

17-2017

TAX TYPE: SALES & USE TAX

TAX YEAR: 07/01/14 – 03/31/17

DATE SIGNED: 5/19/2020

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. 17-2017</p> <p>Account No. #####</p> <p>Tax Type: Sales & Use Tax</p> <p>Audit Period: 07/01/14 – 03/31/17</p> <p>Judge: Phan</p>
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Presiding:

Michael J. Cragun, Commissioner

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE-1 FOR TAXPAYER, Attorney at Law

REPRESENTATIVE-2 FOR TAXPAYER, Owner

For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General

RESPONDENT-1, Sales Tax Audit Manager

RESPONDENT-2, Senior Sales Tax Auditor

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on February 26, 2020, in accordance with Utah Code §59-1-1410 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. Petitioner (“Taxpayer”) has filed an appeal under Utah Code §59-1-1410 of a Utah sales and use tax audit deficiency issued by Respondent (“Division”) for the audit period of July 1, 2014 through March 31, 2017. The original Notice of Deficiency was issued on November 24, 2017.¹ The Taxpayer timely appealed the Notice of Deficiency and the matter proceeded to this Formal Hearing.

¹ Exhibit 13.

2. The original Notice of Deficiency had five audit schedules and indicated the following tax due along with the interest accrued as follows:

Schedule 1	Schedule 2	Schedule 3	Schedule 4	Schedule 5	Total Tax
\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	(\$\$\$\$\$)	(\$\$\$\$\$)	\$\$\$\$\$
Tax	Penalty	Interest ²		Total as of Date of Notice	
\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$		\$\$\$\$\$	

3. On February 24, 2020, just prior to the Formal Hearing, the Division issued a preliminary Amended Audit Report which reduced the tax amount.³ The Amended Audit Report indicated the following tax from the five audit schedules, the total along with the interest amount due as follow:

Schedule 1	Schedule 2	Schedule 3	Schedule 4	Schedule 5	Total Tax
\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	(\$\$\$\$\$)	(\$\$\$\$\$)	\$\$\$\$\$
Tax	Penalty	Interest ⁴		Total as of Date of Notice	
\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$		\$\$\$\$\$	

4. Schedule 1 listed underreported tax amounts or the difference between the sales and use tax that the Taxpayer had collected from its customers pursuant to the Taxpayer’s records and the sales and use tax that the Taxpayer had claimed on its sales and use tax returns and remitted to the State. The tax amount due on Schedule 1 of both the original and Amended Audit had been \$\$\$\$\$.⁵

5. Schedule 2 of the audit was where the largest tax deficiency was indicated. Schedule 2 was the disallowed exemption sales. Schedule 2 lists the sales for which no sales tax was collected by the Taxpayer and for which the Taxpayer had no exemption certificate. Under both the original and amended audit, the Schedule 2 tax deficiency amount was \$\$\$\$\$.⁶

6. Schedule 3 of the audit was the unreported expense purchases. These were consumable items the Taxpayer purchased and used in performing its business for which the Taxpayer had not paid sales tax. In the original audit, the Schedule 3 amount had been \$\$\$\$\$. This amount was reduced to \$\$\$\$\$ in the amended audit.⁷

² Interest continues to accrue on any unpaid balance, so this number reflects only the interest that accrued as of when the Notice of Deficiency was issued.

³ Exhibit 14.

⁴ Interest continues to accrue on any unpaid balance, so this number reflects only the interest that accrued as of when the Notice of Deficiency was issued.

⁵ Exhibits 13 & 14.

⁶ Exhibits 13 & 14.

⁷ Exhibits 13 & 14.

