10-2637
SALES AND USE
TAX YEARS: 2007, 2008, 2009, 2010
SIGNED: 01-31-2012
COMMISSIONERS: R. JOHNSON, M. JOHNSON, D. DIXON, M. CRAGUN
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, dba PETITIONER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION** Appeal No. 10-2637 Account No. ##### Audit Period: 04/01/07 - 01/31/10 Tax Type: Sales and Use Judge: Chapman

Presiding:
R. Bruce Johnson, Commission Chair
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER REP., Owner
For Respondent: RESPONDENT REP. 1, Assistant Attorney General
RESPONDENT REP. 2, from Auditing Division
RESPONDENT REP. 3, from Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on December 7, 2011. At the hearing, the Commission agreed to keep the record open for 30 days to allow PETITIONER dba PETITIONER ("taxpayer" or "PETITIONER") to submit additional evidence to Auditing Division (the "Division") by December 22, 2011 and for the Division to review the evidence by January 6, 2012 and determine if the audit assessment at issue should be revised. On January 10, 2012, the Division informed the Commission that the taxpayer had not submitted any post-hearing information for it to review. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax at issue is sales and use tax.

2. The audit period is April 1, 2007 to January 31, 2010 ("Audit Period").

3. The taxpayer appealed the Division's assessment of sales and use tax for the Audit Period described above. On September 15, 2010, the Division issued a Statutory Notice – Sales and Use Tax, in which it imposed additional sales and use taxes in the amount of $$$$$, 10% late filing and late penalties in the amount of $$$$$ for a number of periods during the Audit Period, and interest (calculated through October 15, 2010) in the amount of $$$$$, for a total assessment of $$$$$. The Statutory Notice also showed that the taxpayer had made a payment of $$$$$ that had been applied to the audit assessment, which reduced the total amount owed (as of October 15, 2010) to $$$$$.

4. The taxpayer did not timely file sales and use tax returns and did not timely pay its sales and use tax liability for a number of periods during the Audit Period. As a result, the Division imposed $$$$$ of late filing and/or late payment penalties for 11 reporting periods, as shown on the Appendix of the Statutory Notice. The periods for which penalties were imposed are the periods ending September 30, 2007, December 31, 2007, December 31, 2008, March 31, 2009, June 30, 2009, July 31, 2009, August 31, 2009, September 30, 2009, October 31, 2009, November 30, 2009, and December 31, 2009.

5. The matter was scheduled for an Initial Hearing on May 18, 2011. The taxpayer, however, was not prepared for the Initial Hearing on the scheduled date and agreed for the matter to be scheduled for a Formal Hearing.

6. PETITIONER started business in 1987 as a OBJECTS installation company. PETITIONER explained that it delivered and installed OBJECTS that its customers already owned and that it did not charge sales and use tax on these services. PETITIONER stated that it was audited three times prior to 2001, and, in each instance, its practice of not charging sales and use tax on its delivery and installation transactions was found to be correct.

7. Sometime in the mid-2000's, PETITIONER transitioned into selling OBJECTS, in addition to delivering and installing it. The OBJECTS included (WORDS REMOVED). PETITIONER stated that it collected sales and use tax on its OBJECTS sales, but continued not to charge and collect sales tax on its separately-stated delivery and installation charges. A review of the invoice descriptions in Schedule 3 of the Statutory Notice also suggests that at some point, PETITIONER also started providing services associated with building maintenance.

8. The Division audited PETITIONER in April 2010, which led to it issuing its Statutory Notice. PETITIONER stated that the Division auditor told him in April 2010 that PETITIONER was required to charge and collect tax on its delivery and installation charges. PETITIONER stated that since April 2010, it has been charging and collecting sales tax on delivery and installation charges associated with its sales of OBJECTS, even if these charges are separately stated.

9. At the hearing, the Division admitted that delivery charges, if separately stated, were nontaxable. The Division stated that it did not impose tax in its assessment on any separately-stated charges that were solely for delivery.

10. The Division, however, stated that installation charges, even if separately stated, are taxable. The Division stated that Utah law in existence during the Audit Period provided that the installation of tangible personal property to other tangible personal property is subject to taxation. In addition, the Division stated that a "combined" delivery and installation charge is also taxable, even if the combined charge is separately stated, because the combined charge includes both a nontaxable delivery charge and a taxable installation charge. For these reasons, the Division assessed tax on the taxpayer's installation charges and its combined delivery and installation charges, even if the taxpayer separately stated these charges. The Division assessed these, as well as other transactions, as "unreported taxable sales" on Schedule 2 of its Statutory Notice.

11. The Division also reconciled the amounts of sales tax that the taxpayer charged and collected from its customers, as shown on its accounting records, to amounts of sales and use tax that the taxpayer reported on its sale tax returns. For the Audit Period, the Division determined that the taxpayer's accounting records show that it collected $$$$$ more in sales and use tax than it reported on and remitted with its sales and use tax returns. The Division assessed the additional sales and use that had been collected, but not remitted, in Schedule 1 of the Statutory Notice.

