

12-947 & 12-948  
TAX TYPE: SALES and USE TAX  
TAX YEAR: 8-1-08 through 5-31-11  
DATE SIGNED: 12-20-2013  
COMMISSIONERS: B. JOHNSON, M. CRAGUN, R. PERO  
EXCUSED: D. DIXON  
GUIDING DECISION

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BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYER-1 Petitioner,</p> <p>v.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p>Respondent.</p>	<p><b>INITIAL HEARING ORDER</b></p> <p>Appeal No. 12-947</p> <p>Account No. ##### Tax Type: Sales and Use Audit period: 8/1/08 – 5/31/11</p> <p>Judge: Jensen</p>
<p>TAXPAYER-2 Petitioner,</p> <p>v.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p>Respondent.</p>	<p>Appeal No. 12-948</p> <p>Account No. ##### Tax Type: Sales and Use Audit period: 8/1/08 – 5/31/11</p> <p>Judge: Jensen</p>

**Presiding:**  
Clinton Jensen, Administrative Law Judge

**Appearances:**  
For Petitioner: REPRESENTATIVE FOR TAXPAYER, for the Taxpayer  
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General  
RESPONDENT, for the Division

STATEMENT OF CASE

This matter came before the Utah State Tax Commission on June 26, 2013 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. At the request of all parties concerned, the Commission held one hearing for the two cases referenced in this order. The two parties listed as Petitioners are related entities. Although the entities operate at different locations, they are related and present identical tax issues in their

appeals. For simplicity, the Commission will refer to the two entities listed as Petitioners as the “Taxpayer” in the remainder of this order. The Taxpayer is appealing Respondent’s (the “Division’s”) audit determination of additional sales and use tax deficiency for the period from August 1, 2008 through May 31, 2011. Although the Division’s audit at one time raised other issues, the parties have resolved those issues and present to the Commission the narrow issue of whether the Taxpayer is entitled to a refund of sales tax amounts collected from the Taxpayer’s customers in excess of tax required to be collected under Utah law.

APPLICABLE LAW<sup>1</sup>

Utah Code Ann. § 59-12-103(1) imposes tax on:

the following transactions: (e) sales of prepared food [and] (l) amounts paid or charged for tangible personal property if within this state the tangible personal property is: (i) stored; (ii) used; or (iii) consumed.

Under subsection (e), sales tax applies to sales of prepared food. Under subsection (l), use tax may apply to ingredients that are used for food that is not sold. Utah Admin. Code R865-19S-61 D. (“Rule 61D”) provides an exemption for ingredients of meals subject to tax, stating:

Ingredients that become a component part of meals subject to tax are construed to be purchased for resale, and as such the purchase of those ingredients is exempt from sales and use tax.

Utah Admin. Code R865-19S-61 E. (“Rule 61E”) and Utah Admin. Code R865-19S-68 A. (“Rule 68A”) address food that is given away on a complimentary basis. Rule 61E states:

Where a meal is given away on a complementary basis, the provider of the meal is considered to be the consumer of the items used in preparing the meal.

Rule 68A states:

Donors that give away items of tangible personal property as premiums or otherwise are regarded as the users or consumers of those items and the sale to the donor is a taxable sale.

Utah Admin. Code R865-19S-68 B. (“Rule 68B”) and Utah Admin. Code R865-19S-68 F. (“Rule 68F”) address premiums or free items given away with the sale of taxable items. Rule 68B states:

When a retailer making a retail sale of tangible personal property that is subject to tax gives a

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<sup>1</sup> The Utah code and rule provisions cited in this case underwent changes not material to the outcome of this case, such as renumbering, during the audit period at issue. Unless otherwise indicated, the Commission cites 2008 law.

Appeal Nos. 12-947, 12-948

premium together with the tangible personal property sold, the transaction is regarded as a sale of both articles to the purchaser, provided the delivery of the premium is certain and does not depend upon chance.

Rule 68F states:

If a retailer agrees to furnish a free item in conjunction with the sale of an item, the sales tax applies only to the net amount due. If sales tax is computed on both items and only the sales value of the free item is deducted from the bill, excess collection of sales tax results. The vendor is then required to follow the procedure outlined in R865-19S-16 and remit any excess sales tax collected.

Utah Admin. Code R865-19S-16 ("Rule 16") sets forth the procedure for excess tax collection as follows:

- A. The amount paid by any vendor to the Tax Commission with each return is the greater of:
  - 1. the actual tax collections for the reporting period, or
  - 2. the amount computed at the rates imposed by law against the total taxable sales for that period.
- B. Space is available on the return forms for inserting figures and the words "excess collections," if needed.

Utah Code Ann. § 59-12-102(83) defines sale, which term affects the meaning of transaction.

Section 59-12-102(83) states:

- (a) "Sale" means any transfer of title, exchange, or barter, conditional or otherwise, in any manner, of tangible personal property or any other taxable transaction under Subsection 59-12-103(1), for consideration.
- (b) "Sale" includes:
  - (i) installment and credit sales;
  - (ii) any closed transaction constituting a sale;
  - (iii) any sale of electrical energy, gas, services, or entertainment taxable under this chapter;
  - (iv) any transaction if the possession of property is transferred but the seller retains the title as security for the payment of the price; and
  - (v) any transaction under which right to possession, operation, or use of any article of tangible personal property is granted under a lease or contract and the transfer of possession would be taxable if an outright sale were made.