7. Schedule 4 of the audit indicated a credit for sales tax paid to sellers in error. This schedule contained primarily sales tax the Taxpayer had paid for electricity, which was deemed to be exempt as an industrial use of fuel and other purchases deemed to be exempt under the manufacturing exemption. For both the original and amended audit, this credit amount had been (\$\$\$\$).⁸

8. Schedule 5 was unreported asset purchases. This schedule lists assets that were purchased by the Taxpayer for use in the Taxpayer's businesses that were not exempt. However, this schedule identified several items in which tax was paid in error and resulted in a credit overall that was allowed against the audit deficiency resulting from the other schedules. In the original audit, this credit amount was (\$\$\$\$) and the amended audit increased the credit to (\$\$\$\$).⁹

9. At the hearing, the only audit schedule the Taxpayer contested was Schedule 2. It was the Taxpayer's position that the Division's deficiency amount of \$\$\$\$ on Schedule 2 was too high and that it should be reduced to \$\$. The Taxpayer did not challenge the amended audit amounts listed on Schedules 1, 3, 4 and 5. The Taxpayer's argument was that the tax projection method used by the Division for Schedule 2 resulted in an unfair error factor. The Taxpayer asserted that the three months used for the Schedule 2 projection factor were not representative of the entire audit period. In addition, the Taxpayer argued that the Taxpayer had not agreed to the projection method or the projection periods chosen.

10. At the hearing, the Taxpayer presented the testimony of REPRESENTATIVE-2 FOR TAXPAYER. REPRESENTATIVE-2 FOR TAXPAYER testified, and it was not refuted, that he was the sole owner, and the only officer and director of the Taxpayer. The primary business of the Taxpayer was to produce and deliver PRODUCTS. In addition, the Taxpayer sells some PRODUCTS such as (X). REPRESENTATIVE-2 FOR TAXPAYER testified that the sale of (X) was seasonal and occurred mostly during the summer and fall, with few winter sales. His primary business was the sale and delivery of the PRODUCTS.

11. The Division referenced Exhibit 12, which listed every (X) sale during the audit period and that list did show (X) sales during winter months as well as spring, summer and fall. The (X) were sold throughout 2015 without a break in sales. In 2016, there was a dip in sales in January and February 2016 and again December 2016 through February 2017, but they resumed again in March 2017.

12. REPRESENTATIVE-2 FOR TAXPAYER testified at the hearing that the Taxpayer did a lot of business with COMPANY-1 (COMPANY-1). He testified that in March through November of 2016, COMPANY-1 was working on a road project and acquiring product from the Taxpayer. It was the Taxpayer's understanding that these sales were exempt from sales tax. The Taxpayer and COMPANY-1

⁸ Exhibits 13 & 14.

⁹ Exhibits 13 & 14.

had the understanding that COMPANY-1 would get the product as needed for use from the Taxpayer and settle up when the project was done. REPRESENTATIVE-2 FOR TAXPAYER said that COMPANY-1 settled up in November 2016 when the invoice was generated for \$\$\$\$.¹⁰ Therefore, although there is an invoice showing a November 2016 charge for this amount, the product was actually received by COMPANY-1 throughout the whole period from March to November. The Division found that the fact that sales tax had not been charged on this transaction was an error. It was the Taxpayer's argument that because this invoice was for product sold over many months using November 2016 as one of the sample period months skewed the audit results. The Taxpayer argued that this COMPANY-1 anomaly was a transaction that occurred only in the November 2016 period.

13. NAME-1 was acting as the Office Manager for the Taxpayer. She testified at the hearing that she answered the phone, was the bookkeeper, did the billings and accounts receivable and generated the invoices. She testified that she was not an officer, director or owner of the Taxpayer. She also testified that she did not sign the checks for the business, but she did the Sales Tax Returns for the business.

14. RESPONDENT-2, the Auditor who conducted the field audit at the Taxpayer's business, testified that she met with both REPRESENTATIVE-2 FOR TAXPAYER and NAME-1 in May 2017. During this meeting, there was some indication from REPRESENTATIVE-2 FOR TAXPAYER to the Auditor that she was to work with NAME-1. The conversation was not recorded and both RESPONDENT-2 and REPRESENTATIVE-2 FOR TAXPAYER had different understandings of the conversation's nuances, but RESPONDENT-2 testified that she was told by REPRESENTATIVE-2 FOR TAXPAYER something to the effect that NAME-1 "will get you what you need."