12. On Schedule 3 of the Statutory Notice, the Division assessed "disallowed exempt sales," which is described on the notice as "exempt sales for which valid exemption documentation was not provided." At the hearing, the Division stated that it would remove these transactions if the taxpayer could provide valid exemption certificates from its customers. The taxpayer asked the Commission for an opportunity to obtain additional exemption certificates. As mentioned earlier, the Commission gave the taxpayer 15 days to submit additional exemption certificates, and the taxpayer did not submit any.

13. It is noted that some of the "disallowed exempt sales" listed in Schedule 3 may be nontaxable charges, regardless of whether the purchaser provides the taxpayer with an exemption certificate. For example, several of the "disallowed" exempt sales are for installation services or for combined delivery and installation services. Should the Commission find that installation services are nontaxable, installation charges and combined delivery and installation charges would be nontaxable, even if the taxpayer did not provide an exemption certificate. Furthermore, it appears that other transactions for services listed on this schedule need to be analyzed further to determine whether they are taxable or nontaxable transactions.

14. On Schedule 4 of the Statutory Notice, the Division assessed "unreported asset purchases" concerning items that the taxpayer purchased and that the Division determined were used or consumed by the taxpayer. The Division assessed tax on these items because the taxpayer was unable to produce an invoice to show that it paid tax when it purchased the items. Specifically at issue were AREA OBJECTS and equipment

and a Toyota truck. The taxpayer conceded that it owed tax on the AREA OBJECTS and equipment because its accountant has fully depreciated these assets on the taxpayer's books instead of listing the items as inventory. The taxpayer, however, disputes that it owes tax on the purchase of the Toyota truck. The taxpayer contends that it paid sales tax on the truck at the time it purchased it from DEALERSHIP.

15. The Division asks the Commission to sustain its Statutory Notice. The taxpayer asks the Commission not to impose any of the taxes imposed in the assessment in exchange for it collecting and paying the taxes prospectively. In the alternative, the taxpayer provided information to contest certain portions of the assessment and asks the Commission to remove any transactions for which it does not owe tax.

APPLICABLE LAW

1. Utah Code Ann. §59-10-103(1) (2009)[1] imposes sales and use tax on amounts paid or charged for certain transactions, as follows in pertinent part:

> (a) retail sales of tangible personal property made within the state;
> . . . .
> (g) amounts paid or charged for services for repairs or renovations of tangible personal property, unless Section 59-12-104 provides for an exemption from sales and use tax for:
> (i) the tangible personal property; and
> (ii) parts used in the repairs or renovations of the tangible personal property described in Subsection (1)(g)(i), whether or not any parts are actually used in the repairs or renovations of that tangible personal property;
> . . . .
> (k) amounts paid or charged for leases or rentals of tangible personal property if within this state the tangible personal property is:
> (i) stored;
> (ii) used; or
> (iii) otherwise consumed;
> . . . .

2. UCA §59-12-102 (2009) defines "delivery charge," "installation charge," "purchase price," and "repairs or renovations of tangible personal property," as follows in pertinent part:

> . . . .
> (28) (a) "Delivery charge" means a charge:
> (i) by a seller of:

1 All citations are to the 2009 version of Utah law, unless otherwise indicated.

(A) tangible personal property; or
(B) a product transferred electronically; or
(C) services; and
(ii) for preparation and delivery of the tangible personal property, product transferred electronically, or services described in Subsection (28)(a)(i) to a location designated by the purchaser.
(b) "Delivery charge" includes a charge for the following:

(i) transportation;
(ii) shipping;
(iii) postage;
(iv) handling;
(v) crating; or
(vi) packing.

. . . .
(47) (a) Except as provided in Subsection (47)(b), "installation charge"[2] means a charge for installing:
(i) tangible personal property; or
(ii) a product transferred electronically.
(b) "Installation charge" does not include a charge for repairs or renovations of:
(i) tangible personal property; or
(ii) a product transferred electronically.

. . . .
(82) (a) "Purchase price" and "sales price" mean . . .
(b) "Purchase price" and "sales price" include:
(i) the seller's cost of the tangible personal property, a product transferred electronically, or services sold;
(ii) expenses of the seller, including:
. . . .
(C) a service cost;
. . . .
(F) the cost of transportation to the seller; or
. . . .
(iii) a charge by the seller for any service necessary to complete the sale.
. . . .
(c) "Purchase price" and "sales price" do not include:
. . . .
(ii) the following if separately stated on an invoice, bill of sale, or similar document provided to the purchaser:

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2 The 2009 version of the definition of “installation charge” is slightly different from the version that existed between July 1, 2005 and January 1, 2009. However, the Commission believes that the definition of “installation charge,” both before and after January 1, 2009, is interpreted the same.

