09-0049
TAX TYPE: SALES TAX
TAX YEARS: 9-1-05 – 5-31-08
DATE SIGNED: 9-30-2011
COMMISSIONERS: B. JOHNSON, M. JOHNSON, D. DIXON, M. CRAGUN
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER, Petitioner, vs. AUDITING DIVISION, OF THE UTAH STATE TAX COMMISSION Respondent.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION** Appeal No. 09-0049 Account No. ##### Tax Type: Sales Tax Audit Period: 9/1/05 – 5/31/08 Judge: Phan

Presiding:
D'Arcy Dixon Pignanelli, Commissioner
Jane Phan, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE-1 FOR TAXPAYER, Attorney At Law
REPRESENTATIVE-2 FOR TAXPAYER, President TAXPAYER
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General
RESPONDENT, Assistant Director Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on June 21, 2011, in accordance with Utah Code §59-1-501 and §63G-4-201 et al. The issues before the Commission are: 1) whether or not the transaction involved an admission or user fee under Utah Code Sec. 59-12-103(1)(f)(2008); 2) whether or not the transaction was a "rental" under Utah Code Sec. 59-12-103(1)(k)(2008); and 3) did the transaction qualify as an "unassisted amusement device" under Utah Code Sec. 59-12-104(40) (2008). Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. Petitioner (the "Taxpayer") is appealing an audit assessment issued against it for the period of September 1, 2005 through May 31, 2008. The Statutory Notice of audit change was

issued on December 9, 2008. Schedule 1 (Under and Over-Reported Taxable Amounts) resulted in a net credit for the Taxpayer and Schedule 2 (Unreported Taxable Purchases) a net deficiency. Combining the two schedules resulted in an overpayment of $$$$$ and a refund based on that amount plus interest was paid to the Taxpayer as a result of the audit. No penalties were assessed with the audit.

2. The Taxpayer filed this appeal to contest the audit findings on Schedule 2.

3. The Taxpayer opened its location in Utah in October 2000.

4. During the audit period the Taxpayer's business in Utah was primarily the operation of indoor (X) FACILITY in CITY-1 and CITY-2, Utah. The facilities include a lobby area and a viewing area where persons can see the FACILITY and watch the (X) being OPERATED around the (X). There is no admission fee charged to enter into the building or to the watch the (X) from the viewing area. In the CITY-1 location there is also a snack bar where food is sold and there are tables and chairs. These viewing areas are separated from the (X) FACILITY area by glass windows and doors.

5. For the FACILITY area, entry is limited. However, people who are not operating (X) are allowed into the FACILITY area without paying a fee, as long as they sign the liability waiver. There is some increased risk of injury in the FACILITY area than in the general viewing areas.

6. Included in the FACILITY area is the "pit" area where (X) are parked for loading. (REMOVED SENTENCE). The FACILITIES are outlined by barriers to prevent the (X) from leaving the FACILITY and an area where the (X) are stopped for exiting PERSON-B. Also in this limited entry area is a STATION AREA.

7. If a person wants to operate a (X) they will have to pay a fee. They can purchase either a set period of time to operate the (X) around the FACILITY OR PARTICIPATE IN AN EVENT, that would involve a set number of laps around the FACILITY. A price list was provided in this matter. For the set time periods a ##### minute session was $$$$$ and a ##### minute session $$$$$. The price schedule for the EVENTS listed a ##### DISTANCE at a cost of $$$$$ and a ##### DISTANCE at a cost of $$$$$.

8. Before a patron is allowed to operate a (X), they have to sign a liability waiver form and watch a ten to fifteen minute instructional video. The parties provided some of the posted warnings and warnings included with the liability waiver form. Some of the language contained in the warnings are as follows:

> WARNING! THIS IS NOT AN AMUSEMENT RIDE. You are about to engage in a HIGH PERFORMANCE DRIVER CONTROLLED (X) EXPERIENCE. FAILURE BY YOU OR ANYONE ELSE TO FOLLOW ALL OF THE RULES OR TO EXERCISE GOOD JUDGMENT COULD RESULT IN SEVERE INJURY OR DEATH.
>
> WARNING! ANY PERSON ENTERING THIS AREA ASSUMES AND UNDERSTANDS THAT (X) RIDING AND SPECTATING IS HAZARDOUS, THAT MANY HAZARDS EXIST WITHIN THE TAXPAYER AND SPECTATING AREA.
>
> THE STAFF AND MANAGEMENT RESERVES THE RIGHT TO REMOVE ANYONE WE FEEL MAY THREATEN THE SAFETY OF THEMSELVES OR OTHERS!

