

17-1688

TAX TYPE: SALES & USE/TRANSIENT ROOM

TAX YEAR: 07/01/14 – 03/31/17

DATE SIGNED: 1/17/2020

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

GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYER,</p> <p style="padding-left: 40px;">Petitioner,</p> <p>v.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="padding-left: 40px;">Respondent.</p>	<p>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</p> <p>Appeal No. 17-1688</p> <p>Account No. #####</p> <p>Tax Types: Sales and Use/Transient Room</p> <p>Audit Period: 07/01/14 – 03/31/17</p> <p>Judge: Chapman</p>
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Presiding:

Lawrence C. Walters, Commissioner
Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE FOR TAXPAYER, Representative
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General
RESPONDENT-1, from Auditing Division
RESPONDENT-2, from Auditing Division

STATEMENT OF THE CASE

TAXPAYER (“Petitioner” or “taxpayer”) is appealing an assessment of Utah sales and use taxes issued by the Auditing Division of the Utah State Tax Commission (“Respondent” or “Division”). This matter came before the Utah State Tax Commission for a Formal Hearing on October 16, 2019. Based upon the evidence and arguments, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax at issue is sales and use tax.
2. The period at issue is July 1, 2014 through March 31, 2017 (the “audit period”).
3. The taxpayer operates a hotel located in CITY-1, Utah. The hotel was built and began

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operating in YEAR.

4. On October 3, 2017, the Division issued a Statutory Notice – Sales and Use Tax (“Original Assessment”) to the taxpayer for the audit period, in which it imposed sales and use taxes, transient room taxes, and interest (calculated as of November 2, 2017),¹ as follows:

	<u>Tax</u>	<u>Penalties</u>	<u>Interest</u>	<u>Total</u>
Sales and Use Tax	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
Transient Room Tax	<u>\$\$\$\$\$</u>	<u>\$\$\$\$\$</u>	<u>\$\$\$\$\$</u>	<u>\$\$\$\$\$</u>
TOTALS	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

5. The \$\$\$\$\$ of sales and use taxes and the \$\$\$\$\$ of transient room taxes imposed in the Original Assessment was the sum of the sales and use taxes imposed on four schedules and the transient room taxes imposed on three schedules, as follows:²

<u>Sales and Use Tax Schedules</u>	<u>Description of Schedules</u>	<u>Tax</u>
Schedule 1	Additional Taxable Sales Subject to Sales Tax	\$\$\$\$\$
Schedule 4	Disallowed Exempt Sales Subject to Sales Tax	\$\$\$\$\$
Schedule 6	Unreported Expense Purchases	\$\$\$\$\$
Schedule 7	Unreported Asset Purchases	<u>\$\$\$\$\$</u>
	TOTAL	\$\$\$\$\$

<u>Transient Room Tax Schedules</u>	<u>Description of Schedules</u>	<u>Tax</u>
Schedule 2	Additional Taxable Sales Subject to Transient Room Tax	\$\$\$\$\$
Schedule 3	Unreported Taxable Sales Subject to Transient Room Tax	\$\$\$\$\$
Schedule 5	Disallowed Exempt Sales Subject to Transient Room Tax	<u>\$\$\$\$\$</u>
	TOTAL	\$\$\$\$\$

6. On October 27, 2017, the taxpayer submitted a Form TC-738 (Petition for Redetermination) to contest the Division’s Original Assessment.

7. An Initial Hearing was scheduled in this matter for February 6, 2019. Between the October 27, 2017 date that the taxpayer appealed the Original Assessment and the February 6, 2019 date of the Initial

Respondent’s Formal Hearing Exhibit 1. Interest continues to accrue until any tax liability is paid. No penalties were imposed.

2 Respondent’s Formal Hearing Exhibit 1 (Summary A and Summary B).

Hearing, the taxpayer provided some information to the Division, and the Division requested additional information from the taxpayer that the taxpayer did not provide.

8. At the February 6, 2019 Initial Hearing, both parties asked to waive the Initial Hearing and proceed to the Formal Hearing. As a result, on February 7, 2019, the Commission issued a Scheduling Order, in which it scheduled the Formal Hearing for October 16, 2019; and in which it ordered the following:

1. All parties are to conduct and complete their discovery in this matter on or before July 16, 2019.
2. The Petitioner is ordered to submit a pre-hearing brief on or before August 28, 2019.
3. The Respondent is ordered to submit a pre-hearing brief on or before September 18, 2019.
4. The Petitioner may submit a reply brief on or before October 2, 2019.
5. On or before October 2, 2019, the parties are ordered to exchange any document and/or exhibit that they intend to submit at the Formal Hearing.