It is also noted that the definitions for “installation charge” and “repairs or renovations of tangible personal property” were amended again in 2011, effective July 1, 2011. As explained later in the decision, the Commission believes that the 2011 amendments to these definitions were merely clarifying prior practice and that that the current law is interpreted the same as the law that existed during the Audit Period.

. . . .
(B) a delivery charge;
(C) an installation charge.
. . . .
(88) "Repairs or renovations of tangible personal property" means:
(a) a repair or renovation of tangible personal property that is not permanently attached to real property; or

(b) attaching tangible personal property or a product that is transferred electronically to other tangible personal property if the other tangible personal property to which the tangible personal property or product that is transferred electronically is attached is not permanently attached to real property.

3. UCA §59-1-401(13) (2011) 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."

4. Utah Admin. Rule R865-1A-42 ("Rule 42") (2011) provides guidance concerning the waiver of penalties and interest, as follows in pertinent part:

. . . .
(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.
(3) Reasonable Cause for Waiver of Penalty. The following clearly documented circumstances may constitute reasonable cause for a waiver of penalty:
. . . .
(l) Compliance History:
(i) The commission will consider the taxpayer's recent history for payment, filing, and delinquencies in determining whether a penalty may be waived.
(ii) The commission will also consider whether other tax returns or reports are overdue at the time the waiver is requested.
. . . .

5. UCA §59-1-1417 (2011) provides that the burden of proof is generally 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.

DISCUSSION

The taxpayer stated that a large portion of the Division's assessment concerns its separately-stated delivery and installation charges for OBJECTS it sold. The taxpayer explained that it has been in business since 1987 and has always met its tax obligations. The taxpayer explained that until around 2005, its primary business activity was the delivery and installation of OBJECTS (including (WORDS REMOVED)) for customers who already owned the OBJECTS, services that it knew to be nontaxable from prior audits. The taxpayer further explained that it started selling OBJECTS around 2005 and that it did not realize that the taxation of delivery and installation charges for OBJECTS it sold might be different from the taxation of such charges for OBJECTS it did not sell. As a result, during the Audit Period, the taxpayer did not charge sales tax on its separately-stated delivery and installation charges for OBJECTS it sold.

The taxpayer stated that since the audit was conducted in April 2010, it has started collecting sales tax on its separately-stated delivery and installation charges for OBJECTS it sells. Given these circumstances and the taxpayer's willingness in April 2010 to start charging sales tax as instructed by the Division's auditor, the taxpayer asks the Commission to forgive and abate the tax assessment in return for its prospective compliance.

Although the Commission is authorized under Section 59-1-401(13) to waive penalties and interest for good cause, it is not authorized to waive tax that is properly due. That being said, however, the Commission believes that the taxpayer may not owe tax on all of the transactions listed in the Statutory Notice.

The Commission needs to analyze the Division's assessment and the evidence more closely to determine whether any of the transactions in the Statutory Notice should be removed from the assessment.

Schedule 1. The Division reconciled the amounts of sales tax that the taxpayer charged and collected from its customers, as shown on its accounting records, to amounts of sales tax that the taxpayer reported and remitted with its sale tax returns. For the Audit Period, the Division determined that the taxpayer collected $$$$$ more in sales tax from its customer than it reported and remitted with its sales and use tax returns.[3] The Division assessed the $$$$$ of additional sales tax on Schedule 1 of the Statutory Notice.

The taxpayer, who has the burden of proof, has not shown that the amount of additional taxes assessed on Schedule 1 is incorrect. The taxpayer has not shown that it collected an aggregate amount of taxes during the Audit Period that is different from the amount the Division obtained from its accounting records. In addition, the taxpayer has not shown that it reported and remitted an aggregate amount of taxes that is different from the amount the Division claims that the taxpayer reported and remitted. Accordingly, the Commission finds that the taxpayer collected $$$$$ in sales tax that it did not remit to the Tax Commission.

UCA §59-12-107(2) provides that a seller shall submit to the Tax Commission all sales tax that it collects from its customers, even if the seller collects sales tax that is in excess of the amount lawfully due. The Division has determined that during the Audit Period, the taxpayer collected $$$$$ in sales tax that it did not remit to the Tax Commission, which the taxpayer did not refute. Accordingly, the Commission sustains the $$$$$ in additional tax that the Division assessed on Schedule 1 of the Statutory Notice.

Schedule 2. The Division determined that some transactions for which the taxpayer did not charge sales tax to its customers were, in fact, taxable. The Division imposed sales tax on these transactions on

3 When the audit was first conducted, the Division determined that the taxpayer had collected $$$$$ in sales tax that it had not reported and remitted to the Tax Commission. Most of this amount was related to periods for which the taxpayer had not yet submitted returns. Subsequent to the Division conducting the audit, but prior to the Division issuing the Statutory Notice, the taxpayer remitted additional returns on which it reported and remitted $$$$$ in tax, which leaves $$$$$ ($$$$$ minus $$$$$) in sales taxes that the taxpayer collected but did not remit to the Tax Commission.

