15-761
TAX TYPE: SALES & USE
TAX YEAR: 08/01/11-09/30/14
DATE SIGNED: 02/27/18
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. PERO, R. ROCKWELL
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

| | |
|---|---|
| PETITIONER,<br><br>Petitioner,<br><br>v.<br><br>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,<br><br>Respondent. | **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION**<br><br>Appeal No. 15-761<br><br>Account Nos. #####; #####<br>Tax Type: Sales and Use Tax<br>Audit Period: 08/01/11 - 09/30/14<br><br>Judge: Chapman |

**Presiding:**
John L. Valentine, Commission Chair
Michael J. Cragun, Commissioner
Robert P. Pero, Commissioner
Rebecca L. Rockwell, Commissioner
Kerry R. Chapman, Administrative Law Judge

**Appearances:**
For Petitioner: REPRESENTATIVE FOR PETITIONER, Representative
NAME-1, President of PETITIONER.
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General

## STATEMENT OF THE CASE

PETITIONER ("Petitioner," "taxpayer," or "PETITIONER") is appealing actions by Auditing Division ("Respondent" or "Division") to deny all or almost all of two purchaser refund claims that the taxpayer submitted to the Utah State Tax Commission. This matter came before the Commission for a Formal Hearing on November 20, 2017. Based upon the evidence and arguments, the Commission hereby makes its:

## FINDINGS OF FACT

1. The tax at issue is sales and use tax.

2. The period at issue is August 1, 2011 through September 30, 2014.

3. On September 9, 2014, the taxpayer submitted an Application for Refund of Utah Sales and Use Tax for the period August 1, 2011 to September 30, 2014, in which it requested a refund in the amount of $$$$$ ("1st Refund Request").[1] On this application, the taxpayer indicated that the 1st Refund Request concerned 66 invoices and/or purchases.

4. On October 31, 2014, the taxpayer submitted another Application for Refund of Utah Sales and Use Tax for the period September 1, 2011 to September 30, 2014, in which it requested a refund in the amount of $$$$$ ("2nd Refund Request").[2] On this application, the taxpayer indicated that the 2nd Refund Request concerned 181 invoices and/or purchases. It appears that the 181 invoices and/or purchases that comprise the taxpayer's 2nd Refund Request are all different from the 66 invoices and/or purchases that comprise the taxpayer's 1st Refund Request.

5. On April 6, 2015, the Division issued a Statutory Notice – Sales and Use Tax, in which it took action concerning the taxpayer's 2nd Refund Request ("2nd Request Notice").[3] Specifically, the Division granted a refund of $$$$$ and denied the remaining $$$$$ of the 2nd Refund Request. In this notice, the Division indicated that it "dismissed" transactions from the refund request "after requested documentation was not submitted[.]"

6. On April 7, 2015, the Division issued another Statutory Notice – Sales and Use Tax, in which it denied all $$$$$ of the taxpayer's 1st Refund Request ("1st Request Notice").[4] In this notice, the Division also indicated that it "dismissed" transactions from the refund request "after requested documentation was not submitted[.]"

7. On May 5, 2015, the taxpayer submitted two Petitions for Redetermination ("Petitions"), one

---

1 Petitioner's Exhibit 6.
2 Petitioner's Exhibit 5.
3 Petitioner's Exhibit 8. On this notice, the Division identified the account number associated with the taxpayer's 2nd Refund Request to be Account No. 12314138-007-STC.
4 Petitioner's Exhibit 7. On this notice, the Division identified the account number associated with the taxpayer's 1st Refund Request to be Account No. 12314138-006-STC.

to contest the 1st Request Notice and the other to contest the 2nd Request Notice.[5] The appeal to contest the 1st Request Notice was designated *USTC Appeal No. 15-761*, while the appeal to contest the 2nd Request Notice was designated *USTC Appeal No. 15-1126*. On November 19, 2015, the Commission issued an order consolidating the two appeals (by incorporating all documents, submissions, and arguments filed for *Appeal No. 15-1126* into *Appeal No. 15-761* and closing *Appeal No. 15-1126*). Accordingly, the Formal Hearing in the instant matter concerns both of the taxpayer's refund requests.

8. Prior to the Formal Hearing in this matter, the Commission issued several orders concerning the taxpayer's two refund requests. On July 26, 2016, the Commission issued an Order Denying Respondent's Motion to Dismiss ("July 26, 2016 Order"). The Division had argued that the taxpayer's appeal should be dismissed pursuant to Utah Admin. Rule R865-1A-46 ("Rule 46") (2014) because the taxpayer had not provided with its purchaser refund requests certain information that the Division considered necessary for it to determine the validity of the refund requests. After hearing oral argument on the Division's motion, the Commission found that the taxpayer had provided sufficient information to proceed to a hearing where the Commission would determine whether the taxpayer's refund requests were valid or not, stating in its July 26, 2016 Order that:

> . . . the taxpayer has submitted sufficient information and documents to preclude the dismissal of its purchaser refund requests under Rule 46. That being said, the information and documents detailed in the Division's Answers may weigh on the Commission's future determination of whether the taxpayer has met its burden to show that its refund requests should be granted.

9. In its July 26, 2016 Order, the Commission also ordered the Division to "consider the information the taxpayer has currently provided and submit a statement as to whether the refund requests for all transactions the Division previously dismissed should be denied or granted based on this information." On August 5, 2016, the Division submitted its Response to Commission's Order, in which it stated "that having

5 Petitioner's Exhibits 7 and 8.

reviewed the information currently submitted for all transactions previously disallowed, the Auditing Division would still deny, on the merits, all of the requests previously denied . . . ."

10. On January 6, 2017, the Commission also issued an Order Denying Petitioner's Motion for Summary Judgment ("January 6, 2017 Order"), in which it denied the taxpayer's Motion for Summary Judgment because of the existence of genuine issues as to material facts that precluded the Commission from issuing a judgment as a matter of law. The Commission determined that a factual hearing was needed before it could determine whether the transactions at issue were subject to sales and use taxation or not. After the Commission issued its January 6, 2017 Order, the parties agreed for the matter to proceed to a Formal Hearing.

Items at Issue and Parties' Arguments

11. In its two refund requests, the taxpayer seeks refunds of the sales and use taxes that it paid on certain items that it, as a subcontractor, purchased and installed on public freeways and/or highways. The items at issue include sign structures, signage (on and off of the freeway), guardrails, and crash cushions.[6] The taxpayer did not purchase any of these items tax-free and, thus, did not provide any exemption certificates to the sellers of the items.[7] The taxpayer concedes that a real property contractor must pay sales and use tax on items it purchases if those items, upon installation, become real property. The taxpayer, however, contends that the items at issue remained personal property after their installation and that it did not owe sales and use tax on its purchases of these items. In addition, because it subsequently sold these items to the Utah Department of Transportation ("UDOT"), the taxpayer claims that it was also not required to collect sales and use taxes on its sales of these items. For these reasons, the taxpayer contends that the items at issue are exempt from taxation and that it is entitled to the refunds requested.

12. Projects for Which the Taxpayer Purchased and Installed the Items at Issue. NAME-1, the taxpayer's president, testified that all of the items at issue were purchased for UDOT "jobs" on which the

6 Petitioner's Pre-hearing Brief, p.1.
7 Petitioner's Exhibit 4.

taxpayer worked as a subcontractor. REPRESENTATIVE FOR PETITIONER (who, although the taxpayer's representative, also provided testimony at the hearing) testified that all subcontractors on these jobs, including the taxpayer, were subject to contracts between UDOT and the general contractors with whom UDOT had contracted. NAME-1 testified that under the contract(s) between UDOT and the general contractors, ownership of the items was transferred from the taxpayer to UDOT once the taxpayer installed the items and the installed items were inspected by the state. REPRESENTATIVE FOR PETITIONER further clarified that the general contractor(s) never took ownership of these items. The taxpayer did not submit the contract(s) between UDOT and the general contractor(s) to which the taxpayer was subject when it purchased and installed the items at issue in the appeal.

