

10-0996
SALES TAX
TAX YEARS: 2007-2009
SIGNED: 05-26-2011
COMMISSIONERS: R. JOHNSON, M. JOHNSON, M. CRAGUN
EXCUSED: D. DIXON

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,

Petitioner,

v.

AUDITING DIVISION OF THE
UTAH STATE TAX COMMISSION

Respondent.

INITIAL HEARING ORDER

Appeal No. 10-0996
Account No. #####
Tax Type: Sales Tax
Audit Period: 1/1/07-9/30/09

Judge: Phan

Presiding:

Jane Phan, Administrative Judge

Appearances:

For Petitioner: PETITIONER REP
For Respondent: RESPONDENT REP. 1, Assistant Attorney General
RESPONDENT REP. 2, Assistant Director, Auditing
RESPONDENT REP. 3, Tax Audit Manager
RESPONDENT REP. 4, Auditor

STATEMENT OF THE CASE

This matter came before the Commission for an Initial Hearing in accordance with Utah Code §59-1-502.5, on February 24, 2011. Petitioner (the “Taxpayer”) is appealing a sales and use tax audit for the period of January 1, 2007 through September 30, 2009. The Statutory Notice of the audit change had been issued by Respondent (the “Division”) on March 1, 2010. In the audit it was the Division’s conclusion that the Taxpayer owed \$\$\$\$\$ in tax with interest of \$\$\$\$\$. No penalties were assessed with the audit. Interest continues to accrue on the unpaid balance.

APPLICABLE LAW

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

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

Utah Code §59-12-102(82) states:

- (b) “Purchase price” and “sales price” include:
 - (ii) expenses of the seller, including:
 - (B) a labor cost

Utah Admin. Rule R865-19S-51 further clarifies when labor is subject to tax and provides:

- A. The amount charged for fabrication that is part of the process of creating a finished article of tangible personal property must be included in the amount upon which tax is collected. This type of labor and service charge may not be deducted from the selling price used for taxation purposes even though billed separately to the consumer and regardless of whether the articles are commonly carried in stock or made up on special order.
- B. Casting, forging, cutting, drilling, heat treating, surfacing, machining, constructing, and assembling are examples of steps in the process resulting in the creation or production of a finished article.

Utah Admin. Rule R865-19S-58 clarifies the different taxable treatment for labor performed on real property as follows:

The sale of real property is not subject to sales tax, nor is the labor performed on real property.

DISCUSSION

At the hearing the Taxpayer’s representative (“Representative”) stated that the Taxpayer did not dispute the tax amounts identified in schedule 4 of the audit. The amount determined in Schedule 4 had been \$\$\$\$ in tax for Unreported Purchases of Consumables and Materials used to Perform Real Property Work. He indicated that this was just an unintentional error on the part of the Taxpayer. However, the Representative asked for relief from the taxes indicated on Schedules 1 through 3. Schedule 1 indicated additional tax in the amount of \$\$\$\$ for Underreported Tax Amounts, Schedule 2 was additional tax in the amount of \$\$\$\$ for Additional Taxable Sales and Schedule 3, \$\$\$\$\$, for Disallowed Exempt Sales. His request for relief was on the basis that the Taxpayer did not have a clear understating that some of the transactions were taxable, so they did not charge the tax to the customer or pay the tax at the time they purchased items for use. Basically the Representative asked for consideration because the Taxpayer did not understand the tax codes.

The Taxpayer operates a retail store where (PRODUCTS) may be sold to customers. Apparently there were three types of transactions: 1) customers might pick up the product from the store; 2) the buyer contracts for both the purchase of the product and the delivery to the customer’s location; and 3) the buyer contracts for the purchase and installation of the product into its real property.

It was the Representative's position that even the auditor was confused on how the sales tax should be collected, although he did not provide any details on whom he had talked to or what questions had been asked or information provided to the auditor and received from the auditor. He states that basically they did not understand and were unable to keep up with the Tax Code.

The Division stated under the Sales & Use Tax Act provisions, the different transactions in the Taxpayer's business have a different tax result. The Division pointed out that labor charged to fabricate the tangible personal property is subject to tax. But labor amounts charged to either convert tangible personal property to real property or attach tangible personal property to real property are not subject to tax. The labor charges for the Taxpayer to convert the PRODUCTS to real property or attach the PRODUCTS to the real property would not be subject to tax. It was the Division's position that all items in Schedule 3 of the audit were sales of tangible personal property that were subject to tax and in fact, by the admission of the accountant for the Taxpayer, were items that were not installed into or attached onto real property. The tax in the audit on Schedule 2 was from labor charges for work in the shop to fabricate or manufacture the product.

After further discussion it appeared that Schedule 1 was not in dispute, these were just a few unreported items that were invoices that may have bled over into a different period.

The Division representatives pointed out that under Utah Admin. Rule R861-1A-42(2) and as explained in Tax Commission Publication 17, interest would be waived only when the taxpayer is able to prove the Tax Commission or a Tax Commission employee gave the taxpayer erroneous information or took inappropriate action that contributed to the error. It was their contention that the Taxpayer had not shown this type of error.

After reviewing all of the information presented in this matter, there is no indication that the audit was incorrect based on the transactions and the applicable law. In fact, the Taxpayer did not contest the audit on that basis. The fact that the Taxpayer did not understand some of the labor charges were subject to tax and some were not, depending on the type of labor is not basis to abate portions of the audit. The Tax Commission does not abate audits based on a lack of understating of the law on the part of a taxpayer. If it had been shown that there was an error on the part of a Tax Commission employee that led the Taxpayer to file the returns incorrectly that would be given consideration for waiver of interest. However, the proffer that even the auditor seemed confused is not sufficient evidentiary support that there had been a Tax Commission employee error. There was no letter from a Tax Commission employee expressing an inaccurate opinion, nor even any details of a conversation with the auditor that led the Taxpayer to file incorrectly. If the Taxpayer was not explaining all the transactions to the auditor, or did not understand the auditor's response applied to some of the labor charges but not others, a conversation may have been confusing, but does not rise to the level of basis for waiver of either the tax or the interest. The audit should be sustained. The Taxpayer may contact the Taxpayer

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Services Division to set up a payment plan or discuss financial hardship options at 801 297-7703.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Tax Commission sustains the sales and use tax audit deficiency issued against the Taxpayer for the period of January 1, 2007 through September 30, 2009.

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

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