Schedule 2 of the Statutory Notice. Most of these transactions involve the taxpayer's separately-stated installation charges or combined charges for installation and delivery of OBJECTS that the taxpayer sold. These transactions, as well as several others that are listed on Schedule 2, will be discussed below.

Installation charges. As mentioned previously, the taxpayer often delivered and installed OBJECTS that it sold. In some instances, the taxpayer's invoice would show a separate OBJECTS charge, a separate delivery charge, and a separate installation charge. In other instances, the taxpayer would state on its invoices a separate OBJECTS charge and a separate, but combined, charge for delivery and installation. The Division determined that any separately-stated charge for delivery only was nontaxable and did not impose sales tax on such delivery charges.[4]

The Division, however, determined that installation charges were taxable if associated with OBJECTS sales. As a result, it imposed tax on the taxpayer's separately-stated installation charges. In addition, the Division imposed sales tax on any combined charge for delivery and installation that was associated with a OBJECTS sale because the combined charge, in the Division's opinion, included both a taxable charge for installation and a nontaxable charge for delivery.[5]

Most of the taxpayer's installation charges involve the assemblage or installation of OBJECTS (including cubicles and filing systems). The Division determined these charges to be taxable "repairs or renovations of tangible personal property," as defined in Section 59-12-102(88), because the taxpayer's services involve the attachment of tangible personal property to other tangible personal property. At issue is whether the assemblage or installation of tangible personal property is subject to taxation if the services involve the attachment of tangible personal property to other tangible personal property, but not a repair or renovation.

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4 Section 59-12-102(82)(c)(ii)(B) provides that "purchase price" does not include separately-stated delivery charges.

5 Section 59-12-103(2)(d)(ii)(A) provides, in general, that "if the sales price of the bundled transaction is attributable to tangible personal property, a product, or a service that is subject to taxation under this chapter and tangible personal property, a product, or service that is not subject to taxation under this chapter, the entire bundled transaction is subject to taxation[.]"

Since July 1, 2005, Utah law has provided that "purchase price" does not include an "installation charge." Section 59-12-102(82). Although an "installation charge" has been nontaxable since 2005, the law was, arguably, ambiguous in regards to attachments of tangible personal property to other tangible personal property until July 1, 2011, when House Bill 35 ("HB 35") (2011) became effective. Both prior to and after July 1, 2011, "installation charge" is defined to exclude "repairs or renovations of tangible personal property." Prior to July 1, 2011, "repairs or renovations of tangible personal property" was defined to include the attachment of tangible personal property to other tangible personal property. Section 59-12-102(88) (2009). Effective July 1, 2011, however, the term "repairs or renovations of tangible personal property" was amended by HB 35 to no longer include the attachment of tangible personal property to other tangible personal property if no repair or renovation is involved. Section 59-12-102(93) (2011).

The Commission has recently addressed whether a separately-stated charge to assemble or install tangible personal property to other tangible personal property is a nontaxable installation charge or a taxable repair or renovation between July 1, 2005 and July 1, 2011. In *USTC Private Letter Ruling 11-002* (Dec. 21, 2011) ("*PLR 11-002*"),[6] the Commission determined that assembly or installation charges that do not involve a repair or renovation, if separately stated, were nontaxable "both before and after July 1, 2011." The Commission issued this ruling after concluding that the definition of "repairs or renovations of tangible personal property" from July 1, 2005 to July 1, 2011 included the attachment of tangible personal property to other tangible personal property only when a repair or renovation is involved.

The Commission believes that such a ruling is consistent with the legislative intent behind HB 35, which was presented to the Legislature as a technical clarification with no fiscal note. If HB 35 merely clarified prior law and had no fiscal impact, the definition of "repairs or renovations of tangible personal

6 Private letter rulings cited in this decision can be found at http://tax.utah.gov/commission/rulings.

property" from July 1, 2005 to July 1, 2011 must be interpreted the same way both before and after July 1, 2011 and cannot include assembly or installation charges for which no repair or renovation is involved.

In addition, the Commission believes that such a ruling is consistent with principles of statutory construction because the relevant provisions are taxing statutes and "[i]t is an established rule in the construction of tax statutes that if any doubt exists as to the meaning of the statute, our practice is to construe taxation statutes liberally in favor of the taxpayer**,** leaving it to the legislature to clarify an intent to be more restrictive if such intent exists." *County Bd. of Equalization v. Utah State Tax Comm'n,* 944 P.2d 370 (Utah 1997). The relevant statutory provisions at issue for the period July 1, 2005 through July 1, 2011 are the definitions of "installation charge," "purchase price," and "repairs or renovations of tangible personal property." These provisions define what the tax base is, as opposed to carving out an exemption. As such, any doubt as to their meaning must be construed in favor of the taxpayer.