13. However, the taxpayer did submit a number of contracts and/or invoices between itself, as subcontractor, and various entities that appear to be either general contractors or other subcontractors on the various UDOT projects.[8] The taxpayer contends that these contracts and/or invoices involve the vast majority of the items at issue in this appeal.[9] A review of several of the 25 contracts that the taxpayer submitted indicates the following:

a. Contract No. 10003 is a Subcontract Agreement between the taxpayer and BUSINESS-1 for

---

8 Petitioner's Exhibit 3 (which consists of 25 contracts and/or invoices).

9 On Petitioner's Exhibit 4, the taxpayer indicates that its two refund requests are based on items it purchased and installed under 28 different contracts and/or invoices. On this exhibit, the taxpayer indicated that it was able to provide full or partial versions of 22 of these contracts and/or invoices (all but 6 of the 28 different contracts and/or invoices) and that the total portion of the two refund requests that is associated with the 6 missing contracts and/or invoices only amounts to $$$$$.

However, as previously explained, the taxpayer submitted 25 contracts and/or invoices (not 22 contracts and/or invoices) in Petitioner's Exhibit 3. A comparison of the contracts and/or invoices *identified* on Petitioner's Exhibit 4 and the contracts and/or invoices *provided* in Petitioner's Exhibit 3 shows that the taxpayer: 1) actually provided a contract and/or invoice in Petitioner's Exhibit 3 that it had identified as a missing contract on Petitioner's Exhibit 4 (Contract No. 13008); 2) the taxpayer provided three additional contracts and/or invoices in Petitioner's Exhibit 3 that were not identified on Petitioner's Exhibit 4 (specifically Contract Nos. 11009, 12008, and 13015); and 3) the taxpayer did not include in Petitioner's Exhibit 3 one of the full or partial contracts and/or invoices that it indicated on Petitioner's Exhibit 4 as being provided (Contract No. 13014).

work to be performed on a project described as "PARTIAL PARAGRAPH REMOVED."[10]

b. Contract No. 11002 is a Subcontract Agreement between the taxpayer and BUSINESS-2 for a project described as "PARTIAL PARAGRAPH REMOVED. . . ."

c. Contract Nos. 11006 and 11007 are Subcontract Agreements between the taxpayer and BUSINESS-3 for projects described as "PARTIAL PARAGRAPH REMOVED."

d. Contract No. 11008 is a Subcontract Agreement between the taxpayer and Granite Construction Company ("Granite") for a project described as "PARTIAL PARAGRAPH REMOVED."

14. As mentioned earlier, some of the subcontracts and/or invoices that the taxpayer submitted were incomplete, while a few of the subcontracts that concern the items at issue were missing. However, the complete subcontracts that the taxpayer submitted indicate that the taxpayer purchased and installed the items at issue for projects associated with the building or rebuilding of freeways and/or highways. In addition, these contracts indicate that the ultimate purchaser of the items at issue was the state (specifically UDOT).[11] The taxpayer provided no evidence to suggest that any of the items at issue were purchased and installed pursuant to contracts with UDOT for the item(s) at issue alone (i.e., not pursuant to contracts for the building or rebuilding of freeways and/or highways). Following is a detailed description of the various items at issue, which the taxpayer purchased and installed pursuant to the contracts for the projects to build or rebuild the freeways and/or highways.

15. Signage and Sign Structures. The taxpayer indicates that the majority of its two refund

---

10 NAME-1 testified that the taxpayer had always made bids with "taxes in" (i.e., that the taxpayer would be required to pay taxes on all items that it purchased and installed under its contracts). He further explained that until he was contacted by REPRESENTATIVE FOR PETITIONER, he had never heard that taxes might not be due on all items that the taxpayer purchased and installed for such projects.

11 This finding is also supported by NAME-1's and REPRESENTATIVE FOR PETITIONER's testimony. Although the Division argues that the taxpayer has not shown that it sold the items at issue to UDOT, the Division has provided no evidence to discount the testimony of NAME-1 and REPRESENTATIVE FOR PETITIONER, which appears to be consistent with the subcontracts into which the

requests concerns signage and sign structures that it purchased and installed on the XXXX project in COUNTY. The sign structures span the freeway and are attached to concrete bases with bolts, while the signage is attached to the sign structures with mounting brackets and clamps. In its Pre-hearing Brief, the taxpayer provided "standard UDOT drawings" to show that the concrete bases have bolts that are embedded into and protrude from the concrete so that the sign structures can be bolted onto the bases; and that the signage is attached to the sign structures with the mounting brackets and clamps.[12] For these types of signs, NAME-1 testified that the taxpayer completed the entire sign, from digging the hole to installing the foundation (i.e., the concrete bases), the sign structure, and the signage.

16. The taxpayer admits that the concrete bases were converted into real property after their installation. As a result, the taxpayer did not include in its refund requests its purchases of the concrete, rebar, and bolts that were used to construct these bases. However, the taxpayer contends that the sign structures that are attached to the bases with bolts and that the signage that is attached to the sign structures with mounting brackets and clamps remain personal property after their installation and, thus, included these items in its refund requests. The taxpayer claims that the signage and the sign structures can be removed or replaced without any damage to the signage, the sign structures, or the concrete bases.[13]

17. NAME-1 also testified that the signage installed on these sign structures is "updated" and replaced periodically (every 5 to 10 years). However, the taxpayer has provided no evidence to suggest that any of the signage and sign structures at issue in this appeal were purchased and installed pursuant to contracts for the updating or replacement of the items alone and not pursuant to contracts for the building or rebuilding of a freeway and/or highway. In addition, the taxpayer provided no evidence to suggest that any of the signage and sign structures at issue in this appeal have been moved or replaced since the taxpayer originally installed

---

taxpayer entered with the various contractors on the UDOT projects.

12 Petitioner's Pre-hearing Brief (Attachment, pp. 1-2).

13 Petitioner's Pre-hearing Brief, p. 2. Testimony of NAME-1 and REPRESENTATIVE FOR PETITIONER. The taxpayer submitted photographs of such sign structures, concrete bases, and signage.

them.

18. Signage on Posts. The taxpayer also indicated that two other types of signage that it installs along freeways and/or highways are part of its refund requests. These are "stand-alone" signs that are not attached to sign structures that span the freeway. The two types of "stand-alone" signs involve: 1) signage attached to posts where the posts are attached to concrete bases; and 2) signage attached to posts where the posts are inserted into the ground (but are not embedded in concrete or attached to concrete bases).[14]

19. As to the stand-alone signs where the posts are attached to concrete bases, the taxpayer provided a standard UDOT drawing to show that the signage is attached to posts that are bolted to concrete bases that have a "protruding head." The taxpayer indicates that its refund requests do not include any purchases of the concrete or rebar associated with these concrete bases because these items were converted to real property. However, the refund requests include the taxpayer's purchases of the posts and the signage associated with these stand-alone signs because it contends that these items remained personal property after their installation. The taxpayer claims that the posts are attached to the concrete bases in such a way as to allow the posts to break off if struck by a vehicle and that the signage and posts can be removed without any damage to the signage, posts, or concrete bases.[15]

20. The second type of stand-alone signs involve signage that is attached to wooden posts where the posts are inserted into the ground but are not embedded in concrete or attached to concrete bases. The taxpayer indicates that its refund requests include its purchases of the wooden posts and the signage associated with these signs because it contends that these items remained personal property after their installation. The taxpayer claims that the wooden posts will break off if struck by a vehicle and that the signage is sometimes

---

Petitioner's Exhibit 1, pp. 1-3.

14 Petitioner's Pre-hearing Brief, pp. 3-4. Testimony of NAME-1 and REPRESENTATIVE FOR PETITIONER. The taxpayer also submitted photographs of such stand-alone signs. Petitioner's Exhibit 1, pp. 7-12.

15 Petitioner's Pre-hearing Brief, p. 3 (and Attachment, p. 5). Testimony of NAME-1 and REPRESENTATIVE FOR PETITIONER.

replaced. The taxpayer also claims that the signage and the wooden posts can be removed without any damage to the signage and that removal of the posts would only leave a hole in the ground. The taxpayer admits that even though the removal of such posts would not damage the highway, it would damage the posts.[16]

21. NAME-1 testified that the signage installed on posts is replaced periodically and that the new signs are often larger than the old signs. As a result, NAME-1 indicated that the posts are often replaced at the same time that the signage is replaced. However, the taxpayer has provided no evidence to suggest that any of the signage and posts associated with the stand-alone signs at issue were purchased and installed pursuant to a contract for the updating or replacement of these items alone and not pursuant to contracts for the building or rebuilding of a freeway and/or highway. In addition, the taxpayer provided no evidence to suggest that any of the signage and posts associated with the stand-alone signs at issue have been moved or replaced since the taxpayer originally installed them.

