

16-357
TAX TYPE: SALES & USE TAX
TAX YEAR: 10/01/12 - 07/31/15
DATE SIGNED: 01/18/2018
COMMISSIONERS: M. CRAGUN, R. PERO, R. ROCKWELL
RECUSED: J. VALENTINE
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.</p>	<p>INITIAL HEARING ORDER</p> <p>Appeal No. 16-357</p> <p>Account No. #####</p> <p>Tax Type: Sales & Use Tax</p> <p>Audit Period: 10/01/12 - 07/31/15</p> <p>Judge: Phan</p>
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Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE FOR TAXPAYER
For Respondent: REPRESENTATIVE FOR RESPONDENT-1
REPRESENTATIVE FOR RESPONDENT-2
RESPONDENT, Auditor

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on September 27, 2016 for an Initial Hearing in accordance with Utah Code §59-1-502.5. Petitioner (“Taxpayer”) had filed an appeal of a sales and use tax audit deficiency issued for the audit period of October 1, 2012 through July 31, 2015. The Statutory Notice–Sales and Use Tax was issued on February 25, 2016. The total amount of the tax deficiency in the audit was \$\$\$\$\$. As of the date of the Statutory Notice, with interest and some payments credited to the account, the total balance was \$\$\$\$\$. Interest continues to accrue until the balance is paid in full. At the hearing the Taxpayer only contested Schedule 2-Additional Taxable Sales, which was the charges received by the Taxpayer’s BUSINESS-1. The amount of tax deficiency in Schedule 2 was \$\$\$\$\$. At the hearing, the Taxpayer’s representative also argued that the Taxpayer should receive refunds on taxes it had remitted to the State Tax Commission for its BUSINESS-2 and BUSINESS-3 operations.

APPLICABLE LAW

Sales tax is imposed as follows in relevant part at Utah Code Subsection 59-12-103(1):

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

...

(f) except as provided in Section 59-12-104, amounts paid or charged as admission or user fees for theaters, movies, operas, museums, planetariums, shows of any type or nature, exhibits, concerts, carnivals, amusement parks, amusement rides, circuses, menageries, fairs, races, contests, sporting events, dances, boxing matches, wrestling matches, closed circuit television broadcasts, billiard parlors, pool parlors, bowling lanes, golf, miniature golf, golf driving ranges, batting cages, skating rinks, ski lifts, ski runs, ski trails, snowmobile trails, tennis courts, swimming pools, water slides, river runs, jeep tours, boat tours, scenic cruises, horseback rides, sports activities, or any other amusement, entertainment, recreation, exhibition, cultural, or athletic activity;

...

Guidance on what does not constitute “admissions” and “user fees” is provided at Utah Admin. Rule R865-19S-33 as follows in relevant part:

...

(6) Amounts paid for the following activities are not admissions or user fees:

(a) lessons, public or private;

...

DISCUSSION

The Taxpayer owns and operates four different BUSINESS-1 activities out of one building at ADDRESS, CITY, Utah. Located on the first floor of the building is both the BUSINESS-2 and BUSINESS-3 operations. These activities share one lobby area with shared cashiers. Participants would pay for one or the other activity. However, spectators who are not participating can watch either activity without having to pay any type of entrance fee. The BUSINESS-1 operation is located on the second floor. It has its own separate entrance to the building and its own lobby with cashier. Again, participants pay for this activity but friends or family are allowed into this location to watch as spectators and are not charged an entrance fee. Also in the building is a BUSINESS-4, which has its own separate entrance and separate membership and user fees.

Although there were some other items found to be taxable by Respondent (“Division”), the only dispute that the Taxpayer had with the audit deficiency was the Schedule 2 sales tax that the Division had calculated on the amounts the Taxpayer had charged participants of the BUSINESS-1 activity. The Division assessed tax on these charges under Utah Code Subsection 59-12-103(1)(f) as an admission or user fee. The Taxpayer argued the charge was for instructions

or lessons, which the customer was basically paying for a class on how to WORDS REMOVED, which was a skill that would be applicable to the sports of both ACTIVITY-1 and ACTIVITY-2.¹ The Taxpayer argued what it charged was not an admission fee because the Taxpayer did allow non participants to go into a viewing area and watch persons in the WORDS REMOVED free of charge.

The Taxpayer explained that for first time WORDS REMOVED, before they can go into the WORDS REMOVED they have to participate in a training session. When they go into the WORDS REMOVED, a certified instructor is in the tunnel with them at all times and provides hands on personalized training and assistance. There is also a WORDS REMOVED operator who is outside the tunnel and controls the airflow as needed. The Taxpayer explained that the instructors are certified through the CERTIFIED ASSOCIATION. After initial sessions, participants may train in the WORDS REMOVED to learn new skills. There is always a certified instructor in the tunnel with them. The Taxpayer also asserted that sales tax was not charged on skydiving, but no invoicing or other information was presented to support this assertion or how it was billed to the participants.

