12-769
TAX TYPE: SALES AND USE TAX
TAX YEARS: 10-1-08 THROUGH 6-30-11
DATE SIGNED: 10-15-2013
COMMISSIONERS: B. JOHNSON, M. CRAGUN, R. PERO
CONCURS IN PART AND DISSENTS IN PART: D. DIXON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**INITIAL HEARING ORDER** Appeal No. 12-769 Account No. ##### Tax Type: Sales and Use Tax Audit Period: 10/01/08 – 06/30/11 Judge: Chapman

Presiding:
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE FOR PETITIONER, Attorney
TAXPAYER-1, Taxpayer
TAXPAYER-2, Taxpayer
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General
RESPONDENT-1, from Auditing Division
RESPONDENT-2, from Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5, on March 6, 2013.

PETITIONER ("Petitioner" or "taxpayer") has appealed a sales and use tax assessment that Auditing Division (the "Division") imposed for the period October 1, 2008 through June 30, 2011 ("audit period"). On February 12, 2012, the Division issued a Statutory Notice - Sales and Use Tax ("Statutory Notice"), in which it imposed sales and use tax and interest (calculated through March 9, 2012)[1] for the audit period, as follows:

1 Interest continues to accrue until amounts due are paid.

Tax	Penalties	Interest	Total
$$$$$	$$$$$	$$$$$	$$$$$

The taxpayer is in the business of inspecting, cleaning, and/or repairing commercial kitchen exhaust systems consisting of hoods, fans, and ducts and fire suppression systems built around the exhaust systems. These exhaust and fire suppression systems are used over the cooking equipment found in commercial restaurant kitchens. The taxpayer has never charged sales tax on its sales to clean or repair these items because the items are attached to or incorporated into the underlying real property.

The Division agrees that charges to clean or repair these items were not subject to taxation prior to July 1, 2009. However, beginning July 1, 2009, the Division claims that the taxpayer's charges to clean or repair these items are subject to taxation because of changes made by the Legislature in Senate Bill 35 (2009) ("SB 35"). SB 35 specifically provided that for sales and use tax purposes, "tangible personal property" would include a dishwasher, a dryer, a freezer, a microwave, a refrigerator, a stove, and a washer, "regardless of whether the item is attached to real property." The Legislature enacted SB 35 because of confusion in the repair industry as to what appliances would be personal property not permanently attached to real property (whose repairs would be taxable) and what appliances would be permanently attached to real property (whose repairs would not be taxable) under the prior law.[2] By enacting SB 35, the Legislature indicated that it was providing for a "consistent" taxing policy by classifying all appliances as tangible personal property, regardless of whether the appliance is attached or whether it slides in.

As a result, for that portion of the audit period beginning on July 1, 2009 (i.e., the effective date of SB 35), the Division has assessed sales and use tax on the taxpayer's charges to repair or clean the exhaust systems and fire suppression systems located over commercial cooking equipment. In the Statutory Notice, the

2 Audio recordings of the floor debate concerning SB 35, as well as recordings of committee hearings concerning the bill, are available at http://www.le.state.ut.us/~2009/bills/static/SB0035.html.

Division indicated that "[p]rior to July 2009, hood cleaning was determined to be cleaning of real property and not subject to sales tax. Beginning July 1, 2009, hood cleaning is deemed to be taxable." The amounts the Division assessed on the taxpayer's charges to clean or repair the exhaust and fire suppression systems account for a majority of its total assessment (approximately $$$$$ of the $$$$$ of additional tax that was assessed).

The taxpayer contends that the Division's assessment is incorrect for two reasons: 1) because the exhaust and fire suppression systems are not tangible personal property; and 2) because the services the taxpayer performs is not the type of "assisted cleaning or washing" that the Legislature intended to tax under Utah Code Ann. §59-12-103(1)(h). For these reasons, the taxpayer asks the Commission to remove from the Division's assessment those transactions that involve cleaning or repairing exhaust and fire suppression systems.

In its Pre-hearing Memorandum, the Division claims that the transactions at issue include "the cleaning of hood systems and inspections of the fire suppression systems as part of the repair of tangible personal property." The Division has determined that the exhaust and fire suppression systems are items that are within the scope of the SB 35 amendments and, as a result, are considered to be "tangible personal property" for purposes of services to clean and/or repair beginning July 1, 2009. As a result, the Division contends that it has properly imposed tax on the cleaning and/or repair transactions that occurred on or after July 1, 2009. For these reasons, the Division asks the Commission to sustain its assessment in its entirety.

