

13-284  
TAX TYPE: SALES and USE TAX  
TAX YEARS: 10-1-09 through 7-31-12  
DATE SIGNED: 6-24-2014  
COMMISSIONERS: B. JOHNSON, M. CRAGUN, R. PERO  
EXCUSED: D. DIXON

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BEFORE THE UTAH STATE TAX COMMISSION

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<p>TAXPAYER,      Petitioner,  v.  AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,      Respondent.</p>	<p><b>INITIAL HEARING ORDER</b></p> <p>Appeal No.    13-284</p> <p>Account No.    #####</p> <p>Tax Types:    Sales and Use Tax /                   Tourism (Restaurant) Tax</p> <p>Audit Period:  10/01/09 – 07/31/12</p> <p>Judge:        Chapman</p>
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**Presiding:**  
    Kerry Chapman, Administrative Law Judge

**Appearances:**  
    For Petitioner:    TAXPAYER, Taxpayer (by telephone)  
    For Respondent:    REPRESENTATIVE FOR RESPONDENT, Utah 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 April 9, 2014.

TAXPAYER (“Petitioner” or “taxpayer”) has appealed the Auditing Division’s (“Division”) assessment of sales and use tax and tourism (restaurant) tax for the period October 1, 2009 through July 31, 2012 (“audit period”). On December 28, 2012, the Division issued a Statutory Notice – Sales and Use Tax (“Statutory Notice), in which it imposed additional sales and use tax, tourism (restaurant) tax, and interest (calculated through January 27, 2013)<sup>1</sup> for the audit period, as follows:

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1 Interest continues to accrue until any tax liability is paid.

<u>Tax Type</u>	<u>Tax</u>	<u>Penalties</u>	<u>Interest</u>	<u>Total</u>
Sales and Use	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
Tourism (Restaurant)	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

The taxpayer does not contest the \$\$\$\$\$ of sales and use tax that the Division assessed. He only contests the Division's assessment of \$\$\$\$\$ of tourism (restaurant) tax, as shown on Schedule 3 of the Statutory Notice.<sup>2</sup> The taxpayer admits that his records will show that he charged and collected \$\$\$\$\$ of restaurant tax from his customers that he did not remit to the Tax Commission. However, he believes that he was justified in not remitting this tax and that in the interest of fairness, the Commission should reverse this portion of the Division's assessment.

The taxpayer operates a BUSINESS in CITY-1, Utah as a sole proprietorship. Most of the items that the taxpayer sells are subject to both sales and use tax and restaurant tax. However, a few of the items that he sells are subject to sales and use tax, but not restaurant tax. The taxpayer explained that until recently, his cash registers were not capable of charging more than one tax rate. As a result, the taxpayer charged a single tax rate that included both the sales and use tax rate and the restaurant tax rate on all of his sales, including those not subject to restaurant taxation. For those transactions not subject to restaurant taxation, the taxpayer remitted the sales and use taxes he had charged and collected from his customers. However, he did not remit the restaurant tax he had also charged and collected from these customers.

The Division does not contest the taxpayer's assertion that the transactions at issue were not subject to restaurant taxation. However, because the taxpayer's customers paid "excess" restaurant taxes, the Division argues that Utah law requires the taxpayer to either refund these excess taxes to the customers or remit the excess taxes to the Tax Commission. Because the taxpayer has not refunded these excess restaurant taxes to the customers, the Division asks the Commission to sustain its restaurant tax assessment. The Division points out that the policy of requiring a seller to remit excess taxes is needed because the Tax

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2 The tourism (restaurant) tax will be referred to as the "restaurant tax" in the remainder of the decision.

Commission would have refunded the restaurant tax directly to any customer who submitted a refund request along with their receipt that showed that they were improperly charged restaurant tax on their transaction.

