

12-2354  
TAX TYPE: REFUND REQUEST SALES AND USE  
TAX YEAR: 2010  
DATE SIGNED: 11-5-2013  
COMMISSIONERS: B. JOHNSON, D. DIXON, M. CRAGUN  
EXCUSED: R. PERO  
GUIDING DECISION

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BEFORE THE UTAH STATE TAX COMMISSION

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<p>PETITIONER,      Petitioner,  vs.  TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION,      Respondent.</p>	<p><b>INITIAL HEARING ORDER</b></p> <p>Appeal No. 12-2354</p> <p>Account No. #####</p> <p>Tax Type: Sales &amp; Use Tax</p> <p>Tax Year: 2010</p> <p>Judge: Phan</p>
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**Presiding:**

Jane Phan, Administrative Judge

**Appearances:**

For Petitioner: REPRESENTATIVE FOR PETITIONER, 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 on August 26, 2013 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. Petitioner (“Taxpayer”) is appealing the decision by Respondent (“Division”) to dismiss a sales and use tax refund request made for the period of February 1, 2007 through December 31, 2007. The amount of refund requested had been \$\$\$\$\$.

APPLICABLE LAW

Utah Law requires taxpayer to retain records as follows at Utah Code §59-1-1406.

- (1) A person subject to a tax, fee, or charge shall:
- (a) keep in a form prescribed by the commission books and records that are necessary to determine the amount of a tax, fee, or charge the person owes;
  - (b) keep books and records described in Subsection (1)(a) for the time period during which an assessment may be made under Section 59-1-1408; and
  - (c) open the person’s books and records for examination at any time by:

- (i) the commission; or
- (ii) an agent or representative the commission designates.

. . . .

(3) For the purpose of ascertaining the correctness of a return...the commission may:

- (a) examine the books and records bearing upon the matter required to be included in a return;
- (b) authorize an agent or representative designated by the commission to examine the books and records bearing upon the matter required to be included in a return;
- (c) required the attendance of:
  - (i) an officer or employee of a person required to make a return; or
  - (ii) a person having knowledge of a pertinent fact;
- (d) take testimony; or
- (e) require any other necessary information.

The Petitioner has the burden of proof in this matter pursuant to Utah Code §59-1-1417 which provides.

- (1) In a proceeding before the commission, the burden of proof is on the petitioner....
- (2) Regardless of whether a taxpayer has paid or remitted a tax, fee, or charge, the commission or a court considering a case involving the tax, fee, or charge shall:
  - (a) construe a statute imposing the tax, fee, or charge strictly in favor of the taxpayer; and
  - (b) construe a statute providing an exemption from or credit against the tax, fee, or charge strictly against the taxpayer.

The Tax Commission has adopted rules providing for record retention regarding sales and use tax. Utah Rule R865-19S-22 provides the following:

A. Every retailer, lessor, lessee, and person doing business in this state or storing, using, or otherwise consuming in this state tangible personal property purchased from a retailer, shall keep and preserve complete and adequate records as may be necessary to determine the amount of sales and use tax for which such a person or entity is liable. Unless the Tax Commission authorizes in writing an alternative method of record keeping, these records shall:

- 1. Show gross receipts from sales, or rental payments from leases, of tangible personal property or services performed in connection with tangible personal property made in this state, irrespective of whether the retailer regards the receipts to be taxable or nontaxable;
- 2. Show all deductions allowed by law and claimed in filing returns;
- 3. Show bills, invoices, or similar evidence of all tangible person property purchased for sale, consumption, or lease in this state; and
- 4. Include the normal books of account maintained by an ordinarily prudent business person engaged in such business, together with supporting documents of original entry such as: bills, receipts, invoices, and cash register tapes. All schedules or working papers used in connection with the preparation of tax returns must also be maintained.

. . . . .

- D. All records pertaining to transactions involving sales or use tax liability shall be preserved for a period of not less than three years.
- E. All of the foregoing records shall be made available for examination on request by the Tax Commission or its authorized representatives.
- F. Upon failure of the taxpayer, without reasonable cause, to substantially comply with the requirements of this rule, the Tax Commission may:
  - 1. Prohibit the taxpayer from introducing in any protest or refund claim proceeding those microfilm, microfiche, ADP, or any records which have not been prepared and maintained in substantial compliance with the requirements of this rule.
  - 2. Dismiss any protest or refund claim proceeding in which the taxpayer bases its claim upon any microfilm, microfiche, ADP, or any records which have not been prepared and maintained in substantial compliance with the requirements of this rule.
  - 3. Enter such other order necessary to obtain compliance with this rule in the future.
  - 4. Revoke taxpayer's license upon evidence of continued failure to comply with the requirements of this rule.

DISCUSSION

The facts in this case were not substantially in dispute. On October 26, 2010, the Taxpayer had filed a request for refund of sales tax in the amount of \$\$\$\$ for the period of February 1, 2007 through December 31 2007. The Taxpayer is a building supply store. Much of its product was sold to builders on invoice. Sales tax was charged based on the full amount of the purchase price as listed on the invoice and remitted to the Tax Commission. If purchasers paid their invoice within ten days they would receive a %%% discount off of the invoice price that would generally be credited to the purchasers account or otherwise refunded to the purchaser. During the periods at issue the Taxpayer had paid sales tax based on the original amount but after refunding the %%% to the purchaser the Taxpayer had not been claiming a credit for the overpaid tax on its returns. The amount of the refund requested was an estimate of the sales tax that had been charged and remitted to the Tax Commission on the %%% discount amount. The refund request that is subject to this appeal was for the period from February 1, 2007 to December 31, 2007. The Division dismissed the refund request for this period on August 24, 2012 for lack of evidence. It is this dismissal that is the subject of this appeal.

The Taxpayer had also filed a second request for refund for the period from January 1, 2008 through April 13, 2010, for the sales tax paid on the discounted portion of the invoice and the Division has refunded approximately %%% of that request to the Taxpayer. The Property Owner had been able to provide invoices and additional information to support the refund for the latter period and for that reason the request was processed rather than dismissed.

The Taxpayer was unable to provide the same information for the period of February 1, 2007 through December 31, 2007 as it had for the later period. The reason for this was that the Taxpayer had installed a new computer system beginning in January 2008. The new system was backed up at an offsite location. The old computer system and invoices were kept at the Taxpayer's STORE in CITY, Utah. The Taxpayer's representative had started gathering information on the refund claims and had printed off some general ledger information from the old computer system in April 2010.<sup>1</sup> However, on July 27, 2010, the STORE burned down and was destroyed.<sup>2</sup> There was no offsite back-up of the 2007 information and the old computer system, records and invoices for the 2007 year burned with the building.

When the Taxpayer submitted the refund claims the Taxpayer had decided to file two separate claims for these periods because of the lack of information for the 2007 year and the fact that the Taxpayer had information to support the request for the later period of January 1, 2008 through April 13, 2010. The Taxpayer's representative argued at this hearing, had they been filed instead as one request the Division might have allowed a sample period from the later years when there was sufficient documentation and then applied the sample period to the entire refund request period. The Taxpayer stated that the Division had refunded approximately %%% of the Taxpayer's claim for the later period after reviewing the supporting documentation. It was the Taxpayer's contention that the Division should apply the same percentage to the claim for the 2007 tax year.

After receiving the refund claim for the 2007 period, there were numerous contacts and discussions between the Taxpayer's representatives and the Division's representatives. The Taxpayer had submitted the refund request by letter in October 2010.<sup>3</sup> The Division had responded on November 3, 2010, with a notice that stated additional information was required before the request for refund could be processed.<sup>4</sup> There was email correspondence between the representatives for the Taxpayer and Division in December of 2010 through March of 2011.<sup>5</sup> On March 3, 2011, the Taxpayer provided CDs with sample invoices. However, the Division was unable to match any of the invoices for the 2007<sup>6</sup> year to the invoices on the spreadsheet the Taxpayer had provided. On July 19, 2011, the Division requested by email new spreadsheets

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<sup>1</sup> The general ledger information was submitted at the hearing as Petitioner's Exhibit 4.

<sup>2</sup> The fact that the store and records were destroyed by a fire was not disputed by the Division. Regardless, the Taxpayer did provide a News Article regarding the fire, Petitioner's Exhibit 3.

<sup>3</sup> Petitioner's Exhibit 1.

<sup>4</sup> Respondent's Exhibit 1.

<sup>5</sup> Respondent's Exhibits 2-4.

<sup>6</sup> Respondent's Exhibit 5.

with the sample invoices highlighted.<sup>7</sup> The Taxpayer was able to provide this for 2008, but not for 2007. The Division sent an additional email on September 21, 2011 for more invoices.<sup>8</sup> The Taxpayer's representative responded by letter on November 8, 2011,<sup>9</sup> in which he requested that samples pulled for the period from 1/1/08 through 4/15/10 be applied to the 2007 year period because the records for the 2007 had been destroyed in the fire. On May 29, 2012, the Division sent an Incomplete Request for Refund notice to the Taxpayer.<sup>10</sup> This notice stated that if requested documents were not received in the described formats by June 28, 2012, the appeal could be dismissed for lack of evidence. The Taxpayer responded by letter dated June 20, 2012,<sup>11</sup> providing again the general ledger document, explaining about the fire and asking if the general ledger document could substantiated the claim. On August 24, 2012, the Division issued its Dismissal Notice<sup>12</sup> which dismissed the appeal.

There are several unique factors in this case that need to be considered. The Taxpayer in this matter presumably had retained documents and records for the 2007 year period as they had for the subsequent years, but the 2007 records were destroyed, a circumstance beyond the Taxpayer's control. This is not a situation where the Taxpayer was ignoring requests by the Division for the additional information, they did respond to the Division's requests. The Taxpayer was just unable to obtain more documentation because it was not available. There is a general ledger showing discounts made to purchasers during 2007, like the discounts made for the subsequent period. The Division did allow most of the refund claimed by the Taxpayer for the 2008 through 2010 period. Had the Taxpayer filed one refund claim for February 1, 2007 to April 13, 2010, this would have been a period of approximately 38 months in total for which the Taxpayer would have been able to provide all the supporting documentation for 27 of the months and only had 11 months for which it had some documentation, but not all the supporting information requested by the Division. Essentially two-thirds of the 38 month period could be supported as a test period. Given these factors this matter should be remanded back to the Division to consider the 2007 refund claim as if it had been made as part of the 2008 through 2010 claim and apply a reasonable test period or percentage to the 2007 tax year from subsequent years where additional supporting information is available.

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<sup>7</sup> Respondent's Exhibit 7.

<sup>8</sup> Respondent's Exhibit 8.

<sup>9</sup> Respondent's Exhibit 9.

<sup>10</sup> Respondent's Exhibit 10.

<sup>11</sup> Respondent's Exhibit 11.

<sup>12</sup> Respondent's Exhibit 12.

Jane Phan  
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission remands this matter back to the Division to process the Taxpayer's refund request in a manner consistent with the above findings. 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

D'Arcy Dixon Pignanelli  
Commissioner

Michael J. Cragun  
Commissioner

Robert P. Pero  
Commissioner