A few of the transactions that the Division assessed in its Statutory Notice are for repairs of tangible personal property. These charges are taxable. A few of the transactions also appear to be bundled transactions for nontaxable installation labor and for taxable tangible personal property. For example, transactions described as "provide and install [tangible personal property]" are considered to be taxable bundled transactions because they include sales of both taxable tangible personal property and nontaxable services.

Nevertheless, a majority of the transactions in Schedule 2 are separate installation charges to assemble or install tangible personal property that the taxpayer sold to its customers and that do not appear to involve a repair or renovation. These separately-stated charges are not taxable "repairs or renovations of tangible personal property," but are, instead, nontaxable "installation charges." Accordingly, the Division should remove from Schedule 2 those transactions described with the words "install," "installation," "labor to install," or "set-up" and other similarly-described transactions, with the exception of bundled transactions where one

portion of the separately-stated transaction involves the taxpayer "providing" the tangible personal property being installed.

Furthermore, the combined charges for "delivery and installation" that the Division found to be taxable on Schedule 2 are also nontaxable because deliveries and installation are both nontaxable. Accordingly, the Division should remove from its assessment those transactions described with the words "delivery and installation," "deliver and install" or "travel and install" and other similarly-described transactions.

Fuel Surcharge. One of the transactions that the Division assessed on Schedule 2 is described as "fuel surcharge." In *USTC Private Letter Ruling 09-023* (Mar. 10, 2010), the Commission found that a separately stated fuel surcharge to transport tangible personal property was a "delivery charge" that was not subject to taxation. Accordingly, the Division's audit assessment should be revised to remove the separately-stated charge for "fuel surcharge."

Charges to Move, Reconfigure, or Tear Down Tangible Personal Property. Several of the transactions listed on the Statutory Notice involve the taxpayer's services to "move networks," "move" and "reconfigure" networks, "move (AREAS)," "move" OBJECTS from storage, "reconfigure" (AREA), "knock down" and "reconfigure" (AREAS), and "tear down" (AREAS). Although the Division has determined that these services are taxable, the Commission's recent ruling in *PLR 11-002* suggests otherwise.

In *PLR 11-002*, the Commission considered the taxability of several services associated with the rental and assemblage, or installation, of scaffolding. The Commission determined that a separately-stated labor charge for the disassembly of scaffolding is taxable because it is not a nontaxable "installation charge" and because it is a labor or service expense of the seller and, thus, part of the "purchase price" of the rental of scaffolding.

On the other hand, the Commission determined that a combined labor charge for disassembling, moving and reassembling the scaffolding to a new location at the same worksite is for an additional,

nontaxable service, separate from the rental of the scaffolding. The Commission explained that the combined charge is not part of the "purchase price" of the rental because the combined disassembling, moving, and reassembling service is not intrinsically related to the rental of the scaffolding and because the service transaction is not one of the service transactions specifically enumerated in Section 59-12-103(1) as taxable.

Several of the taxpayer's services that the Division assessed as taxable appear to be more similar to the services the Commission found to be nontaxable in *PLR 11-002*. Services to move a network or AREA that is already installed do not appear to be services intrinsically related to the "purchase price" of a network or OBJECTS. It appears to be a service based on a separate decision to move tangible personal property subsequent to its purchase and original installation. Moreover, moving services are not transactions that are specifically enumerated under Section 59-12-103 as taxable. Accordingly, such services are nontaxable, and the Division should remove from its assessment those services described with the words "move" or "reconfigure" and other similarly-described transactions.

Furthermore, the taxpayer's services to "tear down" or "knock down" AREAS do not appear to be taxable services. The Commission recognizes that it has previously found the "disassembly" of scaffolding to be taxable. However, the rental of scaffolding, where assembly and disassembly are anticipated at the time of rental, is different from the purchase of AREAS and OBJECTS, where the demolition or removal of the OBJECTS is not anticipated at the time of purchase and original installation. A transaction to tear down or knock down OBJECTS appears to be based on a separate decision from the purchase of OBJECTS. As a result, the Commission does not consider charges for tearing or knocking down AREAS to be a service that is part of the "purchase price" of taxable OBJECTS. Moreover, such services are not transactions that are specifically enumerated under Section 59-12-103 as taxable. Accordingly, such services are nontaxable, and the Division should remove from its assessment those services described with the words "tear down" or "knock down" and other similarly-described transactions.

Summary - Schedule 2. For the Audit Period at issue, the Commission finds that the taxpayer's separately-stated installation charges are nontaxable, with the exception of bundled transactions where one portion of the separately-stated transaction involves the taxpayer "providing" the tangible personal property being installed. The Commission also finds that delivery charges, including the transaction described as "fuel surcharge," are nontaxable. In addition, the Commission finds that the taxpayer's transactions to move, reconfigure, and tear down OBJECTS are transactions for nontaxable services.