The taxpayer stated that he was aware that his cash registers would not accommodate the dual rate of taxation. As a result, he claims he had to collect restaurant tax on all transactions. However, to ensure that customers who were not lawfully subject to the restaurant tax were not harmed, he claims that he did not increase prices on items not subject to restaurant tax as much for inflation as he increased prices on items that were subject to the tax. As a result of these “artificially low” prices, he claims that his customers who bought items not subject to restaurant taxation actually paid the same “total amount” that they would have paid had he increased the items’ prices and not charged restaurant tax. For these reasons, he kept the restaurant tax on these transactions to compensate himself for keeping the prices on these items artificially low. The taxpayer contends that this approach was fair because the Tax Commission received the restaurant tax that was lawfully due and because his customers paid the same total price they would have had to pay had his cash registers been able to accommodate dual taxation rates. For these reasons, the taxpayer believes that it is only fair that the Tax Commission overturn that portion of the Division’s audit imposing restaurant taxes.

APPLICABLE LAW

1. Utah Code Ann. §59-12-103(1) (2012)<sup>3</sup> provides for the imposition of sales and use tax on certain transactions, as follows in pertinent part:

(1) 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;
- ....
- (e) sales of prepared food;
- ....

2. UCA §59-12-603(1)(a)(ii) imposes a restaurant tax on sales of certain items sold by a restaurant, as follows:

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3 All citations are to the 2012 version of the Utah Code and the Utah Administrative Code, unless

(1)(a)(ii) a county legislative body of any county may impose a tax of not to exceed 1% of all sales of the following that are sold by a restaurant:

- (A) alcoholic beverages;
- (B) food and food ingredients; or
- (C) prepared food[.]

3. Section 59-12-603(7)(a)(i) provides that the restaurant tax “shall be administered, collected, and enforced in accordance with: (A) the same procedures used to administer, collect, and enforce the tax under: (I) Part 1, Tax Collection; or (II) Part 2, Local Sales and Use Tax Act; and (B) Chapter 1, General Taxation Policies.”

4. UCA §59-12-107(3) provides for a seller to remit taxes it collects to the Tax Commission, even if it collects an amount in excess of the taxes that are due, as follows in pertinent part:

- ....
- (e) Taxes collected by a seller pursuant to this chapter shall be held in trust for the benefit of the state and for payment to the commission in the manner and at the time provided for in this chapter.
  - (f) If any seller, during any reporting period, collects as a tax an amount in excess of the lawful state and local percentage of total taxable sales allowed under this chapter, the seller shall remit to the commission the full amount of the tax imposed under this chapter, plus any excess.
- ....

5. Utah Admin. Rule R865-19S-4(5) (“Rule 4”) provides that “[a] seller that collects an excess amount of sales or use tax must either refund the excess to the purchasers from whom the seller collected the excess or remit the excess to the commission.”

6. Utah Admin. Rule R865-19S-16(A) (“Rule 16”) provides for the remittance of excess tax collections, as follows in pertinent part:

- 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.

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otherwise indicated.

7. UCA §59-1-1417 (2013) provides that the burden of proof is generally 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 claims that the restaurant tax assessment has arisen because he charged and collected restaurant tax on sales that were not subject to this tax. The receipts for these sales showed that the taxpayer's customers were charged a tax rate that improperly included the restaurant tax. Accordingly, the taxpayer charged excess restaurant taxes to some of his customers. Section 59-12-107(3)(e) provides that where a seller collects excess tax (which includes restaurant tax), the seller will either refund the excess tax to its customers or remit the excess tax to the Tax Commission.<sup>4</sup> Because the taxpayer has not refunded the excess restaurant taxes to his customers, Utah law requires him to remit the taxes to the Tax Commission, which he also has not done. Accordingly, the Division properly imposed restaurant taxes on the taxpayer.

The taxpayer explained that he collected the excess restaurant taxes and kept them in an attempt to rectify the inability of his cash registers to accommodate more than one tax rate. The taxpayer's actions,

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<sup>4</sup> See also Rule 4(5) and Rule 16(A). Moreover, Section 59-12-603(7)(a)(i) provides that the restaurant tax will be administered, collected, and enforced with the same procedures used to administer, collect, and enforce sales and use tax.

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however, are not permissible under Utah law. His customers have paid the restaurant taxes at issue. As a result, he must either refund the tax to his customers or remit it to the Tax Commission. Because he has done neither, the Division's audit assessment should be sustained in its entirety.

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Kerry R. Chapman  
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division's audit in its entirety. 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.

R. Bruce Johnson  
Commission Chair

D'Arcy Dixon Pignanelli  
Commissioner

Michael J. Cragun  
Commissioner

Robert P. Pero  
Commissioner

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**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.