13-488
TAX TYPE: SALES AND USE TAX
TAX YEAR: 7-01-09 through 03-31-12
DATE SIGNED: 8-19-2014
COMMISSIONERS: B. JOHNSON, D. DIXON, M. CRAGUN, R. PERO
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**INITIAL HEARING ORDER** Appeal No. 13-488 Account No. ##### Tax Type: Sales and Use Tax Audit Period: 07/01/09 – 03/31/12 Judge: Chapman

Presiding:
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE FOR PETITIONER, Representative
TAXPAYER, Taxpayer
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General
RESPONDENT, 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 February 19, 2014.

PETITIONER("Petitioner" or "taxpayer") has appealed a sales and use tax assessment that Auditing Division (the "Division") imposed for the period July 1, 2009 through March 31, 2012 (the "audit period"). On January 10, 2013, the Division issued a Statutory Notice - Sales and Use Tax ("Statutory Notice"), in which it imposed sales and use tax and interest (calculated through February 9, 2013)[1] for the audit period, as follows:

Tax	Penalties	Interest	Total
$$$$$	$$$$$	$$$$$	$$$$$

The Division's assessment is comprised of four schedules. The only schedule that the taxpayer is contesting is Schedule 2, which comprises more than 98% of the entire audit. On Schedule 2, the Division assessed sales and use tax on a number of sales for which the taxpayer did not charge and collect sales tax from its customers. These sales are described on 22 separate invoices listed on Schedule 2.

The taxpayer is in the business of building and installing outdoor business signs and specializes in signs with (X) displays. Also, the taxpayer occasionally moves or replaces signs or portions of signs. The taxpayer collected sales tax on its sales of "smaller" signs that it considered to be sales of tangible personal property. The taxpayer, however, did not collect sales and use tax on the transactions described in the invoices identified on Schedule 2. The taxpayer proffered that it believed that the signs associated with these invoices were "permanent" signs that became part of the real property once they were built and installed. For this reason and because the taxpayer consulted with the Tax Commission on a number of occasions concerning the taxability of the signs it built and installed, it treated these transactions as sales of nontaxable real property.[2]

The Division agrees that the 3 transactions found on Invoice No. 272 (which is 1 of the 22 invoices identified on Schedule 2) should be removed from the audit because the transactions concern a deposit and not a taxable sale. As a result, the 3 transactions identified on Invoice No. 272 will be removed from the audit. In addition, the taxpayer agrees that it owes the tax the Division assessed on the transactions listed on 3 of

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1 Interest continues to accrue until amounts due are paid.

2 TAXPAYER is one of the partners of the taxpayer, which has been in business about four years. He claims that the taxpayer first became concerned about charging sales tax when a client claimed that they were improperly charging him sales tax on a sign that had become real property. TAXPAYER proffers that he, his partner, and their former accountant all called the "general number" of the Tax Commission for advice a number of times. He stated that between them, he would estimate they called between 10 and 12 times. He claims that they were told that the signs at issue would not be subject to sales tax because the signs were attached to real property and because USTC Publication 42 ("Publication 42") provided that sales of items attached to real property were not subject to taxation. TAXPAYER stated that they asked for this advice to be

Schedule 2's remaining 21 invoices. These transactions concern signs that are attached to customers' buildings and are found on Invoice Nos. 278, 292, and 301. The taxpayer explained that these signs were attached to the outsides of buildings with bolts that run through the walls to metal "plates" placed on the inside of the walls. The taxpayer explains that these signs can be moved to another site without destroying the signs, even though the process is labor intensive. Because the taxpayer is not contesting these transactions, the Division's assessment of tax on all transactions found on Invoice Nos. 278, 292, and 301 will be sustained.

The parties, however, disagree on the taxability of the transactions described on the remaining 18 invoices. For the most part, these invoices involve signs that are separate from the buildings in which the customers' businesses are located. Many of the signs contain (X) components installed on poles.

The Division determined that the transactions on these 18 invoices were taxable by relying on the Commission's ruling in *USTC Private Letter Ruling 97-035* (June 9, 1997) ("*PLR 97-035*").[3] In this ruling, the Commission considered whether electronic components installed on freeways retained their character as tangible personal property upon installation or whether they were converted to real property. The items at issue included VMS (variable message signs) electronic message boards, which provide traveler information and are "mounted along side or cantilevered over the highway," and "electronic components or computer components which are installed in metal cabinets along side the road to operate traffic signals." In the ruling, the Commission stated that:

> As a general rule, anything that is affixed to real property and that becomes an integral part of a real property improvement upon installation is treated like construction materials. However, moveable items that are attached to real property merely for stability or for an obvious temporary purpose are not considered to be part of the real property improvement.

In *PLR 97-035*, the Commission noted that none of the items at issue were built into the roadway. After applying the general rule, the Commission found that the VMS electronic message boards and the

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put in writing, but were told that it was the Tax Commission's policy not to respond in writing.

3 Redacted versions of private letter rulings can be viewed on the Tax Commission's website at

electronic and computer items all retained their character as tangible personal property upon installation. As a result, it appears that the Commission determined that the items were movable items that were attached to the real property merely for stability or for an obvious temporary purpose.

The taxpayer stated that the (X) signs at issue in this appeal are more permanent in nature and, thus, are different from signs that relay messages on the freeways. TAXPAYER stated that the freeway signs at issue in *PLR 97-035* are nothing like the signs the taxpayer builds and that that most businesses, including the taxpayer, will not build the freeway signs. The Division countered that the Utah Supreme Court also considered signs to be tangible personal property when addressing taxation issues in *Young Elec. Sign Co. v. Utah State Tax Commission*, 291 P.2d 900 (Utah 1955). The Division, however, did not know what types of signs were being discussed in *Young*.[4]

Most of the 18 transactions remaining at issue concern signs that consist of a steel pole with signage and/or (X) displays installed on or in "cabinets," which are typically located near the top of the pole. Occasionally, the signs look like a "monument" with the cabinet(s) containing the signage and/or (X) displays located at the top of the pole and a cabinet encased in block, stonework, or some other material located at the bottom of the pole. The taxpayer proffered that a significant portion of its business is building *new* signs. In these cases, the taxpayer will install the pole on which the cabinet(s) containing the signage and/or (X) display will be attached. Then, the taxpayer builds the cabinet(s) out of angle-iron steel and installs it on the pole, along with the signage and/or (X) display incorporated into it. The taxpayer explained that another portion of its business involves building and installing new angle-iron cabinets onto *existing* poles and incorporating the signage and/or (X) displays into the new cabinets. These jobs also entail removing the old cabinets from the pole. The different types of signs the taxpayer builds and the various transactions at issue will be discussed in

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http://tax.utah.gov/commission-office/rulings.