The Commission does not have sufficient information to determine if some of the other charges assessed on Schedule 2 are nontaxable or taxable. For example, charges described only as "labor" could be nontaxable installation labor or taxable fabrication labor. The taxpayer, who has the burden of proof, has not shown that this "labor" is the type that is nontaxable. Accordingly, the assessment of such transactions must be sustained.

Schedule 3. On this schedule, the Division imposed tax on transactions it labeled as "disallowed exempt sales." The Division explained that these transactions are for items that the taxpayer sold as "exempt" and for which the taxpayer was unable to provide an exemption certificate from the customer. The Division stated that it would remove any transaction from Schedule 3 for which the taxpayer could provide an exemption certificate. Although the taxpayer was given 15 days after the hearing to provide additional exemption certificates to the Division, it did not do so.

Nevertheless, it appears that a number of the transactions assessed on Schedule 3 are not taxable, regardless of whether the customer is exempt from taxation. Accordingly, the Commission will analyze the transactions further to determine whether any of them need to be removed from the assessment.

Transactions Similar to Ones Previously Discussed for Schedule 2. Schedule 3 includes some transactions that are similar to ones previously discussed for Schedule 2, including transactions for installation and delivery services and for services to move, relocate, tear down, and knock down (AREAS) or

OBJECTS. The Commission has found these services to be nontaxable. Accordingly, the Division should remove from Schedule 3 those transactions described with the words "install," "installation," "labor to install," "set-up," "delivery," "deliver," "move," "reconfigure," "tear down," or "knock down" and other similarly-described transactions, subject to any exception previously discussed.

The Division has assessed a transaction where the taxpayer charged DEALERSHIP 2 $$$$$ to "provide all moving materials needed for upcoming move [and] move out all existing OBJECTS in new [location.]" It is unclear whether this charge relates primarily to nontaxable moving services (where any moving materials are incidental to the moving services), or whether the charge relates to a bundled transaction where the object of the transaction is both taxable personal property (i.e., the moving materials) and nontaxable moving services. If the latter, the transaction is taxable. The taxpayer, who has the burden of proof, has not provided sufficient information for the Commission to determine whether this $$$$$ charge is subject to taxation. Accordingly, the Commission must sustain the Division's assessment of this transaction.

Building Maintenance Services. Although the taxpayer was primarily in the business of selling and installing OBJECTS, it appears that the taxpayer began to provide building maintenance services to certain customers during the Audit Period. The transactions for building maintenance services appear on Schedule 3.

Some of the services were clearly performed on real property, not personal property. These services are not taxable because they are not part of the "purchase price" of taxable personal property and because the services are not specifically enumerated in Section 59-12-103 as taxable services. For example, several of the transactions are for services to (WORDS REMOVED) an AREA. Other transactions are for services to clean stairs and apply stair gripper to each step, to "replace all bad ceiling tiles," to "provide, modify, and install filler between the wall and door," and to "repair conference room." These nontaxable transactions should be removed from Schedule 3.

Services to Install Light Bulbs and Ballasts. A number of separately-stated transactions on Schedule 3 concern the labor cost to replace light bulbs and ballasts in light fixtures. With one exception, all of the charges are based on labor costs of $$$$$ per hour. The transactions are described as (WORDS REMOVED) Many of these separately-stated labor charges are accompanied by separate charges for "materials and supplies."

The taxpayer performed most, if not all, of these services in the AREA of one customer. An AREA typically has light fixtures that are considered real property (i.e., light fixtures installed in ceilings, etc.) and light fixtures that are considered personal property (i.e., light fixtures installed under cubicle shelves that are themselves personal property, etc.)

Replacing the ballast in a light fixture is a service that qualifies as a "repair" or "renovation."[7] If the ballast is replaced in a light fixture that is considered real property, the service is nontaxable, as the repair or renovation of real property is not specifically enumerated in Section 59-12-103 as a taxable service. On the other hand, if the ballast is replaced in a light fixture that is considered personal property, the service is taxable under Section 59-12-103(1)(g).

A light bulb, however, is sufficiently distinct from the light fixture in which it is installed so that replacing the light bulb is not considered a repair or renovation of the light fixture. Accordingly, the taxpayer's services to install a light bulb only are nontaxable, regardless of whether the bulb is installed in real property or personal property.

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7 In *Union Pacific Railroad Co. v. Auditing Division*, 842 P.2d 876 (Utah 1992), the Utah Supreme Court provided definitions for the terms "to repair" and "to renovate" and explained that:

> Repair and renovation . . . suggest activities that "fix" an already manufactured product. To repair is to "restore by replacing a part or putting together what is torn or broken." To renovate is to "restore to a former better state." Webster's Ninth New Collegiate Dictionary 998 (1984).

When the taxpayer replaces the ballast in a light fixture, it is performing a "repair" or "renovation" because it is restoring the light fixture "by replacing a part" or restoring it "to a former better state."

