

17-1278

TAX TYPE: SALES & USE TAX

TAX YEAR: 05/01/14 01/31/17

DATE SIGNED: 4/18/2019

COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. ROCKWELL, L. WALTERS

GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION Appeal No. 17-1278 Account No. ##### Tax Type: Sales & Use Tax Audit Period: 05/01/14 01/31/17 Judge: Phan
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Presiding:

John L. Valentine, Commission Chair

Michael J. Cragun, Commissioner

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE-1 FOR TAXPAYER, Attorney at Law
 REPRESENTATIVE-2 FOR TAXPAYER, Attorney at Law
 REPRESENTATIVE-3 FOR TAXPAYER, General Counsel, TAXPAYER
 REPRESENTATIVE-4 FOR TAXPAYER, CFO, TAXPAYER
 REPRESENTATIVE-5 FOR TAXPAYER, Senior VP Finance, TAXPAYER

For Respondent: REPRESENTATIVE-1 FOR RESPONDENT, Assistant Attorney General
 RESPONDENT-2, Manager, Sales Tax Auditing

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on August 13, 2018, in accordance with Utah Code §59-1-501 and §63G-4-201 et seq. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. On June 29, 2017, Respondent (“Division”) issued a Statutory Notice indicating a sales and use tax deficiency for the audit period of May 1, 2014 through January 31, 2017.¹

¹ Petitioner’s Exhibit 1.

2. Petitioner (“Taxpayer”) timely appealed the notice of deficiency to the Utah State Tax Commission and the matter proceeded through the administrative appeal process to the Formal Hearing.

3. Prior to the Formal Hearing, the Division had issued an amended notice of deficiency on May 15, 2018.² The amended notice indicated an increased amount of sales and use tax due with the audit. Based on the amended notice there was a total deficiency of \$\$\$\$\$ in tax and \$\$\$\$\$ in interest as of the date of the amended notice, for a total due as of the date the amended notice was issued of \$\$\$\$\$.³ No penalties were assessed with the audit.

4. The Taxpayer operates the EVENT CENTER, which is a venue for ENTERTAINMENT EVENTS. The Taxpayer sells tickets to these events directly to the public as well as through a third party vendor. Sales tax is collected and remitted on the price charged for what it describes as the ticket for the event as well as the facility fee that is added to the ticket price. Since sales tax was remitted on the ticket and facilities fees, these items are not in dispute. What is at issue in this audit is the amount added as a “convenience fee” and an “order processing fee.” The Taxpayer had not charged the customer sales tax or remitted sales tax on the “convenience fee” or the “order processing fee” and argued that these fees were not subject to sales and use tax because they were charged for a service. It was the Division’s position that the amounts charged for the convenience fee and order processing fee were subject to sales tax as part of the charge for admission.

5. The Taxpayer sells tickets directly from its own Box Office, which is a physical location in the arena staffed by employees of the Taxpayer.⁴ It was not in dispute that if a customer came into the Box Office at the arena and purchased the ticket directly from the Taxpayer, no convenience fee or order processing fee was charged. They would pay the face value on the ticket and the ticket was the admission into the event. This was also the same with tickets purchased from what the Taxpayer referred to as the Taxpayer’s “Back Office.” The Taxpayer directly marketed tickets to corporate clients, season ticket holders or persons who purchased a large number of tickets through its Back Office. The convenience and order processing fees were not charged on tickets sold by the Taxpayer from its Back Office.

6. However, tickets were also sold through third party VENDOR.⁵ VENDOR sold the tickets through its ‘remote’ locations inside GROCERY STORES, VENDOR’s call center or from an internet website managed by VENDOR.⁶ It was with the purchases of these tickets sold from the third-party vendor and internet website that the convenience fees and order processing fees were charged to the customer in addition to the ticket amount. The customer could purchase the tickets from these VENDOR

² Respondent’s Exhibit 1.

³ Interest continues to accrue on a deficiency until paid in full.

⁴ Testimony of NAME-1, Employee of TAXPAYER.

⁵ Respondent’s Exhibit 2.

⁶ Petitioner’s Exhibit 4.

sources, but would have to pay the convenience fee and order processing fee plus the ticket charge to obtain the ticket. Then the customer could use the ticket to gain admission to the event.