The Division had provided some advertising information about the BUSINESS-1 it had obtained from the internet including “First Flight Packages” offered. A package for \$\$\$\$ stated, “Your first flight experience includes your training session, use of all the flight gear, two–one minute flights for a total of two minutes of flight time in the tunnel, hands on personal assistance from your instructor and a flight certificate. In your first flights you will learn the basic freefall position.” A package for \$\$\$\$ was also advertised and was described as, “This package is the same as our First Flight Package, but has twice the flying time, two-two minute flights for a total of four minutes! This extra time gives you the opportunity to fully experience the freedom of flight . . . With this package as you have double the flight time you should start to learn some of the basic ACTIVITY-1 techniques and soon feel in control.” The website goes on to provide information for those who have completed the first flight sessions, “After you have completed your first flight session, you’re addicted and ready for more, and are wondering what step is next. . . As long as you return within three months of your initial flight you will not need to go through the basic training class. There are many options you can consider, it all depends on the level of flight skill you wish to achieve. . . . BUSINESS-1 Utah offers many exciting flight development programs for you to advance your flight skills.” On its website, BUSINESS-1 also advertised

¹ The Taxpayer stated that when ACTIVITY-2 from an airplane there is only 30 to 40 seconds of free fall time in the air to use or practice maneuvers. In the WORDS REMOVED they have more time to learn and practice the maneuvers which they can then use while sky diving.

training camps for body flyers. These were described as, “We offer tunnel camps for every level of flyer. BUSINESS-1 Utah has the most affordable rates as well as some of the BEST coaches in the world. . . . You will need to prepay for the tunnel time to make your reservation and then you can pay the coaching upon arrival.”

The Taxpayer did explain that in some instances the charge for the instructors was separately stated on the Taxpayer’s books and invoices. The Division’s representatives indicated that they did not include in the audit as taxable any charges listed as instructor fees. However, generally there was only one charge to the customer for the BUSINESS-1 activity and that charge was not invoiced or listed on the Taxpayer’s books with some portion for instruction and some as a user fee. The Division had concluded that the single charge was taxable under Utah Code Subsection 59-12-103(1)(f) because the charge was for both the use of the facility and for instruction. As the charge did not separate out what portion was for the user fee and what was for instruction, the Division argues that all of the amount charged was subject to sales tax. The Taxpayer had not charged its customers sales tax on the charge for the BUSINESS-1 activity.

The Division’s position is consistent with the Tax Commission’s *Initial Hearing Order in Appeal No. 15-585* (May 6, 2016).² That case involved a fitness center that had weight rooms, a swimming pool, racquetball courts, basketball courts, tennis courts and locker rooms as well as rooms where aerobics, yoga and other classes were taught. The fitness center had a contract with health insurance providers to provide passes to use the facility for eligible plan members who were senior citizens and to provide specific classes that were geared towards the abilities of seniors. Pursuant to the contract, these seniors had access to all of the facility including the classes for seniors, but the taxpayer in that appeal represented that the seniors who used the facility under this contract primarily attended the classes and did not use the other parts of the facility. One of the arguments made in that case was the payment to the fitness center by the health insurance providers was primarily for the classes and not an admission or user fee. The Commission did not agree with the taxpayer in that case, noting that the seniors had access and could use all of the facility.

Under the facts in the appeal at issue, it is clear that instruction and training are a significant component of the BUSINESS-1 activity, but also participants are paying to use the WORDS REMOVED. Under Utah Code Subsection 59-12-103(1)(f) user fees for sports activities or athletic activities are subject to tax. For the transactions in the audit that the Division found taxable, there was not a separately stated user fee subject to tax and instructor or class fee

² This and other Tax Commission decisions are available for review in a redacted format at tax.utah.gov/commission-office/decisions.

not subject to tax on the invoices or receipts. There was just a total charge. The Utah Supreme Court has noted in *Ivory Homes v. Tax Commission*, 2011 UT 54, ¶16, “[T]he form in which a transaction is structured often creates very different tax consequences given that our tax code is highly sensitive to such form.” The Court goes on to find, “Similarly, the form in which Ivory Homes and Parson chose to arrange their transactions cannot be dismissed as inconsequential simply because Ivory Homes may now suffer an unfavorable tax consequence.” *Id.* at ¶17. In this case, where there was one charge not separated out between user fee and instructor fee it is subject to tax as a user fee under Utah Code Subsection 59-12-103(1)(f).

At the hearing, the Taxpayer also requested a refund of taxes that the Taxpayer had remitted on its charges for the BUSINESS-3 and BUSINESS-2 activities. The Taxpayer had charged a set rate for these activities, for example \$20 per hour on the BUSINESS-2, and then backed out sales tax from that amount and remitted the tax. At the hearing, the Taxpayer argued that this was a mistake, that the charge was really a fee for a lesson and not a user fee. The Taxpayer had explained that there was instruction involved with both the BUSINESS-2 and to a lesser extent the BUSINESS-3. However, for both of these activities this lesson or instruction component seemed to be a lesser portion of the activity than for the BUSINESS-1. It did not appear that the Taxpayer had filed a claim for refund under Utah Code Subsection 59-1-1410(8) for the taxes remitted on these two activities and no decision had been issued by the Division on the refund claim. If the Division denies a refund claim a taxpayer may then appeal that to the Commission under Utah Code Subsection 59-1-1410(9). As this procedure had not been followed, this refund request is not properly before the Tax Commission.

The Taxpayer’s appeal in this matter should be denied.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Tax Commission denies the Taxpayer’s appeal of the sales and use tax audit deficiency for the audit period of October 1, 2012 through July 31, 2015. 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

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Formal Hearing. Such a request shall be mailed, or emailed, 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

or emailed to:
taxappeals@utah.gov

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2017.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Rebecca L. Rockwell
Commissioner

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