22. Guardrails. The taxpayer's refund requests also include items it purchased and installed as guardrails. The taxpayer explained that the guardrails consist of steel slugs that are driven into the ground, posts that are attached to the steel slugs, and metal guardrails that are attached to the posts. The taxpayer also provided a standard UDOT drawing to show how the guardrails are installed. The taxpayer indicates that its refund requests include its purchases of these posts and metal guardrails because it contends that these items remained personal property after their installation. The taxpayer also claims that the metal guardrails and the posts can be removed without any damage to either of them.[17]

23. NAME-1 testified that the guardrail posts will break off if struck by a vehicle and that the posts and guardrails are routinely replaced. However, the taxpayer has provided no evidence to suggest that

---

16 Petitioner's Pre-hearing Brief, pp. 3-4. Testimony of NAME-1.

17 Petitioner's Pre-hearing Brief, pp. 2-3 (and Attachment, p. 3). Testimony of NAME-1 and REPRESENTATIVE FOR PETITIONER. The taxpayer also submitted photographs of such guardrails. Petitioner's Exhibit 1, pp. 13-15. It does not appear that the taxpayer's refund requests include the steel slugs to which the guardrail posts are attached.

any of the metal guardrails and posts at issue in this appeal were purchased and installed pursuant to a contract for the updating or replacement of the items alone and not pursuant to contracts for the building or rebuilding of a freeway and/or highway. In addition, the taxpayer provided no evidence to suggest that any of the metal guardrails and posts at issue in this appeal have been moved or replaced since the taxpayer originally installed them.

24. Crash Cushions. Lastly, the taxpayer's refund requests include items it purchased and installed as "crash cushions." The taxpayer explained that the crash cushions are comprised of a guardrail-like material that is bolted to a concrete pad and structure, and it provided a standard UDOT drawing to illustrate the construction of a crash cushion.[18] It is unclear whether the taxpayer's refund requests were for the guardrail-like materials only or for the guardrail-like materials *and* the concrete pads and structures (i.e., whether the taxpayer is asserting that the guardrail-like materials remain personal property and the concrete pads and structures become real property after installation or whether the guardrail-like materials and the concrete pads and structures all remain personal property after installation).[19]

25. Regardless, the taxpayer claims that the crash cushions are easily removed and replaced when struck by a vehicle and that they can be easily moved from one location to another.[20] Again, however, the taxpayer has provided no evidence to suggest that any of the crash cushion items at issue were purchased and installed pursuant to a contract for the updating or replacement of the items alone and not pursuant to contracts for the building or rebuilding of a freeway and/or highway. In addition, the taxpayer provided no evidence to

---

18 Petitioner's Pre-hearing Brief, p. 3 (and Attachment, p. 4). Testimony of NAME-1 and REPRESENTATIVE FOR PETITIONER. The taxpayer also submitted photographs of such crash cushions. Petitioner's Exhibit 1, pp. 4-6.

19 For reasons that will be later explained, the Commission's decision in this matter would be the same regardless of whether the taxpayer is requesting a refund of the sales and use taxes it paid on the guardrail-like materials only or on the guardrail-like materials *and* the concrete pads and structures.

20 Petitioner's Pre-hearing Brief, p. 3.

suggest that any of the crash cushion items at issue in this appeal have been moved or replaced since the taxpayer originally installed them.

26. Division's Arguments. The Division contends that the taxpayer is erroneously looking at the items at issue on an individual basis instead of looking at the items as part of the "big picture" transactions of which they were a part. Specifically, the Division contends that the taxpayer purchased and installed the items at issue not as part of a transaction(s) for the items alone, but as part of a transaction(s) for a "highway safety project." The Division contends that the contracts submitted by the taxpayer show that in each instance, the transaction was for a highway project, not for the item alone (i.e., does not involve a contract for the purchase of a sign or a guardrail only). The Division contends that the items at issue were converted into real property once they were purchased and installed by the taxpayer because highways are real property; because the items at issue are considered to be part of a highway;[21] because the items at issue were intended to remain in place for their "useful life;" and because the highway "unit" to which the items at issue were installed would no longer operate as designed if the items were removed.

27. In addition, the Division contends that the items at issue are not considered sales to the state that qualify for exemption under Utah Code Ann. §59-12-104(2) (2014). First, the Division contends that the taxpayer did not sell the items at issue to the state because the taxpayer's contracts were all with other contractors, not with UDOT. Second, the Division notes that Subsection 59-12-104(2) specifically excludes construction materials from exemption, unless the construction materials are installed or converted to real property by employees of the state, its institutions, or its political subdivisions. The Division contends that because the taxpayer converted the items at issue to real property and because the taxpayer and its employees

---

21 At the hearing, the Division indicated that under 23 CFR §924.3, the federal government had, during the audit period, defined "highway" to mean "(1) A road, street, and parkway; (2) A right-of-way, bridge, railway-highway crossing, tunnel, drainage structure, sign, guardrail, and protective structure, in connection with a highway; and (3) A portion of any interstate or international bridge or tunnel and the approaches thereto . . . ." The taxpayer has not shown that a "highway" as defined under 23 CFR §924.3, or a freeway is not real property.

are not employees of the state, its institutions, or its political subdivisions, the items at issue do not qualify for exemption from sales and use tax under Subsection 59-12-104(2).

28. The Division further argues that the items at issue are not considered items purchased for resale that qualify for exemption under Subsection 59-12-104(25). The Division contends that this particular exemption anticipates that tax will be collected on an item one time. The Division contends that no tax will have been collected on the items at issue if the Commission grants the taxpayer's refund requests. Furthermore, the Division contends that the taxpayer, the contractors with whom the taxpayer contracted, and UDOT all anticipated that the taxpayer would pay sales tax on the taxpayer's purchases of the items at issue. The Division contends that granting the taxpayer's request for a refund of these taxes would allow the taxpayer to unilaterally recharacterize these transactions and would result in a windfall to the taxpayer. For these reasons and because the taxpayer did not issue exemption certificates when it purchased the items at issue,[22] the Division contends that the items at issue do not qualify for exemption under Subsection 59-12-104(25).

29. At the hearing, the Division acknowledged that it had asked the taxpayer to provide "letters of intent" to show that the contractors with whom the taxpayer had contracted or that UDOT had intended the items at issue to remain personal property once the taxpayer installed them. The Division, however, explained that even if the taxpayer had provided such letters of intent, it would still have found that the items were converted to real property upon installation.

30. Lastly, the Division asks the Commission to consider that under UCA §59-1-1417(2) (2014) and pursuant to *MacFarlane v. Utah State Tax Comm'n*, 134 P.3d 1116, 2006 UT 18 (Utah 2006), tax exemption statutes are to be strictly construed against a taxpayer. For these reasons, the Division asks the Commission to deny the taxpayer's requests for refunds for the items at issue.

## APPLICABLE LAW

22 Division's Pre-hearing Brief.

1. Utah Code Ann. §59-12-103 (2014)[23] provides that the following transactions are subject to 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. UCA §59-12-104 provides that the following transactions are exempt from sales and use tax, as follows in pertinent part:

> Exemptions from the taxes imposed by this chapter are as follows:
> . . .
> (2) subject to Section 59-12-104.6, sales to the state, its institutions, and its political subdivisions; however, this exemption does not apply to sales of:
> (a) construction materials except:
> . . . .
> (ii) construction materials purchased by the state, its institutions, or its political subdivisions which are installed or converted to real property by employees of the state, its institutions, or its political subdivisions. . . .
> . . . .
> (25) a product purchased for resale in this state, in the regular course of business, either in its original form or as an ingredient or component part of a manufactured or compounded product;
> . . . .

3. UCA §59-12-102 defines "construction materials" and "tangible personal property" to mean, as follows in pertinent part:

> . . . .
> (30) "Construction materials" means any tangible personal property that will be converted into real property.
> . . . .
> (123)(a) Except as provided in Subsection (123)(d) or (e), "tangible personal property" means personal property that:
> (i) may be:
> (A) seen;
> (B) weighed;
> (C) measured;

23 All substantive law cites are to the 2014 version of Utah law, unless otherwise indicated. During the audit period, certain subsections of the substantive law were renumbered. However, any amendments to the substantive law during the audit period were nonsubstantive changes that have no impact on this decision.

