

20-1426

TAX TYPE: REFUND REQUEST/SALES & USE TAX

TAX YEAR: 2012-2016

DATE SIGNED: 7/19/2021

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

BEFORE THE UTAH STATE TAX COMMISSION	
TAXPAYER,  Petitioner,  v.  AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,  Respondent.	<b>INITIAL HEARING ORDER</b>  Appeal No. 20-1426  Account No. #####-STC  Tax Type: Refund Request Sales & Use Tax  Tax Year: 2012-2016  Judge: Nielson-Larios

**Presiding:**

Aimee Nielson-Larios, Administrative Law Judge

**Appearances:**

For Petitioner: REPRESENTATIVE-1 FOR TAXPAYER  
REPRESENTATIVE-2 FOR TAXPAYER

For Respondent: REPRESENTATIVE FOR RESPONDENT, Utah Assistant Attorney General  
RESPONDENT-1, Auditing Division  
RESPONDENT-2, Auditing Division  
RESPONDENT-3, Auditing Division

**STATEMENT OF THE CASE**

This matter came before the Utah State Tax Commission on May 3, 2021, for an Initial Hearing in accordance with Utah Code Ann. § 59-1-502.5.

On November 6, 2019, the Division issued a final audit report, first, assessing audit tax and interest totaling \$\$\$\$\$ for the audit period of January 1, 2012 through January 31, 2017, and second, indicating that the Taxpayer paid \$\$\$\$\$ on October 29, 2019. On December 27, 2019, the Taxpayer requested a refund of \$\$\$\$\$ in sales and use taxes for the time period of January 1, 2012 through July 31,

2016.<sup>1</sup> On June 29, 2020, the Division issued a Statutory Notice – Sales and Use Tax, denying in full the Taxpayer’s refund request. The Taxpayer is appealing the Division’s Statutory Notice dated June 29, 2020, denying the Taxpayer’s refund request of \$\$\$\$\$. The parties disagree about the correct interpretation of “two years from the date the tax was paid” found in § 59-1-1410(8)(a)(ii).

Additionally, the Division asked that the Commission remand the matter back to the Division for the Division to review the underlying documentation supporting the refund request if the Commission rules against the Division’s interpretation of § 59-1-1410(8)(a)(ii). The Division indicated that the Division has only determined that the Taxpayer’s refund request must be denied because it was untimely; the Division has not reviewed the underlying documentation of the request to determine whether the refund request is otherwise correct. The Taxpayer expressed no disagreement on having the matter remanded

APPLICABLE LAW

Utah Code Ann. § 59-1-1410 addresses in part the timing of audit assessments and refund claims, stating the following in part:

- (1) (a) Except as provided in Subsections (3) through (7) and Sections 59-5-114, 59-7-519, 59-10-536, and 59-11-113, the commission shall assess a tax, fee, or charge within three years after the day on which a person files a return.
- (b) Except as provided in Subsections (3) through (7), if the commission does not assess a tax, fee, or charge within the three-year period provided in Subsection (1)(a), the commission may not commence a proceeding to collect the tax, fee, or charge.
- .....
- (4) The commission may extend the period to make an assessment or to commence a proceeding to collect a tax, fee, or charge if:
  - (a) the three-year period under Subsection (1) has not expired; and
  - (b) the commission and the person sign a written agreement:
    - (i) authorizing the extension; and
    - (ii) providing for the length of the extension.
- .....
- (8) (a) Except as provided in Subsection (8)(b) or Section 19-12-203, 59-7-522, 59-10-529, or 59-12-110, the commission may not make a credit or refund unless a person files a claim with the commission within the later of:
  - (i) three years from the due date of the return, including the period of any extension of time provided in statute for filing the return; or
  - (ii) **two years from the date the tax was paid.**

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<sup>1</sup> At the beginning of the Initial Hearing, the parties told the Judge that the refund request was for January 1, 2012, through January 31, 2017. During the Initial Hearing, no one commented about the tax period of the refund request being six months shorter than the audit period for the final audit report dated November 6, 2019. Throughout the arguments of the Initial Hearing, the time period of the audit appeared to have been identical to the time period of the refund request. It was only while drafting this decision that the Judge noticed that the time period of the refund request is within the time period of the audit, but six months shorter.

