

12-2315
TAX TYPE: SALES & USE TAX
TAX YEAR: 2008 – 2011
DATE SIGNED: 11-17-2014
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. PERO
EXCUSED: D. DIXON

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER, Petitioner, vs. TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION Appeal No. 12-2315 Account No. ##### Tax Type: Sales & Use Tax Tax Year: 2008-2011 Judge: Marshall
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Presiding:

Robert Pero, Commissioner
Jan Marshall, Administrative Judge

Appearances:

For Petitioner: REPRESENTATIVE-1 FOR TAXPAYER, Representative
REPRESENTATIVE-2 FOR TAXPAYER, Representative
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General
RESPONDENT, Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on May 22, 2014, in accordance with Utah Code Ann. §63G-4-201 et seq. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The above named Petitioner (“Taxpayer”) is appealing the dismissal of a refund request by the Respondent (“Division”).
2. The tax at issue is sales and use tax.
3. Taxpayer operates a manufacturing facility in CITY, Utah. It manufactures (X) systems used in the aerospace industry and Homeland Security applications. (Exhibit 1).

4. The Taxpayer purchased certain goods and services for which it believes they improperly paid sales and/or use tax.
5. The Taxpayer submitted an "Application to Extend Time to File a Claim For Refund" on March 30, 2011. Taxpayer was granted an extension to file until May 30, 2011. (Exhibit 5).
6. On May 26, 2011, the Taxpayer filed a "third party" or "purchaser" refund request. The Taxpayer provided the Division with a CD that contained two attachments. The first attachment outlined the background, issues, and arguments in support of the refund request. The second attachment was an excel spreadsheet containing the purchases for which a refund was sought. (Exhibit 1).
7. Taxpayer requested a refund for sales tax and accrued use tax it believes was erroneously charged for items related to manufacturing, purchases for resale, non-taxable services, computer services, construction and repairs to real property, other non-taxable transactions, and out of state transactions. (Exhibit 1).
8. The excel spreadsheet provided by the Taxpayer to the Division included the tax type, vendor name, vendor number, vendor voucher number, invoice date, amount taxed, tax amount, description, and reason the item qualified for an exemption. (Exhibit 1).
9. NAME-1, a former employee of the Division, was originally assigned to the Taxpayer's refund claim.
10. RESPONDENT was assigned to the Taxpayer's refund claim in March of 2012.
11. RESPONDENT testified that when she was assigned the refund claim she reviewed the documents and notes in the file. She stated there was a comment on the account entered by NAME-1 on July 18, 2011, indicating NAME-1 had spoken to the Taxpayer's representative regarding missing proof of payment.
12. NAME-1 contacted REPRESENTATIVE-1 FOR TAXPAYER via email on July 18, 2011 requesting an affidavit that the items claimed as exempt have an extended life of 3 years. It appears that REPRESENTATIVE-1 FOR TAXPAYER did not receive the email because of an error in the email address used by NAME-1. (Exhibit 6).
13. NAME-1 had drafted a Statutory Notice denying the refund claim, explaining that either the items did not qualify for a refund or there was insufficient documentation. There was no evidence presented to show the Statutory Notice was ever issued to the Taxpayer. (Exhibit 6).

14. RESPONDENT testified that she contacted the Taxpayer's representative on March 24, 2012, and that through April she exchanged emails with REPRESENTATIVE-1 FOR TAXPAYER regarding the refund request and the need for proof of payment.
15. The Taxpayer's representative maintains that they did not receive a request for proof of payment from NAME-1; that it was only after RESPONDENT became involved that he was made aware that the Division required proof of payment.
16. On June 7, 2012, the Division sent a notice to the Taxpayer indicating that the request for refund was incomplete. The notice outlined the required documentation that had not yet been received by the Division. It also informed the Taxpayer that if the additional information was not received by July 9, 2012, the Division would evaluate the refund requests based on the evidence they had, and would dismiss for a lack of evidence requests for which the Division had not received the required documents. (Exhibit 2).
17. The Tax Commission publishes information on its website regarding refund requests. At the time the Taxpayer submitted its refund request, the website identified the information and documents that were required. The following information was required for each purchase: purchase date, invoice number, taxable purchase amount, amount of tax paid, amount of tax overpaid, seller's name, description of items purchased and the reason the items are exempt from sales and use tax. Additionally, the following documents were required to be submitted: invoices or receipts that show the items purchased and Utah sales tax charged and proof of payment. The website went on to explain that "proof of payment" can include copies of cancelled checks, bank statements, credit cards receipts, or a letter from the seller. (Exhibit 4).
18. The information on the Tax Commission website at the time the Taxpayer filed its refund request provided the following regarding denied requests:

