

09-2808
SALES AND USE
TAX YEAR: 2006, 2007, 2008
SIGNED: 03-21-2011

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.</p>	<p>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</p> <p>Appeal No. 09-2808</p> <p>Account No. ##### Tax Type: Sales and Use Tax Year: 01/01/06 - 12/31/08</p> <p>Judge: Chapman</p>
---	---

Presiding:

Marc B. Johnson, Commissioner
Kerry R. Chapman, Administrative Law Judge

Appearing:

For Petitioner: PETITIONER REP., Taxpayer
For Respondent: RESONDENT REP. 1, Assistant Attorney General
RESONDENT REP. 2, Auditing Division

FINDINGS OF FACT

1. The tax at issue is sales and use tax.
2. The audit period is January 1, 2006 through December 31, 2008.
3. On June 25, 2009, Auditing Division (the "Division") issued a Statutory Notice – Sales and Use Tax ("Statutory Notice") to PETITIONER ("Petitioner" or "taxpayer") in regards to the above-referenced audit period. In the Statutory Notice, the Division imposed sales and use tax of \$\$\$\$\$ and interest (calculated through July 25, 2009) of \$\$\$\$\$, for a total assessment of \$\$\$\$\$. The Statutory Notice also showed that the taxpayer had already paid \$\$\$\$\$ of the total assessment.
4. The Division's assessment was based on the taxpayer's responses to a self-review audit that the Division sent to photographers and other related businesses. The taxpayer

disagrees with one aspect of the self-review audit, specifically whether “sitting fees” are subject to sales tax.

5. The taxpayer testified that he operates his photography business on a part-time basis and that his business primarily serves his family and friends. When a customer “books” a photography shoot, the taxpayer charges a “sitting fee” for him to come out and shoot the photographs. The taxpayer explains that the sitting fee is typically \$\$\$\$ (more for weddings) and that the charge is separate from any subsequent charges to purchase photographs or prints. The taxpayer indicates that he typically charges and collects the sitting fee at the time the photographs are taken through a verbal contract, as he already knows most of his customers. No invoice is prepared for customers when they pay the sitting fee.

6. Several weeks after the taxpayer takes the photographs, he posts them to an Internet site so that customers can review and decide what photographs or prints they want to order. After customers order photographs or prints, an invoice is prepared with the charges that the customers are required to pay for the prints. These invoices do not include the sitting charge that was charged and collected at the time the photographs were taken.

7. The taxpayer estimates that 95% of the customers who pay a sitting fee end up ordering photographs or prints from him. The taxpayer states that customers who purchase prints can spend anywhere from \$\$\$\$ to \$\$\$\$’s for the prints.

8. The Division has determined that the amount charged for the sitting fee is not a separate transaction for a nontaxable service, but an incidental charge associated with the purchase of taxable photographs or prints. The Division’s self-review audit explains that sitting fees and other services are taxable components in the sales price of photography. The taxpayer, however, believes that the sitting fees are separate, nontaxable charges.

9. The Division admitted that in the few instances where the taxpayer charges a sitting fee and the customer ends up not purchasing taxable photographs or prints, the sitting fee

would be nontaxable because the sitting fee would not be associated with the sale of taxable photography.

10. The taxpayer states that he called the Tax Commission several times around 2008 to inquire about sales tax in general and specifically asked whether the sitting fees were subject to taxation. He stated that he opened his business in 2005 and called in 2008, when he became aware that he needed to open a sales tax account. The taxpayer stated that he was told by Taxpayer Services Division that the amount charged for a sitting fee was nontaxable, as it was a charge for a service. The taxpayer presented evidence to show that he called Taxpayer Services Division on January 28, 2008. The taxpayer also indicated that his records show that he spoke to an employee named EMPLOYEE. Should the Commission find that the sitting fees are taxable, the taxpayer asks the Commission to waive interest because of the advice he was given.

11. The Division states that it does not have a position on whether interest should be waived, but notes that it does not know what topics were discussed in the conversations between the taxpayer and Taxpayer Services Division.

APPLICABLE LAW

1. Utah Code Ann. §59-12-103(1)(a) (2008)¹ provides that sales tax is imposed on “amounts paid or charged for . . . retail sales of tangible personal property made within the state[.]”