(D) felt; or
(E) touched; or
(ii) is in any manner perceptible to the senses.
. . . .

4. Utah Admin. Rule R865-19S-58 ("Rule 58") provides sales and use tax guidance to real property contractors, 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.
> (2) The sale of real property is not subject to sales tax, nor is the labor performed on real property. For example, the sale of a completed home or building is not subject to the tax, but sales of materials and supplies to contractors for use in building the home or building are taxable transactions as sales to final consumers.
> (a) The contractor or repairman who converts the personal property to real property is the consumer of tangible personal property regardless of the type of contract entered into--whether it is a lump sum, time and material, or a cost-plus contract.
> (b) Except as otherwise provided in Subsection (2)(d), the contractor or repairman who converts the construction materials, fixtures or other items to real property is the consumer of the personal property whether the contract is performed for an individual, a religious or charitable institution, or a government entity. . . .
> . . . .
> (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 Administrative Rule R865-19S-23 provides guidance concerning exemption certificates obtained for sales and use tax purposes, as follows:

> A. Taxpayers selling tangible personal property or services to customers exempt from sales tax are required to keep records verifying the nontaxable status of those sales.
> B. The Tax Commission will furnish samples of acceptable exemption certificate forms on request. Stock quantities are not furnished, but taxpayers may reproduce samples as needed in whole or in part.
> C. A seller may retain a copy of a purchase order, check, or voucher in place of the exemption certificate as evidence of exemption for a federal, state, or local government entity, including public schools.
> D. If a purchaser is unable to segregate tangible personal property or services purchased for resale from tangible personal property or services purchased for the purchaser's own consumption, everything should be purchased tax-free. The purchaser must then report and pay the tax on the cost of goods or services purchased tax-free for resale that the purchaser uses or consumes.
> E. A seller may provide evidence of a sales and use tax exemption electronically if the seller uses the standard sales and use tax exemption form adopted by the governing board of the agreement.
> F. A seller shall obtain the same information for proof of a claimed exemption regardless of the medium in which the transaction occurs.

6. UCA §59-1-1410 provides for the refund of overpaid taxes, as follows in pertinent part:

> . . . .
> (7) If a person erroneously pays a liability, overpays a liability, pays a liability more than once, or the commission erroneously receives, collects, or computes a liability, the commission shall:
> (a) credit the liability against any amount of liability the person owes; and
> (b) refund any balance to:
> (i) the person; or
> (ii) (A) the person's assign;
> (B) the person's personal representative;
> (C) the person's successor; or
> (D) a person similar to Subsections (7)(b)(ii)(A) through (C) as determined by the commission by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.
> (8) (a) Except as provided in Subsection (8)(b) or Section 19-12-203, 59-7-522, 59-10-529, or 59-12-110, the commission may not make a credit or refund unless a person files a claim with the commission within the later of:
> (i) three years from the due date of the return, including the period of any extension of time provided in statute for filing the return; or
> (ii) two years from the date the tax was paid. . . .
> . . . .

7. UCA §59-1-1417 (2017) provides that the burden of proof is generally upon the petitioner in proceedings before the Commission (with limited exceptions not applicable to this appeal) and provides guidance on how tax statutes should be construed, 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

### I. Burden of Proof and Statutory Construction.

In its Pre-hearing Reply Brief, the taxpayer contends that it does not have the burden of proof in this matter because the statutes that impose sales and use tax on sales of tangible personal property are not ambiguous. The taxpayer's conclusion is erroneous, and the reasoning behind it is flawed. First, Subsection 59-1-1417(1) provides that the burden of proof is on the petitioner in appeals before the Commission (with limited exceptions not applicable to this case).

Second, the strict construction provisions found in Subsection 59-1-1417(2) and Utah case law are unrelated to burden of proof. If the legislative intent can be discerned from the plain language of the statute, the strict construction provisions are not even applicable, regardless of whether the statute is one that imposes a

tax or provides an exemption from a tax.[24] Accordingly, whether the applicable statute(s) in this case are ambiguous or not, the burden of proof in this case lies with the taxpayer, who is the petitioner. In addition, for reasons that will become apparent later in the decision, the Commission does not find any applicable statute to be ambiguous. As a result, it is not critical to analyze each statute at issue in this appeal and delineate between those that are tax imposition statutes and those that are tax exemption statues.

**II. Effect of the Commission's Prior Order Concerning Rule 46.**

In its Pre-hearing Reply Brief, the taxpayer indicates that in the instant matter, the Commission previously denied the Division's Motion to Dismiss by ruling that the taxpayer had "provided sufficient information under Rule 46." Because of this ruling, the taxpayer contends that the Commission has already determined that it is entitled to receive the refunds at issue. The taxpayer is mistaken.

Once the Division has dismissed a request for refund under Rule 46(2)(f), Rule 46(2)(g) provides that the dismissal may be appealed to the Commission and that "the only matter that will be reviewed by the commission is whether information and documents *adequate to determine the validity of the purchaser refund request* were received by the division within the [applicable time period]" (emphasis added). If, under appeal, the Commission determines that a taxpayer has not submitted sufficient information and documents for the Commission "to determine the validity of the purchaser refund request," the Division's dismissal is sustained and no further proceedings are held.

On the other hand, if the Commission determines that a taxpayer has submitted sufficient information and documents "to determine the validity of the purchaser request," the Division's dismissal is overturned.

24 In *Keene v. Bonser*, 2005 UT App 37, ¶10 (Utah Ct. App. 2005), the Utah Court of Appeals stated that when interpreting statutory provisions, including definitions, "[w]e look first to the plain language of the statute to discern the legislative intent.... 'Only when we find ambiguity in the statute's plain language need we seek guidance from the legislative history and relevant policy considerations.'" (quoting *Gohler v. Wood*, 919

Rule 46(2)(g), however, is silent on *when* the Commission will determine whether the information and documents the taxpayer submitted show or do not show the refund request to be valid. If the Commission only determined that the taxpayer had submitted adequate information and documents to determine the validity of the refund requests without actually determining the validity of the request (as the taxpayer appears to suggest should have occurred), the matter would be left in limbo without any resolution. As a result, Rule 46(2)(g)(ii) clearly provides that once the Commission overturns a Division's Rule 46 dismissal that is under appeal, the Commission will subsequently take the steps necessary to determine the validity of a taxpayer's refund request.

In the instant case, the Commission scheduled the Formal Hearing to determine the validity of the taxpayer's refund requests, which is consistent with the guidance provided in Rule 46. Nowhere in any of the prior orders the Commission has issued in this appeal has the Commission ruled that the taxpayer submitted sufficient information and documents to show that its refund requests are valid. In its July 26, 2016 Order, the Commission denied the Division's Motion to Dismiss, but indicated that the matter would be scheduled for further proceedings "in regards to the underlying tax issues." As a result, the Commission will for the first time in this decision determine whether the taxpayer's refund requests are valid or not.

**III. Do the Items at Issue Remain Personal Property or Become Real Property Once They are Installed by the Taxpayer?**

This matter can be resolved based on the single issue of whether the items at issue remained personal property or became real property after the taxpayer installed them. As explained earlier, the taxpayer sold the items at issue to a state entity, specifically UDOT. While sales of tangible personal property are clearly subject to taxation under Subsection 59-2-103(1)(a), sales of real property are clearly not subject to taxation. In addition, sales of personal property that is not converted to real property are exempt from taxation if sold to the state, its institutions, or its political subdivision, pursuant to Subsection 59-12-104(2). Furthermore, if the items at issue remained personal property after they were installed and sold to UDOT, the taxpayer was entitled

P.2d 561 (Utah 1996)) (other citations omitted).

to purchase the items tax-free under Subsection 59-12-104(25). Accordingly, to resolve this case, the Commission need only determine if the items at issue in this case remained personal property or became real property after installation.[25]

In *Nickerson Pump & Machinery Co. v. State Tax Commission*, 361 P.2d 520, 12 Utah 2d 30 (Utah 1961), the Utah Supreme Court stated 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." In *Chicago Bridge & Iron Co. v. State Tax Comm'n*, 839 P.2d 303 (Utah 1992), the Court stated "[w]hether the subject matter of a sales transaction is deemed real property or tangible personal property will depend on the facts of each case." For these reasons, the specific, or peculiar, facts pertaining to the transactions and items at issue in the instant case must be analyzed to determine whether the items remained personal property or became real property upon installation for sales and use tax purposes.

