14-1518
TAX TYPE: SALES & USE TAX
TAX YEAR: JANUARY 1, 2011 – SEPTEMBER 30, 2013
DATE SIGNED: 7-20-2016
COMMISSIONERS: M. CRAGUN, R. PERO, R. ROCKWELL
EXCUSED: J. VALENTINE

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER, Petitioner, vs. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**INITIAL HEARING DECISION** Appeal No. 14-1518 Account No. ##### Tax Type: Sales and Use Tax Audit Period: January 1, 2011 – September 30, 2013 Judge: Jensen

Presiding:
Clinton Jensen, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE FOR TAXPAYER, Taxpayer
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General
RESPONDENT, for the Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing on June 22, 2015 in accordance with Utah Code Ann. §59-1-502.5.

Petitioner (the "Taxpayer") appealed the assessment of Utah sales and use tax for audit period January 1, 2011 to September 30, 2013. On June 12, 2014, the Auditing Division of the Utah State Tax Commission (the "Division") sent a Statutory Notice of Deficiency. In the Statutory Notice, the Division assessed additional sales and use tax of $$$$$ and interest of $$$$$[1] for a total of $$$$$.

APPLICABLE LAW[2]

Utah Code Ann. §59-12-103(1) imposes a tax on the purchaser for amounts paid or charged on certain transactions, as follows in pertinent part:

[1] Interest continues to accrue on any unpaid balance.
[2] Some of the statutes cited in this decision changed, primarily through renumbering, throughout the audit period. None of these changes are relevant to the outcome of this case. The Commission cites statutes as they appeared in 2013.

> (h) except as provided in Subsection 59-12-104(7), amounts paid or charged for assisted cleaning or washing of tangible personal property;

Utah Code Ann. §59-12-104(7) provides for an exemption from sales and use tax for cleaning or washing of tangible personal property that is not assisted cleaning or washing of tangible personal property as follows:

> (a) subject to Subsection (7)(b), sales of cleaning or washing of tangible personal property if the cleaning or washing of the tangible personal property is not assisted cleaning or washing of tangible personal property;
> (b) if a seller that sells at the same business location assisted cleaning or washing of tangible personal property and cleaning or washing of tangible personal property that is not assisted cleaning or washing of tangible personal property, the exemption described in Subsection (7)(a) applies if the seller separately accounts for the sales of the assisted cleaning or washing of the tangible personal property; and
> (c) for purposes of Subsection (7)(b) and in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the commission may make rules:
>> (i) governing the circumstances under which sales are at the same business location; and
>> (ii) establishing the procedures and requirements for a seller to separately account for sales of assisted cleaning or washing of tangible personal property;

Utah Code Ann. §59-12-102(15) defines "[a]ssisted cleaning or washing of tangible personal property" as follows:

> "Assisted cleaning or washing of tangible personal property" means cleaning or washing of tangible personal property if the cleaning or washing labor is primarily performed by an individual:
>> (a) who is not the purchaser of the cleaning or washing of the tangible personal property; and
>> (b) at the direction of the seller of the cleaning or washing of the tangible personal property.

Utah Code Ann. §59-1-1417 governs burden of proof and statutory construction for cases before the Commission 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.

> (2) Regardless of whether a taxpayer has paid or remitted a tax, fee, or charge, the commission or a court considering a case involving the tax, fee, or charge shall:
>
> (a) construe a statute imposing the tax, fee, or charge strictly in favor of the taxpayer; and
>
> (b) construe a statute providing an exemption from or credit against the tax, fee, or charge strictly against the taxpayer.

DISCUSSION

The Taxpayer operates a facility in CITY-1, Utah to refine crude oil products into products marketed primarily in the West and Northwest. The Taxpayer hires vendors to provide services upon its refining equipment at the CITY-1 facility. The parties agree that the refining equipment is properly categorized as tangible personal property. They disagree regarding the nature of the services that the vendors performed on the tangible personal property.

Two separate vendors provided the services at issue in this case. The Taxpayer provided a detailed description of the services that each of the vendors performed. One vendor, VENDOR-1, performs services on the Taxpayer's heat exchangers and fin fans located in processing equipment. It removes debris and hard water deposits from the heat exchangers and fin fans using pressurized fluid to flush out the tubes in the heat exchangers. To access the narrow tubes on the heat exchangers, it is necessary to disassemble parts of the heat exchangers. The invoices from VENDOR-1 include charges for labor, hot water washers, protective equipment, nozzles, and products listed as lances. The Taxpayer's witness explained that a lance is a long, narrow device that allows debris and deposits to be removed from the inside of the tubes on the heat exchanger. The Taxpayer's witness did not indicate whether disassembly was necessary to remove debris and hard water deposits from fin fans.