We may deny any Third-Party Refund request that is missing required information or that does not qualify for refund under Utah sales tax law. If we deny your request, we will send a letter explaining your appeal rights.
19. On August 15, 2012 the Division issued a Dismissal Notice indicating the Division was dismissing \$\$\$\$\$ of the refund request for a lack of evidence. (Exhibit 3).
20. Taxpayer acknowledges the requested information was not submitted by July 9, 2014; but alleges the Division denied a request for extension.
21. On September 14, 2012, the Commission received the Petition for Redetermination filed by the Taxpayer appealing the August 15, 2012 Dismissal Notice.

APPLICABLE LAW

Utah Code Ann. §59-12-110 sets forth the procedures for claiming a refund under the Sales and Use Tax Act. At the time the Taxpayer submitted its refund request, the statute provided:

- (3) A taxpayer may obtain a refund under Section 59-1-1410 of a tax paid under this chapter on a transaction that is taxable under Subsection 59-12-103(1) if:
 - (a) the sale or use is exempt from sales and use taxes under Section 59-12-104 on the date of purchase; and
 - (b) the taxpayer files a claim for a refund with the commission as provided in Section 59-1-1410.

Senate Bill 27 Amended this code section, effective May 8, 2012. However, it was amended retrospectively to apply to any refund requests that were pending on or filed after September 27, 2011. Senate Bill 27 changed Utah Code Ann. §59-12-110 to read as follows, in pertinent part:

- (3) Except as provided in Subsection (1) or (2), procedures and requirements for a taxpayer to obtain a refund from the commission are as provided in Section 59-1-1410.

At the time the Taxpayer submitted its refund request, Utah Code Ann. §59-1-1410 provided as follows:

- (7) If a person pays a liability more than once, or the commission erroneously receives, collects, or computes a liability, the commission shall:
 - (a) credit the liability against any amount of liability the person owes; and
 - (b) refund the balance to:
 - (i) the person; or
 - (ii) (A) the person's assign;
 - (B) the person's personal representative;
 - (C) the person's successor; or
 - (D) a person similar to Subsection (7)(b)(ii)(A) through (C) as determined by the commission by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act...
- (9) If the commission denies a claim for a credit or refund, a person may request a redetermination of the denial by filing a petition or request for agency action with the commission:
 - (a) (i) within a 30-day period after the day on which the commission mails a notice of denial for the claim for credit or refund; or
 - (ii) within a 90-day period after the day on which the commission mails a notice of denial for the claim for credit or refund, if the notice is addressed to a person outside of the United States or the District of Columbia; and
 - (b) in accordance with:
 - (i) Section 59-1-501; and
 - (ii) Title 63G, Chapter 4, Administrative Procedures Act.

Senate Bill 27 amended this code section retrospectively to apply to any refund requests that were pending on or filed after September 27, 2011. Senate Bill 27 amended Utah Code Ann. §59-1-1410, to read as follows, in pertinent part:

- (7) If a person erroneously pays a liability, overpays a liability, pays a liability more than once, or the commission erroneously receives, collects, or computes a liability, the commission shall:
 - (a) credit the liability against any amount of liability the person owes; and
 - (b) refund the balance to:
 - (i) the person; or
 - (ii) (A) the person's assign;
 - (B) the person's personal representative;
 - (C) the person's successor; or
 - (D) a person similar to Subsection (7)(b)(ii)(A) through (C) as determined by the commission by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act...
- (9) If the commission denies a claim for a credit or refund, a person may request a redetermination of the denial by filing a petition or request for agency action with the commission:
 - (a) (i) within a 30-day period after the day on which the commission mails a notice of denial for the claim for credit or refund; or
 - (ii) within a 90-day period after the day on which the commission mails a notice of denial for the claim for credit or refund, if the notice is addressed to a person outside of the United States or the District of Columbia; and
 - (b) in accordance with:
 - (i) Section 59-1-501; and
 - (ii) Title 63G, Chapter 4, Administrative Procedures Act.