9. It appears that after February 6, 2019, the taxpayer provided the Division with some information, and the parties agreed that the Division would amend Schedule 6 based on a sample period of three months. On June 28, 2019, RESPONDENT-2, a Division auditor, sent an email to REPRESENTATIVE FOR TAXPAYER, the taxpayer's representative, in which she attached "the updated schedules to the audit" and listed "information requested for the appeal[.]"³

10. On July 1, 2019, the Division sent to the taxpayer Respondent's First Discovery Requests to Petitioner, in which the Division requested that the taxpayer produce documents in regards to the updated schedules that it had sent to the taxpayer on June 28, 2019.⁴

11. The taxpayer did not submit its pre-hearing brief on before the August 28, 2019 date set forth in the Scheduling Order, nor did the taxpayer submit a pre-hearing brief prior to the Formal Hearing to indicate what exactly it was contesting.

12. On August 29, 2019, the Division submitted Auditing Division's Motion to Compel Production of Discovery Information for Formal Hearing (the Division's "Discovery Motion"), in which the

3 Respondent's Formal Hearing Exhibit 10.

4 Respondent's Formal Hearing Exhibit 11.

Division indicated that the taxpayer had failed “to provide much of the documentation the Division requested” and asked “that the Commission compel Petitioner to respond to the Division’s July 1, 2019 discovery request.” The Division also indicated that “[t]o the extent any of the requested documents and information are not provided before the hearing, should Petitioner seek to offer such documents or information at the hearing the Division will request at that time that it be excluded.”

13. On September 3, 2019, the Commission issued its Order Granting Auditing Division’s Motion to Compel Production of Discovery Information for Formal Hearing, in which it granted the Division’s Discovery Motion and ordered the taxpayer to provide the information requested in the Division’s July 1, 2019 discovery request. In this order, the Commission stated that any information not exchanged on or before the October 2, 2019 date set forth in the Scheduling Order may be excluded at the Formal Hearing.

14. On September 20, 2019, the Division issued a letter to the taxpayer’s representative, in which the Division indicated that the purpose of the letter was to summarize the documentation the Division sent to the taxpayer’s representative on September 9, 2019, and to request additional information for the appeal. In the letter, the Division indicated that it “reconciled the Petitioner’s deposits per the previously provided bank statements to the Petitioner’s sales tax returns and income tax returns. The deposits per the bank statements are considerably higher than both the total sales per each type of tax return. Please provide additional documentation to show why the deposit amounts are higher.” In addition, the Division asked the taxpayer’s representative to provide, among other things, “all accounts payable invoices requested for Unreported Expense Purchases for the sample periods . . .” and “the purchase invoices for all transactions listed on the schedule for verification of tax paid where applicable.”⁵

15. On September 25, 2019, RESPONDENT-2 sent the taxpayer’s representative an email, indicating that she and the taxpayer’s representative had just spoken and that the taxpayer’s representative

5 Respondent’s Formal Hearing Exhibit 14.

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would be providing her certain information later that week. Because the taxpayer’s representative did not provide this information, the Division amended its Original Assessment with the limited information it did have.

16. On October 10, 2019, the Division prepared an Amended Utah Tax Audit (“Amended Assessment”), in which it imposed sales and use taxes, transient room taxes, and interest (calculated as of December 31, 2019),⁶ as follows:

	<u>Tax</u>	<u>Penalties</u>	<u>Interest</u>	<u>Total</u>
Sales and Use Tax	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
Transient Room Tax	<u>\$\$\$\$\$</u>	<u>\$\$\$\$\$</u>	<u>\$\$\$\$\$</u>	<u>\$\$\$\$\$</u>
TOTALS	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

17. The\$\$\$\$\$ of sales and use taxes and the \$\$\$\$\$ of transient room taxes imposed in the Amended Assessment is the sum of the sales and use taxes imposed on four schedules and the transient room taxes imposed on three schedules, as follows:⁷

<u>Sales and Use Tax Schedules</u>	<u>Description of Schedules</u>	<u>Tax</u>
Schedule 1	Additional Taxable Sales Subject to Sales Tax	\$\$\$\$\$
Schedule 4	Disallowed Exempt Sales Subject to Sales Tax	\$\$\$\$\$
Schedule 6	Unreported Expense Purchases	\$\$\$\$\$ ⁸
Schedule 7	Unreported Asset Purchases	\$\$\$\$\$
Schedule 8	Under-and Over-Reported Sales Tax Amounts	<u>\$\$\$\$\$</u>
	TOTAL	\$\$\$\$\$

<u>Transient Room Tax Schedules</u>	<u>Description of Schedules</u>	<u>Tax</u>
Schedule 2	Additional Taxable Sales Subject to Transient Room Tax	\$\$\$\$\$
Schedule 3	Unreported Taxable Sales Subject to Transient Room Tax	\$\$\$\$\$
Schedule 5	Disallowed Exempt Sales Subject to Transient Room Tax	\$\$\$\$\$

⁶ Respondent’s Formal Hearing Exhibit 18. Again, interest continues to accrue until any tax liability is paid, and no penalties were imposed.