VENDOR-1 also provides services to remove bird dung from the Taxpayer's outdoor equipment, catwalk, and cooling tower areas. The Taxpayer's witness explained bird dung can be corrosive to these pieces of equipment. He further explained bird dung is slippery enough to cause a slipping hazard and has sufficient bacteria and toxins to cause an issue of industrial hygiene. VENDOR-1 uses a hot water pressure washer to remove bird dung.

The second vendor, VENDOR-2, provides services that are part of the Taxpayer's maintenance program. The services rendered depend on the areas in which the services are needed and the Taxpayer's goal in requesting services.

VENDOR-2 performs services on the Taxpayer's storage tanks. The Taxpayer's witness explained that at regular intervals, ten years for the gasoline tank at issue in this audit, it has to inspect its tanks from the inside for mechanical integrity. To make this inspection, it is necessary to remove approximately ten years' accumulation of solids from the bottom of the tank so that inspectors can gain

access to the inside of the tank. The Taxpayer argues that the actions of VENDOR-2 inside gasoline storage tanks are more properly described as removing solids rather than cleaning.

VENDOR-2 performs a service that it lists on its invoice as a "CLEANING PRODUCT" on the Taxpayer's hydrotreating unit. The parties did not discuss whether "CLEANING PRODUCT" describes the type of chemical clean or whether it describes the hydrotreating unit on which VENDOR-2 performs the chemical clean. The Taxpayer's witness explained that the hydrotreating unit is constructed with a 321/347 alloy of stainless steel to withstand the effects of a hydrogen/gas oil at high temperatures and high pressures. This stainless steel alloy is susceptible to polytheonic acid attack when exposed to oxygen in ambient air. The Taxpayer's witness described the chemical clean as a pickling process using a soda wash to neutralize and coat the surface of the stainless steel to protect it from ambient oxygen when it is opened and exposed to air.

VENDOR-2 performed services that it listed on its invoices as "Chem. Clean & Neutralize Unit 4 FCC" and "Chemical Clean Fresh Acid Storage Drum." The Taxpayer's witness described these as services provided during a scheduled turnaround of the Taxpayer's gas plant. VENDOR-2 used a chemical wash to clean towers and equipment to remove dangerous chemical compounds such as arsenic to allow safe entry for workers who would then service the equipment. Similarly, the Taxpayer's witness explained that before workers are able to enter acid tanks, it is necessary to neutralize acids to avoid exposure to toxic chemicals such as hydrogen fluoride. VENDOR-2 removes and neutralizes acids to create a safe work environment. As it argued with removal of solids from its gasoline tanks, the Taxpayer argues that VENDOR-2 is not "cleaning" acid tanks. Rather, it is removing hazardous materials from the acid tanks.

The Taxpayer takes the position that the services performed by VENDOR-1 and VENDOR-2 are not taxable under Utah Code Ann. §59-12-103(1)(h) as "amounts paid or charged for assisted cleaning or washing of tangible personal property." The Taxpayer argues that the services provided by VENDOR-1 and VENDOR-2 go beyond cleaning or washing and are more accurately described as a restoration of its property. The Taxpayer cites Merriam-Webster Collegiate Dictionary (10th Edition 1998), 212 for possible definitions of "clean" with relevance to this case as follows:

- to rid of dirt, impurities, or extraneous matter; or
- an act of cleaning dirt esp. from the surface of something.

Similarly, the Taxpayer cites the same source for possible definitions of "wash" with relevance to this case as follows:

- to cleanse by or as if by the action of liquid (as water);
- to remove (as dirt) by rubbing or drenching with liquid;

> · to pass a liquid (as water) over or through esp. so as to carry off material from the surface or interior; or
> · to clean something by rubbing or dipping in water.

Id. at 1333.

