Commission. The Taxpayer argued that the sales tax had been charged for personal property converted to real property and should be refunded on that basis.

In response to the Taxpayer's refund request, the Division determined that $$$$$ of the amount requested was for installation of personal property onto real property. On that basis, the Division refunded that amount to the Taxpayer. The Division denied refund on the remaining $$$$$ in sales tax, finding it to be tax on property that never became real property and thus retained its taxable status as tangible personal property. The Division also indicated that in its investigation of this matter, it determined that the Taxpayer had no right to claim refund for the sales tax amounts at issue because the contract between the Taxpayer and the Sign Company provided that the Taxpayer gave those rights to the Sign Company.

APPLICABLE LAW

Under Utah Code Ann. § 59-12-103[1], a tax is imposed on the purchaser as provided in this part for amounts paid or charged for . . . retail sales of tangible personal property made within the state

Utah Administrative Rule R865-19S-58 governs sales tax for materials and supplies sold to owners, contractors and repairmen of real property under Utah Code Ann. Section 59-12-103:

(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.

(1) "Construction materials" include items of tangible personal property such as lumber, bricks, nails and cement that are used to construct buildings, structures or improvements on the land and typically lose their separate identity as personal property once incorporated into the real property.

(2) Fixtures or other items of tangible personal property such as furnaces, built-in air conditioning systems, built-in appliances, or other items that are appurtenant to or incorporated into real property and that become an integral part of a real property improvement are treated as construction materials for purposes of this rule.

(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.

(2) Except as otherwise provided in Subsection B.4, 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.

(3) Sales of construction materials or fixtures made to religious or charitable institutions are exempt only if the items are sold as tangible personal property.

(4) Sales of materials are considered made to religious or charitable institutions and, therefore, exempt from sales tax, if:

(a) the religious or charitable institution makes payment for the materials directly to the vendor; or

(b) the materials are purchased on behalf of the religious or charitable institution. (i) Materials are purchased on behalf of the religious or charitable institution if the materials are clearly identified and segregated and installed or converted to real property owned by the religious or charitable institution.

[1] Unless stated otherwise, all statutes and rules cited are for 2006 and 2007.

(5) Purchases not made pursuant to B.4 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.

(2) The contractor must accrue and remit tax on all merchandise bought tax-free and converted to real property. Books and records must be kept to account for both material sold and material consumed.

(D) This rule does not apply to contracts where the retailer sells and installs personal property that does not become part of the real property. Examples of items that remain tangible personal property even when attached to real property are:

(1) moveable items that are attached to real property merely for stability or for an obvious temporary purpose;

(2) manufacturing equipment and machinery and essential accessories appurtenant to the manufacturing equipment and machinery; and

(3) items installed for the benefit of the trade or business conducted on the property that are affixed in a manner that facilitates removal without substantial damage to the real property or to the item itself.

DISCUSSION

As a threshold issue, the Division raised the question of whether the Taxpayer has the ability to request a refund for the sales tax at issue in this case. The Division maintains that the Taxpayer does not have the right to request a tax refund on the purchases at issue because it entered into a contract that gave that right to another party. The Division supports its argument with language from a document between the parties titled Master Signage Agreement (the "Agreement"). In the Agreement, the Taxpayer (referred to in the Agreement as the "Buyer") makes agreements with the Sign Company (referred to in the Agreement as "Seller") regarding taxes:

> 5. TAXES: Buyer shall be liable for all personal property, occupation, sales, rental, use, transaction privilege, and any other state, municipal, federal, or other taxes that may be levied, imposed or assessed by law on the Display or improvements thereon or on the transaction subject to this Agreement (collectively referred to herein as "Assessed Tax") whether imposed upon Seller or its own behalf or on behalf of Buyer. Seller shall solely determine whether an Assessed Tax applies to the Display and/or transaction subject to this Agreement and the manner in which such Assessed Tax shall be collected and remitted. Unless Seller otherwise notifies Buyer in writing, Seller shall collect from Buyer and remit to the appropriate government agency any Assessed Tax. Where in this Agreement or any other documents produced related to this Agreement an amount is specified as "Sales Tax", "Use Tax", or "Sales/Use Tax" it shall be deemed to refer to sales tax for those taxing entities where Seller is required to collect Assessed Tax from the Buyer. It shall be deemed to refer to use tax where Seller is required to impose use tax on itself by a taxing entity and will be treated as an additional charge to the Buyer as part of the purchase price of the Display and not the

> imposition of tax directly on the Buyer. If Seller remits any Assessed Tax prior to having collected said tax from Buyer, or if Seller is unable to collect from Buyer and any Assessed Tax, Buyer shall reimburse Seller, within five (5) days from receipt of notice from Seller, the full amount of any such Assessed Tax paid by Seller, and any penalties and/or interest which may be paid by or assessed against Seller, as well as all of Seller's costs and expenses in defending against any action taken against Seller for such taxes, penalties, and/or interest, including Seller's reasonable attorney's fees. In the event Seller collects and remits to the appropriate taxing authority any Assessed Tax due hereunder, and it is subsequently determined that the method or manner of collection, calculation, or remittance of said tax was in error, Buyer shall continue to be liable for the payment of the actual Assessed Tax due, including penalties and interest. Buyer hereby appoints Seller as its attorney-in-fact to take all necessary actions to remedy such a situation, including without limitation the seeking of any tax refunds on behalf of Buyer and/or Seller.