Administrative Rule R861-1A-46 became effective on February 21, 2013. Subsection (2) sets forth the procedures for a refund request pursuant to Utah Code Ann. §59-1-1410 and §59-12-110, as follows:

- (a) Except as provided in Subsection (3), a person submitting a purchaser refund request shall include the required information and documents with the application to the division.
- (b) The items described in Subsection (2)(a) shall be provided to the division in the format and manner prescribed by the division.
- (c) If the application is not accompanied by all of the required information and documents, the division shall send a notice to the person that submitted the purchaser refund request.
- (d) The notice in Subsection (2)(c) shall:
 - (i) indicate the required information and documents that are missing; and
 - (ii) allow the person submitting the purchaser refund request 30 days to provide the missing required information and documents to the division.
- (e) (i) A person submitting a purchaser refund request who is unable to provide the information and documents described in Subsection (2)(d)(i) within the time period described in Subsection (2)(d)(ii) may contact the division to request an extension of time to provide the required information and documents that are missing.
- (ii) The division shall grant reasonable requests for extension that will not unnecessarily prolong the processing of the refund request. If an extension is granted, the division shall provide written notice to the person submitting the purchaser refund request of the length of time granted under Subsection (2)(e)(i).

- (f) If the division has not received all of the required information and documents within the time period described in Subsection (2)(d), or if applicable, within an extension of time granted under Subsection (2)(e), the division shall:
 - (i) Evaluate the purchaser refund request based solely on the required information and documents received; and
 - (ii) Dismiss for lack of evidence requests for refunds on items for which the division has not received the required information and documents.
- (g) (i) Dismissals under Subsection (2)(f) may be appealed to the Commission.
 - (ii) On appeal under Subsection (2)(g)(i), the only matter that will be reviewed by the commission is whether information and documents adequate to determine the validity of the purchaser refund request were received by the division within the time period prescribed under Subsection (2)(d), or if applicable, within an extension of time granted under Subsection (2)(e).

The Utah Legislature has specifically provided that the Taxpayer bears the burden of proof in this matter, as provided in Utah Code Ann. §59-1-1417, below, in pertinent part:

In a proceeding before the commission, the burden of proof is on the petitioner...

DISCUSSION

The Taxpayer's representative argued that the refund request should have been denied, not dismissed. REPRESENTATIVE-2 FOR TAXPAYER stated that the statute was amended to allow for the procedure to dismiss after they had submitted their refund claim, and thus the statute should not apply to them. He stated that they followed the instructions on how to claim a refund that are set out in Exhibit 5, and argued that if a check voucher is sufficient for an audit, that it should be sufficient to claim a refund.

The Division's representative stated that that the Taxpayer has the burden of proof under Utah Code Ann. §59-1-1417, and needs to present information to show the Commission that they are entitled to the relief. He stated that Administrative Rule R861-1A-46 sets forth the procedures for refund requests. He argued that the procedure is fair, gives taxpayers adequate notice, and an opportunity to cure. He noted that the Taxpayer had filed the request a year earlier, and did not submit the evidence of payment during that time.

Statutes, rules and other regulations are presumed to only apply prospectively unless expressly made retroactive. The Utah Supreme Court in *Beaver County, et al. v. Utah State Tax Comm'n*, 254 P.3d 158, 160 (Utah 2010) stated, "In Utah, there is a 'long-standing rule...that a legislative enactment which alters the substantive law...will not be read to operate retrospectively unless the legislature has clearly expressed that intention,'" citing to *Evans and Sutherland Computer Corp. v. Utah State Tax Comm'n*, 953 P.2d 435, 437 (Utah 1997). Senate Bill 27 specifically provided that the amended code sections were to apply retrospectively to all claims that were pending, or filed, after September 27, 2011. In the instant case, Utah Code Ann. §59-12-110 and §59-1-1410 were amended while the Taxpayer's claim was pending. Thus, the revised statutory provisions are applicable to the Taxpayer's refund claim. The

revision to Utah Code Ann. §59-1-1410(7) effectively enlarged the circumstances under which a refund could be granted from “if a person pays a liability more than once or the commission erroneously receives, collects, or computes a liability...” to “if a person erroneously pays a liability, overpays a liability, pays a liability more than once, or the commission erroneously receives, collects, or computes a liability...”. The amendment did not change Subsection (9), which allows for the filing of a petition for redetermination if a claim for refund is denied.