APPLICABLE LAW

1. Utah Code Ann. §59-12-103(1) (2010)[3] provides that the following transactions are subject to Utah sales and use tax, as follows in pertinent part:

> . . . .
> (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

3 All cites are to the 2010 version of Utah law, unless otherwise indicated.

(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;

(h) except as provided in Subsection 59-12-104(7), amounts paid or charged for assisted cleaning or washing of tangible personal property;

. . . .

2. UCA §59-12-102(13) defines "assisted cleaning or washing of tangible personal property," as follows:

"Assisted cleaning or washing of tangible personal property" means cleaning or washing of tangible personal property if the cleaning or washing labor is primarily performed by an individual:

(a) who is not the purchaser of the cleaning or washing of the tangible personal property; and

(b) at the direction of the seller of the cleaning or washing of the tangible personal property.

3. UCA §59-12-102(91) defines "repairs or renovations of tangible personal property" to mean, as follows in pertinent part:

(a) "Repairs or renovations of tangible personal property" means:

(i) a repair or renovation of tangible personal property that is not permanently attached to real property; or

. . . .

4. Effective July 1, 2009, the definition of "permanently attached to real property" was amended in Section 59-12-102(71), to mean, as follows in pertinent part:

(a) "Permanently attached to real property" means that for tangible personal property attached to real 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

(B) attached only to facilitate the operation of the tangible personal property;

. . . .

(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;

. . . .

(iv) an item listed in Subsection (111)(c).

5. Also effective July 1, 2009, the definition of "tangible personal property" was amended in UCA §59-12-102(111) to mean, as follows in pertinent part:

. . . .

(c) "Tangible personal property" includes the following regardless of whether the item is attached to real property:

(i) a dishwasher;

(ii) a dryer;

(iii) a freezer;

(iv) a microwave;

(v) a refrigerator;

(vi) a stove;

(vii) a washer; or

(viii) an item similar to Subsections (111)(c)(i) through (vii) as determined by the commission by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

. . . .

6. Utah Code Ann. §59-12-102(85)(b)(iii) provides that "purchase price" and "sales price" include "a charge by the seller for any service necessary to complete the sale[.]"

7. Utah Admin. Rule R865-19S-58 ("Rule 58") provides sales and use tax guidance to real property contractors and repairmen, as follows in pertinent part:

(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.

. . . .

(b) Fixtures or other items of tangible personal property such as furnaces, built-in air conditioning systems, 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]
>
> . . . .
>
> (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;
>
> . . . .
>
> (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
>
> . . . .

8. Utah Admin. Rule R865-19S-60 ("Rule 60") provides guidance concerning sales of fixtures, as follows in pertinent part:

> . . . .
>
> C. Sales of trade fixtures to a business owner are taxable as sales of tangible personal property even if the fixtures are temporarily attached to real property.
>
> 1. Trade fixtures are items of tangible personal property used for the benefit of the business conducted on the property.
>
> 2. Trade fixtures tend to be transient in nature in that the fixtures installed in a commercial building may vary from one tenant to the next without substantial alteration of the building, and the building itself is readily adaptable to multiple uses.
>
> 3. Examples of trade fixtures include cases, shelves and racks used to store or display merchandise.
>
> . . . .

9. USTC Publication 42 ("Publication 42.") provides sales and use tax guidance concerning tangible personal property attached to real property. Publication 42 was revised in August 2010,[5] and this version of the publication provides, as follows in pertinent part:

> . . . .
>
> Repair

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4 Until September 17, 2009, Rule 58(1)(b) also provided that "built-in appliances" were to be treated as construction materials. However, this portion of the rule was deleted after SB 35 became effective on July 1, 2009, which provided for the same tax treatment of all appliances.

5 The August 2010 version of a Publication 42 and a subsequent version showing a revision date of June 2011 are available on the Tax Commission's website at http://www.tax.utah.gov/forms-pubs/.

Sales tax applies to charges for labor and parts to repair tangible personal property. If the item has been permanently attached to real property, the separately-listed labor charges are not taxable. However, charges for the repair parts are taxable.

