
BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER 1/PETITIONER 2

Petitioner,

v.

TAXPAYER SERVICES DIVISION OF THE
UTAH STATE TAX COMMISSION,

Respondent.

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND FINAL DECISION**

Appeal No. 08-2583

Account No. #####

Tax Type: Sales and Use Tax

Tax Period: July 2005 to April 2008

Judge: Jensen

Presiding:

Pam Hendrickson, Commission Chair
R. Bruce Johnson, Commissioner
Clinton Jensen, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP 1, Attorney for PETITIONER 1
PETITIONER REP 2, Controller for PETITIONER 1
For Respondent: RESPONDENT REP, Assistant Attorney General

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on April 22, 2009. On the basis of the evidence and testimony presented at the hearing, the Tax Commission makes its:

FINDINGS OF FACT

1. On August 28, 2008, PETITIONER (the "Taxpayer"), acting through its representative, made a written refund request for Utah sales taxes to Respondent Taxpayer Services Division of the Utah State Tax Commission (the "Division").
2. The Taxpayer's refund request included invoices from July 5, 2005 to August 9, 2008.
3. On November 26, 2008, the Division issued a Statutory Notice in which it denied the Taxpayer's refund request.
4. In its Statutory Notice, the Division identified tax periods from July 2005 to April 2008. The parties did not address the difference between the April 2008 ending date in the Statutory Notice and the August 9, 2008 ending date in the refund request from the Taxpayer.

5. At issue in the Taxpayer's refund request are delivery charges for ready-mixed concrete products from PETITIONER 2, a supplier of, among other things, ready mixed concrete (the "Supplier").

6. For ready-mixed concrete and related sand and aggregate products ("Products") that the Supplier delivered to the Taxpayer during the periods at issue, the Supplier generally provided invoices to the Taxpayer showing a single price for Products without separately identifying delivery charges. The Supplier's invoices generally included tax on the entire amount of the purchase and the Taxpayer paid sales tax as invoiced.

7. The Supplier's accounting system allowed for the tracking of delivery charges as a separate item from the cost of the Products themselves. The Supplier appeared at hearing and provided evidence as to what would have been the amounts of the delivery charges if they had been separately identified on the Supplier's invoices.

8. The Division denied the Taxpayer's request for sales tax on the amounts that the Supplier later identified as delivery charges. It acknowledged that delivery charges are not always subject to sales tax. The Division denied the Taxpayer's refund request on the basis of its determination that the transaction, as concluded between the parties, was for delivered goods rather than for goods plus separate delivery charges.

9. The Taxpayer acknowledged that, with rare exceptions, invoices for Products from the Supplier reflected a single charge for delivered Products. However, the Taxpayer maintains that even though delivery charges were not separately identified on invoices, the Supplier and the Taxpayer have the ability to correct invoices that were in error. The Taxpayer relies on Utah State Tax Commission Private Letter Ruling 06-013 (the "PLR") for the proposition that delivery charges on the Products are not taxable.

10. The Supplier provided evidence that while sales of ready-mixed concrete products without delivery are infrequent, it has the ability to sell, and has sold, its ready-mixed concrete products to customers with their own equipment for the transportation of ready-mixed concrete. When the Supplier sold ready-mixed concrete products without delivery, it did so at a reduced price compared to ready-mixed concrete products with delivery.

11. In prior cases in which it found that individuals or entities had made errors in the preparation of tax returns or sales documents, the Division has allowed those parties or entities to correct errors through refund requests or amended returns subject to applicable Utah law such as statutes of limitation.

APPLICABLE LAW

1. Utah Code Annotated Section 59-12-103(1)¹ provides, in pertinent part, as follows:

(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;

....

2. Utah Code Annotated Section 59-12-102(72)(2008) defines the terms “purchase price” and “sales price,” in pertinent part, as follows:

(72)(a) "Purchase price" and "sales price" mean the total amount of consideration:

(i) valued in money; and

(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.

