

09-3164
REFUND REQUEST
SIGNED: 09-07-2011
COMMISSIONERS: R. JOHNSON, M. JOHNSON, M. CRAGUN
EXCUSED: D. DIXON

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,

Petitioner,

v.

TAXPAYER SERVICES DIVISION OF
THE UTAH STATE TAX COMMISSION,

Respondent.

INITIAL HEARING ORDER

Appeal No. 09-3164

Account No. #####

Tax Type: Sales Tax

Judge: Marshall

Presiding:

Jan Marshall, Administrative Judge

Appearances:

For Petitioner: PETITIONER REP. 1, Representative
PETITIONER REP. 2, Representative
For Respondent: RESPONDENT REP. 1, Assistant Attorney General
RESPONDENT REP. 2, Taxpayer Services Division
RESPONDENT REP. 3, Taxpayer Services Division
RESPONDENT REP. 4, Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Commission for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5, on January 25, 2011. Petitioner ("Taxpayer") is requesting a refund of sales tax paid on the purchase and installation of various appliances in the amount of \$\$\$\$\$. The Respondent ("Division") allowed a portion of the request and issued a refund in the amount of \$\$\$\$\$. The Division denied part of the refund request in the amount of \$\$\$\$\$. Taxpayer timely appealed the partial denial of the refund request.

APPLICABLE LAW

Sales tax is imposed on certain transactions, as set forth in Utah Code Ann. §59-12-103, below in pertinent part:

- (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...

Utah Code Ann. §59-12-102(92)¹ defines “tangible personal property” as follows:

- (a) “Tangible personal property” means personal property that:
 - (i) May be:
 - (A) seen;
 - (B) weighed;
 - (C) measured;
 - (D) felt; or
 - (E) touched; or
 - (ii) is in any manner perceptible to the senses.
- (b) “Tangible personal property” includes:
 - (i) electricity,
 - (ii) water,
 - (iii) gas,
 - (iv) steam; or
 - (v) prewritten computer software.

Utah Code Ann. §59-12-102(57)² defines “permanently attached to real property” as follows:

- (a) “Permanently attached to real property” means that for tangible personal property:
 - (i) The attachment of the tangible personal property to the real property:
 - (A) is essential to the use of the tangible personal property; and
 - (B) suggests that the tangible personal property will remain attached to the real property in the same place over the useful life of the tangible personal property; or
 - (ii) if the tangible personal property is detached from the real property, the detachment would:
 - (A) cause substantial damage to the tangible personal property; or
 - (B) require substantial alteration or repair of the real property to which the tangible personal property is attached.
- (b) “Permanently attached to real property” includes:
 - (i) The attachment of an accessory to the tangible personal property if the accessory is:
 - (A) essential to the operation of the tangible personal property; and

1 The Commission references the 2006 statute. For the 2007 tax year, this provision was renumbered as subparagraph (97). In 2008, the provision was renumbered as subparagraph (108), and included additional paragraphs excluding hot water heaters, water softener systems, and water filtrations systems if attached to real property. Further, the Commission notes that Senate Bill 35 became effective July 1, 2009 and specifically provides that “Tangible Personal Property” includes dishwashers, dryers, freezers, microwaves, refrigerators, stoves, and washers, regardless of whether the item is attached to real property.

2 The Commission references the 2006 statute. For the 2007 and 2008 tax years, this provision was renumbered as subparagraph (62), and as subparagraph 68 for the 2009 tax year. The language remained the same for all years at issue.

- (B) attached only to facilitate the operation of the tangible personal property;
- (ii) a temporary detachment of tangible personal property from real property for a repair or renovation if the repair or renovation is performed where the tangible personal property and real property are located; or
- (iii) an attachment of the following tangible personal property to real property, regardless of whether the attachment to real property is only through a lien that supplies water, electricity, gas, telephone, cable, or supplies a similar item as determined by the commission by rule made in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act:
 - (A) property attached to oil, gas, or water pipelines, other than the property listed in Subsection (57)(c)(iii);
 - (B) a hot water heater;
 - (C) a water softener system; or
 - (D) a water filtration system, other than a water filtration system manufactured as part of a refrigerator.
- (c) “Permanently attached to real property” does not include:
 - (i) the attachment of portable or movable tangible personal property to real property if that portable or movable tangible personal property is attached to real property only for:
 - (A) Convenience;
 - (B) Stability; or
 - (C) For an obvious temporary purpose;
 - (ii) the detachment of tangible personal property from real property other than the detachment described in Subsection (57)(b)(ii); or
 - (iii) an attachment of the following tangible personal property to real property if the attachment to real property is only through a line that supplies water, electricity gas, telephone, cable, or supplies a similar item as determined by the commission by rule made in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act:
 - (A) a refrigerator;
 - (B) a washer;
 - (C) a dryer;
 - (D) a stove;
 - (E) a television;
 - (F) a computer;
 - (G) a telephone; or
 - (H) tangible personal property similar to Subsections (58)(c)(iii)(A) through (G) as determined by the commission by rule made in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

The Commission has promulgated Administrative Rule R865-19S-58 to provide additional guidance on materials and supplies sold to owners, contractors, and repairmen of real property, as set forth below 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.
 - 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 that are treated as construction materials for purposes of this rule.
- 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.