A dishwasher, freezer, microwave, refrigerator, stove, washer, dryer or similar appliance is not considered permanently attached even when affixed to real property and all repair charges are subject to tax.

If an item is permanently attached to real property, its accessories are also considered permanently attached if they are a necessary part of the item and are installed only to serve the operation of the item.

An item attached to real property may be removed for onsite repairs, but if it is repaired off-site, it reverts to tangible personal property and the repairs are taxable.

Example 1:
A repairman services a built-in refrigerated meat counter in a grocery store. It is attached to the building and should remain in place over its useful life. The building was designed to house the case and moving it would cause major remodeling or repair of the building. Charges for labor to repair the case are not taxable. However, the repairman must collect sales tax on charges for repair parts.

The compressor, control panels, water lines and electrical lines that serve the case are also considered permanently attached to real property. The repairman treats the entire system as a unit.

If the repairman temporarily removes the case from the floor for an on-site repair, labor charges are non-taxable. If the case is removed and repaired off-site, the repair is considered a repair to tangible personal property and the entire charge for parts and labor is taxable.

Example 2:
A repairman services a portable refrigeration case in a grocery store. The case sits in an aisle near an electrical outlet. It may be shifted easily from place to place as needed, but when used it is screwed into the floor so it will not fall or move. The case is not permanently attached and charges for labor to repair it are taxable. The repairman must collect sales tax on charges for repair parts.

Example 3:
A repairman services a built-in dishwasher. Even though the dishwasher is affixed to real property it is not considered permanently attached. Charges for labor and parts to repair the dishwasher are subject to sales tax.

. . . .

Washing or Cleaning

Sales tax applies to charges for washing or cleaning tangible personal property, including tangible personal property permanently attached to real property. Charges for cleaning and

washing real property are not subject to tax.

Publication 42 also contains a table containing examples to help taxpayers understand the distinctions in taxability of charges for sales, installations, and repairs. The table indicates that repair charges are taxable if performed on a "commercial gas stove in a restaurant," a "commercial ice machine at a convenience store," and a "restaurant oven/grill."

10. UCA §59-1-1417 (2013) provides that the burden of proof is upon the petitioner in proceedings before the Commission, with limited exceptions as follows:

> (1) 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:
> (a) whether the petitioner committed fraud with intent to evade a tax, fee, or charge;
> (b) 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
> (c) 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:
> (i) required to be reported; and
> (ii) of which the commission has no notice at the time the commission mails the notice of deficiency.
> . . . .

DISCUSSION

The taxpayer explains that in a commercial restaurant, the exhaust system's hood, which can run between 4 and 24 feet in length, is typically bolted to the building's ceiling and hardwired to electrical connections. It may also be sheet rocked in. The duct, which is typically 10 to 20 feet in length, is bolted to the real property and takes the cooking fumes and smoke outside of the building. The duct is welded to the hood. The duct usually goes through the building's roof where the fan is then attached. The fan is "hinged" so that it can be opened and is attached to a "shroud" that is attached to the roof. The taxpayer explains that it

would take four persons approximately eight hours to remove an exhaust system (hood, duct, and fan) from a building.

The service to clean an exhaust system includes cleaning all of its hood, duct, and fan. The taxpayer explains that its employees use pressured hoses to clean the hood, duct, and fan with water and, sometimes, degreaser. They will also clean any filters incorporated into the system. They clean the hood and duct from inside the building. However, they also get onto the building's roof to clean the fan and, sometimes, spray down the duct, as well. The taxpayer estimates that approximately 60% of the cleaning activity is for the duct, while the remaining 40% is for the hood and fan.

The taxpayer explains that a fire suppression system is required over cooking equipment in a commercial kitchen. The system consists of a tank that holds the wet chemical agent and pipes that carry the chemical agent to nozzles located at certain intervals over the cooking equipment. The system also contains "fusible links" to detect a fire and "microswitches" that will cut off the cooking equipment in case of a fire. The system is also wired into the fire alarm. The tanks are 1½ to 3 feet tall and about 5 inches in diameter. They hold between three to six gallons of chemical agent and are usually mounted by bolts on the wall next to the hood or mounted directly onto the hood. Pipes into which the fusible links are connected run horizontally along the inside of the hood. Vertical pipes are cut through the hood at intervals to hold the nozzles from which the chemical agent is dispensed in case of a fire. The pipes are welded together and connected to the hood with bolts. The taxpayer explains that a 6-foot long hood will typically require about 20 feet of pipe for the fire suppression system. In addition, the taxpayer explains that the fire suppression system would need to be removed in order to remove the exhaust system.