⁷ Respondent’s Formal Hearing Exhibit 18 (Amended Summary A and Amended Summary B).

⁸ The Division initially imposed approximately \$\$\$\$\$ of sales and use taxes on its amended Schedule 6 (which was discussed but not submitted at the hearing). As will be explained in more detail later in the decision, however, the Division revised its Amended Assessment at the Formal Hearing to only impose \$\$\$\$\$ of sales and use taxes on amended Schedule 6 (which the Division did submit at the hearing).

Schedule 9	Under-and Over-Reported Transient Room Tax Amounts	<u>\$\$\$\$\$</u>
	TOTAL	\$\$\$\$\$

18. The Division *decreased* the \$\$\$\$\$ of sales and use taxes and transient room taxes (combined) that it imposed on its Original Assessment to \$\$\$\$\$ on its Amended Assessment. For sales and use taxes only, the Division *decreased* the \$\$\$\$\$ of total sales and use taxes that it imposed on its Original Assessment to \$\$\$\$\$ on its Amended Assessment. For transient room taxes alone, the Division *increased* the \$\$\$\$\$ of total transient room taxes that it imposed on its Original Assessment to \$\$\$\$\$ on its Amended Assessment.

19. The difference between the amounts imposed on the Division's Original Assessment and Amended Assessment involve four schedules, specifically: 1) the Division *increased* the Schedule 6 assessment of sales and use taxes for Unreported Expense Purchases from \$\$\$\$\$ (on the Original Assessment) to \$\$\$\$\$ (on the Amended Assessment); 2) the Division *decreased* the Schedule 7 assessment of sales and use taxes for Unreported Asset Purchases from \$\$\$\$\$ (on the Original Assessment) to \$\$\$\$\$ (on the Amended Assessment); 3) the Division added a new Schedule 8 to the Amended Assessment, which *increased* the sales and use taxes for Under-and Over-Reported Sales Tax Amounts from \$\$\$\$\$ (on the Original Assessment) to \$\$\$\$\$ (on the Amended Assessment); and 4) the Division added a new Schedule 9 on the Amended Assessment, which *increased* the transient room taxes for Under-and Over-Reported Transient Room Tax Amounts from \$\$\$\$\$ (on the Original Assessment) to \$\$\$\$\$ (on the Amended Assessment).

20. The taxpayer did not submit a pre-hearing brief to inform the Commission and the Division, prior to the Formal Hearing, whether it was contesting all or only a portion of the schedules included in the Division's Original Assessment and/or Amended Assessment. At the Formal Hearing, however, the taxpayer's representative stated that the taxpayer was only contesting the sales and use taxes that the Division imposed on Schedules 6 and 7 of the Original Assessment and/or Amended Assessment. These are the two schedules that comprise most of the tax liability imposed in the Original Assessment and in the Amended Assessment.

21. The taxpayer's representative stated that the taxpayer is not contesting the sales and use taxes imposed on Schedules 1 and 4 of the Original Assessment and the Amended Assessment; the sales and use taxes imposed on Schedule 8 of the Amended Assessment; the transient room taxes imposed on Schedules 2, 3, and 5 of the Original Assessment and the Amended Assessment; or the transient room taxes imposed on Schedule 9 of the Amended Assessment. The taxpayer's representative stated that since the taxpayer has no records, it is not worth contesting the relatively small amounts imposed on these schedules. Accordingly, the Commission will sustain the entirety of the sales and use taxes and transient room taxes imposed on Schedules 1, 2, 3, 4, 5, 8, and 9 of the Division's Amended Assessment.

22. The taxpayer's representative stated that obtaining the invoices for the taxpayer's purchases is nearly impossible because the taxpayer's prior representative lost the taxpayer's invoices. In addition, the taxpayer explained that the taxpayer is a "failing" entity that is trying to sell its business and that it has been difficult in attempting to "pick up the pieces" of this entity. The taxpayer's representative stated that the taxpayer is a "dysfunctional organization" and that he cannot produce documents that the taxpayer has not kept. The taxpayer's representative stated that in his 30-year career, he has not had a client whose records were as lacking as the taxpayer's records.

Schedule 6

23. For the Division, RESPONDENT-1 explained that part of the difficulty in auditing the taxpayer has been the taxpayer's lack of detailed records. RESPONDENT-1 stated that it is unusual for a taxpayer not to provide the Division with detailed records.