- (b) The commission shall extend the time period for a person to file a claim under Subsection (8)(a) if:
  - (i) the time period described in Subsection (8)(a) has not expired; and
  - (ii) the commission and the person sign a written agreement:
    - (A) authorizing the extension; and
    - (B) providing for the length of the extension.

.....

(Emphasis added.)

Utah Code Ann. § 59-12-103(1) (2017) imposes sales and use taxes, as follows in part:

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:

- (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; and

.....

Utah Code Ann. § 59-12-103(1) (2012-2016) did not include the phrase “on the purchase price or sales price,” which is currently found in § 59-12-103(1). Otherwise, the language of Utah Code Ann. § 59 12 103(1) (2012-2016) matches the language of § 59-12-103(1) (2017) that is quoted in this order.

Utah Code Ann. § 59-12-107 (2012-2017) imposes, in part, payment and remittance requirements on persons including sellers, with § 59-12-107 stating the following in part:<sup>2</sup>

- (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);

.....

- (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:

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<sup>2</sup> The language found in § 59-12-107(2)(e) (2012-2017) is currently located in § 59-12-107(2)(f).

- (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.

.....  
(4) (e) (i) The use tax as computed in the return shall be based on the total amount of purchases for storage, use, or other consumption in this state made during the period for which the return is filed, including both cash and charge purchases.

.....  
Utah Code Ann. § 59-12-108(1) (2014-2017) provides the following filing and remittance requirements for a monthly filer:

- (1) (a) Notwithstanding Section 59-12-107, a seller that has a tax liability under this chapter of \$50,000 or more for the previous calendar year shall:
  - (i) file a return with the commission:
    - (A) monthly on or before the last day of the month immediately following the month for which the seller collects a tax under this chapter; and
    - (B) for the month for which the seller collects a tax under this chapter; and
  - (ii) except as provided in Subsection (1)(b), remit with the return required by Subsection (1)(a)(i) the amount the person is required to remit to the commission for each tax, fee, or charge described in Subsection (1)(c):
    - (A) if that seller's tax liability under this chapter for the previous calendar year is less than \$96,000, by any method permitted by the commission; or
    - (B) if that seller's tax liability under this chapter for the previous calendar year is \$96,000 or more, by electronic funds transfer.
- (b) A seller shall remit electronically with the return required by Subsection (1)(a)(i) the amount the seller is required to remit to the commission for each tax, fee, or charge described in Subsection (1)(c) if that seller:
  - (i) is required by Section 59-12-107 to file the return electronically; or
  - (ii) (A) is required to collect and remit a tax under Section 59-12-107; and
  - (B) files a simplified electronic return.
- (c) Subsections (1)(a) and (b) apply to the following taxes, fees, or charges:
  - .....
  - (v) a tax under this chapter.
  - .....

The phrase “a tax under this chapter” located in § 59-12-108(1)(c)(v) (2014-2017) was located in § 59 12 108(1)(c)(vii) (2012-2013). Otherwise, the language quoted for § 59-12-108(1) (2014-2017) matches the language of § 59-12-108(1) (2012-2013).

Utah Code Ann. § 59-12-110.1 provides the following, in part, about refund requests of sales and use taxes:

- (1) Subject to the other provisions of this section, a purchaser may request from a seller a refund or credit of any amount that:
  - (a) the purchaser overpaid in taxes under this chapter; and
  - (b) was collected by the seller.
- (2) (a) Except as provided in Subsection (2)(b), the procedure described in Subsection (1) is in addition to the process for a taxpayer to file a claim for a refund or credit with the commission under Section 59-1-1410.
- (b) Notwithstanding Subsection (2)(a):
  - (i) the commission is not required to make a refund or credit of an amount for which as of the date the refund or credit is to be given the purchaser has requested or received a refund or credit from the seller; and
  - (ii) a seller is not required to refund or credit an amount for which as of the date the refund is to be given the purchaser has requested or received a refund or credit from the commission.