15. RESPONDENT-2 testified that on June 5, 2017, she and the Audit Manager RESPONDENT-1 met with NAME-1 and NAME-2, who was a CPA working for the Taxpayer at that time. At that meeting, she discussed with them the idea of using a three-month sample period and it was her understanding that they agreed to the use of the sample period, due to it being too difficult to provide all information that would be needed for a 100% audit of all types of sales for the entire audit period. On June 6, RESPONDENT-2 emailed REPRESENTATIVE-2 FOR TAXPAYER and the CPA regarding the three-month sample period and in the email she stated that she included a proposed sample projection form for them to sign.¹¹ Neither signed the form.

16. However, NAME-1 eventually signed the form. This form lists the three sample period months, which were March 2015, October 2015 and November 2016. NAME-1 signed and dated that form on July 31, 2017, indicating that she "concurred with the planned sampling method stated above."

¹⁰ See also Exhibit 10.

¹¹ Exhibit A.

However, just under the signature line the form notes, “The signing of this form does NOT constitute a waiver of your rights to appeal any assessment which may result from this sample (emphasis in the original).”¹² NAME-1 had signed a second form on September 29, 2017 that listed the same sample period months and contained the same statement about not waiving appeal rights.¹³

17. REPRESENTATIVE-2 FOR TAXPAYER testified at the hearing that he had not given NAME-1 the authority to sign a document agreeing to a sample period.

18. At the hearing, the Taxpayer did not disagree with the use of some type of projection based on an error factor from sample periods. The Taxpayer agreed with the Division that a 100% audit review of all purchases and sales over the entire audit period was time and cost prohibitive. The Taxpayer’s request was that a different method be applied in determining the appropriate error factor and tax deficiency. To this end, the Taxpayer retained, CPA, to do a review and prepare a report. NAME-3 testified at the hearing regarding his conclusion and his report was received as Exhibit 1.

19. In his report, NAME-3 states that the Division had applied a %%% error factor on every invoice over the entire audit period.¹⁴ NAME-3 notes in his report that there were five types of sales with respect to which the Taxpayer had made errors during the sample period months. These errors were: 1) tax not charged on sales of (X); 2) tax not charged on the extra SERVICE-3fee; 3) tax not charged on the extra fee for Saturday delivery; 4) tax not charged for the occasional SERVICE-1 of PRODUCT; and 5) tax not charged on invoices to COMPANY-1 Construction. For these five types of sales NAME-3 did a 100% review for the entire audit period, calculating the correct amount of the sales tax that should have been remitted for these five errors, which amounts he listed in his report as follows:¹⁵

(X)	\$\$\$\$
SERVICE-3 Fees	\$\$\$\$
SERVICE-2 Fees	\$\$\$\$
SERVICE-1	\$\$\$\$
COMPANY-1 Invoices	<u>\$\$\$\$</u>
Total	\$\$\$\$ ¹⁶

20. It was NAME-3’s contention that these five sales categories, which he referred to as 100% categories, should be removed from the error factor calculation and error factor application, and

¹² Exhibit 11, pg. 1.

¹³ Exhibit 11, pg. 3.

¹⁴ In the amended audit, the Schedule 2, pg. 1 the Projection Factor as listed was %%% so it is not clear how NAME-3 calculated the %%% factor he noted in his report.

¹⁵ Exhibit 1, pg. 2.

¹⁶ This was not totaled in the report, but this is mathematically the total of these amounts provided in his reported when added together.

instead the tax amount he totaled above should be added 100% to the Schedule 2 amounts. In this manner, the correct tax for these types of sales would be included in the audit, but these sales would not affect the error factor applied to all the other sales. In his report, it was his calculation that if these five 100% categories were removed for purposes of calculating the error factor, the error factor would be reduced to %%%%. .