2. UCA §59-12-102(82) defines “purchase price” and “sales price,” as follows in pertinent part:

-
- (b) “Purchase price” and “sales price” include:
 - (i) the seller’s cost of the tangible personal property . . . or service sold;
 - (ii) expenses of the seller, including:
 - (A) the cost of materials used;
 - (B) a labor cost;
 - (C) a service cost;

¹ Because there have been no substantive changes to the relevant statutes that would affect this opinion, we cite to 2008 versions, unless otherwise indicated.

- (D) interest;
- (E) a loss;
- (F) the cost of transportation to the seller; or
- (G) a tax imposed on the seller...

3. Utah Admin. Rule R865-19S-75 (“Rule 75”) provides guidance concerning sales made by photographers, as follows:

- A. Photographers, photofinishers, and photostat producers are engaged in selling tangible personal property and rendering services such as developing, retouching, tinting, or coloring photographs belonging to others.
 - 1. Persons described in this rule must collect tax on all of the above services and on all sales of tangible personal property, such as films, frames, cameras, prints, etc.
- B. Sales of tangible personal property by photoengravers, electrotypers, and wood engravers to printers, advertisers, or other persons who do not resell such property but use or consume it in the process of producing printed matter are taxable sales. The value or worth of the services or processing which go into their production is of no moment, and it is immaterial that each sale is upon a special order for a particular customer.
 - 1. Electrotypes and engravings are manufactured articles of merchandise and are sold as such and not as a service. No deduction is allowed on account of the cost of the property sold, labor, service, or any other expense.

4. UCA §59-1-401(13) (2010) provides that “[u]pon making a record of its actions, and upon reasonable cause shown, the commission may waive, reduce, or compromise any of the penalties or interest imposed under this part.”

5. The Commission has promulgated Utah Admin. Rule R861-1A-42 (“Rule 42”) (2010) to provide guidance on the waiver of penalties and interest, which provides in pertinent part as follows:

- (2) Reasonable Cause for Waiver of Interest. Grounds for waiving interest are more stringent than for penalty. To be granted a waiver of interest, the taxpayer must prove that the commission gave the taxpayer erroneous information or took inappropriate action that contributed to the error.

6. UCA §59-1-1417 (2010) provides that the burden of proof is upon the petitioner in proceedings before the Commission, with limited exceptions as follows:

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:

- (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.

CONCLUSIONS OF LAW

1. The sitting fees charged to a customer are subject to taxation when the customer subsequently purchases photographs or prints from the taxpayer. In this circumstance, the sitting fees are not a separate transaction, but are incidental to the amounts paid by the customers for the object of the transaction; i.e., the taxable photographs or prints. The sitting fees are the types of service charges that are included in the price of the photographs or prints, pursuant to the definition of “purchase price” and “sales price.” For these reasons, the charges for sitting fees are deemed to be taxable when associated with the sale of taxable photographs or prints.

2. When a customer charged a sitting fee does not also purchase photographs, prints, discs, rights to download photographs or prints, or other taxable tangible personal property, the sitting fee is an amount paid for a nontaxable service and is not subject to sales tax.

3. The taxpayer submitted evidence to support his claim that he called Taxpayer Services Division to inquire about the taxability of sitting fees and was told that such charges were nontaxable. Rule 42 provides for the waiver of interest when the taxpayer shows that an error was made due to advice received or actions taken by the Tax Commission. In this case, it appears that a portion of the taxpayer’s assessment resulted from erroneous advice received from the Tax Commission sometime around January 28, 2008. Accordingly, interest should be waived

Appeal No. 09-2808

on any assessment concerning a sitting fee that was charged on or after January 28, 2008. Any other interest assessment should be sustained.

Kerry R. Chapman
Administrative Law Judge

DECISION AND ORDER

Based upon the foregoing, the Commission sustains the Division's assessment with the following exceptions. First, the Commission orders the Division to remove any sitting fee charge imposed on a customer who did not subsequently purchase taxable tangible personal property from the taxpayer. Second, the Commission waives any interest imposed on a sitting fee charge that was imposed on or after January 28, 2008. Third, although not before the Commission, the Commission notes that the Division has agreed to remove a non-filing penalty that was erroneously added to the taxpayer's account after he filed this appeal. 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.

KRC/09-2808.fof