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Utah Administrative Code R865-19S-2, titled, "Nature of Tax Pursuant to Utah Code Ann. Section 59-12-103," states the following:

- A. The sales and use taxes are transaction taxes imposed upon certain retail sales and leases of tangible personal property, as well as upon certain services.
- B. The tax is not upon the articles sold or furnished, but upon the transaction, and the purchaser is the actual taxpayer. The vendor is charged with the duty of collecting the tax from the purchaser and of paying the tax to the state.

Utah Administrative Code R865-19S-4(5) states the following:

A seller that collects an excess amount of sales or use tax must either refund the excess to the purchasers from whom the seller collected the excess or remit the excess to the commission.

- (a) A seller may offset an undercollection of tax on sales against any excess tax collected in the same reporting period.
- (b) A seller may not offset an underpayment of tax on the seller's purchases against an excess of tax collected.

### DISCUSSION

This Discussion Section includes the following subsections:

- A. Information about the audit of January 1, 2012 through January 31, 2017.
- B. Information about the refund request for January 1, 2012 through July 31, 2016.
- C. Information about the "Sixth Waiver and Extension of Statute of Limitations."
- D. Taxpayer's arguments.
- E. Division's arguments.

- F. The Taxpayer has not shown the Agreement provides a basis for the refund request to be considered timely.
- G. Discussion of the applicable law relating to § 59-1-1410(8)(a)(ii).
- H. The Taxpayer's refund request was timely made in accordance with § 59-1-1410(8)(a)(ii).

**A. Information about the audit of January 1, 2012 through January 31, 2017.**

The Taxpayer is a monthly filer. The Division audited the Taxpayer for the audit period of January 1, 2012 to January 31, 2017. The Division explained that during the audit process, the Division used statistical sampling and the parties collaborated about the accounts from which the Division would sample and test transactions. Thus, the population tested for the audit was limited to the transactions of specific accounts of the Taxpayer's chart of accounts. On October 3, 2019, the Division issued a preliminary draft of the audit. On October 29, 2019, the Taxpayer paid \$\$\$\$\$, which was the amount reflected as owing in the preliminary draft. On November 6, 2019, the Division issued the final audit report, assessing \$\$\$\$\$ in sales and use taxes and related interest and also showing the Taxpayer's payment of \$\$\$\$\$.<sup>3</sup> At the Initial Hearing, the Division explained that Schedule 3 of the final audit report indicated that \$\$\$\$\$ of the \$\$\$\$\$ total assessment was for "unreported expense purchases" that included "consumable expense purchases for which tax was not paid." Thus, when the Taxpayer paid \$\$\$\$\$, the Taxpayer also paid \$\$\$\$\$ in unreported, previously unpaid use taxes for the time period of January 1, 2012 through January 31, 2017. The Taxpayer did not appeal the final audit report.

**B. Information about the refund request for January 1, 2012 through July 31, 2016.**

On December 27, 2019, the Taxpayer submitted a refund request for \$\$\$\$\$ for the time period of January 1, 2012 through July 31, 2016, because "[the Taxpayer] inadvertently remitted use tax on exempt advertising supplements distributed as part of a newspaper," according to the Taxpayer's application for refund. These transactions involved "advertising supplements distributed as part of a newspaper" and were not part of the population of transactions that were tested for the audit.

On June 29, 2020, the Division denied the Taxpayer's refund request, explaining the following in the Division's Utah Tax Audit Report dated June 29, 2020:

The refund request is denied because the time period to request the refund for the provided transactions has expired. The Commission may not make a refund unless a claim is filed within the later [of] three years from the date of the return or two years from the date of the claim. The Commission may extend the time for a business to make a claim through written agreement if the period to claim a refund has not expired.

The periods covered by the request were included in a sales and use tax audit of [the Taxpayer] for January 1, 2012 through January 1, 2017 [sic]. The transactions included in the refund request were not included in the population used in a sample selected to

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<sup>3</sup> No penalties were assessed.

review expense purchases in that audit. The assessments made in that audit were not based on those transactions, so payment of the audit does not provide additional time to claim a refund.