21. NAME-3 then argued in his report for applying the %%%% error factor to all sales in Schedule 2, except the five 100% categories. This way he calculated a tax based on all sales excluding the five 100% categories, multiplied by the %%%% error factor. Then he added to that the 100% tax from the five 100% categories to get to what he argued was a more fair Schedule 2 sales tax deficiency. This is demonstrated by the following equation based on the numbers as he had listed them in his report:¹⁷

Base Sales (excluding the 100% Categories)	x	%%%%	=	\$\$\$\$\$
Total Tax Due on 100% Categories			+	<u>\$\$\$\$\$</u>
Schedule 2 Tax Deficiency Conclusion				\$\$\$\$\$

22. At the hearing, however, NAME-3 testified that the Taxpayer had found additional invoices or information to show less tax was due. Based on that he testified at the hearing that the amount of the Schedule 2 Tax Deficiency should be reduced from the \$\$\$\$\$ which was the amount listed in his report and discussed in the finding above, to \$\$\$\$\$. The Taxpayer requested at the hearing that Schedule 2 be reduced to \$\$\$\$\$. The Taxpayer did not contest any of the other schedules from the Amended Audit at the hearing. If Schedule 2 were reduced and the rest of the Division’s Amended Audit schedules are upheld it would indicate the following tax deficiency:

Schedule 1	Schedule 2	Schedule 3	Schedule 4	Schedule 5	Total Tax ¹⁸
\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	(\$\$\$\$\$)	(\$\$\$\$\$)	\$\$\$\$\$

23. During the hearing, NAME-3 and NAME-1 testified about how they came up with the tax amount for the 100% categories. NAME-1 testified that she went back through every single invoice for the entire audit period to find all of the (X) sales. She had listed every (X) sale in Exhibit 12 that occurred during the audit period and calculated the tax amount for each invoice. She did the same for the SERVICE-1 which was presented as Exhibit 7, the SERVICE-2, which was Exhibit 8, the SERVICE-3

¹⁷ Exhibits 1 & 2.

¹⁸ The Taxpayer did not present an exhibit at the hearing to demonstrate their request, but this is what they appeared to be requesting at the hearing.

Fees, which was Exhibit 9, and the COMPANY-1 invoices, which were Exhibit 10. Based on these exhibits NAME-3 was able to determine the actual sales tax that should have been remitted on the five 100% categories. This 100% review, however, was limited to the five types of sales that comprise the 100% categories. NAME-1 did not do a 100% review of all of the Taxpayer's sales or purchases and the majority of the Taxpayer's sales were for the sale of the PRODUCT and not the five types of sales included in the 100% categories.

24. The Division's auditor, RESPONDENT-2 testified that the Division usually uses a sample period when they do a sales tax audit and in this case she felt like the Taxpayer through his representative NAME-1 and the Taxpayer's CPA agreed to the use of this sample period. RESPONDENT-2 explained that the three months that were chosen for the sample period were based on a computer generated random selection, the months were statistically representative and they did look at a standard deviation to make sure the months chosen were representative of the period as a whole.

25. The Division's Audit Manager, RESPONDENT-1, testified that sampling is used in 90% of the Division's audits. He testified that he was in the meeting with the auditor RESPONDENT-2, REPRESENTATIVE-2 FOR TAXPAYER and their CPA on June 5, 2017, when they talked about using sample periods. It was his understanding that the Taxpayer wanted to use sampling. He also points out that the five 100% categories that NAME-3 had identified were the primary errors made in the three random sample months. RESPONDENT-1 provided the opinion that it was likely other types of errors existed in the other ##### months of the audit period in addition to the five types of errors found in the three month sample periods. RESPONDENT-1 also provided the opinion that there was no statute or rule that required that the Division obtain the Taxpayer's approval of the use of sampling or a sampling period. The Division, however, had developed the procedure of providing to a taxpayer a written document listing the sample periods and having them sign that they agree to the use of sample periods to avoid issues of the Taxpayer coming back and saying they did not agree, like has happened in the subject case.