24. In Schedule 6 of its Original Assessment, the Division imposed \$\$\$\$ of sales and use taxes for Unreported Expense Purchases. The Division derived this tax amount after determining that the \$\$\$\$ of "other deductions" and "repairs and maintenance" expenses that the taxpayer deducted on its 2014, 2015, and 2016 federal income tax returns could relate to transactions for taxable tangible personal property and/or

repairs and on which the taxpayer may not have paid sales and use taxes. For the 36 months reported on the 2014, 2015, and 2016 returns, the \$\$\$\$ of expenses that the taxpayer deducted equates to \$\$\$\$ per month (\$\$\$\$ divided by 36 months). As a result, the Division determined that sales and use taxes should be assessed on \$\$\$\$ of Unreported Expense Purchases for each month of the audit period. With this methodology, the Division determined that the taxpayer owed \$\$\$\$ of Unreported Expense Purchases for the audit period.⁹

25. After February 6, 2019 (the date scheduled for the Initial Hearing), however, the parties agreed that the Division would amend Schedule 6 using sampling for three months of the audit period (specifically for the months of April 2015, May 2016, and December 2016). RESPONDENT-1 stated that the parties agreed to a three-month sampling period, at least in part, because the taxpayer's representative contended that it would be too burdensome to obtain information for the taxpayer's expense purchases for the entire audit period. When the Division amended Schedule 6, it no longer relied on the expenses reported on the taxpayer's federal income tax returns (as it had done in its Original Assessment). Instead, the Division used expenses reported on the taxpayer's Profit and Loss Income Statements for the audit period and transactions listed in the taxpayer's "check registers" for the three sample months to estimate the taxpayer's Unreported Expense Purchases.

26. For the three sample months combined, the Division determined that the taxpayer's Profit and Loss Income Statements showed that the taxpayer had incurred approximately \$\$\$\$ of expenses (specifically for general administrative expenses, information and telecommunication expenses, sales and marketing expenses, property operations and maintenance expenses, utilities expenses, advertising and promotion

⁹ Respondent's Formal Hearing Exhibit 1 (Schedules 6, 6-A, and 6-A-1). It is unclear whether the Division properly applied the methodology it employed for the Original Assessment's Schedule 6. It appears that the Division may not have applied the monthly Unreported Expense Purchases amount of \$\$\$\$ to each month of the audit period, which if so, would have resulted in an underestimation of the Unreported Expense Purchases deficiency. However, neither party indicated that the Division applied the monthly Unreported Expense Purchases amount to some months and not to some months of the audit period. Furthermore, upon questioning at the Formal Hearing, the Division denied any suggestion that it had not properly executed one or both of the different methodologies that it used for the Original Assessment's Schedule 6 and the Amended Assessment's Schedule 6. As a result, the Commission will assume that the Original Assessment's Schedule 6 methodology results in a deficiency of \$\$\$\$.

expenses, maintenance and repairs expenses, supplied expenses, and technology expenses). Then, for the three sample months combined, the Division determined that the taxpayer's check registers showed that the taxpayer had written checks totaling approximately \$\$\$\$\$. With these amounts, the Division originally projected that the taxpayer's monthly expenses, as reported in its Profit and Loss Income Statements, had an "error" rate of approximately 221% (\$\$\$\$\$ divided by \$\$\$\$\$). As a result, the Division multiplied the taxpayer's Profit and Loss Income Statement expenses for each month of the audit period by approximately 221% to determine the taxpayer's Unreported Expense Purchases. With this methodology, the Division initially amended Schedule 6 to reflect a sales and use tax deficiency of approximately \$\$\$\$\$.

27. The taxpayer's representative argued that a majority of transactions from the taxpayer's check registers for the three months of the Division's sample period are transactions that are not subject to sales and use taxation or transactions on which the seller would have collected sales and use taxes. For example, the taxpayer's representative stated that the amounts that the taxpayer paid a management company to manage the taxpayer's hotel would not be subject to sales and use taxation. In addition, the taxpayer's representative stated that the amounts that the taxpayer paid utility companies would have included sales and use taxes because such entities generally include sales and use taxes in their charges.¹⁰ The taxpayer admits that he has not been able to obtain information about which check register amounts for the three sample months would be or would not be subject to sales and use tax and whether any sellers collected sales and use taxes on the transactions listed in the check registers. Nevertheless, the taxpayer's representative contends that the Division's use of all transactions from the taxpayer's check registers for the three sample months will overestimate the Unreported Expenses Purchases on which the taxpayer may actually owe sales and use taxes.¹¹

10 For example, transactions in the taxpayer's check registers for the three sample months included relatively large checks paid to BUSINESS-1 and BUSINESS-2 and relatively small checks paid to COMPANY-1 and COMPANY-2.