3. For purposes of determining the “purchase price” or “sales price” of an item or service, the term “delivery charge” is defined in Utah Code Annotated 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

¹ All citations are to the Utah Code Annotated as it existed from July 1, 2005 through August 2008. Although revisions in other subsections caused renumbering of some of the subsections at issue, the Commission is not aware of any substantive changes to applicable law during the period at issue.

- (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.

DISCUSSION

The Taxpayer notes, correctly, that Utah taxpayers have the right and the ability to correct errors in tax filings. Amended returns and refund requests are two avenues for the correction of errors. The Taxpayer characterizes the inclusion of delivery costs on invoices without separate identification of those delivery costs as errors. The problem with characterization of these actions and their invoicing was that the Taxpayer did not present evidence to indicate that, at the time of the transactions, the Taxpayer or the Supplier intended to enter into transactions for products other than delivered concrete as documented in the original invoices from the Supplier to the Taxpayer. The Supplier provided invoices for delivered Products and did so for a period of more than two years. Fuel surcharges, on the other hand, were separately computed and Supplier generally charged no tax on these amounts. The Taxpayer paid those invoices without requesting a change in the terms of the transactions. Later, when the Taxpayer discovered that it would have received tax savings if it has structured its transactions differently, it sought to have the Supplier amend its invoices to show separate delivery charges.

The best evidence of the intent of the Taxpayer and the Supplier in their transactions comes from invoices that were contemporaneous with those transactions. The Taxpayer had not provided any contract that would indicate that the terms of the transactions were as reflected in those invoices. Because the transactions were as the parties intended them at the time, tax on delivery charges not separately listed on invoices would be the correct tax rather than an overpayment of tax. The Supplier had sufficient records to show that it could have accurately identified delivery costs. On that basis, it was willing to provide new invoices to identify those delivery charges. However, it did not provide any evidence to show that the transactions at issue were for other than delivered concrete or that there was any error in its invoices as originally prepared and as originally paid.

CONCLUSIONS OF LAW

1. Utah Code Annotated Section 59-12-103(1) provides for a tax on the retail sales of tangible personal property made within the state.

2. Utah Code Annotated Section 59-12-102(72)(2008) defines the terms “purchase price” and “sales price,” to exclude, “if separately stated on an invoice, bill of sale, or similar document provided to the purchaser . . . a delivery charge.”

3. The PLR provides that delivery charges for ready-mixed concrete products are exempt from tax if the delivery charge is “separately stated on the invoice.” The PLR does not extend to delivery charges that are not separately stated on the invoice.

4. To the extent that delivery charges such as fuel surcharges and truck waiting time were “separately stated on an invoice, bill of sale, or similar document provided to the purchaser,” they are not subject to sales tax.

5. To the extent that delivery charges from Supplier were not “separately stated on an invoice, bill of sale, or similar document provided to the purchaser,” they became part of a transaction for delivered goods. Transactions for the times at issue in this case were, at the time of the Taxpayer’s refund request, completed transactions.

6. The provisions of Utah law allowing for the correction of errors do not allow the Taxpayer to change completed transactions for delivered goods into sales of goods plus delivery charges.

7. Because the Division has not responded to the Taxpayer’s refund request for the period from the end of April 2008 through August 9, 2008, there is currently no pending appeal with regard to that period. However, in the absence of a material difference in facts, the reasoning of this order should apply to all open periods.

DECISION AND ORDER

On the basis of the foregoing, the Tax Commission orders the Division to make sales tax refunds to the extent that those delivery charges were separately identified on invoices from the Supplier to the Taxpayer. As to delivery charges that were included in the sales price without separate identification on invoices, bills of sale, or similar documents provided to the Taxpayer, the Commission sustains the actions of the Division in denying the Taxpayer’s refund request. It is so ordered.

DATED this _____ day of _____, 2009.

Appeal No. 08-2583

Clinton Jensen
Administrative Law Judge

Appeal No. 08-2583

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

Notice of Appeal Rights: 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. §63-46b-13. 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. Sections 59-1-601 and 63-46b-13 et. seq.

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