26. In this matter, after reviewing the evidence submitted, the sale of (X) did not occur just in the fall months. In addition, the Saturday delivery, SERVICE-3 and occasional SERVICE-1 all were also issues that occurred throughout the audit period. However, one of the five categories of sales referred to as the 100% categories, the COMPANY-1 transaction, did appear to be an anomaly that affected only the November 2016 sample month. The Taxpayer did not show how much this one-month period affected the overall error factor statistically, but that can be seen in the Division's audits. The Schedule 2 error factor calculation is shown by the Division in its Amended Audit report, Exhibit 14, Schedule 2-A. This schedule shows the total sales for the test periods and the disallowed exempt sales for each test month from which the error projection factor for the Schedule 2 items was calculated. This does indicate a much

higher disallowed exempt sales in the November 2016 period than occurred in the other sample months as follows:

	Disallowed Exempt Sales	Total Sales	Projection Factor
March 2015	\$\$\$\$\$		
October 2015	\$\$\$\$\$		
November 2016	<u>\$\$\$\$\$\$</u>		
	\$\$\$\$\$ /	\$\$\$\$\$	= %%%%

If, in fact, the COMPANY-1 invoice amount of \$\$\$\$\$ was removed from the November period the following would result.¹⁹

	Disallowed Exempt Sales	Total Sales	Projection Factor
March 2015	\$\$\$\$\$	\$\$\$\$\$	
October 2015	\$\$\$\$\$	\$\$\$\$\$	
November 2016	\$\$\$\$\$- \$\$\$\$\$ = <u>\$\$\$\$\$</u>		
	\$\$\$\$\$/	\$\$\$\$\$	= %%%%

27. Applying this %%%% as the Schedule 2 Projection Factor instead of the Schedule 2 Projection Factor the Division used in its audit of %%%% would reduce the Schedule 2 tax deficiency amount to \$\$\$\$\$. This change would reduce the audit deficiency tax amount to \$\$\$\$\$. Interest would accrue and would need to be added based on the tax deficiency amount.

APPLICABLE LAW

The Tax Commission applies the substantive law in effect during the audit period, which was July 1, 2014 through March 31, 2017. The parties did not point to any change of law during this period that would affect this appeal, although there had been some revisions over the course of the audit period. For ease of reference, this decision refers to the 2017 provisions of the law.

Sales and use tax is imposed at Utah Code Subsection 59-12-103(1) (2017) in relevant part:

A tax is imposed . . . for amounts paid or charged for the following transactions: (a) retail sales of tangible personal property made within the state . . .

Utah Code Subsection 59-12-106(3)(a) provides the following regarding exempt sales:

For the purpose of the proper administration of this chapter and to prevent evasion of the tax and the duty to collect the tax, it shall be presumed that tangible personal property or

¹⁹ The parties did not submit an exhibit that demonstrates this, but this is mathematically what would occur if this one change were made.

any other taxable transaction under Subsection 59-12-103(1) sold by any person for delivery in this state is sold for storage, use, or other consumption in this state unless the person selling the property, item, or service has taken from the purchaser an exemption certificate . . .

Utah Code Subsection 59-12-107(3)(f) provides the following when excess tax is collected by the seller as follows:

If any seller, during any reporting period, collects as a tax an amount in excess of the lawful state and local percentage of total taxable sales allowed under this chapter, the seller shall remit to the commission the full amount of the tax imposed under this chapter, plus any excess.

A taxpayer is required to maintain its records at Utah Code Sec. 59-1-1406 in relevant part as follows:

- (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.
- ...
- (3) For the purpose of ascertaining the correctness of a return or for estimating a tax, fee, or charge due in accordance with Subsection (2)(a), the commission may:
 - (a) examine the books and records bearing upon the matter required to be included in a return . . .

For purposes of appeal proceedings regarding actions by the Utah State Tax Commission, Utah Code §59-1-1417 provides for the burden of proof and for statutory construction 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.

Utah Admin. Rule R865-19S-22 provides the following regarding record keeping:

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.

CONCLUSIONS OF LAW

1. In this appeal it was not in dispute that certain transactions the Division had identified in its audit were subject to sales or use tax under Utah Code Subsection 59-12-103(1). The Taxpayer acknowledges some errors were made during the audit period and that sales tax was owed on the five 100% categories as well as on some other transactions with respect to which there were errors. The issue is how the dollar amount of the sales and use tax deficiency should be determined. The audit could have been based on a 100% review of all sales and purchases that occurred during the entire audit period. However, like 90% of the audits the Division issues, the subject audit was not done in this manner. Pursuant to Subsection 59-1-1406(1) the Taxpayer is required to maintain records. Pursuant to Subsection 59-1-1406(3), the Division may “examine the books and records bearing upon the matter required to be included in a return” It is clear that the Division may do a 100% audit review. However, neither party advocates for a 100% audit due to the time it would take for the Taxpayer to provide the information and the Division to audit the information. This subject audit was instead based on three separate sample period months. The months used were determined by computer generated random selection from which an error projection factor was determined. The Division’s witness has testified they were determined to be statistically representative based on a standard deviation factor. Neither party pointed to a statute or Administrative Rule that governs how sampling and sample

