

10-1219  
SALES TAX  
TAX YEARS: 2006, 2007, 2008, 2009  
SIGNED: 10-13-2011  
COMMISSIONERS: R. JOHNSON, D. DIXON, M. CRAGUN  
CONCURRENCE: M. JOHNSON  
GUIDING DECISION

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BEFORE THE UTAH STATE TAX COMMISSION

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<p>PETITIONER,</p> <p style="text-align: center;">Petitioner,</p> <p>vs.</p> <p>TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="text-align: center;">Respondent.</p>	<p><b>INITIAL HEARING DECISION</b></p> <p>Appeal No. 10-1219</p> <p>Account No. #####</p> <p>Tax Type: Sales Tax</p> <p>Audit Period: 09/06 – 08/09</p> <p>Judge: Jensen</p>
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**Presiding:**

Clinton Jensen, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER REP., for the Taxpayer  
For Respondent: RESPONDENT REP. 1, Assistant Attorney General  
RESPONDENT REP. 2, for the Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5 on March 9, 2011. Petitioner (the “Taxpayer”) filed this appeal to challenge an action by the Taxpayer Services Division of the Utah State Tax Commission (the “Division”) denying refunds of sales tax paid on portable restrooms from September 2006 to August 2009.

APPLICABLE LAW<sup>1</sup>

1. A tax is imposed on the purchaser as provided in this part for amounts paid or charged for the following transactions: (h) except as provided in Subsection 59-12-104(7) amounts paid or charged for cleaning or washing of tangible personal property; (k) amounts paid or charged for leases or rentals of

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<sup>1</sup> Although pertinent sections of the Utah Code did not change in substantive ways, numbering did change for some sections between the various years at issue in this case. Unless otherwise noted, the Commission cites 2009 law.

tangible personal property if within this state the tangible personal property is (i) stored; (ii) used; or (iii) otherwise consumed; . . . Utah Code Ann. §59-12-103(1).

2. For sales and use tax purposes, “[p]urchase price” and “sales price” does not include a “delivery charge [when] separately stated on an invoice, bill of sale, or similar document provided by the purchaser.” Utah Code Ann. §59-12-102(82)(c)(ii)(B).
3. “Delivery charge” means a charge: (i) by a seller of: (A) tangible personal property; or (B) a product transferred electronically; or (C) services; and (ii) for preparation and delivery of the tangible personal property or services described in Subsection (28)(a)(i) to a location designated by the purchaser. Utah Code Ann. Ann. §59-12-102(28)(a).
4. In an action before the Tax Commission, the petitioner generally bears the burden of proof. Utah Code Ann. §59-1-1417 (2011).

#### ANALYSIS

The Taxpayer is a ( X ) company. During the period at issue, it used portable restrooms at its jobsites. Two vendors supplied portable restrooms to the Taxpayer. The first vendor invoiced portable restrooms using phrases such as “( X )– RENT,” “( X ) RENT,” and “( X )-RENT” along with dates of service. This vendor of these portable restrooms charged a lump sum on the basis of time. The vendor charged sales tax on its invoices. For charges by the first vendor, the Division denied the Taxpayer’s refund request in its entirety.

The other supplier of portable restrooms listed separate charges for different line items, such as “STD - Standard Restroom,” “REG SERVICE – Regular Service,” and “DEL/PU – Delivery/Pickup.” The second vendor then totaled these separate lines and added sales tax on the total. The Division refunded sales tax for separately-stated delivery charges but denied refunds of sales tax on other charges by the second vendor.

Both parties rely on previous Tax Commission decisions for their respective positions. The Taxpayer cites Tax Commission Case No. 07-0666 (“07-0666”), in which the Commission ruled that “service” and “weekly service” charges for portable restrooms were not subject to sales tax. The Commission based its ruling on evidence presented showing that the essence of a transaction for portable restrooms was the providing of a nontaxable service. Other items, such as the restrooms themselves and cleaning of the restrooms would normally be taxable as a rental of tangible personal property and the cleaning of tangible personal property. Nevertheless, under the facts of 07-0666, the Commission found these items incidental to the providing of a service and therefore not taxable. One factor on which the Commission relied in reaching these decisions was

that providing toilets was less than two percent of the vendor's costs and that cleaning was necessary to comply with regulations applicable to portable restroom service.

The Division cites Tax Commission Case No. 94-0609 ("94-0609"), in which the Commission ruled that "rentals" and "rentals and service" charges for portable restrooms were subject to sales tax. The Commission based its ruling on evidence presented showing that essence of the transaction for providing portable restroom services under the facts of 94-0609 was a rental, even though the transactions included maintenance services.