The Division maintains that the language in which the Taxpayer appoints the Sign Company "attorney-in-fact to take all necessary actions to remedy" tax overpayments, including "the seeking of any tax refunds" on behalf of the Taxpayer makes the Taxpayer the wrong party to be seeking a tax refund in this case. However, whether the Division is correct in these assertions is not for the Tax Commission to decide. Contractual rights between two parties are civil matters and not subject to Tax Commission jurisdiction. If the Sign Company is of the opinion that the Taxpayer has breached a contract by claiming a refund when it had already granted that right by contract to the Sign Company, it has the option to take action under its contract as it sees fit. The Tax Commission is bound to respond to a refund request in accordance with Utah law and let parties to contracts enforce their rights in this regard. For this reason, the Commission will respond to the refund request as submitted.

The parties agree that the Taxpayer is not owed a refund unless the Taxpayer demonstrates that the signs at issue have become incorporated into real property. The parties agree that the signage at issue is attached to real property. However, the Division maintains that the signs are still tangible personal property under Utah Administrative Rule R865-19S-58 (D), which provides that the rule exempting some property converted to real property "does not apply to contracts where the retailer sells and installs personal property that does not become part of the real property." Utah Administrative Rule R865-19S-58 (D) indicates that examples of items that do not become real property include "items installed for the benefit of the trade or business conducted on the property that are affixed in a manner that facilitates removal without substantial damage to the real property or to the item itself."

In support of its position that the signs at issue do not become real property, the Division relied in part on the Agreement between the Sign Company and the Taxpayer. Paragraph 1 of the Agreement refers to the

signage at issue as "displays," which the Division argued connotes something less permanent than real property. Paragraph 2 provides that the Buyer under the Agreement is to pay "any applicable taxes," which the Division argued at least contemplates that the displays would be subject to sales tax. In Paragraph 3, the Seller agrees to "replace, or, at its option repair" defective products. The Division argued that this adds to language in which the parties treated the signs as personal property that could be replaced. In Paragraph 9, the Buyer grants the Seller a security interest in the signs until the Buyer pays in full for the signs. The Division argued that if the signs at issue became real property, the security interest would be in the real property into which the signs were incorporated rather than a separate security interest in signs. Paragraph 10 contemplates storage of the signs at the Seller's plant, which the Division argued as a factor favoring treating the signs as personal property.

The Division provided invoices between the Taxpayer and the Sign Company in which the Sign Company removed preexisting signs and replaced them with new signs. For some of these signs, the invoices listed sign faces. The Division provides photographs showing the means by which the Sign Company removed existing signs and faces and replaced them with new signs. The Division pointed out that while a lawn sign was attached to the ground with steel posts cemented into the ground, the sign replacement at issue appeared to be by means of sign faces being attached to the old steel posts by means of bolts and screws. Whether the replacements were faces or complete signs, the Division argued that the replacement shows a fairly typical re-signing that would take place when a business moved into a new location rather than construction causing significant damage to building or signs.

The Taxpayer argued that the Division's photographs showed bolt holes left in the Taxpayer's building when old signs were removed. These, the Taxpayer argued, were evidence of significant damage. The Taxpayer argued that by being attached with bolts to the front of the building and posts set in concrete, the signs at issue became part of real property and thus should not have been taxed as sales of tangible personal property.

The Commission has had occasion to consider, for sales tax purposes, sales of items that are attached to the ground through a means of steel posts set in concrete. In PLR 05-003, the Commission issued a Private Letter Ruling to a party with a business installing playground equipment. In PLR 05-003, the requester of the Private Letter Ruling explained that it installed playground equipment by digging holes to facilitate the setting of steel posts in concrete. The requester explained that after the posts were set in concrete, bolts secured the various types of equipment to the posts. On occasion, the requester would move playground equipment from

one location to another. It accomplished this by unbolting the equipment from the posts, digging the posts out of the ground, and breaking concrete from the post. The requester would then re-install the posts and bolted equipment at the new location. In PLR 05-003, the Commission found that although playground equipment was set in concrete in the ground, it retained enough mobility to be installed at another location to be considered personal rather than real property. On that basis, the Commission directed the requester to tax certain sales of playground equipment as sales of personal rather than real property.

The Commission has also reviewed *(X) v. Salt Lake County*, 912 P.2d. 961 (Utah 1996). In *(X)*, the Utah Supreme Court directed that for purposes of property tax, leasehold improvement such as walls, a ceiling, a glass storefront, carpet, and granite flooring should be considered real property. The Court reasoned that the leasehold improvements at issue were intended to remain where affixed until worn out and thus more like real property than tangible personal property. *Id.* at 968.

Reviewing previous cases making distinctions between real and personal property, the Commission notes that it is not always possible to harmonize statutes, rules, and cases that categorize property for different purposes such as sales tax or property tax. In this case, however, the Commission finds that factual rather than legal differences dictate a clear result. The Commission finds the installation methods of the signs at issue to be remarkably similar to the playground equipment at issue in PLR 05-003. The present case involves sales tax, as did PLR 05-003. Like playground equipment, some of the signs at issue in this case are affixed to the ground via steel posts held in the ground with concrete. If anything, the signs at issue may be removed more easily than playground equipment. The evidence indicates that the lawn sign was replaced without the need to dig a post out of the ground or to break concrete from the post. Awning signs were likewise attached to a building in a manner that involved unbolting without the need to break concrete or similar structural material. That different businesses at a location may bolt different signs to a building seems normal and outside the realm of serious damage to the building, notwithstanding evidence of more minor issues such as remaining bolt holes or fasteners left behind. The Commission finds distinctions between signage that would normally be changed with each tenancy and the more permanent materials at issue in *(X)*. Because *(X)*presents a different set of facts than are present in the present case, it is not necessary to make further application of *(X)*.

DECISION AND ORDER

Based upon the information presented at the hearing, the Commission sustains the Division's actions in denying the sales tax refund at issue in this matter. 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.

_____
Clinton Jensen
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

D'Arcy Dixon Pignanelli
Commissioner

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