11 However, the taxpayer also does not agree with the \$\$\$\$\$ of taxes for Unreported Expense Purchases that the Division derived on the Original Assessment's Schedule 6. The taxpayer's representative stated that in

28. At the hearing, the Division admitted that the error factor that it calculated with its amended Schedule 6 methodology is likely incorrect. However, it contends that the taxpayer has not met its burden of proof to show that the error factor that the Division derived is incorrect or to show the actual amount of its Unreported Expense Purchases. Later in the hearing, however, the Division agreed to remove some transactions found in the taxpayer's check registers for the three sample months because of the likelihood that these specific transactions would not be subject to sales and use tax. With this alteration, the Division derived a new error rate of 178.8338% that it applied to the expenses shown on the taxpayer's Profit and Loss Income Statements for each month of the audit period. Making this change to the Division's amended Schedule 6 resulted in a final amended Schedule 6 tax liability of \$\$\$\$\$.¹²

29. For reasons to be explained later in the decision, it is clear that the taxpayer has the burden of proof to show that the taxpayer's tax liability for Unreported Expense Purchases is less than the \$\$\$\$\$ amount that the Division imposed in the Original Assessment's Schedule 6. Less clear, however, is whether the Division or the taxpayer has the burden of proof in regards to the higher amount that the Division has imposed in the Amended Assessment's Schedule 6. Regardless, the Commission finds that the methodology the Division used to estimate the taxpayer's tax liability in the Amended Assessment's Schedule 6 is more likely to overestimate the taxpayer's tax liability for Unreported Expense Purchases than the methodology that the Division used in the Original Assessment's Schedule 6. The Commission is wary of the Division's amended Schedule 6 methodology because it results in the taxation of most transactions contained in the taxpayer's check registers, including transactions that may have been paid for nontaxable management services. Even after the Division revised its amended Schedule 6 at the Formal Hearing, the transactions from the check registers for the three sample months with which the Division derived a tax liability of \$\$\$\$\$ still includes

his experience with other clients, the taxpayer's tax liability for Unreported Expense Purchases would likely be less than \$\$\$\$\$.

12 Respondent's Formal Hearing Exhibit 18 (Amended Schedules 6 and 6-A).

checks paid to BUSINESS-1 and BUSINESS-2.

30. For these reasons, the Commission finds the \$\$\$\$ tax liability for Unreported Expense Purchases that the Division derived with the original Schedule 6 methodology the Division used in its Original Assessment to be the most convincing evidence of the taxpayer's tax liability for Unreported Expense Purchases. The taxpayer has not shown what the taxpayer's total tax liability for Unreported Expense Purchases for the audit period should be or that this liability is less than the \$\$\$\$ amount shown on the Original Assessment's Schedule 6.

31. For these reasons, the Commission finds that the taxpayer's Schedule 6 sales and use tax liability for Unreported Expense Purchases is \$\$\$\$.

Schedule 7

32. In Schedule 7 of its Original Assessment, the Division imposed \$\$\$\$ of sales and use taxes for Unreported Asset Purchases that were described as "buildings and other depreciable assets" and "estimated asset purchases" for which the Division indicated that "it could not be verified if sales or use tax was paid." The "asset purchases" on which the original Schedule 7 was based totaled more than \$\$\$\$.¹³

33. At the Formal Hearing, the Division explained that it has amended Schedule 7 to remove those asset purchases that were for real property. On its Amended Assessment, the Division indicated that it made this revision after receiving the taxpayer's 2017 Depreciation Detail Listing that showed which of the taxpayer's asset purchases were for tangible personal property. The \$\$\$\$ of sales and use taxes that the Division imposed on the Amended Assessment's Schedule 7 consists of: 1) \$\$\$\$ of sales and use taxes imposed on the \$\$\$\$ purchase price for various items (described as freezers, equipment, furniture, front desk, thinkcentre, fitness equipment, fitness machines, and computers) on November 25, 2014 (around the time the hotel opened); 2) \$\$\$\$ of sales and use taxes imposed on the \$\$\$\$ purchase price for "equipment" on July 1,

13 Respondent's Formal Hearing Exhibit 1 (Schedule 7).

2016; and 3) \$\$\$\$ of sales and use taxes imposed on the \$\$\$\$ purchase price of “equipment” on October 1, 2016.¹⁴

34. At the hearing, the taxpayer’s representative explained that the taxpayer is only contesting the \$\$\$\$ of sales and use taxes imposed on the November 25, 2014 transaction (i.e., the taxpayer is not contesting the \$\$\$\$ of taxes imposed on the July 1, 2016 transaction or the \$\$\$\$ of taxes imposed on the October 1, 2016 transaction). The taxpayer’s representative explained that the transaction on which the Division imposed \$\$\$\$ of sales and use taxes was the “packaged” purchase of furniture and fixtures around the time that the taxpayer’s hotel opened and that he does not know whether sales and use tax was charged at the time of purchase because he has not been able to obtain an invoice for this transaction.