The taxpayer explained the fire suppression system services it provides includes inspecting the system and replacing parts that need to be replaced, such as the "fusible links" (which must be replaced twice a year by code) and nozzles. To perform this service, the taxpayer first disables the system and inspects the tanks. It

then changes the fusible links and makes sure the nozzles are clear, replacing them as needed. It explains that filling a tank would be a charge that is invoiced separately from the inspection charge.

The Division proffered two invoices to illustrate the charges at issue. The first invoice show three charges: 1) a $$$$$ charge for "kitchen exhaust cleaning;" 2) an $$$$$ charge for "fire suppression system service," and 3) a $$$$$ charge for eight "450 degree fusible links" that were replaced in the fire suppression system. The taxpayer charged sales tax on the $$$$$ charge for the fusible links. The taxpayer did not charge sales tax on the exhaust cleaning charge or the fire suppression system service charge, which has led to the Division's imposing tax on these charges.

The second invoice shows four charges: 1) a $$$$$ charge for "kitchen grease cleaning of hood, duct and fan;" 2) a $$$$$ charge for "kitchen fire suppression inspection," 3) a $$$$$ charge for "new rubber caps replaced" in the fire suppression system; and 4) a $$$$$ charge for "fusible links replaced" in the fire suppression system. The taxpayer charged sales tax on the $$$$$ charge for new rubber caps and the $$$$$ charge for the fusible links. The taxpayer did not charge sales tax on the kitchen grease cleaning of hood, duct and fan charge or on the kitchen fire suppression inspection charge, which has led to the Division's also imposing tax on these charges.

The taxpayer did not indicate that these two invoices were not representative of the transactions at issue in this appeal. However, the taxpayer believes that it is unfair for the Division to impose tax on it for these charges when its competitors also do not collect tax on these charges. Given the transactions shown on these invoices, the Commission must address two issues: 1) whether "kitchen exhaust cleaning" or "kitchen grease cleaning of hood, duct and fan" is considered to be the "assisted cleaning or washing of tangible personal property," which is subject to tax under Section 59-12-103(1)(h); and 2) whether charges to inspect and replace parts in fire suppression systems is considered to be services for repairs or renovations of tangible personal property, which are taxable under Section 59-12-103(1)(g).

I. Cleaning Kitchen Exhaust Systems Consisting of Hoods, Ducts, and Fans.

In the Division's Statutory Notice, it stated that it was imposing tax on charges for "cleaning hoods." Section 59-12-103(1)(h) provides that "amounts paid or charged for assisted cleaning or washing of tangible personal property" are subject to taxation. The taxpayer claims that its charges to clean exhaust systems are not taxable under this section because: 1) its cleaning services are not ones that the Legislature intended to tax; and 2) the exhaust systems are not tangible personal property. Both of these arguments will be addressed below.

A. Assisted Cleaning or Washing. The taxpayer admits that it "cleans" its customers' exhaust systems that consist of hoods, ducts, and fans. However, the taxpayer argues that the Legislature did not intend Section 59-12-103(1)(h) to apply to cleaning services performed on such equipment in restaurants. The taxpayer argues that the Legislature only intended Section 59-12-103(1)(h) to apply to cleaning and washing services performed at laundries and car washes. The taxpayer claims that prior to the Legislature creating the current version of Section 59-12-103(1)(h), there were two 2005 provisions that imposed tax on cleaning and washing services and that these two provisions only involved laundries and car washes.

In 2005, Section 59-12-103(1)(h) (2005) provided that services for the "cleaning or washing of tangible personal property" were taxable (the word "assisted" was not added until 2006). In addition, the 2005 law also provided in Utah Code Ann. §59-12-104(7) and (43) (2005) for exemptions for "sales of cleaning or washing of tangible personal property by a coin-operated laundry or dry cleaning machine" and "sales of cleaning or washing of tangible personal property by a coin-operated car wash machine." The taxpayer claims that when the Legislature amended Section 59-12-103(1)(h) in 2006 to tax the "assisted cleaning or washing of tangible personal property," it only intended to tax certain cleaning or washing services performed at laundry and car wash businesses.