projections are to be used by the Division in completing an audit. The Taxpayer proposes a variation from the method used by the Division that results in a lower tax due. Utah Code §59-1-1417 places the burden of proof on the Taxpayer.

2. The Taxpayer argues that the Division's sample projection and error factor are improper because the Taxpayer did not authorize the use of the proposed sample or sample periods. REPRESENTATIVE-2 FOR TAXPAYER, the sole owner, officer and director of the Taxpayer did not sign the Sample Projection Form. The form was signed by NAME-1, the Office Manager. REPRESENTATIVE-2 FOR TAXPAYER testified at the hearing that he did not authorize NAME-1 to sign the form on behalf of the Taxpayer. Neither party briefed the issue of agency or implied or apparent authority. NAME-1 did sign the forms and provided them to the Division. REPRESENTATIVE-2 FOR TAXPAYER was in a meeting in which the sampling was discussed and had been included on an email the following day about the three-month sample period. Furthermore, there is nothing in the statute or administrative rule that requires the Division to obtain authorization from a taxpayer to use a sample period. In addition, there is nothing in the statute or rule that says a Taxpayer may not challenge a sample period on appeal of an audit deficiency as being non-representative, even if they agreed to the use of sample periods or that particular period during the audit process. Utah Code Subsection 59-1-501(2) provides that a taxpayer may Petition the Tax Commission for redetermination of deficiency. This Taxpayer had timely filed an appeal, the matter has proceeded to a Formal Hearing and at the hearing the Taxpayer presented evidence that shows that one of the sample months is non-representative of the audit period as a whole. In considering the evidence submitted at the hearing regarding the sample period, one of the sample period months is not representative.

3. The Taxpayer proposes in this matter an alternative from the Division's standard sampling method that is a combination of sample period and 100% audit and that results in a lower tax deficiency. The Taxpayer's requested process is to remove the five error categories that were prevalent during the three random sample months from the calculation of the error factor. This lowers what the Taxpayer's representative represented to be the total error factor from %%% to %%%. The Taxpayer applies the %%% error factor to all other sales except for the five categories of sales and then calculates the actual tax amount for the five categories at 100% for the entire audit period and adds that to the proposed deficiency. Although this is an alternative method, as argued by the Division in this matter, it fails to take into account that there might be other types of errors made in the ##### months that were not made in the three-month sample period. The basis of applying an error factor is if the Taxpayer made a percentage of errors in the three random sample months, it is likely that other errors were made throughout the audit period. Utah Code §59-1-1417 places the burden of proof on the Taxpayer in this appeal. Absent a full 100% audit of all sales and purchases during the audit period, the Taxpayer has not

established that its proposed method has resulted in a more accurate value than the method of applying the error factor adjusted for the one invoice that was non-representative during the sample period. Applying the corrected error factor does account for the other types of errors that may have occurred during the ##### months of the audit that were not audited.

The Schedule 2 tax deficiency should be calculated based on the Projection Factor of %%%%. This reduces the Schedule 2 deficiency to \$\$\$\$\$ in tax. All other audit schedules as found in the Amended Audit should be upheld. This results in a total audit deficiency tax amount of \$\$\$\$\$. Interest has accrued and should be adjusted based on this reduced tax amount.



Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing the Utah State Tax Commission reduces the sales and use tax audit tax deficiency to \$\$\$\$\$ for the audit period of July 1, 2014 through March 31, 2017. The Division is to recalculate the interest accordingly. 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 and Payment Requirement: Any balance due as a result of this order must be paid within thirty (#####) days of the date of this order, or a late payment penalty could be assessed. 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-#####2. 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 (#####) 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.