35. However, the taxpayer’s representative believes that it is possible that the taxpayer paid sales and use taxes on this transaction because the amount that the taxpayer capitalized in its accounting records is greater than the amount that the taxpayer was quoted for the furniture and fixtures. As a result, the taxpayer’s representative believes that the difference between the amount that was quoted and the amount that was capitalized may reflect sales and use taxes that the taxpayer paid. As a result, it appears that the taxpayer’s representative is asking the Commission to find that the taxpayer does not owe the \$\$\$\$ of sales and use taxes that the Division imposed on the November 25, 2014 transaction in its amended Schedule 7.¹⁵

36. For reasons to be discussed in more detail later in the decision, the taxpayer has the burden of proof to show that it previously paid sales and use taxes on the November 25, 2014 transaction at issue on amended Schedule 7. The taxpayer has not met this burden of proof. The taxpayer did not provide an invoice

14 Respondent’s Formal Hearing Exhibit 18 (Amended Schedule 7).

15 At the Formal Hearing, the taxpayer’s representative asked the Commission to continue the Formal Hearing to allow him more time to attempt to find an invoice that relates to the November 25, 2014 transaction. The presiding officers denied this request, at least in part, because the taxpayer’s representative did not ask for a continuance prior to the Formal Hearing.

showing that sales and use taxes were charged on this transaction. In addition, no evidence was provided to show that the amount that the taxpayer was “quoted” for furniture and fixtures is equal to the \$\$\$\$ purchase price of the November 25, 2014 transaction or that the difference between the “quoted” and capitalized amounts is equal to the \$\$\$\$ of sales and use taxes due on this transaction. For these reasons, the taxpayer has provided no evidence to show that the Division improperly imposed \$\$\$\$ of sales and use taxes on the November 25, 2014 transaction at issue on amended Schedule 7.

37. Based on the foregoing, the Commission will sustain the entirety of the \$\$\$\$ of sales and use taxes that the Division imposed on Schedule 7 of its Amended Assessment.

Summary

38. Based on the foregoing, the Commission sustains the Division’s Amended Assessment (including the amended Schedule 7), with one exception. Specifically, the Commission finds that the Amended Assessment’s Schedule 6 should be revised to reflect a sales and use tax liability of \$\$\$\$ for Unreported Expense Purchases.

APPLICABLE LAW

1. Utah Code Ann. §59-12-103(1) (2016)¹⁶ imposes a sales and use tax on certain transactions, 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;

....

(l) amounts paid or charged for tangible personal property if within this state the tangible personal property is:

(i) stored;

(ii) used; or

(iii) consumed; . . .

....

16 All substantive law citations will refer to the 2016 version of Utah law. Unless otherwise indicated, the substantive law remained the same during the audit period, except for the renumbering of some subsections.

2. UCA §59-12-107 provides for a seller to pay or collect and remit sales and use taxes and for a person to pay a use tax, as follows in pertinent part:

....

(2) (a) Except as provided in Subsection (2)(e), Section 59-12-107.1, or Section 59-12-123, and subject to Subsection (2)(f), each seller shall pay or collect and remit the sales and use taxes imposed by this chapter if within this state the seller:

- (i) has or utilizes:
 - (A) an office;
 - (B) a distribution house;
 - (C) a sales house;
 - (D) a warehouse;
 - (E) a service enterprise; or
 - (F) a place of business similar to Subsections (2)(a)(i)(A) through (E);
- (ii) maintains a stock of goods;
- (iii) regularly solicits orders, regardless of whether or not the orders are accepted in the state, unless the seller's only activity in the state is:
 - (A) advertising; or
 - (B) solicitation by:
 - (I) direct mail;
 - (II) electronic mail;
 - (III) the Internet;
 - (IV) telecommunications service; or
 - (V) a means similar to Subsection (2)(a)(iii)(A) or (B);
- (iv) regularly engages in the delivery of property in the state other than by:
 - (A) common carrier; or
 - (B) United States mail; or
- (v) regularly engages in an activity directly related to the leasing or servicing of property located within the state.

....

(e) A person shall pay a use tax imposed by this chapter on a transaction described in Subsection 59-12-103(1) if:

- (i) the seller did not collect a tax imposed by this chapter on the transaction; and
- (ii) the person:
 - (A) stores the tangible personal property or product transferred electronically in the state;
 - (B) uses the tangible personal property or product transferred electronically in the state; or
 - (C) consumes the tangible personal property or product transferred electronically in the state.