The Taxpayer cites *Union Pacific Railroad Co. v. Auditing Div.*, 842 P.2d 876, 885 (Utah 1992) addressing the difference between cleaning and washing services compared with services other than cleaning and washing:

> Milling logs into uniform size and drilling spike holes do not involve the installation of tangible personal property. Furthermore, drilling and milling do not suggest the same type of activity as washing or cleaning. The Commission appears to view drilling and milling as equivalent to repair or renovation. Repair and renovation, however, suggest activities that "fix" an already manufactured product. To repair is to "restore by replacing a part or putting together what is torn or broken." To renovate is to "restore to a former better state." Webster's Ninth New Collegiate Dictionary 998 (1984). Drilling and milling the cross ties did not involve repairing existing cross ties or restoring the existing cross ties to a former better state. [10] Thus, even under a deferential standard of review, we agree with Union Pacific that the drilling and milling services are not repairs or renovations within the meaning of section 59-12-103(1)(g).

The Taxpayer argues that when it buys or constructs its equipment, the equipment is free from debris, deposits, or hazardous substances. It describes the services of VENDOR-1 and VENDOR-2 as necessary to restore the equipment to the former better state of being free from these contaminants. It points out that it is hiring vendors to provide services that directly affect the function and safety of its equipment.

The Taxpayer characterizes this case as one involving statutory interpretation. It cites *Builders Components Supply Co. v. Cockayne*, 450 P.2d 97, 99 (Utah 1969) for the proposition that "statutes imposing taxes and prescribing tax procedures should generally be construed favorably to the taxpayer and strictly against the taxing authority."

The Division takes the position that the services performed by VENDOR-1 and VENDOR-2 are taxable under Utah Code Ann. §59-12-103(1)(h) as "amounts paid or charged for assisted cleaning or washing of tangible personal property." The Division cites two previous Tax Commission decisions, Appeal Nos. 12-769 and 07-0118[3], in support of its decision. In Appeal No. 12-769, the Commission found that services to remove grease and particulate matter that had built up on a restaurant exhaust system's hood, fans, and ducting along with the removal of grease that had collected in the systems filters were properly taxed as "assisted cleaning or washing" under Utah Code Ann. §59-12-103(1)(h).

In Appeal No. 07-0118, the Commission found "that services to cleanse or to get rid of dirt or dust from a computer, as well as services to rid a computer's hardware, software or data of impurities,

[3] The cited Utah State Tax Commission cases are among those available at a searchable datable at http://tax.utah.gov/commission-office/decisions.

qualify as taxable services to clean or wash tangible personal property." In so doing, the Commission cited Webster's II New Riverside University Dictionary (1984), 269 defining the verb "clean" to mean "to get rid of dirt" or "to get rid of impurities" and the verb "wash" to mean "to cleanse with water or other liquid, and often with soap, detergent, or bleach, by immersing, dipping, rubbing, or scrubbing" or "to cleanse or purify." Webster's II New Riverside University Dictionary (1984), 1302.

In its decision for Appeal No. 07-0118, the Commission also considered *Ogden Union Railway and Depot Co. v. State Tax Comm'n,* 395 P.2d 57 (Utah 1964) (modified on other grounds, *Ogden Union Railway and Depot Co. v. State Tax Comm'n,* 399 P.2d 145 (Utah 1965), a case determining whether cleaning and washing the exterior windows on cabs of diesel units, cleaning and washing train marker lamps and lights, and cleaning, sanding, and disinfecting livestock cars should be considered renovations or cleaning and washing. The court determined that the cleaning windows should be considered cleaning and washing because there were no changes to the windows other than to remove contaminants. Specifically, the court found that "[t]he glass is identical after the dirt is removed as it was before, unless a washer breaks it, and anyone, it would seem, would be inclined to conclude that the glass was not changed, but only 'washed,' – a word the legislature must have known about and easily could have employed." *Id.* at 64, note 6. The Court went on to make the same determinations about cleaning marker lamps and lights as well as cleaning, sanding and disinfecting livestock cars. *Id.*, notes 7-8.

The Commission considers the parties' arguments under applicable Utah law. Utah Code Ann. §59-12-103(1)(h) provides for the imposition of a sales and use tax on the "amounts paid or charged for assisted cleaning or washing of tangible personal property." Utah Code Ann. §59-12-102(15) defines "[a]ssisted cleaning or washing of tangible personal property" as follows:

> "Assisted cleaning or washing of tangible personal property" means cleaning or washing of tangible personal property if the cleaning or washing labor is primarily performed by an individual:
>
> (a) who is not the purchaser of the cleaning or washing of the tangible personal property; and
>
> (b) at the direction of the seller of the cleaning or washing of the tangible personal property.