9. After the person has paid the fee, watched the video and signed the liability waiver, they are provided a helmet. Then they are allowed into a (X). (TWO SENTENCES REMOVED). PERSON A will waive the PERSON-B in the (X) onto the FACILITY to start his or her time period or EVENT, and flags and/or lights will waive them off the FACILITY when they are finished.

10. While on the FACILITY all PARTICIPANTS are generally supervised by the Taxpayer's employees. PARTICIPANTS whose actions may endanger themselves or others may be waived off the FACILITY and could be asked to leave.

11. The Taxpayer's witness and one witness for the Division testified that in their opinion, what was more important to the customer was the use of the (X), not the use of the FACILITY. Another witness for the Division testified in his opinion it was the entire experience that the patron was paying for, not just the (X).

12. The Taxpayer occasionally set up outdoor FACILITIES for limited periods of time for special events, although there may have been only one such event in Utah during the audit period. These FACILITIES are generally set up in empty parking lot areas and barricades are set around the FACILITY to keep the (X) within the confines of the FACILITY.

13. The Taxpayer's representative testified that they did not lease (X) out to persons to take off the premise for use because of the danger and risk. For safety reasons, the (X) were operated only in the controlled confines of the FACILITY.

14. The Taxpayer had treated the operation like a rental of (X) for tax purposes during the audit period. The Taxpayer's representative asserts that this is based on advice he received from a Tax Commission employee. He states that before opening the Utah business he came in person to the front counters of the Tax Commission building and asked about how the

business would be taxed. He testified that he was told by the Tax Commission employee that the operation was a rental. As a rental the Taxpayer had collected sales tax from its customers on the fees it charges the customers to operate the (X) and remitted the tax to the state. However, the Taxpayer did not pay sales tax for parts and repairs used to maintain the (X). Under the Division's contention that this was an admission and not a rental, the fees charged to the customers to operate the (X) would also be subject sales tax. The only difference asserted was that as an admission, the Taxpayer would have been required to pay tax on its purchase of the (X) and replacement parts and repairs.

15. The Taxpayer's representative did question the Division's auditors regarding whether they had thought the transaction was a rental rather than a user fee or admission while they were performing the audit. However, the auditors' supervisor and the Division's position during the hearing were consistent.

APPLICABLE LAW

Utah Code Sec. 59-12-103(1)(f)(2008) provides:

> [E]xcept as provided in Section 59-12-104, amounts paid or charged as admissions or user fees for theaters, movies, operas, museums, planetariums, shows of any type or nature, exhibitions, concerts, carnivals, amusement parks, amusement rides, circuses, menageries, fairs, races, contests, sporting events, dances, boxing matches, wrestling matches, closed circuit television broadcasts, billiard parlors, pool parlors, bowling lanes, golf, miniature golf, golf driving ranges, batting cages, skating rinks, ski lifts, ski runs, ski trials, snowmobile trails, tennis courts swimming pools, water slides, river runs, jeep tours, boat tours, scenic cruises, horseback rides, sports activities, or any other amusement, entertainment, recreation, exhibition, cultural, or athletic activity. . .

Utah Code Sec. 59-12-104 (2008) provides:

> The following sales and uses are exempt from the taxation imposed by this chapter; . . .
> (40)(a) subject to Subsection 40(b) sales or rentals of the right to use or operate for amusement, entertainment or recreation an unassisted amusement device as defined in Section 59-12-102; . . .

Utah Code Sec. 59-12-102(118)(2008) defines unassisted amusement device as follows:

> "Unassisted amusement device" means an amusement device, skill device, or ride device that is started and stopped by the purchaser or renter of the right to use or operate the amusement device, skill device, or ride device.