....

3. UCA §59-1-1406 provides for a person to retain books and records necessary to determine the amount of a tax, fee, or charge the person owes, as follows in pertinent part:

- (1) A person subject to a tax, fee, or charge shall:
 - (a) keep in a form prescribed by the commission books and records that are necessary to determine the amount of a tax, fee, or charge the person owes;
 - (b) keep books and records described in Subsection (1)(a) for the time period during which an assessment may be made under Section 59-1-1408; and
 - (c) open the person's books and records for examination at any time by:
 - (i) the commission; or
 - (ii) an agent or representative the commission designates.

....

4. Utah Admin. Rule R865-19S-22(A) ("Rule 22") provides for the retention of sales and use tax records, as follows in pertinent part:

A. Every retailer, lessor, lessee, and person doing business in this state or storing, using, or otherwise consuming in this state tangible personal property purchased from a retailer, shall keep and preserve complete and adequate records as may be necessary to determine the amount of sales and use tax for which such person or entity is liable. Unless the Tax Commission authorizes in writing an alternative method of record keeping, these records shall:

- 1. show gross receipts from sales, or rental payments from leases, of tangible personal property or services performed in connection with tangible personal property made in this state, irrespective of whether the retailer regards the receipts to be taxable or nontaxable;
- 2. show all deductions allowed by law and claimed in filing returns;
- 3. show bills, invoices or similar evidence of all tangible personal property purchased for sale, consumption, or lease in this state; and
- 4. include the normal books of account maintained by an ordinarily prudent business person engaged in such business, together with supporting documents of original entry such as: bills, receipts, invoices, and cash register tapes. All schedules or working papers used in connection with the preparation of tax returns must also be maintained.

....

D. All records pertaining to transactions involving sales or use tax liability shall be preserved for a period of not less than three years.

E. All of the foregoing records shall be made available for examination on request by the Tax Commission or its authorized representatives.

F. Upon failure of the taxpayer, without reasonable cause, to substantially comply with the requirements of this rule, the Tax Commission may:

- 1. Prohibit the taxpayer from introducing in any protest or refund claim proceeding those microfilm, microfiche, ADP, or any records which have not been prepared and maintained in substantial compliance with the requirements of this rule.
- 2. Dismiss any protest or refund claim proceeding in which the taxpayer bases its claim upon any microfilm, microfiche, ADP, or any records which have not been prepared and maintained in substantial compliance with the requirements of this rule.

3. Enter such other order necessary to obtain compliance with this rule in the future.
4. Revoke taxpayer's license upon evidence of continued failure to comply with the requirements of this rule.

5. For the instant matter, UCA §59-1-1417(1) (2019) provides guidance concerning which party has the burden of proof, 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.

CONCLUSIONS OF LAW

1. Subsection 59-1-1417(1) provides that in a proceeding before the commission, the burden of proof is on the petitioner (i.e., the taxpayer) unless certain circumstances exist, in which case the burden of proof is on the respondent (i.e., the Division). It is clear that the circumstances that would shift the burden of proof to the Division under Subsection 59-1-1417(1)(a) or (1)(b) do not exist in this appeal. However, because the Schedule 6 deficiency the Division imposed in its Amended Assessment is higher than the Schedule 6 deficiency the Division imposed in its Original Assessment, Subsection 59-1-1417(1)(c) needs additional analysis. The Division asserted the Amended Assessment's higher Schedule 6 deficiency after the taxpayer had appealed the Original Assessment, and no evidence was proffered to suggest that the increased Schedule 6 deficiency was due to a change or correction of federal taxable income.

2. The taxpayer is contesting two of the sales and use tax schedules that are included in both the Division's Original Assessment and its Amended Assessment, specifically Schedule 6 and Schedule 7. The

Commission will first address Schedule 7. In its Amended Assessment, the Division has decreased the total amount of sales and use taxes and transient room taxes that was imposed in its Original Assessment. In addition, in its Amended Assessment, the Division has decreased the total amount of sales and use taxes (only) that was imposed in its Original Assessment. Furthermore, in its Amended Assessment, the Division has decreased the amount of sales and use taxes that it imposed in the Original Assessment's Schedule 7. As a result, it is clear that the taxpayer has the burden of proof to show that all or a portion of the \$\$\$\$ of Schedule 7 taxes that the Division has imposed in its Amended Assessment is incorrect.