4 In the *Young* case, the signs are described as "electric signs." It does not appear that the issue in that case was whether or not the electric signs were personal or real property, which may explain why no detailed

more detail below.

Monument-Style Signs. The taxpayer proffers that 3 of the 18 invoices still in dispute involve monument-style signs that it built and installed, specifically Invoice Nos. 253, 259, and 268.[5] The taxpayer explained that all outdoor signs must be built so that they can withstand winds up to 120 mph. As a result, the taxpayer explains, the signs are built in such a way that they generally cannot be moved without destroying them. The taxpayer explained the process to build and install the monument signs, as follows:

All monument signs are initially constructed like the signs that consist only of a steel pole with the angle-iron cabinet(s) near the top on the pole. Regardless of the type of sign, a hole is dug in the ground where the sign is to be located with the depth of the hole dependent on the height of the steel pole on which the cabinet(s) will be installed. The depth and size of the hole is determined by an engineer. For shorter signs, the hole may only be several feet deep, perhaps 3 feet. For taller signs, the hole will be as deep as 10 feet. The steel pole is placed in the center of the hole, and the hole is filled with concrete (and sometimes rebar) to form the foundation of the sign. For shorter signs, the steel pole may be 6 to 8 inches in diameter. For larger signs, the steel pole may be up to 30 inches in diameter.

Once the steel pole is encased in concrete, the foundation is allowed to cure for about a week. For signs that need electricity, space is left for the electrical lines to be routed through the concrete foundation. Next, at its shop, the taxpayer constructs the cabinet(s) that will be attached to the pole and on which the signage or (X) panels will be installed. The taxpayer explained that the cabinets will be welded to the pole after the pole is installed. The taxpayer claims that the pole and cabinet(s) would be too heavy to install together because a cabinet alone is often comprised of 1,500 pounds of angle-iron steel. Once the foundation is cured, the cabinet(s) will be brought to the site and lifted with a crane to slide over the pole.

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description of the signs was included in the decision.

5 It can be argued that the sign the taxpayer sold in Invoice No. 238 is also a monument-style sign, because concrete blocks surround the bottom portion of the sign. On the other hand, this sign is very tall and

A cabinet is comprised of an angle-iron "skeleton" to which facing is added along with signage and/or (X) components. For a monument-style sign, the skeleton goes from the foundation to the top of the sign. The skeleton is covered with stucco, aluminum, or plastic to which vinyl signage or aluminum letters can be added. As an alternative, (X) or light components can also be attached to the skeleton. Finally, stonework or other decorative elements can be attached to the skeleton by attaching plywood or a concrete panel to the skeleton and then applying the stone or other materials. There may even be doors located on the aluminum sides of a cabinet that will allow limited access into the skeleton for smaller cabinets and access large enough for a person to enter the skeleton for larger cabinets. The center of the cabinet is constructed with a hole or "tunnel" in the middle so that the crane can slide the cabinet over the pole and into place. While the crane holds the cabinet in place, a welder will weld the cabinet to the pole at about 50 "weld points" along the tunnel. Cities usually require the welds to be inspected.

The taxpayer explained that moving a monument-style sign would destroy much of the sign and cost nearly as much as building a new sign. To move a monument sign, the stonework or blocks would have to torn away. Then, the "roof" and faces of the sign would have to be "ripped" off. Next, the weld points that connect the skeleton to the pole would have to be cut. The taxpayer explains that it is much harder to cut weld points than to create weld points and that different tools are required to cut welds than to create them. The taxpayer explained that when cutting the weld, the entire center portion of the skeleton is cut out and would have to be reconstructed if moved and reinstalled. The taxpayer also explained that when cutting the welds for smaller cabinets, one may not be able to reach all of the weld points to cut them.

In addition, an excavator would be needed to dig up the steel pole and concrete, which could not be reused. As a result, moving a sign would destroy the foundation, the steel pole, and any stonework or other masonry. At the new site, a new pole and foundation would be put in place. The skeleton would be taken to

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does not have the same appearance as the three other monument-style signs.

the shop to take it apart and rebuild the center tunnel structure that fits over the pole. Then, the process described earlier would have to take place (i.e., weld the skeleton to the pole, add the roof, facing, and sides to the cabinet, apply plastic or aluminum lettering, add (X) components, and build the masonry). The taxpayer stated that it receives a couple of calls a year from customers who inquire about moving their signs to a new location and that it generally tries to talk the customers out of moving the signs. For example, the taxpayer's charge to build the monument-style sign on Invoice No. 253 was around $$$$$. The taxpayer estimated at the hearing that the cost to move this sign would be $$$$$ to $$$$$, at a minimum.

The taxpayer also explained that if a new business moved in and wanted the name on the monument-style changed, it would probably cost $$$$$ to $$$$$ to remove and replace the roof and facing from the skeleton cabinet and apply new plastic or aluminum letting to the facing. The taxpayer also stated that it once asked a customer who went out of business if it could get some scrap parts from the sign it had built for the customer and that the customer refused because he claimed that the sign added value to his property.

Pole-Style Signs. The other signs at issue are generally taller than monument-style signs. For these "pole-style" signs, the steel pole is often exposed between the foundation and the bottom of the angle-iron cabinet(s) welded on near the top of the pole. Some of these signs, however, may have an angle-iron skeleton attached at the bottom of the pole that is narrower than the wider cabinet(s) at the top of the pole that holds the signage. In this case, the narrower skeleton is covered in aluminum or some other decorative wrap. Because the pole-style signs are generally taller, they require a deeper foundation and a steel pole with a wider diameter. They generally do not have stonework or other masonry work. Otherwise, they are built in manner similar to that already described for the monument-style signs.

The taxpayer explained that it is possible, but expensive, to move a pole-style sign. The taxpayer stated that it was once hired by UDOT to move a tall pole-style sign because it was expanding the street on which the sign was located. TAXPAYER stated that the sign was a $$$$$ sign and that it cost $$$$$ to move

it.

(X) Displays. A component that the taxpayer often builds and installs onto a sign's cabinet is an (X) display, which can represent 50% or more of the total cost of the sign. For example, the taxpayer charged its customer approximately $$$$$ to build the sign identified on Invoice No. 238. At the hearing, the taxpayer estimated that the (X) component of this sign represented $$$$$ to $$$$$ of that total charge. In addition, for the monument-style sign associated with Invoice No. 253, the taxpayer estimated that the cost of the (X) component represented about half of the total sign charge of approximately $$$$$.