In House Bill 51 (2006) ("HB 51"), the Legislature added the word "assisted" to Section 59-12-103(1)(h) and added the definition of "assisted cleaning or washing of tangible personal property" to Section 59-12-102. Audio recordings of house and senate debates concerning the bill indicate that the Legislature focused its discussion on the laundry and car wash industries (which offer both assisted and unassisted cleaning services) and indicated that the bill would help to eliminate inconsistencies in how the law was being administered for these industries. However, the debates do not clarify that Section 59-12-103(1)(h) imposes tax on assisted cleaning and washing provided *only* by laundry and car wash businesses.

Furthermore, if the Legislature had intended to limit Section 59-12-103(1)(h) only to cleaning or washing provided by laundries and car washes, it could have stated so. It did not. Instead, it provided a definition of "assisted cleaning or washing of tangible personal property" that has broader application than just to laundries and car washes. Section 59-12-102(13) defines "assisted cleaning or washing of tangible personal property" to mean "cleaning or washing of tangible personal property if the cleaning or washing labor is primarily performed by an individual: (a) who is not the purchaser of the cleaning or washing of the tangible personal property; and (b) at the direction of the seller of the cleaning or washing of the tangible personal property."

The taxpayer explains that its employees remove grease and particulate matter that has built up on the exhaust system's hood, fans, and ducting. It also removes grease that has collected in the systems filters. As a result, this cleaning is performed by an individual who is not the purchaser of the services, thus meeting the first requirement of Section 59-12-102(13). In addition, the Division contends that the cleaning is performed at the direction of the taxpayer (i.e. the seller of the cleaning services), which the taxpayer did not refute. Accordingly, the second requirement of Section 59-12-102(13) is also met. For these reasons, the taxpayer's cleaning of the exhaust systems located over cooking equipment in commercial restaurants meets the definition of "assisted cleaning or washing of tangible personal property" and will be subject to taxation if the exhaust

systems are found to be "tangible personal property."

B. Tangible Personal Property. The taxpayer explains that an exhaust system's hood, fan, and duct all remain as part of a restaurant's premises even after a lease of the restaurant has terminated. As a result, the taxpayer contends that hoods, fans, and ducts are not "tangible personal property," but are, instead, fixtures that become a part of the real estate because they are "permanently attached to real property," as defined in Section 59-12-102(71). Specifically, the taxpayer explains that the exhaust systems meet all the conditions set forth in Section 59-12-102(71)(a)(i) because their attachment to the real property is necessary, because they will remain attached to the real property over their useful life, and because it would cause substantial damage to them and/or the underlying real property to remove them.

Prior to July 1, 2009, when SB 35 became effective, it appears that the Division would agree that the hoods, fans, and ducts were, at the very least, permanently attached to the real property because it did not impose tax on the taxpayer's charges to clean them prior to this date. However, beginning July 1, 2009, the Division contends that the exhaust systems are now considered "tangible personal property" because of the SB 35 amendments.

SB 35 was enacted in order to treat all appliances the same for sales and use tax purposes, regardless of whether the appliances were attached to the underlying realty or whether they were slide-in appliances. As a result, the Legislature amended the definition of "tangible personal property" so that this term included a number of specified appliances "regardless of whether the item is attached to real property." Section 59-12-102(111)(c). In addition, the Legislature amended the definition of "permanently attached to real property" to exclude from this term those items now classified as tangible personal property under Section 59-12-102(111)(c). Section 59-12-102(71)(c)(iv).

Section 59-12-102(111)(c) specifically lists a number of kitchen appliances (i.e., a dishwasher, a microwave, a refrigerator, and a stove) that as of July 1, 2009, are to be considered tangible personal property

regardless of whether they are attached to the real property. A hooded exhaust system to vent fumes and smoke from the stove is found in many commercial and residential kitchens, but is not specifically listed in Section 59-12-102(111)(c). However, the list of items in Section 59-12-102(111)(c) is not exhaustive (i.e., the list is not limited to those items specifically listed). First, the statute uses the word "includes," which implies that the list is not exhaustive and includes items that are similar to the ones listed. Second, the statute specifically provides that the list will include an item similar to the ones listed "as determined by the commission by rule." The Commission has not adopted a rule to provide that other items will receive similar treatment. Nevertheless, because the list is a not an exhaustive list, the Commission may find that an item similar to the ones specifically listed is "tangible personal property" regardless of whether it is attached to real property.