3. In the Amended Assessment's Schedule 7, the taxpayer is contesting the \$\$\$\$ of sales and use taxes imposed on its November 25, 2014 purchase of freezers, equipment, furniture, front desk, thinkcentre, fitness equipment, fitness machines, and computers. Pursuant to Subsections 59-12-103(1)(a), 59-12-103(1)(l), and 59-12-107(2)(e), the taxpayer is liable for sales and use taxes paid for tangible personal property purchased in Utah and/or paid for tangible personal property that it stored, used, or consumed in Utah. The taxpayer does not argue that the November 25, 2014 purchase of freezers, equipment, furniture, front desk, thinkcentre, fitness equipment, fitness machines, and computers is not subject to Utah sales and use taxation. Instead, the taxpayer argues that it may have already paid the Utah sales and use taxes on this transaction. As a result, the Commission finds that the amount of Utah sales and use taxes for which the taxpayer is liable on the November 25, 2014 transaction is \$\$\$\$.

4. Still at issue is whether the taxpayer has met its burden of proof to show that it has previously paid the \$\$\$\$ of sales and use taxes that was due on the November 25, 2014 transaction. For reasons explained earlier, the taxpayer's evidence is insufficient to show that it has previously paid the \$\$\$\$ of sales and use taxes owed on this transaction. Furthermore, the taxpayer has not kept records required under Utah law to show whether or not it paid the sales and use taxes owed on this transaction. Subsection 59-1-1406(1) requires a person subject to a tax, fee, or charge to keep books and records that are necessary to determine the

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amount of the person's tax, fee, or charge, while Rule 22(A) provides for a person doing business in Utah to keep and preserve complete and adequate records as may be necessary to determine the person's sales and use liability. The taxpayer's actions of not keeping adequate records with which to determine its Utah sales and use tax liability in regards to the Amended Assessment's Schedule 7 transactions are a violation of Utah law. For these reasons, the Commission finds that the taxpayer owes the entirety of the \$\$\$\$ of sales and use taxes that the Division imposed on Schedule 7 of its Amended Assessment.

5. As to Schedule 6, it is again true that in its Amended Assessment, the Division has decreased not only the total amount of sales and use taxes and transient room taxes that was imposed in its Original Assessment, but also the total amount of sales and use taxes (only) that was imposed in its Original Assessment. However, the Division has increased the \$\$\$\$ amount of sales and use taxes that it imposed in the Original Assessment's Schedule 6 to \$\$\$\$ in the Amended Assessment's Schedule 6. Under these circumstances, pursuant to Subsection 59-1-1417(1)(c), the taxpayer has the burden of proof to show that the \$\$\$\$ amount assessed in the Original Assessment's Schedule 6 is incorrect; however, it is unclear whether the taxpayer also has the burden of proof to show that the higher \$\$\$\$ amount imposed in the Amended Assessment's Schedule 6 is incorrect, or whether it is the Division that has the burden of proof to show that the higher \$\$\$\$ amount imposed in the Amended Assessment's Schedule 6 is correct.

6. Nevertheless, as explained earlier, the Commission is wary of the methodology that the Division employed for the Amended Assessment's Schedule 6 and believes that the methodology that the Division employed for the Original Assessment's Schedule 6 is more convincing. As a result, regardless of which party has the burden of proof in regards to the higher amount imposed in the Amended Assessment's Schedule 6, the Commission will find that the taxpayer's sales and use liability for Unreported Expense Purchases is the \$\$\$\$ amount imposed in the Original Assessment's Schedule 6, unless the taxpayer shows that the actual amount of the taxpayer's Unreported Expense Purchases is lower.

7. Although the taxpayer's representative suspects that the actual amount of the taxpayer's Unreported Expense Purchases is less than the \$\$\$\$ amount imposed in the Original Assessment's Schedule 6, the taxpayer has not provided any credible evidence to show what this lower amount might be. Again, the taxpayer has not kept and preserved complete and adequate records that are necessary to determine its sales and use tax liability for Unreported Expense Purchases (as required under Subsection 59-1-1406(1) and Rule 22(1)). As a result, the Commission finds that the taxpayer's Schedule 6 sales and use tax liability for Unreported Expense Purchases is \$\$\$\$.

8. Based on the foregoing, the Commission should sustain the Division's Amended Assessment (including amended Schedule 7), with one exception. Specifically, the Commission should find that the Amended Assessment's Schedule 6 should be revised to reflect a sales and use tax liability of \$\$\$\$ for Unreported Expense Purchases.

Kerry R. Chapman
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division's Amended Assessment (including amended Schedule 7), with one exception. Specifically, the Commission finds that the Amended Assessment's Schedule 6 should be revised to reflect a sales and use tax liability of \$\$\$\$ for Unreported Expense Purchases. It is so ordered.

DATED this _____ day of _____, 2020.

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.