7. Ticket prices were set by event and location of the seat by the performer.⁷ The price of the ticket was printed on the ticket. The ticket price itself was the same whether the customer purchased it from the Box Office, Back Office or from any of the VENDOR Sources, but if it was purchased from any of the VENDOR Sources, in addition to the ticket price, the customer had to pay the additional fees.

8. The Taxpayer and Division submitted invoices demonstrating that the total charges for the tickets were different depending on where the customer purchased the tickets. The invoices also clearly showed a ticket price and a separately stated amount for the additional fees charged, if any. A number of invoices were provided from the CONCERT held on DATE, to demonstrate the different charges based on where the ticket was purchased.⁸ The invoices broke out the ticket price and listed each of the fees separately. It was not disputed at the hearing that all invoices during the audit period listed the ticket price and various fees charged, if any, separately. The Division had recorded on the CONCERT invoices the sources from where the tickets had been purchased and the invoices showed the following:

Where Purchased	Price Per Ticket	Facility Fee Per Ticket	Number of Tickets	Other Fees	Total Cost ⁹
Back Office	\$\$\$\$\$	\$\$\$\$\$	#####	None	\$\$\$\$\$
Box Office	\$\$\$\$\$	\$\$\$\$\$	#####	None	\$\$\$\$\$
Call Center	\$\$\$\$\$	\$\$\$\$\$	#####	Order Processing \$\$\$\$\$\$ Convenience \$\$\$\$\$\$ Artist \$\$\$\$\$\$	\$\$\$\$\$
Remote	\$\$\$\$\$	\$\$\$\$\$	#####	Order Processing \$\$\$\$\$\$ Convenience \$\$\$\$\$\$ Artist \$\$\$\$\$\$	\$\$\$\$\$
Mobile	\$\$\$\$\$	\$\$\$\$\$	#####	Order Processing \$5 Convenience \$\$\$\$\$\$ Artist \$\$\$\$\$\$	\$\$\$\$\$

⁷ Petitioner’s Exhibit 8.

⁸ Respondent’s Exhibit 15.

⁹ No line item for sales tax was listed on the invoices. A fact that came out at the hearing, which was not relevant to the issues in dispute, was that sales tax was incorporated into the price of the ticket, meaning that the \$\$\$\$\$ or \$\$\$\$\$ charged per ticket included the sales tax; the sales tax was backed out from that amount and remitted to the Tax Commission. The same thing was done for the \$\$\$\$\$ per ticket facilities fee charge. The sales tax was included in the \$\$\$\$\$ per ticket fee, backed out from that amount, and remitted to the Tax Commission. See Petitioner’s Exhibit 4. Tax was not remitted on the processing fee or convenience fee.

Internet	\$\$\$\$\$	\$\$\$\$\$	#####	Order Processing	\$\$\$\$\$	
				Convenience	\$\$\$\$\$	\$\$\$\$\$
				Artist	\$\$\$\$\$	

9. While the ‘Back Office’ sales were directed from the Taxpayer to the customer, anyone could go to the ‘Box Office’ and purchase their tickets without paying the extra fees. Their ticket would get them admission into the event just like the tickets purchased from any of the VENDOR sources. Regardless, only about 13% of the tickets were sold from the Box Office for nine different events sampled by the Taxpayer.¹⁰

10. If a customer purchased from anywhere except the Box Office or Back Office, the customer had to pay the convenience fee and order processing fee plus the charge for the ticket in order to acquire the ticket. Fifty-two percent of the tickets were sold via VENDOR’s internet site and the customers paid the convenience fee and order processing fee to purchase in that manner.¹¹ Once these customers acquired their tickets, they could get admission into the arena for the event just like the customer who purchased from the Box Office or Back Office.

11. The Taxpayer and VENDOR split the convenience fee and order processing fee.¹²

12. The Taxpayer argued at the hearing that it really was a matter of convenience for the customer to purchase using one of the other options instead of driving to the arena during business hours, find parking and purchasing the ticket there. The customer could choose to purchase the ticket over the phone, via internet or the other VENDOR options, saving the customer time, but if they did so, they had to pay the convenience fees.

13. It does appear from the evidence that the order processing and convenience fees were not charged for the admission itself. Any customer could go to the Box Office and purchase a ticket directly from the Taxpayer that would get them admission into the event without being charged these fees and the price charged for the “ticket” itself was the same if the customer purchased directly from the Taxpayer or from the VENDOR sources. The VENDOR sources would add the fees, but the fees were not for the admission into the event, they were instead for the service of being able to acquire the ticket in a more convenient manner.