The parties agree that the property on which the Taxpayer's vendors performed services is tangible personal property. There is no dispute that employees of VENDOR-1 and VENDOR-2 performed these services. Thus, the services upon the Taxpayer's tangible personal property qualify as "assisted cleaning or washing" if they are cleaning or washing.

The Taxpayer presents this matter as a case involving statutory interpretation. As cited by the Taxpayer in *Builders Components Supply Co. v. Cockayne*, 450 P.2d 97, 99 (Utah 1969) and as more recently provided in statute at Utah Code Ann. §59-1-1417(2)(a), courts are to construe statutes imposing

taxes strictly in favor of taxpayers. However, there is no role for statutory construction when the meaning of the statute is clear from statutory language. "Where the language of the statute is clear, that language controls and cannot be overridden by a presumed statutory purpose." *VCS Inc. v. La Salle Development, LLC,* 2012 UT 89, ¶23, 293 P.3d 290; s*ee also Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 1999 UT 18, ¶30, 974 P.2d 1194 ("[w]hen the intent is clear from the plain language of the statute, we need not go beyond that language").

In the case now before the Commission, there is no role for statutory construction because the words "cleaning" and "washing" are sufficiently clear on their face. While there is need to determine whether the terms "cleaning" and "washing" encompass the particular facts described by a given taxpayer, this does not render a statute ambiguous or require rules of statutory construction.

Both parties in this case correctly look to dictionary definitions to determine whether the specific services that the Taxpayer received should be considered "cleaning" or "washing" as opposed to something other than cleaning or washing. When a statute does not define a word or phrase, courts generally give words "their usual and accepted meaning" and look to dictionary definitions to determine that usual and accepted meaning. *Gull Laboratories v. Utah State Tax Comm'n*, 936 P.2d 1082, 1084 (Utah App. 1997) (internal citations omitted).

For the services described by the Taxpayer, dictionary definitions for "clean" or "wash" describe the actions in the services that the Taxpayer received. The Taxpayer's definition for "clean" described a process "to rid of dirt, impurities, or extraneous matter." The Division's cited definition likewise refers to a process "to get rid of impurities." While cleaning often involves removal of dirt, it is clear that it also encompasses removal of other undesirable impurities or extraneous matter. As described by the Taxpayer, those include debris and hard water, bird dung, solids from gasoline, arsenic, or hydrogen fluoride. That removal of these undesirable impurities and extraneous matter may require disassembly and reassembly of key components does not change that the only actions the vendors are taking are actions of removal.

It does not further a discussion of cleaning and washing to consider whether there are health, safety, or functional reasons for cleaning and washing services. Whether the reasons for removing undesirable impurities or extraneous matter are to improve appearance or to promote health, safety, or the function of machinery does change the nature of the cleaning and washing as a process to remove undesirable impurities or extraneous matter as well as dirt.

The Taxpayer's description of removal of undesirable impurities or extraneous matter as a renovation does not fit well with the facts as described in this case. Cleaning or washing and the concept of renovation are not mutually exclusive. That cleaning or washing might be a type of renovation does not mean that no cleaning or washing took place. For that reason, the concept of "renovation" as provided in

Union Pacific Railroad Co. v. Auditing Div., 842 P.2d 876, 885 (Utah 1992) is not useful to the analysis in the case now before the Commission.

The court's description of cleaning in *Ogden Union Railway and Depot Co. v. State Tax Comm'n,* 399 P.2d 145 (Utah 1965) has greater application to the case now before the Commission. Here, as in that case, it is meaningful that there is no change in the property except to remove undesirable impurities or extraneous matter. Because there is no change to the Taxpayer's personal property other than to remove undesired items such as debris and hard water, bird dung, solids from gasoline, arsenic, or hydrogen fluoride, the actions to make this removal are best described as cleaning or washing. There is good cause to sustain the Division's audit findings.

Because there is good cause to sustain the Division's audit based on actions best described as "assisted cleaning or washing" under Utah Code Ann. §59-12-103(1)(h), the Commission need not address other sections of the Utah Sales and Use Tax Act. Courts generally avoid ruling on moot issues where the ruling would be merely advisory. "When an issue is moot, judicial policy dictates against . . . rendering an advisory opinion." *State v. Sims*, 881 P.2d 840, 841 (Utah 1994) (citations omitted).

Clinton Jensen
Administrative Law Judge

DECISION AND ORDER

Based on the information presented at the hearing, the Commission sustains the Division's audit for the audit period of January 1, 2011 to September 30, 2013. 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 _____, 2016.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Rebecca L. Rockwell
Commissioner