Given the changes brought about by SB 35, it is clear that an exhaust hood located over a stove in a commercial or residential kitchen should be treated the same as other appliances in the kitchen are treated for sales and use tax purposes. In addition, Publication 42 (Revised 8/10 and Revised 6/11 versions), which gives tax guidance to taxpayers, includes a "table" at the end of the publication that indicates a "commercial gas stove in a restaurant," a "commercial ice machine at a convenience store," and a "restaurant oven/grill" are treated, for tax purposes, like the items specifically listed in Section 59-12-102(111)(c) (i.e., they are considered to be tangible personal property regardless of whether they are attached to real property). Publication 42 clearly provides that cooking appliances in restaurants are treated as tangible personal property for sales and use tax purposes. The exhaust systems are part of these cooking systems and, as a result, are also considered to be tangible personal property for sales and use tax purposes, regardless of whether the exhaust systems are permanently attached to real property. For these reasons, the Commission should find that the cleaning services that the taxpayer performs on exhaust systems in commercial restaurants are subject to sale tax because the taxpayer is performing assisted cleaning or washing services on tangible personal property.

II. Inspecting and Replacing Parts in Fire Suppression Systems.

The Division contends that services to inspect an item and replace parts on it are considered to be taxable services for repairs or renovations if performed on tangible personal property that is not permanently attached to real property. Sections 59-12-103(1)(g) and 59-12-102(91). At issue is whether the taxpayer's services to inspect and replace parts of fire suppression systems located over commercial cooking equipment in restaurants are: 1) services involving a repair or a renovation; and 2) whether the taxpayer performs the services on tangible personal property that is not permanently attached to real property.

A. Repair or Renovation. In *Union Pacific Railroad Co. v. Auditing Division*, 842 P.2d 876 (Utah 1992), the Utah Supreme Court considered whether certain services were repair or renovation services. The Court based its rulings on definitions of the terms "to repair" and "to renovate," finding that "[r]epair 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)."

In this case, the taxpayer inspects fire suppression systems and replaces parts that need to be replaced every so often to comply with code or that need to be replaced because they are broken, worn out, or not functioning properly. "Replacing a part" is a portion of the definition the Court used to define the term "to repair." Furthermore, when an older item that may still be functioning, such as a fusible link, is replaced by a newer one, it is arguable that a renovation has occurred because the system is being restored to a "former better state." For these reasons, the taxpayer's services on fire suppression systems are repair or renovation services. In addition, the inspection services are part of the repair or renovation services because "purchase price" or "sales price," as defined in Section 59-12-102(85)(b)(iii), includes "a charge by the seller for any service necessary to complete the sale." Inspecting an item is a necessary service associated with repairing or

renovating it. For these reasons, the services the taxpayer performs to inspect and replace parts on fire suppression systems will be subject to taxation if a fire suppression system is "tangible personal property that is not permanently attached to real property."

B. Tangible Personal Property Not Permanently Attached to Real Property. "Repairs or renovations of tangible personal property" is defined in Section 59-12-102(91) to mean "a repair or renovation of tangible personal property that is not permanently attached to real property." "Permanently attached to real property" is defined to include tangible personal property where the attachment to real property is essential to the use of the tangible personal property, where the tangible personal property will remaining attached to the real property over its useful life, and where substantial damage would occur to the tangible personal property or the real property to detach the tangible personal property. Section 59-12-102(71)(a)(i). However, as discussed previously in regards to cleaning services performed on exhaust systems, the same statute specifically excludes from "permanently attached to real property" an item listed in Subsection 59-12-102(111)(c).

The Division contends that the fire suppression systems should have the same classification for sales and use tax purposes as the exhaust or hood systems previously discussed (i.e., the Division contends that they should both be considered tangible personal property under Section 59-12-102(111)(c) regardless of whether they are attached to real property). Because the fire suppression systems are so integrated into the exhaust or hood systems in commercial restaurants, the Division's argument that they should be treated similarly is convincing. It has been determined earlier that the exhaust or hood systems should be treated as tangible personal property under Section 59-12-111(c) for sales and use tax purposes. There is no reason why the fire suppression systems should be treated any differently. For these reasons, the Commission should find that the repair or renovation services that the taxpayer performs on fire suppression systems in commercial restaurants are subject to sale tax because the taxpayer's repair or renovation services are being performed on tangible personal property.