The taxpayer contends that the (X) components cannot be moved from one sign to another because the components (mainly (Y) and (Z)) are located in their own metal case that is itself welded to the cabinet skeleton. The taxpayer stated that the (X) component cannot be used for any other sign and that it is better to "start over." The taxpayer explained that it would "destroy" the (X) component to cut it off from the skeleton and that it would have to be rebuilt at the shop in order to reuse it.

Remodeling Old Signs. The taxpayer also performs work on old signs, either remodeling them or replacing a cabinet on them. For example, the taxpayer may be asked to provide new plastic stickers (or lettering) to apply to the cabinet's faces, or it may be asked to replace the faces and lettering. On occasions, the taxpayer may replace one or more of the cabinets that are attached to the sign or to replace a cabinet that has plastic signage with a cabinet that has (X) components. On other occasions, the taxpayer may replace everything except the pole and foundation. The taxpayer explained that when it is hired to work on an old sign, it will first go to city records to see if the pole was constructed strong enough to support the cabinets and signage the customer is requesting. The taxpayer stated that on rare occasions, it discovers that the foundation is insufficient to support the weight of the new cabinet(s) and that it will have to add concrete to the existing foundation.

Replacing a Cabinet on an Exiting Pole. One of the invoices, Invoice No. 276, involves a transaction for a customer who owned a sign at one location and hired the taxpayer to remove the cabinet from that sign's pole and install it on another sign's pole at a different location. As the taxpayer explained, this rarely happens because the expense of moving a sign or cabinet is high. TAXPAYER indicated it was the only time he has seen a portion of an old sign moved to a new site in his ##### to ##### year career. For these reasons, the taxpayer claims that the signs still at issue are permanent and not, as the Division contends, transient. For the sign at issue on Invoice No. 276, the taxpayer moved the "top" cabinet that contained aluminum faces on which tenants' names could be applied with vinyl or plastic panels. In addition, the taxpayer built new the "bottom" cabinets that contained an (X) component and to which decorative wraps were installed. The taxpayer had to take the "old" top cabinet to its shop and rebuild it so that it could be welded to the pole at the new location.

More commonly, the taxpayer will replace the only cabinet on an existing pole or replace one of several existing cabinets on a pole instead of moving a cabinet from one pole to another. For example, Invoice No. 296 involved a sign where the taxpayer was hired to "cut out" one of the cabinets that existed on the pole and replace it with a cabinet that contained an (X) component. This sign has two poles with the cabinets located between the poles and welded to both of the poles. The taxpayer stated that the cabinet it replaced with the (X) component cabinet had been a cabinet containing signage (i.e., not (X) components) and that it took the old cabinet to the dump.

Invoice No. 241 concerns another example of replacing an old cabinet. For the transaction at issue on this invoice, the taxpayer was hired to replace only one of several cabinets that had originally been installed on a one-pole sign. The taxpayer replaced a cabinet with an old (X) component (about ##### years old) with a new cabinet containing a new (X) component. The remaining cabinets on the sign were not replaced. The taxpayer stated that it threw the old cabinet and the old (X) components into the garbage.

Tangible Personal Property That Taxpayer Admits to be Attached to Signs and Subject to Taxation. The taxpayer conceded that some of the lettering and neon tubing it added to some signs remained tangible personal property and that it would be willing to pay sales tax on these items. For example, the amount the taxpayer charged for the sign on Invoice No. 238, as discussed earlier, was approximately $$$$$. The taxpayer concedes that the lettering showing the customer's name, which it attached to the top of the sign, remains tangible personal property upon installation. The taxpayer estimates that the lettering cost approximately $$$$$. As a result, the taxpayer concedes that it owes sales tax on $$$$$ of the approximately $$$$$ charge shown on Invoice No. 238.[6]

The taxpayer also concedes that it owes sales tax on $$$$$ of the approximately $$$$$ charge on Invoice No. 235. The taxpayer contends that the $$$$$ amount relates to plastic lettering that the taxpayer applied to the cabinet it constructed and installed on the pole. The taxpayer concedes that the plastic lettering remained tangible personal property after installation. Furthermore, TAXPAYER concedes that neon tubing it installed to the exterior of signs at issue remains tangible personal property after installation, specifically for the remodeled sign on Invoice No. 230 and the new sign on Invoice No. 228. For each of these transactions, which had a total cost between $$$$$ and $$$$$, the taxpayer admits that it owes sales tax on $$$$$ of the charge to account for the neon tubing.[7] The taxpayer admitted that these partial amounts on which it concedes

6 The taxpayer explained that the aluminum lettering on this sign could be moved and installed to another sign at another location for about $$$$$. Some signs, however, have plastic faces where vinyl panels can be "changed out" whenever a new business moves in. The taxpayer explained that a new vinyl panel applied to a cabinet's aluminum facing might cost $$$$$ per side to change out. For example, on one of the invoices at issue, specifically Invoice No. 296, the taxpayer broke out the price of the vinyl panel as a separate line item at $$$$$, as opposed to the other charge of approximately $$$$$ to install an (X) sign. The taxpayer admits that it owes sales tax on the separate invoice charge of $$$$$ for the vinyl panel.

7 On one of the invoices at issue, specifically Invoice No. 258, the taxpayer broke out the price of the neon tubing as a separate line item at $$$$$, as opposed to the other charge of $$$$$ to retrofit a triple-sided (X) sign. The taxpayer admits that it owes sales tax on the separate invoice charge of $$$$$ for the neon tubing.

to owe tax are not always shown on the invoices or found in its records. TAXPAYER stated that his partner estimated the amounts for those invoices where the lettering or neon tubing was not separately stated.

Lighted Wall. One of the transactions remaining at issue, however, does not concern a monument or pole-style sign. Instead, it concerns a "lighted wall." On Invoice No. 257, the taxpayer charged DEALERSHIP $$$$$ to "manufacture & install new (X) lit wall with radius." The taxpayer explains that DEALERSHIP was remodeling its dealership building and that the dealership wanted a lighted wall incorporated into the building. The taxpayer proffers that many dealerships are now incorporating such walls into their buildings. The taxpayer also proffers that a contractor who is building or remodeling a dealership usually knows how to build a lighted wall, but that DEALERSHIP'S contractor did not know how to build one. As a result, the dealership hired the taxpayer to build it.