An assisted amusement device is defined at Utah Code Sec. 59-12-102(8)(2008):

> "Assisted amusement device" means an amusement device, skill device, or ride device that is started and stopped by an individual: (a) who is not the purchaser

> or renter of the right to use or operate the amusement device, skill device or ride device; and (b) at the direction of the seller of the right to use the amusement device, skill device or ride device.

Lease or rentals are defined at Utah Code Sec. 59-12-102(48)(a)(2008):

> "lease" or "rental" means a transfer of possession or control of tangible personal property for: (i)(A) a fixed term; or (B) an indeterminate term; and (ii) consideration . . .

Utah Admin. Rule R865-19S-33 (2008) provides the following:

> A. "Admission" means the right or privilege to enter into a place. Admission includes the amount paid for the right to use a reserved seat or any seat in an auditorium, theater, circus stadium, schoolhouse, meeting house, or gymnasium to view any type of entertainment . . .

Utah Admin. Rule R865-19S-34(2008) provides:

> (1)(a) The amount paid for admission is subject to sales and use tax, even thought that amount includes the right of the purchaser to participate in some activity. (b) For example, the sale of a ticket for a ride upon a mechanical device is an admission to a place of amusement.
> (2)(a)Additional charges for the rental of tangible personal property are subject to sales and use tax as the sale of tangible personal property (b) For example: (i) towel rentals and swimming suit rentals at a swimming pool are subject to sales and use tax; (ii) locker rental fees at a swimming pool are subject to sales tax if the lockers are tangible person property.

DISCUSSION

The fees that the Taxpayer charged to its customers to OPERATE the (X) around the FACILITY, whether it is considered an "admission" or a "rental," is subject to sales tax and, in fact, the Taxpayer had been collecting sales tax on the fee and remitting it to the State Tax Commission during the audit period. The difference between the classification of whether the fee was for an "admission" or for a "rental" does not pertain to the taxability of the fee itself, but instead to the tax treatment on the purchase of the (X) and the costs of repairs and renovations. As a rental the Taxpayer asserts it would not need to pay sales tax on the cost of the repairs or purchase of the (X). However, as an admission, the Taxpayer would be required to pay sales tax on these purchases. The Taxpayer also argues, in the alternative, that the transaction could be deemed to be for the use of an unassisted amusement device. If it, in fact, qualified as an unassisted amusement device, the fee charged for the use of the (X) on the FACILITY would be exempt from sales tax under Utah Code Sec. 59-12-104(4).

The Division's position was that the fee charged by the Taxpayer and paid by its customers to OPERATE a (X) on the Taxpayer's FACILITY was an admission or user fee under

Utah Code Sec. 59-12-103(1)(f). The Taxpayer argued that the fee charged was really a rental fee, the customer was essentially renting the (X). The Taxpayer also argued that even if the 0fee charged was an admission or user fee under Utah Code Sec. 59-12-103(1)(f) it did not necessary preclude it from also qualifying as a rental under Utah Code Sec. 59-12-103(1)(k)(48)(a).

Utah Code Sec. 59-12-103(1)(f) delineates numerous activities for which the fee charged is an admission or user fee. Included in this list are a number of spectator activities like theaters, movies, concerts and sporting events, but also listed are more participatory activities like batting cages, ski trails, tennis courts, swimming pools and sports activities.

It is clear that the activity of OPERATING a (X) involves significantly more control than most typical amusement rides, which are also specifically included by statute. One example is riding a rollercoaster where the customer has no control over the coaster and may receive only minimal instructions, like to stay seated and keep arms and legs in the car. There are other rides which allow more participation from the customer, for instance bumper cars, where they do have some control over the vehicle while the ride is turned on.