Rule 58(4)(c) provides three examples of items that remain tangible personal property even when the items are attached to real property. However, these three examples do not expressly involve signage, sign structures, stand-alone signs, guardrails, or crash cushions installed on a freeway or highway. In *Appeal No. 15-1795*, however, the Commission relied on nine factors that the Utah Supreme Court has considered in *BJ-Titan Services v. State Tax Comm'n*, 842 P.2d 822 (Utah 1992), *Nickerson Pump*, and *Chicago Bridge* to determine whether items remained personal property or became real property upon installation.[26] For this

---

25 This conclusion is consistent with the Commission's decision in *USTC Appeal No. 15-1795* (Findings of Fact, Conclusions of Law, and Final Decision Aug. 9, 2017). In that case, which has a number of similarities to the instant case, the Commission stated that "[t]he Division argues a number of additional points, but primarily . . . the resolution of this appeal depends on whether the [items at issue were] sold by the Taxpayer to the governmental entity purchaser as tangible personal property. . . ." As in *Appeal No. 15-1795*, the Commission need not address all of the Division's additional points and arguments in the instant decision. The Commission need only address whether the items at issue remained personal property or became real property after the taxpayer installed them and sold them to UDOT.

26 The Commission has relied on these nine factors in other sales and use tax cases in which the Commission has determined whether transactions were for items that remained personal property or became real property after installation. *See, e.g.*, *Appeal Nos. 11-1774, 11-2587 & 12-2023* (Findings of Fact,

reason and because both parties discussed how these nine factors would apply to the items at issue in the instant case, the Commission will analyze these nine factors to determine whether the transactions at issue were for items that remained personal property or became real property after installation.

The nine factors discussed by the Utah Supreme Court in *Nickerson Pump*, *Chicago Bridge*, and *BJ-Titan* and which the Commission has synthesized in *Appeal No. 15-1795* and other Commission decisions are as follows: 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.

Before each of these factors is analyzed, the Commission notes that the parties significantly differ in their approaches to applying the nine factors to the facts of the instant case. The taxpayer focuses more on the individual items at issue and places little, if any, emphasis on the contracts under which the transactions occurred. The Division, on the other hand, places significant focus on the taxpayer's contracts and the associated UDOT contracts (which appear to govern all of the taxpayer's contracts). For example, the Division stressed that all of the contracts at issue involved the building or rebuilding of a freeway and/or highway and that none of them involved the sale and installation of the signage, sign structures, stand-alone signs, guardrails, and/or crash cushions alone.[27] Many of the factors upon which the Utah Supreme Court has relied

---

Conclusions of Law, and Final Decision Apr. 9, 2014) (which will be referred to as "*Appeal No. 11-1774*"); and *USTC Appeal No. 13-488* (Initial Hearing Order Aug. 19, 2014).

27 In *Appeal No. 15-1795*, the Division's arguments also appeared to focus on the contracts as opposed to

to delineate between personal and real property involve the primary essence, purpose, or object of the transaction under which the item at issue was installed. As a result, in *Appeal No. 15-1795*, the Commission placed a significant amount of emphasis on the contracts that were at issue instead of focusing only on the items installed under the contracts.[28]

The taxpayer, however, contends that it, unlike the taxpayer in *Appeal No. 15-1795*, did not contract to build or install the entire "system" (i.e., that it did not contract to provide *all* materials and labor to build or rebuild the freeways and/or highways referenced in its contracts). However, in the contracts that taxpayer entered into with various contractors, the taxpayer agreed that the performance of its contracts would be governed by the project contracts into which UDOT and the general contractors had entered. For these reasons, the Commission rejects the taxpayer's argument that the focus should remain solely or almost solely on the individual items at issue. Consequently, the Commission will place a significant amount of emphasis on the primary essence, purpose, or object of the transactions at issue when determining whether the items that the taxpayer installed under these contracts remained personal property or became real property after installation.

First Factor. The first factor is whether the property is removable without harm to the structure on which it is placed. Except for the stand-alone sign posts that are not attached to a concrete base, all of the

---

the individual items that were installed under those contracts. In its ruling for *Appeal No. 15-1795*, the Commission noted that "[u]nder the Division's position, it is possible that [the item at issue in that case] would be real property as part of a real property contract, or could be personal property if sold individually." The Division made a similar distinction in the instant case, arguing that the signage, sign structures, stand-alone signs, guardrails, and crash cushions were all installed as part of a real property contract instead of a contract where the items were sold alone.

28 Such a distinction was critical in *Appeal No. 15-1795*, where the Commission found that pumps and other equipment installed by a contractor who constructs water and sewer pipeline "systems" became real property upon installation when *sold as part of the system*, even though the Utah Supreme Court in *Nickerson Pump* had found that a similar pump apparently *sold alone* remained personal property after its installation. In *Appeal No. 15-1795*, the Commission explained that "[the taxpayer's representative in that case] argues that the primary test should be the physical characteristics of the items themselves and how they are attached to the real property, while the Respondent argues the test involves scrutiny of the essence of the transaction. . . . For example, if the test was limited to the physical characteristics of property and how it is attached, a water pump . . . would appear to be personal property." After considering the essence of the transactions and the contracts at issue in *Appeal No. 15-1795*, the Commission found that the pumps and other items at issue in that case did

signage, sign structures, metal guardrails, crash cushions, and posts at issue can be removed without harm to the structure on which they are placed or harm to the items themselves. However, the Division points out that the contracts under which the items at issue were installed were contracts for highway projects (i.e., for the building or rebuilding of a freeway and/or highway) and that the removal of these items would "frustrate" a contract for a freeway and/or highway. The Division argues that removing these items would damage the freeway and/or highway "unit" and would result in the unit not functioning as designed.

The taxpayer argues that a freeway or highway can function without the items at issue in this appeal. The Commission, however, is not persuaded that freeways and/or highways can function as designed without signage, sign structures, stand-alone signs, guardrails, or crash cushions. In addition, the contracts that the taxpayer entered into (all of which are governed by UDOT project contracts) concern the building or rebuilding of freeways and/or highways (which are real property) and not the sale and installation of signage, sign structures, stand-alone signs, guardrails, and/or crash cushions alone. For these reasons, the Commission finds that the items at issue are not removable without harm to the underlying freeways and/or highway that are the primary essence, purpose, or object of the contracts at issue.[29] This factor supports a finding that the items at issue became real property after they were installed.

Second Factor. The second factor is whether the property is manufactured with the idea that it could be used elsewhere. The taxpayer admits that the items at issue were manufactured to specification, but contends that they could be moved to other locations. The Division, on the other hand, contends that the signage, sign structures, stand-alone signs, guardrails, and crash cushions at issue are manufactured for a single location and that each item will remain at this location for its useful life. The contracts at issue concern the building or rebuilding of freeways and/or highways and it appears that all signage, sign structures, stand-alone signs, guardrails, and crash cushions are manufactured to specifications unique for each installation location.

---

not remain personal property, but became real property, upon installation.

29 When the Commission discussed this factor in *Appeal No. 15-1795*, it noted that "if [the items at issue

The taxpayer, who has the burden of proof, has not shown otherwise. In addition, the taxpayer has not provided a single instance of where an item at issue in this appeal has been moved since it was installed or could have been moved to a location different from where it was installed. For these reasons, the Commission finds that the items at issue were not manufactured with the idea that they could be used elsewhere. This factor also supports a finding that the items at issue became real property after they were installed.

Third Factor. The third factor is whether the parties to the transaction contemplated that the property would be removed for repairs or replacement. It is clear that the taxpayer, the contractors with whom the taxpayer entered into its contracts, and UDOT (the entity with whom the contractors entered into the related contracts that governed the taxpayer's contracts) all contemplated that the *individual* items at issue in this appeal would be removed for repairs and replacement. However, none of these contracts contemplated that the freeway and/or highway system that was the primary essence, purpose, or object of these transactions would be removed for repair and replacement.[30] As a result, this factor also supports a finding that the items at issue became real property upon after they were installed.