The Taxpayer in the case now before the Commission argued, but provided no evidence to show, that restrooms were less than two percent of the costs of the vendors providing it portable restrooms. The Division disputes this.

The Taxpayer argued that in issuing its decision in 07-0666, the Commission overruled 94-0609. The Commission specifically discussed 94-0609 in 07-0666, explaining that the facts in 07-0666 were distinguishable from the facts in 94-0609 because the vendor in 94-0609 provided invoices for "rental" or "rental and service" while the vendor in 07-0666 provided invoices for "Service" or "Weekly Service."

The decisions in 94-0609 and 07-0666 might leave the impression that the language of invoices is determinative of the essence of the transaction at issue. The Commission specifically finds that invoice descriptions are but one factor in making a determination regarding a transaction as one for services or property rental. Another factor is the relative costs of services and equipment consumed in providing those services compared with the costs of property for which a customer takes temporary custody. Other factors include the manner in which the portable restrooms are advertised, whether the vendor pays taxes on purchases of restrooms as a final user of tangible personal property, and the extent to whether the vendor empties portable restrooms on site or exchanges them for replacement units.<sup>2</sup>

It is clear that the Taxpayer in the case now before the Commission contracted with two vendors who provided similar portable restrooms to jobsites. One vendor invoiced those charges as "( X )- RENT," "( X ) RENT," "( X )-RENT," while the other invoiced them as charges for "STD - Standard Restroom," "REG SERVICE - Regular Service," and "DEL/PU - Delivery/Pickup." With the exception of delivery and pickup charges that are not taxable as separately stated charges as described in Utah Code Ann. §59-12-

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<sup>2</sup> The structuring of transactions has sales tax implications beyond sales tax charged on the transactions themselves. As the Commission explained in 07-0666, a vendor providing services is the end user of items consumed as part of providing services. The Commission found that the vendor in 07-0666 was liable for sales tax on the purchase of

102(82)(c)(ii)(B), looking to invoice descriptions only would lead to different sales tax treatments for the same type of restrooms provided by two different vendors. One described the restrooms as rentals while the other used terms that would provide services. As previously indicated, the Commission declines to use invoice description as the sole factor for determining sales tax treatment for portable restroom services.

The problem with the Taxpayer's refund request in this case is that the evidence presented is limited to sample invoices and a listing of products available from one of the vendors. This is fatal to the Taxpayer's case given the burden of proof imposed it as a petitioner under Utah Code Ann. §59-1-1417. The Taxpayer presented an allegation, which the Division disputed, that the restrooms supplied to it cost less than two percent of total costs associated with providing all necessary services. The Taxpayer presented no evidence to support this contention. Rather, the Taxpayer argued that because the Commission found under the facts of another case that another vendor had a given cost structure, that the same must be true in this case. Similarly, the Taxpayer presented no evidence regarding the manner in which the portable restrooms are advertised, whether the vendor pays taxes on purchases of restrooms as a final user of tangible personal property, and the extent to whether the vendor empties portable restrooms on site or exchanges them for replacement units. The Taxpayer in 07-0666 presented evidence on all of these issues and thus presented facts under which the Commission could determine that the essence of the transaction at issue in 07-0666 was non-taxable services. The Commission cannot do so without evidence other than conflicting invoices from two different vendors. Under the evidence presented in this case, there is not good cause to support the Taxpayer's refund request beyond sales tax on separately-stated delivery charges, which were already refunded.

Clinton Jensen  
Administrative Law Judge

DECISION AND ORDER

On the basis of the foregoing, the Tax Commission sustains the Division's audit for all charges with the exception of separately-stated delivery charges. It is so ordered.

This Decision does not limit a party's right to a Formal Hearing. Any party to this case may file 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

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portable restrooms. The same would apply to chemicals or supplies used to provide portable restroom services.

Appeal No. 10-1219

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

D'Arcy Dixon Pignanelli  
Commissioner

Michael J. Cragun  
Commissioner

#### CONCURRENCE

I agree with the majority in every aspect of this Order. I only add that I believe the underlying issue in this case is whether the essence of the transaction involves a waste disposal service, or whether it involves the lease of waste disposal facilities. Presumably the result would hinge on whether one or the other is incidental to the primary transaction. It does not appear that either party raised this issue.

Marc B. Johnson  
Commissioner