Waivers were signed by [the Taxpayer] and the Auditing Division . . . that extended the statute of limitations expiration date to December 31, 2019 for that audit. The waiver form contains language which states that . . . it expires upon the issuance of a Statutory Notice. A Statutory Notice was issued for that audit on November 6, 2019. Accordingly, the waiver expired on that date and the transactions in the refund request are outside of the time allowed to claim a refund. See Utah Code Annotated 59-1-1410(8) for further information.

**C. Information about “Sixth Waiver and Extension of Statute of Limitations.”**

The Division’s denial of the Taxpayer’s refund request references documents extending the statutes of limitations in connection with the audit. On or about June 11, 2019, the parties signed the “Sixth Waiver and Extension of Statute of Limitations” (“Agreement”). The Utah State Tax Commission drafted the Agreement. Through the Agreement, the parties agreed, first, to an extension under § 59 1 1410(4) for the Division to make the audit assessment for the “Audit Period [of] January 1, 2012 to January 31, 2017,” and second, to an extension under § 59-1-1410(8) for the Tax Commission to make a credit or refund to the Taxpayer for the “same taxable period.” Specifically, the Agreement states the following in part:

The Utah State Tax Commission and the Taxpayer mutually agree to allow an extension of time to permit the Utah State Tax Commission to perform an audit and make any and all appropriate deficiency determination(s) or adjustment(s) regarding the Sales and Use Tax liability of the Taxpayer, including assessing additional tax, interest and penalties. The Utah State Tax Commission agrees that this Waiver and Extension also extends the statutory period within which a claim for refund may be filed for the same taxable period.

Taxpayer waives all defenses relating to the date of issuance of the assessment, including statute of limitations, and agrees to not present these defenses against any adjustments to the tax for the Audit Period stated below if a Statutory Notice is issued by the Period Extended Through date. This waiver will expire upon the issuance of a Statutory Notice.

Audit Period	Period Extended Through
January 1, 2012 to January 31, 2017	December 31, 2019

....

**D. Taxpayer’s arguments.**

At the Initial Hearing, the Taxpayer argued that its refund request was made well within the two-year time period provided in § 59-1-1410(8)(a)(ii). Subsection 59-1-1410(8)(a)(ii) states the following.

[T]he commission may not make a credit or refund unless a person files a claim with the commission within the later of: (i) three years from the due date of the return, including the period of any extension of time provided in statute for filing the return; or **(ii) two years from the date the tax was paid.**

(Emphasis added.) The Taxpayer paid sales and use taxes for the time period of January 1, 2012 through January 31, 2017 on October 29, 2019. The Taxpayer made its refund request for the time period of January 1, 2012 through July 31, 2016, on December 27, 2019. The refund request date of December 27, 2019, is within two years of the payment made on October 29, 2019. The refund request amount of \$\$\$\$ is less than the total payment amount of \$\$\$\$.

The Taxpayer asserted that § 59-1-1410(8)(a)(ii) allows the Taxpayer to potentially recover through a refund claim an amount equal to but not greater than the amount of the December 29, 2019 payment and that the Taxpayer's claim for a refund is not required to be based on the same transactions as those tested for the audit. The Taxpayer asserted that, similarly, tax laws generally extend the time allowed for a government entity to audit a taxpayer and potentially recover an amount equal to but not greater than a refund issued for the same time period, and that a government audit is not required to be based on the same transactions as those serving as a basis for a taxpayer's refund claim for the same time period.

The Taxpayer asserted that the language of § 59-1-1410(8)(a)(ii) allows for a refund up to the amount of the October 29, 2019 payment even if the Taxpayer did not challenge the final audit report of November 6, 2019.<sup>4</sup> The Taxpayer explained it is not challenging the audit report. The Taxpayer explained that the transactions of the Taxpayer's refund request were located in an account where transactions involving underpayment of taxes are generally not located; thus, the account where the transactions of the Taxpayer's refund request were recorded, was not one of the accounts that the Division had been interested in selecting for the audit. In response, the Division noted that the Taxpayer worked with the Division in selecting the sample to be audited and the Taxpayer could have requested the account to be included in the audit.

The Taxpayer explained that the language found in the "Sixth Waiver and Extension of Statute of Limitations" (Agreement) and in § 59-1-1410(8)(a)(ii) in no way limits the Tax Commission's ability to issue a refund outside of the Agreement.