However, it is the more participatory activities which are more similar to the OPERATING of a (X) around the FACILITY. For instance the fee charged to use a bowling lane is an admission or user fee pursuant to Utah Code 59-12-103(1)(f). Like at the Taxpayer's indoor FACILITY, there is not a fee charged for admittance in the building or generally to spectators. The fee is charged for the use of the bowling lane. During the hearing, examples were discussed of transactions that were clearly admissions or rentals. A person may pay a fee to one party to rent a snowmobile for a set period of time. They may have considerable discretion over where to use the snowmobile and little supervision from the lessor during the period for which it is leased. This would be considered a rental. They may decide to use the snowmobile on a private snowmobile trail for a set period of time for which they pay another charge. This transaction is clearly an admission or user fee under Utah Code Sec. 59-12-103(1)(f). Another example discussed was when a person pays an admission fee to gain entrance to a state reservoir or lake and also rents a personal watercraft for use on that lake or reservoir for a set period of time. During that time in which the watercraft is leased, the person has considerable control over the watercraft and again little supervision from the lessor of the watercraft. In both of these situations there are separate rental and admission transactions. Although the Taxpayer's (X) transactions encompass some elements of both as the fee covers the admission or use of the FACILITY as well as the use of the (X) in a single transaction, it still is essentially a sports or recreational

activity within Utah Code Sec. 59-12-103(1) and is subject to sales tax as an admission or user fee.

The Taxpayer asserts that even if the fee qualifies as an admission or user fee under Utah Code Sec. 59-12-103(1)(f) it could also be deemed a rental under Utah Code Sec. 59-12-103(1)(k), that these two are not mutually exclusive. The Commission disagrees with the Taxpayer on this point. The transaction would have to be one or the other and the Commission would consider the essence of the transaction to make that determination. The Taxpayer's transaction is more than the lease of a (X). It includes a supervised and relatively safe place to operate the (X), use of safety equipment (a helmet) and detailed instruction on the safe operation of the (X). The transaction is essentially the whole experience which is more than the rental of the (X) and is a sports activity or other amusement under 59-2-103(1)(f). As one of the auditors acknowledged, it was the use of the (X), not the use of the FACILITY that was most important to the customers, but that is not really different from many amusement rides or activities covered under Subsection 103(1)(f), for example bumper cars or horseback riding. Patrons are primarily there for the bumper car or the horse, not the FACILITY or arena or trail.

The Taxpayer also made the alternative argument that the fee it charges to its customers to OPERATE the (X) should be exempt from sales tax under Utah Code Sec. 59-12-104(40) as an unassisted amusement device. "Unassisted amusement device" is defined at Utah Code Sec. 59-12-102(118) to be "an amusement device, skill device, or ride device that is started and stopped by the purchaser or renter of the right to use or operate the amusement device, skill device or ride device." The Division gave an example of an unassisted amusement device, a pinball machine, where the purchaser started the device by putting the coins in the machine and could play until he or she ran out of balls. "Unassisted amusement device" is further clarified by Subsection 102(8) which defines "assisted amusement device" to be a device that is started and stopped by an individual who is not the purchaser and at the direction of the owner of the device. In the facts in the subject case, the operation is not an unassisted amusement device, whether or not the (X-A) are already turned on by the Taxpayer's employees before the customer gets in, the parties are waived on and then off the FACILITY by employees at the direction of the Taxpayer and the operation is assisted and supervised by the Taxpayer's employees.

CONCLUSIONS OF LAW

1. The fee that the Taxpayer charges to its customer to OPERATE the (X) is an admission or user fee pursuant to Utah Code Sec. 59-12-103(1)(f).

2. The essence of the transaction for which the fee is charged by the Taxpayer to its customer is for more than just a rental of a (X). It includes a supervised place to operate the (X) and instructions on how to do so in a safe manner. The transaction is not a rental of tangible personal property under Utah Code Sec. 59-12-103(1)(k).

3. The transaction does not involve an unassisted amusement device pursuant to Utah Code Sec. 59-12-104(40).

4. Although the Taxpayer's representative has asserted, and there was no information to refute, that he was told by a Tax Commission employee the transaction would be taxed as a rental, no penalties had been assessed in this matter and the Taxpayer had not underpaid the tax in total so was not charged interest. Under Utah Admin. Rule R861-1A-42, incorrect advice from a Tax Commission employee, if sufficiently substantiated, may be cause for waiver of penalties or interest. However, as none were assessed in this case there is nothing to waive.

In conclusion, based on the facts presented and the applicable law, the sales and use tax audit for the period from September 1, 2005 through May 31, 2008 should be upheld.

_____
Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division's sales and use tax audit for the period of September 1, 2005 through May 31, 2008. It is so ordered.

DATED this _____day of _____, 2011.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
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. §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. §59-1-601 et seq. and §63G-4-401 et seq.