The taxpayer explained that the lighted wall was built with metal studs, like the other walls of the dealership. Like other walls, the metal studs are attached to concrete footings, and the taxpayer had to obtain a regular building permit to build it. Instead of the outside portion of the wall being sheetrocked or having stucco or stonework, the outside of this wall is covered with white plastic so that lights built inside the wall can shine through and light the wall up. Although the invoice description to an "(X) lit wall," the taxpayer explained that the lights inside the wall are not (X) lights like those that it installs to cabinets on pole signs. On the lighted wall, the taxpayer also installed three-dimensional "channel" letters containing the words "DEALERSHIP." The channel letters are not themselves lighted, but are illuminated to some extent by the lighted wall to which they are attached. TAXPAYER stated that the dealership provided the channel letters.[8]

8 The taxpayer provided information indicating that the cost of the channel letters is approximately $$$$$. It is unknown if this would have been the cost of the letters had the taxpayer provided them (instead of the dealership) or whether this is the approximate cost the taxpayer charged to install them on the wall it built for the dealership.

The taxpayer contends that the wall it built for DEALERSHIP is real property because it is part of the dealership's building. The Division, however, contends that the entire wall is a "different type of sign" that should be considered tangible personal property because the Commission has previously found that signs are tangible personal property for sales and use tax purposes.

APPLICABLE LAW

1. Utah Code Ann. §59-12-103(1) (2011)[9] provides that the following transactions are subject to Utah sales and use tax, 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;
> . . . .
> (2) . . . .
> (d) . . . .
> (ii)[10] Subject to Subsection (2)(d)(iii), for a bundled transaction other than a bundled transaction described in Subsection (2)(d)(i):
> (A) if the sales price of the bundled transaction is attributable to tangible personal property, a product, or a service that is subject to taxation under this chapter and tangible personal property, a product, or service that is not subject to taxation under this chapter, the entire bundled transaction is subject to taxation under this chapter unless:
> (I) the seller is able to identify by reasonable and verifiable standards the tangible personal property, product, or service that is not subject to taxation under this chapter from the books and records the seller keeps in the seller's regular course of business; or
> (II) state or federal law provides otherwise; or
> . . . .
> (iii) For purposes of Subsection (2)(d)(ii), books and records that a seller keeps in the seller's regular course of business includes books and records the seller keeps in the regular course of business for nontax purposes.
> . . . .

2. UCA §59-12-102(113) defines "tangible personal property" to mean, as follows in pertinent part:

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9 All cites are to the 2011 version of Utah law, unless otherwise indicated.

10 Subsequent to the refund period at issue, subsection (2)(d)(ii) has been renumbered.

(a) Except as provided in Subsection (113)(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.
. . . .

3. For purposes of "repairs or renovations of tangible personal property," Section 59-12-102(72) defines "permanently attached to real property" to mean, as follows in pertinent part:

(a) "Permanently attached to real property" means that for tangible personal property attached to real property:
(i) the attachment of the tangible personal property to the real property:
(A) is essential to the use of the tangible personal property; and
(B) suggests that the tangible personal property will remain attached to the real property in the same place over the useful life of the tangible personal property; or
(ii) if the tangible personal property is detached from the real property, the detachment would:
(A) cause substantial damage to the tangible personal property; or
(B) require substantial alteration or repair of the real property to which the tangible personal property is attached.
. . . .
(c) "Permanently attached to real property" does not include:
(i) the attachment of portable or movable tangible personal property to real property if that portable or movable tangible personal property is attached to real property only for:
(A) convenience;
(B) stability; or
(C) for an obvious temporary purpose;
. . . .

4. Utah Admin. Rule R865-19S-58 ("Rule 58") provides sales and use tax guidance to real property contractors and repairmen, as follows in pertinent part:

(1) Sales of construction materials and other items of tangible personal property to real property contractors and repairmen of real property are generally subject to tax if the contractor or repairman converts the materials or items to real property.
(a) "Construction materials" include items of tangible personal property such as lumber, bricks, nails and cement that are used to construct buildings, structures or improvements on the land and typically lose their separate identity as personal property once incorporated into the real property.

> (b) Fixtures or other items of tangible personal property such as furnaces, built-in air conditioning systems, or other items that are appurtenant to or incorporated into real property and that become an integral part of a real property improvement are treated as construction materials for purposes of this rule.
>
> . . . .
>
> (4) This rule does not apply to contracts where the retailer sells and installs personal property that does not become part of the real property. Examples of items that remain tangible personal property even when attached to real property are:
>
> (a) moveable items that are attached to real property merely for stability or for an obvious temporary purpose;
>
> (b) manufacturing equipment and machinery and essential accessories appurtenant to the manufacturing equipment and machinery;
>
> (c) items installed for the benefit of the trade or business conducted on the property that are affixed in a manner that facilitates removal without substantial damage to the real property or to the item itself and
>
> . . . .

5. Utah Admin. Rule R865-19S-60 ("Rule 60") provides guidance concerning sales of fixtures, as follows in pertinent part:

> . . . .
>
> C. Sales of trade fixtures to a business owner are taxable as sales of tangible personal property even if the fixtures are temporarily attached to real property.
>
> 1. Trade fixtures are items of tangible personal property used for the benefit of the business conducted on the property.
>
> 2. Trade fixtures tend to be transient in nature in that the fixtures installed in a commercial building may vary from one tenant to the next without substantial alteration of the building, and the building itself is readily adaptable to multiple uses.
>
> 3. Examples of trade fixtures include cases, shelves and racks used to store or display merchandise.
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> . . . .

6. USTC Publication 42 ("Publication 42") provides sales and use tax guidance concerning the difference between tangible personal property that is attached to real property. Publication 42 was revised in June 2011. This version of the publication provides, as follows in pertinent part:[11]

> **Real Property**
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> . . . .

11 Publication 42 also contains a table with examples to help taxpayers understand the distinctions in the taxability of a number of different items. The table, however, does not contain any information about the taxability of "signs."