¹⁰ Petitioner’s Exhibit 17.

¹¹ Respondent’s Exhibit 7, Petitioner’s Exhibit 17.

¹² Testimony of NAME-1, Employee of TAXPAYER.

APPLICABLE LAW

Sales tax is imposed as follows in relevant part at Utah Code Subsection 59-12-103(1)(2016):¹³

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;

...

During the audit period, “purchase price” and “sales price” were defined at Utah Code Subsection 59-12-102(99) (2016) but these terms were not used in the tax imposition provisions at Subsection 59-12-103(1).¹⁴ Utah Code Subsection 59-12-102(99) (2016) provided the definition as follows:

- (a) “Purchase price” and “sales price” mean the total amount of consideration:
 - (i) valued in money; and
 - (ii) for which tangible personal property, a product transferred electronically, or services are: (A) sold . . .

- (b) “Purchase price” and “sales price” include:
 -
 - (iii) a charge by the seller for any service necessary to complete the sale; or . . .

Utah law places the burden of proof generally on the Petitioner in an appeal and statutory construction is set out at Utah Code Sec. 59-1-1417 as follows:

- (1) In a proceeding before the commission, the burden of proof is on the petitioner . . .

- (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:

¹³ Subsection 59-12-103(1) was amended in 2018 to state, “A tax is imposed on the purchaser as provided in this part on the *purchase price* or *sales price* for amounts paid or charged for the following transactions (emphasis added).” The version of the code in effect during the audit period had used the phrase “*amounts paid or charged*” (emphasis added)” in Subsection 59-12-103(1)(2016). “Amounts paid or charged” is not defined.

¹⁴ The Tax Commission had assumed “purchase price” and “sales price” related to “amounts paid or charged” in the imposition statute at 59-12-103(1) in a prior decision. *See Findings of Fact, Conclusions of Law, and Final Decision, Appeal No. 10-2350* (8/30/2013). The 2018 amendment now makes it clear that the definition of “purchase price” and “sales price” at Subsection 59-12-102(99) apply to the imposition of the tax at Subsection 59-12-103(1).

- (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.

CONCLUSIONS OF LAW

1. Utah Code Subsection 59-12-103(1)(f) (2016) is a tax imposition statute, imposing sales tax as of the audit period on the “amounts paid or charged” as admission or user fees. As pointed out by the Taxpayer, because the issue before the commission involves the statutory construction of a statute imposing the tax, the Commission must construe the statute strictly in favor of the Taxpayer pursuant to Utah Code Subsection 59-1-1417(2).¹⁵

2. During the audit period, Utah Code Subsection. 59-12-103(1) imposed sales tax “on the amounts paid or charged” for a number of types of transactions. The transaction at issue in this appeal was under Subsection 59-12-103(1)(f) which imposes sales tax on admission or user fees. “Amounts paid or charged” are not defined anywhere in the Utah Sales and Use Tax Act. However, “purchase price” and “sales price” were specifically defined at Subsection 59-12-102(99). In determining what constituted “amounts paid or charged,” the Commission had looked to the definitions of “purchase price” and “sales price.” See *Findings of Fact, Conclusions of Law and Final Decision, Appeal No. 10-2350* (August 30, 2013). In 2018, Utah Code Sec. 59-12-103(1) was amended and the amendment provides a more clear link than before that the statutory definitions of “purchase price” and “sales price” apply to determine what constitutes the “amounts paid or charged” under the tax imposition statute.

3. The Commission’s *Final Decision*, in *Appeal No. 10-2350* was appealed to the Utah Supreme Court in *Rent-A-Center West v. Utah State Tax Commission*, 2016 UT 1. In *Rent-A-Center West* the Court was also interpreting what was meant by “amounts paid or charged” under Utah Code Subsection 59-12-103(1) but the specific provision the Court addressed in that case was Subsection 59-12-103(1)(k) for leases or rentals of tangible personal property. *Rent-A-Center West* is then distinguishable from the present case in that the Court in *Rent-A-Center West* was interpreting a different subsection of the sales tax imposition statute. *Rent-A-Center West* involved whether an optional liability waiver fee charged with the rental was subject to sales tax. The Tax Commission had found the optional liability waiver fee to be taxable and the Utah Supreme Court overturned the Tax Commission, deciding the appeal on the basis of its interpretation of the “amounts paid or charged,” noting in a footnote it was “unnecessary to discuss whether these fees could be encompassed within the definitions of “purchase price” and “sales price” *Id.* n. 1.