Given these guidelines, those of the taxpayer's services that relate to replacing light bulbs only are nontaxable. Combined services to replace light bulbs and ballasts in light fixtures that are clearly part of the realty, such as light fixtures in hallways, are also nontaxable. However, where ballasts only or light bulbs and ballasts together are replaced and where insufficient information exists to know whether the light fixtures in which the ballasts are being replaced are real property, the services must be considered taxable repairs or renovations of tangible personal property.

Accordingly, the Commission finds that the transactions described as "replace burnt light bulbs," "replace burnt light bulbs per lighting schedule," "replace bulbs above (WORDS REMOVED)," "replace light bulbs . . . in misc. light fixtures," and "change out light bulbs and ballast in hallway" are nontaxable transactions that should be removed from Schedule 3. Any other transactions involving services to replace ballasts should not be removed from the assessment.

Summary – Schedule 3. For the Audit Period at issue, the Commission once again finds that separately-stated installation and delivery charges and charges to move, reconfigure, and tear down OBJECTS are nontaxable, with certain exceptions previously described. The Commission also finds that those building maintenance services performed on real property, as described earlier, are nontaxable. Finally, the Commission finds that certain transactions for services to replace light bulbs and ballasts, as described earlier, are nontaxable.

Schedule 4. This schedule concerns items that the taxpayer purchased and that the Division determined were used or consumed by the taxpayer. The Division assessed tax on those items for which the taxpayer was unable to produce invoices showing that it had paid tax on the items. Specifically at issue on this schedule were AREA OBJECTS and equipment and a Toyota truck. The taxpayer conceded that it owed tax on the AREA OBJECTS and equipment because its accountant has fully depreciated these assets on the taxpayer's books instead of listing the items as inventory for sale. These facts indicate that the taxpayer owes

the tax that the Division assessed on the AREA OBJECTS and equipment.

Remaining at issue is whether the taxpayer owes the tax that the Division assessed on the $$$$$ purchase of a Toyota truck in December 2008. The Division assessed tax on $$$$$ of "repairs - Toyota" because this amount and description appears on the taxpayer's Asset Summary record (Exhibit R-2) and because the taxpayer was unable to locate an invoice showing that it paid tax on this transaction. The taxpayer explains that the "repairs" description on its Asset Summary record is incorrect and that it actually purchased the Toyota truck for this amount from DEALERSHIP in December 2008.

The taxpayer explained that it could not find the sales receipt for the truck in its records and that DEALERSHIP no longer had a copy of the receipt in its records. Nevertheless, the taxpayer stated that it has always paid sales tax on the vehicles it has bought. The evidence before the Commission supports this statement and shows that the taxpayer was not in the habit of buying vehicles with an exemption certificate. Exhibit R-2 shows that the taxpayer purchased four other vehicles during the Audit Period for which the Division did not impose tax, presumably because the taxpayer was able to find invoices for these four transactions that showed that sales tax was paid.

At the hearing, the Division admitted that the evidence suggests that the taxpayer's habit was to pay sales tax at the time it purchased a vehicle. When the evidence is considered as a whole, it is sufficient for the Commission to find that the taxpayer paid sales tax on the purchase of the Toyota truck.[8] Accordingly, the $$$$$ transaction concerning the Toyota truck should be removed from Schedule 4 of the Statutory Notice.

Waiver of Penalties. Section 59-1-401(13) authorizes the Commission to waive penalties and interest for "reasonable cause." There is no evidence to suggest that any interest should be waived. In accordance with Rule 42(2), interest is waived only if the taxpayer shows that the deficiencies at issue arose due to Tax

8 The Commission does not find this result inconsistent with the Utah Supreme Court's findings in *Tummurru Trades, Inc. v. Utah State Tax Comm'n*, 802 P.2d 715, 720 (Utah 1990). In *Tummurru*, the Court found that "oral testimony is not an adequate substitute for accurate record keeping." In the instant case, the taxpayer's oral testimony is supported by the documentary evidence found in Exhibit R-2.

Commission error. The taxpayer has not shown that the Tax Commission committed any error that led to the taxpayer's tax deficiencies during the Audit Period.

Concerning penalties, Rule 42(3)(l) provides that "reasonable cause" to waive penalties can be evidenced by a taxpayer's "compliance history." At the hearing, PETITIONER REP. testified that he has had a good compliance history of paying the taxes that are due since the business opened in 1987. The Division provided no testimony or evidence to refute PETITIONER REP.'s statement or to show that the taxpayer had not timely paid or timely filed prior to the Audit Period. The taxpayer stated that a number of returns were filed late during the Audit Period because the AREA manager left. On the basis of the taxpayer's good compliance history prior to the Audit Period, the Commission finds that reasonable cause exists to waive all penalties associated with the first three periods for which the Division assessed penalties, specifically for the three periods ending September 30, 2007, December 31, 2007, and December 31, 2008. The penalties for all other periods are sustained.

Payment Arrangements. At the hearing, the taxpayer asked the Commission to approve a payment plan for any taxes that it might owe. The Commission informed the taxpayer that it would need to discuss payments arrangement with Taxpayer Services Division once the appeal was final. The taxpayer may contact Taxpayer Services Division at 801-297-7703 to discuss payment arrangements.