> Buildings are considered real property if they are permanently attached to real property, such as a concrete or steel foundation. A foundation is defined as the base of the building that is embedded below the surface of the soil. Buildings that can be moved without serious damage to either the structure or the real property are considered personal property. Even if buildings are rarely or never moved, they remain personal property unless they are attached to the land.
>
> An item that serves a trade or business is considered part of real property if the building is specially designed for the item. For example, a grocery store is built with troughs in the floor to hold refrigeration cases. Or a building may be designed to house a hydraulic hoist which is withdrawn beneath the floor when not in use.
>
> . . . .
>
> **Personal Property Permanently Attached to Real Property**
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> The above rules do not apply to sales of items that remain tangible personal property after they are attached to real property. Sales of tangible personal property attached to real property are taxable to the last buyer.
>
> Tangible personal property is considered permanently attached to real property if it must be attached to function correctly and it will remain attached over its useful life. This includes an accessory which is essential to the operation of the tangible personal property. Often, removing permanently attached personal property would seriously damage it or require a major repair of the real property. Permanently attached personal property may be temporarily removed for repair or renovation onsite and still be considered permanently attached.
>
> Permanently attached personal property does not include movable tangible personal property that is attached for convenience, stability or an obviously temporary purpose.
>
> Some items that remain tangible personal property even when permanently attached to real property are:
>
> . . . .
>
> • Trade fixtures. Unlike real property fixtures discussed above, trade fixtures can vary from one tenant to another without major change to the building. Examples of trade fixtures include dress racks, display cases, barber chairs, dental chairs and physician tables.
>
> . . . .
>
> The following items are not considered tangible personal property permanently attached to real property:
>
> • A dishwasher, refrigerator, freezer, microwave, stove, washer, dryer or similar appliance.
>
> • Manufacturing equipment and trade fixtures that are attached for convenience, stability or an obviously temporary purpose.
>
> . . . .

7. UCA §59-1-1417 (2013) provides that the burden of proof is 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
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> (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.
>
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DISCUSSION

Burden of Proof. Before addressing the underlying tax issue, burden of proof needs to be discussed. The taxpayer claims that the Division should have the burden of proof to show that the signs at issue remain personal property upon installation instead of becoming part of the realty. Section 59-1-1417, however, provides that the burden of proof is on the petitioner in cases before the Commission (with limited exceptions not applicable to this case). The taxpayer has not provided any other statute or legal precedent to show that the Division has the burden of proof under the circumstances of this case. Accordingly, the burden of proof is on the taxpayer to show that the Division improperly assessed sales tax on the transactions still at issue. Given that the burden of proof is on the taxpayer, the Commission will now address whether the taxpayer has shown, by a preponderance of the evidence, that the Division has improperly determined that the transactions at issue were taxable sales of items that did not become part of the realty, but remained personal property after installation.

Parties' Positions. The taxpayer asks the Commission to find that the charges shown on the 18 invoices remaining at issue are nontaxable charges to build and install real property, with the exceptions concerning lettering, neon tubing, and vinyl panels, as discussed earlier. The taxpayer contends that the

property the Commission addressed in *PLR 97-035* is different from the signs at issue in this appeal. The taxpayer contends that the signs at issue in this appeal are intended to be permanent, whereas there is no indication that the signs described in *PLR 97-035* are permanent or would be damaged to any significant extent if moved. Furthermore, the taxpayer contends that the signs attached to freeways to relay messages are an entirely different product than the signs at issue in this appeal.

The taxpayer also contends that Rule 58 supports its argument that the various signs at issue become real property and lose their tangible personal property character upon installation. The taxpayer points out that Rule 58(4)(c) provides that tangible personal property attached to real property remains tangible personal property if the items "are affixed in a manner that facilitates removal without substantial damage to the real property or to the item itself." Because the poles, cabinets, and (X) components that comprise the signs at issue cannot be removed without substantial damage to the items, the taxpayer contends that Rule 58 makes clear that the signs at issue do not remain tangible personal property, but become real property, upon installation.

In addition, the taxpayer contends that its position is supported by Publication 42. The taxpayer refers the Commission to the last two paragraphs of the "Real Property" section of the publication, which provides that a building that is permanently attached to real property with a concrete or steel foundation is considered real property. The taxpayer contends that the signs at issue should be treated the same as a building because the pole that holds them is real property that is cemented into the ground.

Lastly, the taxpayer contends that Section 59-12-102(72)(c), in which the term "permanently attached to real property" is defined, also supports its position.[12] The taxpayer points out that this definition provides

12 The term "permanently attached to real property" is found in another definition, specifically the definition of "repairs or renovations of tangible personal property" in Section 59-12-102(93) (2011). These definitions are directly applicable to Section 59-12-103(1)(g), a tax imposition statute that imposes sales and use tax on "amounts paid or charged for services for repairs or renovations of tangible personal property." At issue in this appeal is a different tax imposition statute, specifically Section 59-12-103(1)(a), which imposes

that "permanently attached to real property" does not include the attachment of movable personal property to real property if the personal property is attached only for convenience, stability, or for an obvious temporary purpose. The taxpayer contends that because the signs at issue are permanent and are intended to remain attached to real property for the life of the sign, this definition makes clear that they are permanently attached to real property and, thus, converted to real property upon installation.

The Division, on the other hand, asks the Commission to consider that the taxpayer did not treat the transactions that remain at issue as sales of real property because it did not pay sales and use tax on the items it purchased and consumed to construct the signs. The taxpayer could not refute the Division's statement, replying that it did not have this information.

The Division also states that the Commission has made clear in *PLR 97-035* that signs remain tangible personal property after installation. Moreover, the Division contends that Rule 58(4)(a) provides that items of movable tangible personal property installed to real property for purposes of stability remain tangible personal property. The Division contends that the evidence shows that the signs at issue are movable and that they are attached to real property for purposes of stability. Specifically, the Division points out that the taxpayer's testimony and evidence show that the signs can be moved if the business moves. The Division contends that its position is further supported by the definition of "permanently attached to real property," which provides that movable tangible personal property attached merely for stability is not considered permanently attached to real property. Finally, the Division points out that Rule 60(C) provides that trade fixtures remain tangible personal property. The Division contends that the signs at issue are trade fixtures because they are transient in nature.

However, if the Commission were to find that the *new* signs the taxpayer built and installed became part of the realty, the Division asks the Commission to at least find that the transactions involving the

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tax on sales of tangible personal property. Regardless, the Commission does not consider it inappropriate to

renovation and/or replacement of *old* signs and cabinets were taxable. The Division argues that it is clear that the transactions involving "remodeled" signs are taxable because the cabinets that the taxpayer either moved from one pole to another or replaced with a new cabinet are transient in nature and, thus, remain tangible personal property after their installation.