#### DISCUSSION

The facts in this matter were not in dispute and the issue presented to the Commission is a question regarding the application of law. The Taxpayer participated in a discount program in which customers paid

Appeal Nos. 12-947, 12-948

\$\$\$\$\$ for a restaurant voucher to be exchanged at one of the Taxpayers' locations for face values of either \$\$\$\$\$ or \$\$\$\$\$. The Taxpayer received \$\$\$\$\$ of the \$\$\$\$\$ sale price; the seller of the voucher received the other \$\$\$\$\$. Neither the Taxpayer nor the seller of the vouchers collected sales tax on the purchase price of the voucher.

When a holder of a voucher presented a voucher for redemption, the Taxpayer collected sales tax on the full amount of the food ticket. As an example, the Taxpayer presented a copy of a receipt for \$\$\$\$\$ in restaurant meals. The \$\$\$\$\$ receipt reflected food charges of \$\$\$\$\$ and \$\$\$\$\$ in sales tax collected on the \$\$\$\$\$ food subtotal. The Taxpayer's customer paid the \$\$\$\$\$ bill with a \$\$\$\$\$ voucher plus \$\$\$\$\$.

As a second example, the Taxpayer provided a copy of a food bill that totaled \$\$\$\$\$. The \$\$\$\$\$ bill included a food subtotal of \$\$\$\$\$ and sales tax of \$\$\$\$\$. The Customer paid the \$\$\$\$\$ bill with a \$\$\$\$\$ voucher and received no change.

While the Taxpayer generally received \$\$\$\$\$ for a voucher, there were instances in which the Taxpayer gave vouchers away. Typically, give-away vouchers were to charitable causes. The Taxpayer occasionally gave away vouchers to customers as a customer satisfaction solution to a customer complaint or similar issue.

The Taxpayer provided an estimate of the total face value of the vouchers it accepted as well as the amounts it received from the seller of the vouchers. The parties agree that it was proper for the Taxpayer to charge and collect sales tax on any payments in excess of voucher amounts. Their dispute is limited to the treatment of the vouchers. The Taxpayer argues that it should remit sales tax on the amount that it actually received, which was generally \$\$\$\$\$ for each voucher. The Division's position is that the Taxpayer is required to remit sales tax on the full amount of its food sales, whether the payment came in the form of cash, credit cards, debit cards, checks, or vouchers. The Division concedes that if the Taxpayer had invoiced its sales in a manner that reflected a discount, it could have collected sales tax on the discounted total. But since the Taxpayer did not do so, the Division takes the position that the Taxpayer is liable for sales tax on the total amounts reflected on its food bills.

In Utah State Tax Commission Case No. 08-0117<sup>2</sup>, the Commission considered sales tax on a restaurant's program to provide an eleventh free meal to a customer that filled a punch card with ten paid meals. There, the Commission concluded "that the eleventh meals were provided in conjunction with the sale

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<sup>2</sup> Previous Tax Commission decisions are available at <http://tax.utah.gov/commission-office/decisions>

of the tenth meals, similar to a buy one get one free transaction.” On that basis, the Commission ruled that “regardless of whether the customer redeemed the completed card for the eleventh meal at the time he or she purchased the tenth meal, the Taxpayer is not liable for” tax on the eleventh free meal.

At first blush, the facts of the case now before the Commission appear similar to the facts in Utah State Tax Commission Case No. 08-0117. Both involved restaurants that provided food for less than stated value. There is an important difference, however. The Taxpayer now before the Commission prepared receipts that indicated sales tax on the entire amount rather than a discounted amount. This triggers application of Rule 16, which provides that sales tax is “the greater of . . . the actual tax collections for the reporting period [or] the amount computed at the rates imposed by law against the total taxable sales for that period.” Under Rule 16, even if the Taxpayer charged its customers more tax than it should have, the extra tax collected would need to be remitted to the state rather than refunded to the Taxpayer. Accordingly, there is good cause to support the Division’s audit with regard to purchases made with vouchers, even though the Taxpayer’s customers paid less than face value for the vouchers. The same is true of vouchers that the Taxpayer donated to customers or others. Had the Taxpayer directly donated meals, it could pay use tax on its cost for the food ingredients that went in to the finished meals. *See* Rule 68B and Rule 68F. However, the evidence in this case indicated that when a customer presented a voucher to the Taxpayer, the Taxpayer collected sales tax because it has no way to know whether the customer paid for the voucher. On that basis, it was proper for the Division to assess sales tax on the amounts reflected on the Taxpayer’s receipts.<sup>3</sup>

Clinton Jensen  
Administrative Law Judge

#### DECISION AND ORDER

Based upon the foregoing, the Commission sustains the Division’s audits for sales tax and interest. It is so ordered.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will

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<sup>3</sup> Because this decision is grounded on language in Rule 16 requiring remittance of tax amounts collected as reflected on the Taxpayer’s invoices, the Commission does not reach the Division’s arguments that Utah law required the Taxpayer to charge sales tax on the full amount of its sales rather than the discounted amounts that customers paid.

Appeal Nos. 12-947, 12-948

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

D'Arcy Dixon Pignanelli  
Commissioner

Michael Cragun  
Commissioner

Robert P. Pero  
Commissioner

**NOTICE:** Unless a party requests a Formal Hearing, the balance of tax and interest resulting from this decision must be paid within thirty days from the date this decision is issued or an additional late payment penalty may be assessed.