Conclusion. In summary, the Division's imposition of tax on the taxpayer's services to clean exhaust or hood systems should be sustained. In addition, the Division's imposition of tax on the taxpayer's services to repair or renovate fire suppression systems should also be sustained.

_____

Kerry R. Chapman
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division's assessment of tax on the transactions for which the taxpayer charged its customers to clean their exhaust or hood systems and to repair or renovate their fire suppression systems. 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 _____, 2013.

R. Bruce Johnson
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

COMMISSIONER DIXON CONCURS IN PART AND DISSENTS IN PART

I respectfully concur in part and dissent in part from my colleagues. I am concerned about two items. First, the Commission did not enter into rulemaking for the purposes of clarifying or instructing what would be considered an appliance under the statute. Second, there was a conflicting example in Publication 42 issued by the Tax Commission.

In Tax Commission Publication 42, page three, under **"Repair"**, is Example 1:

Example 1:

A repairman services a built-in refrigerated meat counter in a grocery store. It is attached to the building and should remain in place over its useful life. The building was designed to house the case and moving it would cause major remodeling or repair of the building. Charges for labor to repair the case are not taxable. However, the repairman must collect sales tax on charges for repair parts.

The compressor, control panels, water lines and electrical lines that serve the case are also considered permanently attached to real property. The repairman treats the entire system as a unit.

I find that Example 1 is misleading in that the built in refrigerated meat counter as described has elements similar to a built in vent and fire suppression system, particularly in terms of control panels, water lines, and electrical lines that serve the appliance, and as such, the example in the Publication 42 would seem to imply that repairs to a vent and fire suppression system would not be taxable. In addition, it seems possible a meat counter may be more easily removed and sold separately from the building, like appliances often are, than a ventilation and water and fire suppression system.

That said, after giving great consideration to the position of my fellow Commissioner Bruce Johnson who attended the legislative committee meetings and conversed with legislators regarding the intent of the legislation when under consideration by the Legislature, I accept his representation that the legislative intent was for all appliances in commercial and residential kitchens to be included in the definition of appliances, including a vent and its associated fire suppression system. This is also based on my understanding that the intent of the Legislature was to simplify for repair technicians and specialists what should and should not be taxed when servicing appliances.

However, the statutory language does not seem so clear, and the Tax Commission's Publication 42 seems even less clear. In addition, as noted several times in the oral legislative record both of the 2008 Legislative Interim meetings[6], and the 2009 General Session[7], it was the Tax Commission that brought the

[6] Revenue and Taxation Interim Committee, November 19, 2008
Utah State Tax Commission 2009 Legislative Package -- Sales and Use Tax Definitions Relating to Property
http://utahlegislature.granicus.com/MediaPlayer.php?view_id=2&clip_id=12880&meta_id=466445

[7] Revenue and Taxation Committees 2009 http://le.utah.gov/~2009/htmdoc/sbillhtm/SB0035.htm

issue to the attention of the Legislature, and requested the legislation as a Utah State Tax Commission agency bill. In hindsight, the Commission should have entered into rulemaking to allow comment and assure guidance in the rule instead of relying on the Publication 42. For these reasons, I would make the Commission's ruling prospective. In support of this prospective application I reference Commission Order 04-0222.[8] In 04-0222, a taxpayer appealed an audit holding in part that the Tax Commission had not made clear, for the situation presented, when a tax should be imposed. A majority of the commission sustained the audit assessment; however, former Commissioner Marc Johnson penned a dissent in which he stated he "would have waived the entire assessment and required prospective compliance only." His reason was in part on the belief that the legislative language was ambiguous, that a tax commission publication was no less clear, and that the Commission could have, but had not, entered into rulemaking to allow public comment and make clear how the statute would be applied. The dissent in 04-0222 eventually became the majority decision when Commissioner Marc Johnson's position on prospective application was joined by a second commissioner. I find the reasoning of the former commissioner is applicable in this situation, and on the same grounds, would abate the assessment and make compliance prospective.

D'Arcy Dixon Pignanelli
Commissioner

Notice: If a Formal Hearing is not requested as discussed above, failure to pay the balance resulting from this order within thirty (30) days from the date of this order may result in a late payment penalty.

[8] This Commission decision and others can be found at http://www.tax.utah.gov/commission-office/decisions