Administrative Rule R861-1A-46 sets forth the procedures for filing a refund request pursuant to Utah Code Ann. §59-1-1410 and §59-12-110. The Division issued a notice to the Taxpayer on June 7, 2012 that identified the required information and documents that were missing, and allowed a period of 30 days to provide the missing information. When the information was not received in the time allowed, the Division dismissed the appeal for a lack of evidence on August 15, 2012. The Division followed the procedures set forth in Subsection (2) of Rule R861-1A-46. However, this rule was not enacted by the Commission until February 21, 2013, and the Rule does not expressly indicate it is to be applied retrospectively.

There is an exception to the rule against retroactive application if amendments are procedural in nature. “According to this exception, amendments that merely alter the procedure by which substantive rights are adjudicated are retroactively applicable.” See Chief Justice Durham’s concurrence in *Thomas v. Color Country Mngmt.*, 84 P.3d 1201, 1210 (Utah 2004). Utah courts have long held that the “procedural” exception to non-retroactivity is a narrow one. See *In re J.P.*, 648 P.2d 1364, 1370 (Utah 1982). A law is substantive if it changes “the substantive criteria for decision.” *Matter of Disconnection of Certain Territory*, 668 P.2d 544, 549 (Utah 1993). Under this standard, a change is considered substantive if it “enlarges, eliminates, or destroys vested rights.” *Smith v. Cook*, 803 P.2d 788, 792 (Utah 1990). In *Petty v. Clark*, 192 P.2d 589, 593-94 (Utah 1948), the Utah Supreme Court set forth the definition of a substantive change:

Substantive law is defined as the positive law which creates, defines and regulates the rights and duties of the parties and which may give rise to a cause of action, as distinguished from adjective law which pertains to and prescribes the practice and procedure or the legal machinery by which the substantive law is determined or made effective.” (citations omitted.)

While the Title of Administrative Rule is entitled “Procedures for Purchaser Refund Requests” it is evident that when the Tax Commission promulgated the rule, it considered the change to be a substantive one. Rule 46 created a new method for the filing and review of purchaser refund requests under Utah Code Ann. §59-1-1410 and §59-12-110. This change affects more than the “legal machinery” of the Tax Commission; it affects the “substantive criteria” upon which that Tax Commission makes its decision. The information required to be submitted with a refund request is substantially the same as it

was at the time the Taxpayer submitted their request. However, at the time the Taxpayer submitted its request, the Technical Research Unit of the Taxpayer Services Division was responsible for reviewing those requests. Rule 46 provides that the Auditing Division is responsible for reviewing the requests, and allows for a sampling methodology to be used. Additionally, the rule provides for a change in practice. Previously, when a refund request would be denied, a taxpayer could file an appeal of that denial. Under Rule 46, a refund request is dismissed, and the only issue that is appealable is whether information and documents adequate to determine the validity of the refund request were received by the division in the time period prescribed.

CONCLUSIONS OF LAW

The Division improperly dismissed the Taxpayer’s refund claim for a lack of evidence. While the Division followed procedures outlined in Rule R861-1A-46, that rule was not enacted until nearly six months after the Division dismissed the Taxpayer’s refund claim. The Division’s dismissal for a lack of evidence eliminated a vested right of the Taxpayer to appeal a denial of the refund claim that existed at the time.

Jan Marshall
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission finds that the Division improperly dismissed the Taxpayer’s refund request. Because of the confusion in procedures prior to the enactment of Rule R861-1A-46, rather than the thirty days outlined in the rule, the Taxpayer has sixty days from the date this Order is issued to submit the missing information in support of its refund claim. At the expiration of the sixty day period, the refund claim shall be reviewed in accordance with Utah Code Ann. §59-12-110, §59-1-1410, and Administrative Rule R861-1A-46. It is so ordered.

DATED this _____ day of _____, 2014.

John L. Valentine
Commission Chair

D’Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

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