Finally, the Division argues that if any of the transactions at issue are "bundled transactions" (i.e., sales of *both* nontaxable real property and taxable tangible personal property), the entire transaction is subject to taxation under Section 59-12-103(2)(d)(ii). The Division points out that the invoices do not break out the amount of the transaction that is taxable and the amount that is nontaxable. The Division also points out that the taxpayer has not provided any records to show what amounts are taxable and nontaxable for such transactions. As a result, if any transaction is a bundled transaction, the Division asks the Commission to sustain the tax it assessed on the entire transaction. Although there may be no records, the taxpayer contends that the vast majority of any "mixed" transaction at issue is for nontaxable real property. For such sales, the taxpayer asks the Commission to find that any tangible personal property included in the transactions was incidental to the sale of nontaxable real property and, thus, to find that the entire sale is nontaxable (subject to its concession concerning the invoices on which it conceded some liability for lettering, neon tubing, and vinyl panels).

Real Property versus Personal Property. Section 59-12-103(1)(a) imposes a tax on sales of tangible personal property. However, sales of real property are not subject to taxation. In dispute is whether the signs still at issue become part of the underlying realty or remain personal property after installation. There is no sales tax statute or rule that specifically addresses the taxability of signs. The Division's argument that *PLR 97-035* and the *Young* case show that all electronic signs remain personal property upon installation is not convincing. There is little, or no, information about the signs at issue in the *Young* case. In addition, the

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consider the definition of "permanently attached to real property" and use it for guidance in this case.

electronic message boards and electronic boards at issue in *PLR 97-035* appear to involve personal property that could be moved from place to place without damaging the personal property.

For the signs at issue in this case, it was unrebutted that the foundation, the pole, and the electronic components would be destroyed if moved and that the iron cabinets would have to be rebuilt if moved. In addition, it is noted that in *Nickerson Pump & Machinery Co. v. State Tax Commission*, 361 P. 2d 520 (Utah 1961), the Court observed that "[w]hether and when personalty becomes realty is a very difficult question to determine and the facts peculiar to each case must usually determine that question." For these reasons, the specific, or peculiar, facts pertaining to the signs at issue in this case must be analyzed to determine whether or not they remain personal property upon installation for sales tax purposes. They do not remain personal property upon installation merely because they are signs or have electronic components.

Furthermore, it not dispositive that signs become real property upon installation because they are attached to the realty with a concrete foundation, even though Publication 42 indicates that *buildings* permanently attached to a concrete foundation are considered real property. All of the facts concerning a sign must be considered when determining whether it becomes part of the realty, not just whether the sign's pole is attached with a concrete foundation.[13] Rule 58(4)(c) and Section 59-12-102(72)(c) provide some general

13 For example, the Commission considered the taxability of certain signs attached to real property in *USTC Appeal No. 08-1683* (Initial Hearing Order Oct. 1, 2009). In that case, the Commission found that awning signs attached by bolts and screws to buildings and "lawn signs" attached by bolts and screws to steel posts cemented into the ground remained personal property after installation. The taxpayer in that case had not installed the steel posts and cement for the lawn signs, but had replaced all or parts of the signs that were attached to the posts with bolts and screws. Redacted versions of this and other Commission decision can be viewed on the Tax Commission's website at http://tax.utah.gov/commission-office/decisions.

In addition, in *USTC Private Letter Ruling 05-003* (Issued September 27, 2005), the Commission found that playground equipment bolted to posts that were cemented in the ground remained personal property after installation, in part, because the posts and playground equipment could all be moved to another location without any significant damage to either.

Although neither party mentioned these prior Commission decisions, they illustrates that items attached to real property with concrete may remain personal property after installation, depending on all of the facts.

guidance and indicate that items become part of the realty if their removal would cause substantial damage to the real property or to the item itself. It was unrebutted that large portions of the signs at issue in this case would be destroyed or damaged if moved. However, this is just one of a number of factors that the Utah Supreme Court has considered when determining whether an item, upon installation, remains personal property or becomes part of the underlying realty.

In several cases, the Utah Supreme Court has listed a number of factors to be considered when determining whether personal property becomes part of the realty upon installation. These factors can be synthesized into the following nine factors: 1) whether the property is removable without harm to the structure on which it is placed; 2) whether the property is manufactured with the idea that it could be used elsewhere; 3) whether the parties to the transaction contemplated that the property would be removed for repairs or replacement; 4) whether the primary purpose of the transaction was for the property or the installation of the property; 5) whether the installation was for convenience; 6) whether the transaction indicated that the property was to be treated as real property after installation; 7) whether the purchaser intended to purchase real property; 8) whether the property becomes inseparably meshed into a greater facility which is the object of the transaction; and 9) whether the property becomes attached to real property."[14] Each factor will be discussed separately.

First Factor. The first factor is whether the property is removable without harm to the structure on which it is placed. The signs still at issue are comprised of various parts. Some of the parts, specifically the pole and foundation, cannot be removed without some damage to the underlying realty. However, the hole left in the ground by the removal of the pole and foundation can be repaired. On the other hand, an individual

14 *See Nickerson*; *Chicago Bridge & Iron Co. v. State Tax Comm'n*, 839 P.2d 303 (Utah 1992); and *B-J Titan Services v. State Tax Comm'n*, 842 P.2d 822 (Utah 1992).

cabinet on the pole can be removed without any damage to the land. Similarly, the faces on a cabinet or the signage on the faces or other parts of the cabinet can be removed without damage to the underlying land.

Second Factor. The second factor is whether the property is manufactured with the idea that it could be used elsewhere. It is undisputed that the signs' poles and foundations cannot be used elsewhere. It is also undisputed that the (X) components, which comprise a significant portion of a sign's cost, cannot be removed and used elsewhere. For monument-style cabinets, any rock or stonework cannot be moved and used elsewhere. Furthermore, the iron cabinets cannot be used elsewhere without being rebuilt because cutting all the welds that attach the cabinet to the pole destroys a portion of the cabinet. Some signs, however, have lettering attached by bolts that could be moved to another location without damage to the lettering and without significant damage to the sign. TAXPAYER indicated that it is rare for a sign such as those at issue in this case to be moved.

Third Factor. The third factor test is whether the parties to the transaction contemplated that the property would be removed for repairs or replacement. Again, once one of the signs at issue is installed, the pole, the foundation, and the (X) components remain in place for their useful lives because they are destroyed upon removal. Some of the transactions still at issue involve the replacement or removal of a cabinet. However, removing a cabinet from a pole is timely and costly. Numerous welds must be cut to remove a cabinet from a pole, and a crane is needed to remove and replace cabinets. It is an easier process to replace the faces, sides, and the roof that are attached to a cabinet. However, TAXPAYER suggests that these portions of the sign may be damaged because they are "ripped" off. On the other hand, it is apparent that whenever a new business enters the premises, the plastic or vinyl signage may be replaced at a relatively low cost and without much, if any, damage to the remainder of the sign. Similarly, any lettering or neon tubing attached to the sign can be removed or replaced without much damage to the sign.