Fourth Factor. The fourth factor is whether the primary purpose of the transaction was for the property or the installation of the property. In its Pre-hearing Reply Brief, the taxpayer stated that "the 'primary' purpose of the transaction is for the property" and not for the installation of the property. In addition, at the hearing, NAME-1 discussed the various items at issue and stated that the costs of materials exceeded the costs of installation in all instances. To support these statements, however, the taxpayer has provided no documentary evidence concerning the specific items at issue in this appeal. Nevertheless, even if such documentary evidence had been provided, it would not necessarily show that the items purchased and installed under contracts for freeway and/or highway systems would be considered personal property after installation. When the Commission discussed this specific factor in *Appeal No. 15-1795*, the Commission noted that "the

---

in that appeal] are removed from the water system, the water system would not function."

30 When the Commission discussed this factor in *Appeal No. 15-1795*, it noted that "[i]ndividual pieces

primary purpose of the transaction was for [the system], not any individual item. . . ." As a result, this factor also supports a finding that the items at issue became real property after they were installed.

Fifth Factor. The fifth factor is whether the installation was for convenience. None of the items at issue were installed merely for convenience. All of the items at issue had to be installed in order for the various freeways and/or highways (which were the primary essence, purpose, or object of the taxpayer's contracts) to function. In addition, none of the items at issue could function without having been embedded in the ground or attached, as necessary, to a sign structure, a post, a concrete base, or a steel slug. For these reasons, this factor also supports a finding that the items at issue became real property after they were installed.

Sixth and Seventh Factors. The sixth and seventh factors are related and concern 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. The Division contends that the taxpayer and UDOT both treated the contracts at issue as real property contracts, in part, because the taxpayer paid sales and use tax when it purchased the items at issue. NAME-1 admitted that the bids the taxpayer made for the items at issue included some sales and use tax because, at the time the taxpayer made the bids and entered into the contracts, he had never heard that the items at issue might not be subject to taxation. In addition, the taxpayer did not ask for exemption certificates from UDOT (or from the contractors with whom the taxpayer entered into its contracts), nor did the taxpayer prepare and submit exemption certificates to the suppliers from which it purchased the materials for the items at issue. These actions are consistent with a real property contract, not a contract for the purchase of personal property. As a result, this factor also supports a finding that the items at issue became real property after they were installed.

Eighth Factor. The eighth factor is whether the property becomes inseparably meshed into the greater facility which is the object of the transaction. As mentioned earlier, the primary essence, purpose, or object of

---

may be removed for repairs or replacement, but not necessarily the system."

the transactions at issue was for a greater facility or system (specifically the building or rebuilding of a freeway and/or highway system), not for the installation of signage, sign structures, stand-alone signs, guardrails, and/or crash cushions alone. In *Appeal No. 15-1795*, the Commission noted that the items at issue in that case "are not meshed in a way similar to how bricks and mortar would become inseparable from a building[,]" but "are inseparately meshed in the way that they are necessary for the [system] to function." Similarly, in the instant case, the items at issue were inseparately meshed into the greater facilities or systems (i.e., the freeway and/or highway projects) that were the objects of the taxpayer's contracts, and the items at issue were needed for the freeway and/or highway systems into which they were meshed to function. As a result, this factor also supports a finding that the items at issue became real property after they were installed.

Ninth Factor. The ninth factor is whether the property becomes attached to real property. The taxpayer admits that the items at issue are either embedded in the ground, attached to real property by bolts, or, attached to structures or posts that are themselves attached to real property. As a result, this factor also supports a finding that the items at issue became real property after they were installed.

In summary, the primary essence, purpose, or object of the contracts at issue concern the building or rebuilding of freeways and/or highways. When the nine factors discussed above are all considered in the context of these contracts and transactions, the factors indicate that the items at issue did not remain personal property after the taxpayer installed them, but, instead, became real property. As a result, all of the transactions at issue were sales of real property, and the taxpayer was responsible to pay sales and use taxes on the items at issue, which it converted into real property.

## IV. Prior Commission Rulings.

The above conclusions are consistent with the Commission's ruling in *Appeal No. 15-1795*. The taxpayer, however, contends that the Tax Commission has issued refunds concerning items and contracts that are the same or similar to those at issue in the instant appeal. The taxpayer, however, has not provided any

specific instances of such refunds to support this claim. As a result, the Commission will not consider this particular argument any further.

The taxpayer also contends that the Commission's above conclusions are inconsistent with other appeal decisions and private letter rulings in which the Commission has found that items remained personal property after their installation. It is difficult to apply a prior Commission ruling, which concerns a unique fact pattern, to another case. As noted by the Utah Supreme Court in *Nickerson Pump* and *Chicago Bridge*, whether the subject matter of a sales transaction is deemed real property or personal property will depend of the facts peculiar to each case. Nevertheless, the Commission will discuss the various Commission decisions and private letter rulings that the taxpayer specifically mentioned and differentiate them from the instant appeal.

*USTC Private Letter Ruling 97-035* (June 9, 1997).[31] In *PLR 97-035*, the Commission considered whether sales and use tax should be paid on certain items "purchased for use in the I-15 reconstruction project." The equipment at issue included closed circuit television ("CCTV") equipment mounted on a pole or structure; vehicle detection equipment installed on surface roads and interstates; radio, electronic, and computer traffic controllers installed in cabinets along surface streets and interstates; and variable message signs ("VMS") that are "tubular mounted" on structures. The Commission ruled, as follows in pertinent part:

> . . . .
> With regard to the items specified in your letter, we understand that all of the items are electronic components which operate independently or in conjunction with other devices to collect traffic data or to control traffic signals or message boards. None of these items are built into the roadway itself, although they may be connected to sensors or conduit which rests on or in the pavement.
>
> CCTV (Closed Circuit TV), Speed Spectrum Radios mounted on a pole or structure appear to be items that remain tangible personal property even when mounted on a pole or structure. VMS electronic message boards mounted along side or cantilevered over the highway also retain their character as tangible personal property upon installation. All other items listed are electronic components or computer components which are installed in metal cabinets along side the road to operate traffic signals. The cabinets and the components in the cabinets remain items of tangible personal property upon installation. All of these items may be

31 Redacted versions of this and other selected private letter rulings can be viewed on the Tax Commission's website at http://tax.utah.gov/commission-office/rulings.

> purchased by COMPANY A directly from the vendors tax free, even if they are installed by the vendors or other contractors.
> . . . .

The items at issue in *PLR 97-035* (which primarily appear to be electronic components) are different from the items at issue in the instant appeal (which are not electronic components). In addition, the *PLR 97-035* ruling provides no information about the individual contracts associated with the "XXXX reconstruction project" identified in the ruling. As a result, it is not entirely clear that the contracts at issue in *PLR 97-035* concerned a real property system or project or whether the contracts concerned sales of the described electronic components alone. As discussed earlier in the instant decision, such a distinction is critical in determining whether certain items remain personal property or become real property upon installation. Furthermore, in the *PLR 97-035* ruling, the Commission did not mention the factors relied upon by the Utah Supreme Court in *Nickerson Pump*, *Chicago Bridge*, and *BJ-Titan* (which were discussed in much detail earlier in the instant decision). In fact, the *PLR 97-035* ruling contains no explanation as to how the Commission determined that the items at issue in that ruling remained personal property after installation. For these reasons, *PLR 97-035* is not particularly helpful in determining whether the items at issue in the instant appeal remained personal property or became real property upon installation.

<u>*USTC Private Letter Ruling No. 97-081* (February 3, 1998)</u>. In *PLR 97-081*, the Commission considered whether sales and use tax should be paid on "passenger tramways [sold] through a 'turnkey' transaction, where a contractor constructs the entire passenger tramway system, including cement, cables, towers, etc., then 'hands over' the tramway to the ski resort in exchange for payment." The Commission ruled, as follows in pertinent part:

> . . . we have concluded that, at minimum, the cement foundations which underly the tramway are converted to real property upon installation. The cement foundations that support the tramway are intended to be permanent installations over their useful life. Even if the tramway itself is moved, the foundations cannot be removed [intact] without harm and reused in other locations . . . We also conclude that lift houses or other structures that have the characteristics of permanent buildings are treated as real property upon installation.

> As to the tramway itself, the tramway and all of its essential parts or accessories are considered tangible personal property, even upon installation. Unlike the cement foundations, the tramway, including the tramway towers, can be relocated or realigned as needed. Any item that is an integral accessory to the tramway will be treated as tangible personal property for purposes of the sale of the tramway under Utah Administrative Rule R865-19S-58, including any lift houses or structures that can be moved and that do not have the characteristics of permanent buildings.
> . . . .