¹⁵ The Division appears to be arguing that the issue is a tax exemption issue, See Auditing Division’s Pre-Hearing Brief, page 4-5, but provides no analysis to support this contention and the argument lacks merit.

4. As noted by the Utah Supreme Court in *Rent-A-Center West*, ¶13, for determining what constituted “amounts paid or charged,” the Court stated, “When we interpret a statute, “our primary goal is to evince the true intent and purpose of the Legislature (citation omitted).” “The best indication of the legislature’s intent is the plain and ordinary meaning of the statute’s terms (citation omitted).” The court noted that the Oxford English Dictionary defined “pay for” as “giving ‘money or other equivalent for goods or services.’” *Id* at ¶16. The Court noted that Utah Code Subsection 59-12-103(1)(k), which imposed tax on the “amounts paid or charged for leases or rentals of tangible personal property,” did not specifically include “services” for which the property “is leased.” *Id* at ¶20. The Court in that case held, “Because the liability waiver fee does not affect the possession, use, or operation of the rental property, it is not subject to taxation under the plain language of section 59-12-103(1)(k).” *Id* at ¶20

5. Like Utah Code Subsection 59-12-103(1)(k), the subsection at issue in this appeal regarding admissions, Utah Code Subsection 59-12-103(1)(f), does not specifically impose a tax on a service related to the admission. Utah Code Subsection 59-12-103(1)(f) imposes sales tax on “amounts paid or charged as admission or user fees.” In the subject appeal, it is clear from the evidence submitted at the hearing, where a customer purchased the ticket through a means other than the Box Office or Back Office that the customer paid for the ticket, which was the admission, and also paid for the separately stated and charged convenience and processing fees for the service of being able to purchase the ticket in a convenient manner. However, under the plain language of the statute, it is the admission that is subject to tax and not the convenience and processing fees. The convenience and processing fees did “not affect” the “use or operation” of the admission. Therefore, under the test established by the Court in *Rent-A-Center West* and, noting that this is a tax imposition statute and, therefore, strictly construed in favor of the taxpayer under Utah Code Sec. 59-1-1417, the convenience and service fees charged during the audit period were not subject to tax.

6. The Division argues in this matter that the statutory definition of “purchase price” and “sales price,” which is set out at Utah Code Subsection 59-12-102(99), is applicable and should be considered as the definition for what constitutes the “amounts paid or charged.”¹⁶ Under Utah Code Subsection 59-12-102(99) “purchase price” and “sales price” specifically include the “total amount of consideration” and “a charge by the seller for any service necessary to complete the sale.” The Commission notes that the audit period, as well as the Utah Supreme Court’s decision in the *Rent-A-Center West* case, occurred before the 2018 revision that ties the definition of “purchase price” and “sales price” to the tax imposition provisions under Utah Code Subsection 59-12-103(1). The Commission follows the reasoning of the Utah Supreme Court in *Rent-A-Center West* and finds it unnecessary to

¹⁶ The 2018 revision now specifically ties the definition of “purchase price” and “sales price” to the tax imposition provisions under Utah Code Subsection 59-12-103(1).

interpret “purchase price” and “sales price” in this case. In addition, the Commission declines to opine on any potential impacts of the 2018 revisions to Subsection 59-12-103(1). Rather the Commission finds that the convenience fees and processing fees paid in addition to the price paid for the ticket in this case are not subject to sales and use tax. Anyone could have avoided paying these extra fees by purchasing a ticket directly at the Box Office. The same is true for tickets purchased from the Back Office. The convenience and processing fees were for the service of being able to obtain a ticket to an event in a convenient manner and were only imposed when tickets were not purchased directly from the Taxpayer.

The sales and use tax audit deficiency for the period at issue should be adjusted to remove from the deficiency the tax on the convenience fee and order processing fee.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Tax Commission finds the sales and use tax audit deficiency issued against the Taxpayer for the audit period of May 1, 2014 through January 31, 2017, should be adjusted to remove from the deficiency the sales tax charged on the convenience fee and order processing fee. It is so ordered.

DATED this _____ day of _____, 2019.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Rebecca L. Rockwell
Commissioner

Lawrence C. Walters
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. §59-1-601 et seq. and §63G-4-401 et seq.