Fourth Factor. The fourth factor is whether the primary purpose of the transaction was for the property or the installation of the property. No information was provided to show how much of the charge for each transaction was for the installation and how much was for the property. However, the installation costs appear to be significant because an engineer is required to determine the depth of the foundation, city inspections are needed for the installation, and a crane is needed not only for the installation of the pole, but also later for the installation of the cabinets.

Fifth Factor. The fifth consideration is whether the installation was for convenience. The taxpayer has not installed the signs at issue merely for convenience. The taxpayer stated that governmental entities require that the signs must be constructed so that they can withstand winds of 120 miles per hour. To meet this requirement, the poles are encased in a concrete foundation that may be deep as 10 feet and the cabinets are welded to the poles at as many as 50 weld points. The testimony at the hearing indicates the installation of the sign appears to be far more significant than just a convenience.

Sixth and Seventh Factors. The sixth and seventh factors are related, whether the transaction indicated that the property was to be treated as real property after installation and whether the purchaser intended to purchase real property. Neither party has provided any contracts between the taxpayer and its customers that might show what the parties were contemplating. The taxpayer contends that when its customers buy signs like those at issue, they think that they are buying something that increases the value of their real property. The taxpayer explained that it collected sales tax on sales of signs that were less permanent than the ones at issue. The taxpayer also indicated that it considered these more permanent signs at issue to be items that became real property upon installation because of the advice it received from the many calls it made to the Tax Commission. Furthermore, the taxpayer did not collect sales and use tax from its customers for the signs at issue, which would be consistent with sales of items that become part of the realty upon installation. On the other hand, if the taxpayer had intended to sell real property to its customers, it would have paid sales and use

tax on the items that it purchased and incorporated into the signs.[15] The Division claims that the taxpayer did not pay sales tax on the items it purchased and incorporated into the signs. The taxpayer stated that it did not have information at the Initial Hearing to know whether or not it paid sales and use tax on the items it incorporated into the signs at issue.

Eighth Factor. The eighth factor was whether the property becomes inseparably meshed into the greater facility which is the object of the transaction. The signs at issue do not become part of the customer's building.[16] However, businesses often have outdoor signs on the real property. It appears that the signs at issue almost always remain at the property if one business vacates the property and another business then occupies it.

Ninth Factor. The ninth factor is whether the property becomes attached to real property.[17] It is clear that the pole and foundation become attached to the real property. It is also clear that the cabinets and (X) components are attached when they are welded to the pole. The taxpayer proffered that any (X) components removed from the pole are destroyed and that any cabinets removed are significantly damaged and must be rebuilt before they can be reused. This information was unrefuted.

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15 In *Chicago Bridge*, the Utah Supreme Court noted that "[r]eal property contractors are treated as consumers because their purchases of materials that are incorporated into real property are the last transactions in which those materials can be subjected to the sales tax.

16 One of the transactions at issue concerns the "wall" the taxpayer built and installed for DEALERSHIP (Invoice No. 257). This one transaction is different from the other transactions at issue, which concern monument and pole-type signs. As a result, the "wall" transaction will be discussed separately later in the decision.

17 In a property tax case, the Utah Supreme Court determined that the test in determining whether property became real property upon installation was whether the property is "erected upon or affixed to" the underlying property. *Crossroads Plaza Ass'n. v. Pratt*, 912 P.2d 961 (Utah 1996). In that case, the Court noted "that even jurisdictions which, by statute, require the improvements to be 'permanently affixed' do not equate permanence with perpetuity." The Court also noted that "[i]t is sufficient if the item is intended to remain where affixed until worn out, until the purpose to which the realty is devoted is accomplished or until the item is superseded by another item more suitable for the purpose." *Citing Michigan Nat'l Bank v. City of Lansing*, 96 Mich. App. 551, 293 N.W.2d 626 (1980); aff'd, 322 N.W.2d 173 (Mich. 1982).

When all nine of these factors are considered, it appears that transactions that involve the taxpayer installing new signs like those at issue are sales of real property. The signs are permanently affixed to the ground. It is rare that a sign like those remaining at issue would be moved and, to do so, would destroy a significant portion of the sign and/or require significant repairs.

The Division asks, at the least, for the Commission to find that the transactions involving the remodeling or replacement of a cabinet to be transactions involving property that remains personal property and does not become real property upon installation. The Division suggests that this result is appropriate for these transactions because they show that cabinets are transient property intended to be moved or replaced. The facts, however, show otherwise. The effort required to move or replace an old cabinet is substantial because of the manner in which they are attached to the pole. Instead of being transient, the cabinets appear to be permanent in the sense that they will remain in place throughout their useful life or until the cabinet is superseded by another cabinet (such as an (X) cabinet) that is more suitable for the business's purpose.

For these reasons, the Commission should reverse the Division's assessment of tax on the 18 invoices that remain at issue (with certain exceptions concerning lettering and neon tubing that will be discussed later in the decision). The Commission's conclusions concerning the 18 signs at issue in this case is not contrary to and should not be considered a reversal of the Commission's decisions in *PLR 97-035* concerning the VMS electronic message boards on highways and *Appeal No. 08-1683* concerning awnings and "lawn signs." The items at issue in *PLR 97-035* and in *Appeal No. 08-1683* were movable and appear to be attached only by bolts and screws to posts that were not part of those transactions. The only items associated with the signs at issue in this appeal that appear to have transient or temporary characteristics are the lettering and the vinyl panels that are specific to the current business occupying the premises.

As mentioned earlier, however, the taxpayer has admitted it owes a small amount of sales and use tax on the 18 invoices remaining at issue. The taxpayer has proposed that it pay sales and use tax on the lettering,

neon tubing, and vinyl panels that it added to 6 of the 18 signs at issue. For 2 of these 6 signs, the taxpayer broke the price of these items out as a separate line item on the invoices, and the Division assessed tax on these items. Specifically, the Commission should sustain the Division's assessment of tax on the $$$$$ charge for neon tubing, as shown separately on Invoice No. 258, and on the $$$$$ charge for a new vinyl panel, as shown separately on Invoice No. 296. The other charges on these two invoices, however, are nontaxable because they concern sales of signs that become part of the realty upon installation.