Clearly, a passenger tramway system installed at a ski resort is different from a freeway or highway system. In addition, unlike the building or rebuilding of a freeway or highway that is clearly real property, there is no evidence to suggest that the passenger tramway system at issue in *PLR 97-081* was associated with the building or rebuilding of an entire ski resort that is real property. In *PLR 97-081*, the Commission appears to distinguish between property that remains personal property and property that becomes real property by indicating that the former can be relocated or realigned as needed while the latter are intended to be permanent installations over their useful life. While these limited factors are among the nine factors relied upon by the Utah Supreme Court in *Nickerson Pump*, *Chicago Bridge*, and *BJ-Titan* and discussed earlier in this decision, they do not comprise a majority of the factors that should be considered. In *PLR 97-081*, the Commission did not mention or discuss the other factors. For these reasons, *PLR 97-081* is not particularly helpful in determining whether the items at issue in the instant appeal remained personal property or became real property upon installation.

*USTC Private Letter Ruling 05-003* (September 27, 2005). In *PLR 05-003*, the Commission considered whether sales and use tax should be paid on "playground equipment that is typically used in public and private parks, in tot lots in subdivision developments, and etc." The ruling indicated that to stabilize the playground equipment, postholes are dug into the ground; supporting poles are placed into the postholes; cement is poured into the postholes; and the playground equipment is bolted to the supporting poles. *PLR 05-003* further indicated that to remove the playground equipment, the equipment is unbolted from the supporting poles; the supporting poles are dug out of the ground; and the cement is broken off of the supporting poles. In

the ruling, the Commission found that the playground equipment remained personal property after its installation because:

> 1) after the installation the playground equipment can be, and is occasionally moved and used at other locations;
> 2) political subdivisions can and generally do assemble and install the equipment making this service appear to be a mere convenience for the purchaser;
> 3) when removed the equipment only leaves a hole in the ground that could easily be filled;
> 4) there is no substantial difference from the way the playground equipment is attached to the ground for stability as items classified in [Utah Admin. Rule R884-24P-33] as personal property, like billboards and amusement rides.

Clearly, playground equipment is different from the items at issue in the instant appeal, which are installed on freeways and/or highways. In addition, it appears that the contracts at issue in *PLR 05-003* were for the playground equipment only and were not associated with contracts for the building of the parks and real property developments into which the equipment was installed. In *PLR 05-003*, the Commission again considered some, but not all, of the nine factors relied upon by the Utah Supreme Court in *Nickerson Pump*, *Chicago Bridge*, and *BJ-Titan* and discussed earlier in this decision.

Lastly, in *PLR 05-003*, the Commission considered that the playground equipment was attached to the ground like items classified as personal property for property tax purposes and specifically noted that "it appears that when the courts have considered the issue of when personal property becomes converted to real property they have looked at the same criteria for both sales tax and property tax purposes (*citing Crossroads Plaza Ass'n v. Pratt*, 912 P.2d 961 (Utah 1996)). In *Appeal No. 15-1795*, however, the Commission considered that *Crossroads Plaza* was a property tax case and determined that "[w]ithout clarification from the Court that the *Crossroads Plaza* definition of improvement is to be applied in the sales tax context, the Commission should continue to apply the nine factor test that has been set out in prior sales tax cases" (which include *Nickerson Pump*, *Chicago Bridge*, and *BJ-Titan*). For these reasons, *PLR 05-003* is not particularly helpful in determining whether the items at issue in the instant appeal remained personal property or became real property upon installation.

*USTC Appeal No. 05-1035* (Findings of Fact, Conclusions of Law, and Final Decision Apr. 23, 2007). In *Appeal 05-1035*, the Commission considered whether sales and use tax should be paid on precast concrete barriers ("barriers") that were purchased and installed under a subcontract associated with a UDOT "project" on I-15. Even though the taxpayer in that case paid sales and use tax on the items that it purchased to make the barriers (i.e., it did not provide exemption certificates to its vendors or sellers), the Commission found that the barriers remained personal property after installation and granted that taxpayer's refund request. The Commission based its decision, in part, on the facts that it would take no more than five minutes to remove or reposition one of these barriers; that as of the hearing date in that case, approximately 40% of the barriers at issue had already been moved from the locations in which they had originally been installed; that the barriers could be moved and repositioned without damage to either the barrier or the roadway; and that UDOT had subsequently provided an exemption certificate for the barriers (even though the exemption certificate was not provided until around the time the Petitioner submitted its refund request).

Again, the items at issue in the instant appeal are different from the barriers at issue in *Appeal 05-1035*. In addition, unlike the barriers at issue in *Appeal No. 05-1035*, the taxpayer has provided no information to show that it would take a similar amount of time (i.e., no more than five minutes) to remove or reposition any of the items at issue in the instant appeal or that nearly half of the items at issue in the instant appeal have already been removed or repositioned. Furthermore, UDOT has not subsequently provided an exemption certificate concerning the items at issue in the instant appeal.

Moreover, in *Appeal No. 05-1035*, the Commission found that Utah Admin. Rule R865-19S-23(E) (2002) ("Rule 23") contemplated "that the taxpayer can support its claim that a sale was for resale or otherwise exempt with evidence other than an exemption certificate." The 2002 version of Rule 23 indicated that a taxpayer could provide "a valid exemption certificate or *other similar acceptable evidence*" (emphasis added). In 2004, the Commission renumbered and substantively amended Rule 23, which included the deletion of the

"other similar acceptable evidence" language that had previously been found in Rule 23(E) (2002).[32] As a result, it is unclear if the Commission would have reached the same decision in *Appeal No. 05-1035* if it had considered the 2004 version of the rule instead of the 2002 version of the rule.

Lastly, and most importantly, in *Appeal No. 05-1035*, the Commission only considered the first six of the nine factors on which it relied in *Appeal No. 15-1795* and discussed earlier in the instant decision. As a result, in *Appeal No. 05-1035*, the Commission did not consider the seventh and eighth factors, specifically "whether the purchaser intended to purchase real property" and "whether the property becomes inseparably meshed into the greater facility which is the object of this transaction." As discussed in *Appeal No. 15-1795* and earlier in the instant decision, factors concerning the essence, purpose, or object of a transaction are critical in determining whether a particular item remains personal property or becomes real property upon installation. It is unclear whether the Commission would have reached the same decision in *Appeal No. 05-1035* had it considered these additional factors. For these reasons, *Appeal No. 05-1035* is not particularly helpful in determining whether the items at issue in the instant appeal remained personal property or became real property upon installation.

*USTC Appeal No. 08-1683* (Initial Hearing Order Oct. 1, 2009).[33] In *Appeal No. 08-1683*, the Commission considered whether sales and use tax should be paid on lawn and awning business signs installed "by means of bolts and screws." In *Appeal No. 08-1683*, the Division argued that such signs remained personal property after installation and asked the Commission to deny the purchaser's request for a refund of the sales and use taxes it had paid when it purchased the signs. The Commission accepted the Division's argument and found that the lawn and awning signs remained personal property after installation, in part, because the lawn signs were attached by means of bolts and screws to the steel posts that were cemented into

---

32 Rule 23 has not been amended since 2004.

33 Redacted versions of this and other Commission decisions can be viewed on the Tax Commission's website at http://tax.utah.gov/commission-office/decisions.

the ground; because the awning signs were attached by means of bolts and screws to an underlying building; because such signs are often removed and replaced with new signs; because these types of signs could be moved to a new location when a business changed locations; because the seller of the signs retained a security interest in the signs (not the underlying real property) until the purchaser paid for the signs in full; and because "the installation methods of the signs at issue [were] remarkably similar to the playground equipment in *PLR 05-003*" (italics added).

The items at issue in the instant appeal (including the signage and stand-alone signs) are different from the lawn and awning business signs at issue in *Appeal 08-1683*. In addition, the contracts at issue in *Appeal 08-1683* appear to involve the sale and installation of the signs only and do not appear to be associated with the development of the land to which the lawn signs are attached or the construction of the buildings or other improvements to which the awning signs are attached. As a result, the essence, purpose, or object of the transactions at issue in *Appeal No. 08-1683* do not appear to involve a real property project, unlike the contracts at issue in the instant appeal.