Administrative Rule R865-19S-58 was amended for the 2008 and 2009 tax years, as follows:

- (1) 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.
 - (a) "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.
 - (b) 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.
- (4) 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:
 - (a) moveable items that are attached to real property merely for stability or for an obvious temporary purpose;
 - (b) manufacturing equipment and machinery and essential accessories appurtenant to the manufacturing equipment and machinery;
 - (c) 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; and
 - (d) telephone or communications equipment and associated wire and lines if the equipment, wire, and lines:
 - (i) are provided as part of a single transaction;
 - (ii) that are part of real property are an incidental portion of the transaction;
 - (iii) are primarily used for the operation of a telephone system or communications system;
 - (iv) are installed for the benefit of the trade or business conducted on the property; and
 - (v) are attached to real property in a manner such that their removal from the real property does not cause substantial damage to the equipment, wire, or lines or to

the real property to which they are attached.

Utah Code Ann. §59-1-1417 provides, “[i]n a proceeding before the commission, the burden of proof is on the petitioner...”

DISCUSSION

Taxpayer purchased appliances from BRAND 1 on various furnish and install contracts between April 11, 2006 and January 30, 2009. On May 29, 2009, the Taxpayer requested a refund of sales tax paid on the purchase and installation of these appliances in the amount of \$\$\$\$\$. Taxpayer asserted that as “built-in appliances” they were converted to real property and not subject to tax. On October 28, 2009, the Division issued a refund in the amount of \$\$\$\$\$. The Division denied \$\$\$\$\$ of the refund, attributable to the purchase of microwave hood and range hood combination units. However, the Division did refund the sales tax charged and paid on the installation and labor charges of the microwave hood and range hood combination units. The remaining issue is whether the microwave hood and range hood combination units have been incorporated into the real property.

The Taxpayer’s representative argued that the microwave units were built-in appliances and not subject to tax. He pointed to Tax Commission Publication 42 (dated 10/06), and noted that built-in appliances, while they do not lose their separate identity upon installation become an integral part of the real property. The Taxpayer’s representative stated the microwave units are not moveable or temporary, but stay in place and cannot be removed without causing damage to the real property. He provided a copy of the installation instructions for an over-the-range BRAND 2 microwave for illustrative purposes. The Taxpayer’s representative pointed out that installation is more involved than plugging in the microwave. He noted that the instructions show the microwave is bolted into the wall and there is an expectation that it is a permanent appliance and will remain in place throughout its useful life. When asked whether these particular microwave units were vented to the outside, the Taxpayer’s representative did not know for certain. He argued further that the microwave units are an integral part of the real property because they are bolted into the wall, not moveable, and not there for an obvious temporary purpose. He stated that it is similar to bathroom mirrors or a light fixture.

It is the Division’s position that the microwave units remain tangible personal property under Administrative Rule R865-19S-58D., 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.” The Rule then gives examples of moveable items attached to real property for stability, and items installed for the benefit of a trade or business that are affixed in a way that facilitates removal without substantial damage to the real property or the item itself.

The Division’s representative argued that the microwave units, while attached to the wall, would not

cause substantial damage upon removal. She stated the instruction booklet supplied by the Taxpayer shows only that there would be some holes in the wall. She argued that this case is similar to Appeal No. 08-1683, in which the Commission found signs that were attached to a building by bolts or into the ground by cement and bolts were “attached” to the real property but remained tangible personal property. The Division’s representative argued that the Taxpayer has not shown that removal of the microwave would cause substantial damage to remove, and is attached to the wall for “stability purposes”. She noted that if the microwave units were vented, and required some kind of ductwork, that would require changes to the structure, and would cause more serious damage to remove.

In rebuttal, the Taxpayer’s representative argued that Appeal No. 08-1683 is not applicable, as it dealt with commercial signage, rather than microwaves in the home. He stated that the microwaves units are more similar to furnace and air conditioning units which also leave holes when removed. He argued that anyone who removed a microwave unit like those at issue would have the damage to the wall repaired. The Taxpayer’s representative further argued that Subsection D.(3) of Rule R865-19S-58 was not applicable as it specifically deals with trade fixtures, and the microwave units do not fall under that category. He believes the microwaves are “built-in” appliances like those described in Publication 42, and should receive the same treatment.

Administrative Rule R865-19S-58A. specifically lists built-in appliances among the items that are treated as construction materials. The microwave units at issue are bracketed to the wall above the range, and may or may not be vented to the outside. There is a reasonable expectation on the part of homebuyers that such an appliance would remain with the home, and typically cabinetry is installed in a manner that it accommodates the microwave unit. The Division argued that the microwave units fall under Subsection D of Rule R865-19S-58, and remain tangible personal property. The microwave units are arguably not attached “merely for stability” or for an “obvious temporary purpose” and there is an expectation that the microwave units will remain in place throughout their useful life. In addition, the microwave units are neither manufacturing equipment nor are they items installed for the benefit of a trade or business. Under the circumstances described, the microwave units appear to be built-in appliances, and the Taxpayer should be entitled to a refund of the sales tax paid.

Jan Marshall
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission finds the microwave units are built-in appliances that are

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incorporated into the real property. The Taxpayer's request for a refund of the sales tax paid on those microwave units is granted. 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 _____, 2011.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner