

12-2670  
TAX TYPE: SALES & USE TAX  
TAX YEAR: 1/1/08 – 12/31/10  
DATE SIGNED: 10/7/2014  
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. PERO  
EXCUSED: D. DIXON  
GUIDING DECISION

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BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYER,</p> <p style="text-align: center;">Petitioner,</p> <p>vs.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="text-align: center;">Respondent.</p>	<p style="text-align: center;"><b>INITIAL HEARING ORDER</b></p> <p>Appeal No. 12-2670</p> <p>Account No. #####</p> <p>Tax Type: Sales &amp; Use Tax</p> <p>Audit Period: 1/1/08 – 12/31/10</p> <p>Judge: Phan</p>
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**Presiding:**

Jane Phan, Administrative Law Judge

**Appearances:**

For Petitioner: REPRESENTATIVE FOR TAXPAYER, Representative  
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney  
General  
RESPONDENT-1, Assistant Director, Auditing  
RESPONDENT-2, Audit Manger, Sales and Use Tax

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on May 12, 2014, for an Initial Hearing in accordance with Utah Code §59-1-502.5. Petitioner (“Taxpayer”) is appealing an audit deficiency assessed against it by Respondent (“Division”) for the period of January 1, 2008 through December 31, 2010. The Division had issued its Statutory Notice on October 11, 2012, which indicated a deficiency of sales and use tax in the amount of \$\$\$\$ and interest as of the date of the notice<sup>1</sup> in the amount of \$\$\$\$.

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<sup>1</sup> Interest continues to accrue on any unpaid balance.

APPLICABLE LAW

Sales and use tax are imposed under Utah Code 59-12-103(1)(2009)<sup>2</sup> as follows in pertinent part:

A tax is imposed on the purchaser as provided in this part for amounts paid or charged for the following transactions:

- (a) retail sales of tangible personal property made within the state;
- . . .
- (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
- (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; and

“Tangible personal property” is defined at Utah Code 59-12-102(108)(2009) as follows:

- (a) Except as provided in Subsection (108)(d) or (e), “tangible personal property” means personal property that: (i) may be: (A) seen; (B) weighed; (C) measured; (D) felt; or (E) touched; or (ii) is in any manner perceptible to the senses.
- (b) “Tangible personal property” includes: (i) electricity; (ii) water; (iii) gas; (iv) steam; or (v) prewritten computer software.<sup>3</sup>
- . . .

Section 59-12-102(48) (2009) defined “lease” or “rental” as follows in pertinent part:

- (48)(a) "Lease" or "rental" means a transfer of possession or control of tangible personal property or a product transferred electronically for:
- (i) (A) a fixed term; or  
(B) an indeterminate term; and
  - (ii) consideration. . . .

Section 59-12-102(96) (2009) defines a “sale-leaseback transaction,” as follows

in pertinent part:

- (96) "Sale-leaseback transaction" means a transaction by which title to tangible personal property or a product transferred electronically that is subject to a tax under this chapter is transferred:
- (a) by a purchaser-lessee;
  - (b) to a lessor;
  - (c) for consideration; and
  - (d) if:

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<sup>2</sup> The Commission cites to the 2009 version of the Utah Code unless otherwise noted. Although there were some revisions and renumbering during the audit period at issue, neither party argued that they were relevant to the outcome.

<sup>3</sup> Effective July 1, 2011, Section 59-12-102(108)(b)(v) was amended to “prewritten computer software, regardless of the manner in which the prewritten computer software is transferred.”

(i) the purchaser-lessee paid sales and use tax on the purchaser-lessee's initial purchase of the tangible personal property or product transferred electronically; (ii) the sale of the tangible personal property or product transferred electronically to the lessor is intended as a form of financing: (A) for the tangible personal property or product transferred electronically; and (B) to the purchaser-lessee; and  
(iii) in accordance with generally accepted accounting principles, the purchaser-lessee is required to: (A) capitalize the tangible personal property or product transferred electronically for financial reporting purposes; and (B) account for the lease payments as payments made under a financing arrangement.

Utah Code §59-12-104 provides certain exemptions from sales tax. The relevant provisions are at Utah Code §59-12-104 (2009):

The following sales and uses are exempt from the taxes imposed by this chapter:

...

(25) a product purchased for resale in this state, in the regular course of business, either in its original form or as an ingredient or component part of a manufactured or compounded product;

...

(52) amounts paid on a sale-leaseback transaction;

...

The burden of proof is upon the petitioner in this proceeding pursuant to §59-1-1417 as follows:

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

### DISCUSSION

At issue in this appeal and for the hearing was the audit deficiency as indicated in the October 11, 2012 Statutory Notice. Just a few weeks prior to the hearing the Taxpayer has raised the issue of a possible refund claim on the account which was submitted as a refund request, but the Taxpayer had not yet provided to the Division the invoices and back-up to support the refund claim. The refund issue is a separate issue that is not related to the audit issues and deals with pipelines under roads, an issue that has recently been appealed to the District Court from the Tax Commission's decision in *Finding of Fact, Conclusion of Law and Final Decision, Appeal No. 11-1774*, which was issued on April 9, 2014. Although the Taxpayer's refund claim is unrelated to the audit deficiency, if the Taxpayer were to prevail on the refund claim, it might offset some of the tax due in the audit. As of the hearing the Division had not made a decision on the Taxpayer's refund claim and the Taxpayer did not provided evidence to support the claim to the Commission.

For the purposes of the Initial Hearing there were a few audit issues that were addressed, but generally, there was one type of transaction from which the large portion of the audit deficiency had resulted. The major issue was Schedule 5-Unreported Expense Purchases Lease Payments. The amount of tax deficiency from this schedule was \$\$\$\$.<sup>4</sup> Schedule 5 lists monthly payments relating to COMPANY-1 and assesses a tax on the payments. The payments had started out around \$\$\$\$ per month but fluctuated quarterly and were as low as \$\$\$\$ per month. The description in the audit was that the payment was for “leased equipment.” The Taxpayer’s representative explained that the Taxpayer and COMPANY-1 although legally separate entities, had the same principals and owners. He indicated that COMPANY-1 had set up the financing arrangement with the bank, but the Taxpayer was the purchaser/lessee and COMPANY-1 was the lessor. He indicated that the lease amount was to cover the costs COMPANY-1 owed to the bank. It was his contention that this was intended to be a sale-lease back transaction. However, because these were two related companies, there were no invoices that pertained to these transactions. It was apparently just general ledger notations regarding this transfer of the payments. The representative indicated that he does not know what equipment had been leased and that it was possible there was some real property included. The representative pointed to PLR 95-059DJ, issued by the Utah State Tax Commission on September 26, 1995. That ruling discussed factors considered when a business acquired equipment specifically for the purpose of leasing the equipment to other businesses. In that opinion the Commission noted that the sale might not be taxable but the lease payments would be subject to tax. That private ruling also indicated that when a lease payment covers both the rental of a building and equipment the transaction might be non-taxable rental of real estate. The representative suggested that the lease payments listed on Schedule 5 might include both real estate and equipment, but acknowledged that he did not really know what was leased. He also did not show that the transaction met the “sale-leaseback transaction” definitions set out at Utah Code Sec. 59-12-102(96).

The Division points out that the Taxpayer has the burden of proof under Utah Code Sec 59-1-1417 and had failed to show that the transaction was a “sale-leaseback transaction” under 59-12-102(96) (2009).

There were two smaller audit items in contention. One was an invoice listed on Schedule 1 of the audit for \$\$\$\$\$, which the Taxpayer had argued was for web design and programming. After some discussion at the hearing, the Division agreed that this invoice should be removed

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<sup>4</sup> It should be noted that Schedule 4-Credit for Sales Tax Paid to Sellers in Error, allowed a credit in the amount of \$\$\$\$\$ against the deficiencies. Schedule 1 indicated a tax deficiency of \$\$\$\$\$, Schedule 2 of \$\$\$\$\$, and Schedule 3 of \$\$\$\$\$. Schedule 5 was by far the largest portion of the audit deficiency.

from the audit. The Division also agreed to remove from Schedule 2-A-1 Statistical Sample Exceptions, one of the COMPANY-2 construction invoices.

After reviewing the information submitted by the parties at the hearing, the Taxpayer has not provided sufficient information to support that the Schedule 5 transactions qualified as a “sale-leaseback transaction” as set out at Utah Code Sec. 59-12-102(96). Other than the small adjustments noted above on Schedule 1 and Schedule 2-A-1, the audit should be sustained.

Jane Phan  
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, except for the two small changes noted above, the sales and use tax audit issued against the Taxpayer for the period from January 1, 2008 through December 31, 2010, is sustained. 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 \_\_\_\_\_, 2014.

John L. Valentine  
Commission Chair

D’Arcy Dixon Pignanelli  
Commissioner

Michael J. Cragun  
Commissioner

Robert P. Pero  
Commissioner

**Notice of Payment Requirement: Any balance due as a result of this order must be paid within thirty (30) days of the date of this order, or a late payment penalty could be applied.**