Furthermore, in *Appeal No. 08-1683*, the Commission did not expressly refer to the nine factors relied upon by the Utah Supreme Court in *Nickerson Pump*, *Chicago Bridge*, and *BJ-Titan* and discussed earlier in the instant decision. Admittedly, the Commission found that the lawn and awning signs at issue in *Appeal No. 08-1683* remained personal property after installation, in part, because they were attached by means of screws and bolts and could be moved without much harm to the signs and the underlying realty (which involve some of the nine factors). However, these factors alone do not determine whether an item remains personal property or becomes real property upon installation. All nine factors should be considered, including the critical factors concerning the essence, purpose, or object of the transaction at issue (which for the transactions at issue in *Appeal No. 08-1683* appears to involve personal property, unlike the real property transactions at issue in the instant appeal).

Moreover, in *Appeal No. 08-1683*, the Commission appears to have relied, in part, on the Utah Supreme Court's decision in *Crossroads Plaza*, the property tax case mentioned earlier. Again, in *Appeal No. 15-1795*, the Commission determined that "[w]ithout clarification from the Court that the *Crossroads Plaza* definition of improvement is to be applied in the sales tax context, the Commission should continue to apply the nine factor test that has been set out in prior sales tax cases[.]" For these reasons, *Appeal No. 08-1683* is not particularly helpful in determining whether the items at issue in the instant appeal remained personal property or became real property upon installation.

Appeal No. 11-1774.[34] In *Appeal No. 11-1774*, the Commission considered whether sales and use tax should be paid on pipe and other materials used in the construction of water or sewer pipelines projects for governmental entities or political subdivisions. For most of these projects, the pipes were buried using "standard trenching construction," which involved digging a five to eight foot trench; placing a "bedding material" in the trench; placing the pipes in the trench and connecting them; placing bedding material around and over the pipes; and restoring the surface of the ground (or roadway under which the pipes were installed). The taxpayer in *Appeal No. 11-1774* argued that the pipelines remained personal property after installation, in part, because the pipelines were not "attached" to the real property, even if the pipeline's individual pipes were attached to one another. The taxpayer contended that until personal property is "attached" to real property, it cannot be converted to real property.

In *Appeal No. 11-1774*, the Commission considered the nine factors set forth in *Nickerson Pump*, *Chicago Bridge*, and *BJ-Titan* and found that the pipelines became real property after installation, in part, because the object of the transactions was to provide a functioning sewer or water pipeline (not to sell individual pipe sections or pipe materials); because removal of the pipelines would result in significant damage to the underlying realty and/or improvements under which the pipelines were buried; and because "[t]he

---

34 The Tax Commission's decision in *Appeal No. 11-1774* was appealed for judicial review, and that appeal is still pending.

pipeline is attached to the real property by the weight and the size of the pipeline."

In the instant case, the taxpayer notes that the little, if any, damage to the ground or roadway results from the removal of any of the items at issue, as opposed to the significant damage that the Commission found would result by removing the pipelines in *Appeal No. 11-1774*. For this reason and because the Commission found that the pipelines in *Appeal No. 11-1774* became real property after installation, the taxpayer argues that it would follow that the items at issue in the instant case remain personal property after installation. The taxpayer's reasoning is not persuasive because it focuses only on one of the nine factors discussed earlier, specifically whether damage would occur if an item, once installed, is removed. As explained earlier, all nine factors set forth in *Nickerson Pump*, *Chicago Bridge*, and *BJ-Titan* should be considered for each unique fact scenario. When all of these factors are considered in regards to the items at issue in the instant appeal, they show that the items became real property after installation. If anything, the Commission's ruling in *Appeal No. 11-1774* supports the Commission's conclusion in the instant matter because the essence, purpose, or object of the transactions at issue in both cases involve real property projects, not the sale and installation of individual items of personal property alone.

*Appeal No. 13-488*. In *Appeal No. 13-488*, the Commission considered whether sales and use tax should be paid on the installation of outdoor business signs (which were different from the lawn and awning business signs at issue in *Appeal No. 08-1683*). The outdoor business signs at issue in *Appeal No. 13-488* primarily involved signs consisting of a steel pole (which is encased in concrete and sometimes encased in both concrete and rebar) and an angle iron cabinet containing signage and/or LED (light-emitting diode) displays (which is welded to the pole). In *Appeal No. 13-488*, the Division argued, in part, that these signs should be deemed personal property after installation because the taxpayer did not pay sales and use tax on the materials it purchased to construct the signs (i.e. the taxpayer did not treat its contracts as real property contracts where the taxpayer is considered to have consumed the items used to construct the real property).

In *Appeal No. 13-488*, the Commission considered the nine factors set forth in *Nickerson Pump*, *Chicago Bridge*, and *BJ-Titan* and discussed earlier in the instant decision. Although the taxpayer in *Appeal No. 13-488* provided no contracts to show whether the parties to its transactions were contemplating personal property or real property transactions, the Commission concluded that most of the nine factors supported a finding that these particular business signs became real property after installation. The Commission reached this conclusion, in part, because of the manner by which the signs were attached to the realty; because the signs' poles and electronic components would be destroyed and their angle iron cabinets would have to be rebuilt if the signs were removed; and because the signs at issue in *Appeal No. 13-488* were very different from the signs at issue in *PLR 97-035* and *Appeal No. 08-1683* (which had been deemed to have remained personal property after installation).

The taxpayer argues that the Commission's ruling in *Appeal No. 13-488* shows that the Commission can determine whether an item remains personal property or becomes real property after installation without knowing the intent of the parties to the transaction. If all or most of the other nine factors set forth in *Nickerson Pump*, *Chicago Bridge*, and *BJ-Titan* indicate that an item, after installation, remains personal property or becomes real property, it may not be critical to know the intent of the parties. However, if all other factors are evenly split between showing that an item remains personal property and showing that the item becomes real property after installation, the intent factor(s) may be critical in reaching a conclusion about the installed item. As discussed earlier, however, all factors indicate that the items at issue in the instant appeal became real property after their installation. Accordingly, the intent of the parties is not at all critical in reaching a decision in the instant case.

The taxpayer also argues that because the items at issue in the instant case are attached to the realty by bolts, these items are more like the signs in *PLR 97-035* and *Appeal No. 11-1774* (which remained personal property after installation) than the signs in *Appeal No. 13-488* (which became real property after installation).

Again, such reasoning is not persuasive because it focuses on only one or a few of the factors set forth in *Nickerson Pump*, *Chicago Bridge*, and *BJ-Titan* instead of considering all nine factors. When all nine factors are considered in regards to the items at issue in the instant case, they show that these items became real property after they were installed. For these reasons, *Appeal No. 13-488* is not particularly helpful in determining whether the items at issue in the instant appeal remained personal property or became real property upon installation.

## CONCLUSIONS OF LAW

1. Pursuant to Subsection 59-1-1417(1), the burden of proof in this appeal is upon the taxpayer.

2. Subsection 59-12-103(1)(a) imposes sales and use tax on a purchaser for amounts paid or charged for retail sales of tangible personal property within Utah. The taxpayer purchased the items at issue in Utah and is subject to sales and use tax on the items, unless the purchases qualify for exemption from taxation.

3. Had the items at issue remained personal property after the taxpayer purchased and installed them, the taxpayer's purchases of the items would have been exempt from taxation under Subsection 59-12-104(2) and/or Subsection 59-12-104(25). However, when the nine factors set forth in *Nickerson Pump*, *Chicago Bridge*, and *BJ-Titan* are applied to the items and contracts at issue in the instant case, the analysis shows that the items became real property upon installation. As a result, the taxpayer is considered to have consumed these items that it converted to real property. Accordingly, under Rule 58 and Subsection 59-12-103(1)(a), the taxpayer's purchases of the items at issue are subject to taxation and do not qualify for exemption.

4. Based on the foregoing, the Commission should deny the taxpayer's refund requests concerning the items at issue.

____________________________________
Kerry R. Chapman

Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission denies the taxpayer's appeal, thus sustaining all actions taken by the Division in the 1st Request Notice and the 2nd Request Notice. It is so ordered.

DATED this _________ day of ________________________, 2018.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Rebecca L. Rockwell
Commissioner

**Notice of Appeal Rights:** You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §§59-1-601et seq. and 63G-4-401 et seq.