

10-0018
SALES AND USE
AUDIT PERIOD: 2006, 2007, 2008
SIGNED: 9-25-11
COMMISSIONERS: M. JOHNSON, D. DIXON, M. CRAGUN
EXCUSED: B. JOHNSON

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER Petitioner, V. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	ORDER Appeal No. 10-0018 Account No. ##### Tax Type: Sales and Use Audit Period: 01/01/06 – 12/31/08 Judge: Jensen
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Presiding:
Clinton Jensen, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE, for the Taxpayer
For Respondent: RESPONDENT REP 1, Utah Assistant Attorney General
RESPONDENT REP. 2, from Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing on October 4, 2010. On April 28, 2006, the Auditing Division of the Utah State Tax Commission (the “Division”) issued a Statutory Notice to the Petitioner (the “Taxpayer”), imposing sales tax on the sale of digital images. The Statutory Notice indicated \$\$\$\$ in sales tax and \$\$\$\$ in interest as of the notice date. The Division did not impose any penalties. The Taxpayer asks the Commission to rule that the transactions at issue are not subject to sales and use tax, while the Division asks the Commission to sustain its imposition of tax on these transactions.

APPLICABLE LAW¹

Utah Code Ann. §59-12-103(1) provides for the imposition of sales and use tax on certain transactions, as follows in pertinent part:

¹ Although the audit period spans three tax years, the applicable statutes changed only in numbering. The Commission cites the 2008 statutes.

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 provides definitions for purposes of Utah’s sales and use tax, as follows in pertinent part:

(97)(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.

Utah Admin. Rule R865-19S-75 (“Rule 75”) provides guidance concerning the taxability of products sold by photographers, as follows in pertinent part:

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.

ANALYSIS

The Taxpayer is a corporation for the purposes of operating a part-time business taking photographs for advertising clients, who generally receive their photographs as a digital file. The Taxpayer rarely sells digital prints. Because the Taxpayer generally does not transfer a printed photograph, it takes the position that it is performing a service rather than selling tangible personal property. In support of this, the Taxpayer presented information that any storage or transfer medium looks, weighs, and feels the same when a digital file is loaded onto it or when it is empty. For this reason, the Taxpayer takes the position that digital photographs are not tangible personal property.

The problem with the Taxpayer’s position is that the criteria for tangible personal property in Utah Code Ann. §59-12-102(97) are connected by the “or” connector, meaning that meeting one of the criteria will bring property within the definition. It does not matter whether the digital photos stored or transferred in digital format can be seen, weighed, or felt if one of the other criteria of Utah Code Ann. §59-12-102(97) is satisfied. The photographs at issue can be seen. That is the reason the Taxpayer takes the photos and that is what the Taxpayer’s clients pay for. Further, Utah law provides that property is tangible personal property if it

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“is in *any* manner perceptible to the senses.” Utah Code Ann. §59-12-102(97) (ii) (emphasis added). This broad language “any manner” includes loading the digital file on to a computer or printer where the photograph is perceptible. Again, this is the purpose of purchasing the photograph. For these reasons, the Taxpayer’s taking and selling of digital images are taxable as sales of tangible personal property.²

Clinton Jensen
Administrative Law Judge

ORDER

On the basis of the foregoing, the Commission sustains the Division’s imposition of additional sales and use tax on the transactions concerning digital images, together with interest, as imposed in the Division’s assessment. Accordingly, the Taxpayer’s appeal is denied. 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

Notice: If a Formal Hearing is not requested as discussed above, failure to pay the balance resulting from this

² The Commission notes that beginning January 1, 2009, Utah law changed to allow for taxation of digital images as separately described transactions rather than as tangible personal property. As the audit at issue ended December 31, 2008, this decision does not address taxation after January 1, 2009.

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order within thirty (30) days from the date of this order may result in a late payment penalty.