There are two other signs at issue on which the taxpayer also installed neon tubing. On the invoices for each of these signs, however, the taxpayer did not break out the charge for the neon tubing separately from the charge for the remainder of the sign. These transactions are found on Invoice Nos. 228 and 230, which are sales of signs for approximately $$$$$ and $$$$$. For each of these charges, the taxpayer estimates that approximately $$$$$ of the charge was for the taxable neon tubing and that the remainder of the charge was for the nontaxable sign to which the neon tubing was attached. Under these circumstances, the Division claims that its assessments on the entire charges of approximately $$$$$ and $$$$$ should be sustained because the taxpayer has not proffered any books or records that identify which portion of each charge is nontaxable and which is taxable (i.e., the taxpayer has no books or records to show that the charge for the neon tubing to each of these two customers was $$$$$).[18]

The taxpayer admits that it does not have books or records that will show that $$$$$ of the charges for Invoice Nos. 228 and 230 was for taxable neon tubing and that the rest of the charges were for the nontaxable signs. However, Invoice No. 258, which was previously discussed, shows that the taxpayer charged another customer $$$$$ for neon tubing on a different invoice involving the sale of a sign during the tax period at

18 The Division refers the Commission to Section 59-12-103(2)(d)(ii), which provides that a "bundled transaction" including the sale of both taxable and nontaxable items will be fully taxable unless the taxpayer is able to identify by reasonable and verifiable standards the portion of the charge that is not subject to taxation from the books and records the seller keeps in the seller's regular course of business.

issue. The parties did not discuss whether this record for a different transaction would be sufficient under the bundled transaction statute to estimate the taxable portion of the transactions described on Invoice Nos. 228 and 230.

The taxpayer, however, made the argument that the entire charge for each of the transactions should not taxed because the $$$$$ of neon tubing is incidental to the total charges for the signs, which ranged between $$$$$ and $$$$$. It is clear that the vast majority of these charges are for the nontaxable signs that became part of the realty upon installation. The Commission is not inclined to impose tax on the entirety of these transactions without more information from the Division to show that the $$$$$ charge for neon tubing, as shown on Invoice No. 258, should not be used to estimate the taxable portions of the transactions on Invoice Nos. 228 and 230. Accordingly, for Invoice Nos. 228 and 230, the Division's assessment will be sustained for $$$$$ of the taxable amount, but will be reversed as to the remainder of the taxable amount.

There are two other signs at issue on which the taxpayer installed lettering. The taxpayer admits that the lettering remained personal property after installation. Again, however, the taxpayer did not break out the charge for the lettering separately from the charge for remainder of the sign. On Invoice No. 238, the taxpayer claims that the total charge of approximately $$$$$ included about $$$$$ of taxable lettering. On Invoice No. 235, the taxpayer claims that the charge of approximately $$$$$ included about $$$$$ of taxable lettering. Again, the taxpayer admitted that it did not have books or records that would show what portion of these sales was for the lettering, and the Division stated that the entire charge should, thus, be taxed under the bundled transaction statute.

However, Schedule 2 also includes an invoice that is no longer at issue, Invoice No. 301, which contains two separate charges, one for a "lit cabinet logo sign" for approximately $$$$$ and another for "non-lit lettering" for approximately $$$$$. This invoice shows that the taxpayer charged a customer approximately $$$$$ for lettering on a different invoice during the tax period at issue. Again, it is clear that that the vast

majority of Invoice No. 238's total charge of approximately $$$$$ and Invoice No. 235's total charge of approximately $$$$$ are related to nontaxable signs that became part of the realty upon installation. For the same reasons explained earlier in regards to the neon tubing, the Commission is not inclined to impose tax on the entirety of these transactions without more information to show that the approximately $$$$$ charge for lettering, as shown on Invoice No. 301, should not be used to support the taxpayer's estimates of the taxable portions of Invoice Nos. 238 and 235. Accordingly, for Invoice No. 238, the Division's assessment will be sustained for $$$$$ of the taxable amount, but will be reversed on the remainder of the taxable amount. Similarly, for Invoice No. 235, the Division's assessment will be sustained for $$$$$ of the taxable amount, but will be reversed on the remainder of the taxable amount.

Lastly, the Commission should reverse the assessment of tax on the charge for a lighted wall that the taxpayer built and incorporated into DEALERSHIP'S building, as shown on Invoice No. 257. As with the signs previously discussed, this wall is permanently attached to the underlying real property. Unlike the signs, however, it is even incorporated into the business's building. This wall will likely remain in place until the dealership's building is once again remodeled. There is no evidence to suggest that this wall is movable or transient in nature. Accordingly, the Commission should find that this transaction was a real property transaction that is not subject to sales and use tax.

In conclusion, the Commission should sustain all portions of the Division's assessment other than the transactions listed on Schedule 2. For the transactions listed on Schedule 2, the Commission should reverse the assessments, with the following exceptions. The Commission should sustain the Schedule 2 assessments for: 1) all transactions associated with Invoice Nos. 278, 292, and 301; 2) one of the two transactions associated with Invoice No. 258, specifically the transaction where the taxpayer charged $$$$$ for a "neon addition;" 3) one of the two transactions associated with Invoice No. 296, specifically the transaction where the taxpayer charged $$$$$ for "new vinyl, new plex;" 4) $$$$$ of the taxable amount shown for Invoice No. 228

(but reverse the remainder of the assessment for that invoice); 5) $$$$$ of the taxable amount shown for Invoice No. 230 (but reverse the remainder of the assessment for that invoice); 6) $$$$$ of the taxable amount shown for Invoice No. 238 (but reverse the remainder of the assessment for that invoice); and 7) $$$$$ of the taxable amount shown for Invoice No. 235 (but reverse the remainder of the assessment for that invoice).

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Kerry R. Chapman
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains all portions of the Division's assessment other than the transactions listed on Schedule 2. For the transactions listed on Schedule 2, the Commission reverses the assessments, with the following exceptions. The Commission sustains the Schedule 2 assessments for: 1) all transactions associated with Invoice Nos. 278, 292, and 301; 2) one of the two transactions associated with Invoice No. 258, specifically the transaction where the taxpayer charged $$$$$ for a "neon addition;" 3) one of the two transactions associated with Invoice No. 296, specifically the transaction where the taxpayer charged $$$$$ for "new vinyl, new plex;" 4) $$$$$ of the taxable amount shown for Invoice No. 228 (but reverses the remainder of the assessment for that invoice); 5) $$$$$ of the taxable amount shown for Invoice No. 230 (but reverses the remainder of the assessment for that invoice); 6) $$$$$ of the taxable amount shown for Invoice No. 238 (but reverses the remainder of the assessment for that invoice); and 7) $$$$$ of the taxable amount shown for Invoice No. 235 (but reverses the remainder of the assessment for that invoice).

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

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.