CONCLUSIONS OF LAW

1. The Commission is not authorized to waive tax that has been properly imposed in exchange for the taxpayer's prospective compliance.

2. The Commission finds that the taxpayer collected $$$$$ of sale tax from its customers that it did not report and remit to the Tax Commission. Accordingly, the Commission sustains the Division's assessment of $$$$$ of additional tax on Schedule 1 of the Statutory Notice.

3. During the Audit Period, the Commission finds that attachments of tangible personal property

to other tangible personal property that do not involve a repair or renovation are nontaxable installation charges. Accordingly, the Division should remove from Schedules 2 and 3 those installation transactions described with the words "install," "installation," "labor to install," or "set-up" and other similarly-described transactions, with the exception of bundled transactions where one portion of the transaction involves the taxpayer "providing" the tangible personal property being installed.

4. Delivery charges, which include any "fuel surcharge" transaction, are nontaxable. Accordingly, the Division should remove from Schedules 2 and 3 any separately-stated charge for delivery only and any separately-stated charge for delivery and installation together.

5. Services to move, reconfigure, and tear down networks or OBJECTS are nontaxable because they are services that are separate from the "purchase price" of networks and OBJECTS and because they are not specifically enumerated in Section 59-12-103 as taxable services. Accordingly, the Division should remove from Schedules 2 and 3 those transactions described with the words "move," "reconfigure," "tear down," or "knock down" and other similarly-described transactions, with the exception of a $$$$$ charge on Schedule 3 to provide both moving materials and services to move OBJECTS.

6. Several transactions on Schedule 3 concerning building maintenance are for services performed on real property and, thus, are nontaxable. The Division should remove from Schedule 3 those transactions for services to "paint roof hatch area," to "paint [an] AREA," to "paint under windows on exterior walls and interior walls," to "paint and or touchup all walls on 4th floor [and] paint new conference room," to "clean stairs and apply stair gripper," to "provide, modify, and install filler between the wall and door," to "replace all bad ceiling tiles," and to "repair (ROOM)."

7. A number of transactions on Schedule 3 concern transactions for services to replace light bulbs and ballasts in light fixtures. The Commission finds that the transactions described as "replace burnt light bulbs," "replace burnt light bulbs per lighting schedule," "replace bulbs above (WORDS REMOVED

)," "replace light bulbs . . . in misc. light fixtures," and "change out light bulbs and ballast in hallway" are nontaxable transactions that should be removed from Schedule 3. Any other transactions involving ballasts should not be removed from the assessment.

8. Sufficient evidence exists for the Commission to find that the taxpayer paid sales tax on its purchase of a Toyota truck for $$$$$ in December 2008. Accordingly, the Division should remove this transaction from Schedule 4.

9. Reasonable cause does not exist to waive interest. However, reasonable cause does exist to waive all penalties assessed for the periods ending September 30, 2007, December 31, 2007, and December 31, 2008. The penalties for all other periods are sustained.

_____

Kerry R. Chapman
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division's assessment, subject to the following exceptions. The Division is ordered to amend its assessment, as follows:

1) On Schedules 2 and 3, remove those transactions described with the words "install," "installation," "labor to install," or "set-up" and other similarly-described transactions, with the exception of bundled transactions where one portion of the transaction involves the taxpayer "providing" the tangible personal property being installed.

2) On Schedules 2 and 3, remove any separately-stated charge for delivery only (including any transaction described as "fuel surcharge") and any separately-stated charge for delivery and installation together.

3) On Schedules 2 and 3, remove those transactions described with the words "move," "reconfigure," "tear down," or "knock down" and other similarly-described transactions, with the exception of a $$$$$ charge on Schedule 3 to provide both moving materials and services to move OBJECTS.

4) On Schedule 3, remove those transactions described as "paint roof hatch area," to "paint under windows on exterior walls and interior walls," to "paint [an] AREA," to "paint and or touchup all walls on 4th floor [and] paint new conference room," to "clean stairs and apply stair gripper," to "provide, modify, and install filler between the wall and door," to "replace all bad ceiling tile," and to "repair conference room."

5) On Schedule 3, remove those transactions described as "replace burnt light bulbs," "replace burnt light bulbs per lighting schedule," "replace bulbs above (WORDS REMOVED)," "replace light bulbs . . . in misc. light fixtures," and "change out light bulbs and ballast in hallway."

6) On Schedule 4, remove the transaction for $$$$$ described as "repairs – Toyota."

7) Remove all penalties assessed for the periods ending September 30, 2007, December 31, 2007, and December 31, 2008.

The taxpayer may contact Taxpayer Services Division at 801-297-7703 to discuss payment arrangements. It is so ordered.

DATED this _____ day of _____, 2012.

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. §§59-1-601et seq. and 63G-4-401 et seq.

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