The Taxpayer also asserted that the federal government and other states do not interpret the language of "two years from the date the tax was paid" as requiring the payment to be for specific

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<sup>4</sup> If a taxpayer disagrees with a final audit report, a taxpayer may appeal the audit assessment by filing an appeal within 30 days of the date of that final audit report.



transactions rather than for a specific time period. The Taxpayer cited to *Carroll v. United States*, 339 F.3d 61 (2d Cir. 2003), for the proposition that a “taxpayer entitled to a refund may recover an amount up to the total ‘tax paid’ within the 2-year lookback period, regardless of whether the tax, penalties and interest referred to in the refund claim are the same funds paid within the last 2 years.” Additionally, the Taxpayer also cited to Utah Administrative Code R865-6F-14, under which the state generally follows federal interpretations for franchise tax purposes, with R865-6F-14(1) stating in part:

It is the policy of the commission, in matters involving the determination of income for Utah corporation franchise tax purposes, to follow as closely as possible federal requirements with respect to the same matters. . . .

The Taxpayer did not provide a detailed analysis of federal laws, of other states’ laws, and of the reasons why other jurisdictions’ interpretations of “two years from the date the tax was paid” should be applied to Utah sales and use taxes.

The Taxpayer disagreed with the Division’s characterization that the payments for a particular time period are also made for specific transactions within that time period. The Taxpayer believes that payments for a particular time period are made for all transactions within that time period. The Taxpayer asserted that nothing in § 59-1-1410(8)(a)(ii) suggests a transaction-based approach for sales taxes for this two-year statute of limitations. The Taxpayer explained that the language of the Agreement also did not reflect a transaction-based approach for the audit. Instead, the Agreement limited the extensions for issuing the audit and for requesting a refund to a specific time period, not to specific transactions within that time period. Additionally, the Taxpayer asserted that a refund request for a tax return may be based on any of the transactions found within the time period of that tax return. The Taxpayer explained that income tax is not very different from sales taxes; for income tax, the determination of taxable income for a return can be based on thousands of transactions. The Taxpayer questioned why a sales and use tax return and payment should be treated differently from an income tax return and payment, for determining whether a refund claim was timely based on the timing of the payment.

The Taxpayer did not clearly argue that the Agreement provided a basis for the December 27, 2019 refund request to be timely. The Taxpayer mentioned that the Taxpayer thought the Taxpayer had until December 31, 2019, to make its refund request for the time period of January 1, 2012 to January 31, 2017, under the Agreement. However, the Taxpayer did not present arguments regarding an interpretation of the Agreement that would support the Taxpayer’s understanding. Instead, the Taxpayer limited the arguments to the Taxpayer’s refund request being timely under § 59-1-1410(8)(a)(ii), a reason separate from the Agreement.

**E. Division's arguments.**

Based on the Division's presentation at the Initial Hearing and on the Division's written denial of the Taxpayer's refund request, the Division denied the Taxpayer's refund request for two main reasons, discussed below.

First, the Division determined that the "Sixth Waiver and Extension of Statute of Limitations" (Agreement) did not extend the statute of limitations for refund requests for January 1, 2012 through January 31, 2017, to December 27, 2019, the date the Taxpayer filed the refund request. The Division interprets the Agreement to mean that the Taxpayer had until November 6, 2019, to make any refund requests for the time period of January 1, 2012 to January 31, 2017. The Division's interpretation is based on the language of "[t]his waiver will expire upon the issuance of a Statutory Notice," which is found at the end of the second paragraph of the Agreement. The Division explained that the Division has used agreements similar to the Agreement for many years, and the Division is unaware of any previous commission decision interpreting the use of "waiver" at the end of the second paragraph of the Agreement. The Division asserted that the intention of the Agreement was to return to the regular extension periods for both § 59-1-1410(4) and § 59-1-1410(8) when the Division issued the final audit report, which the Division did on November 6, 2019.

For the second reason the Division denied the refund request, the Division determined that the transactions upon which the Taxpayer based the refund request were not among the population of transactions tested by the Division for the audit period of January 1, 2012 through January 31, 2017. Thus, the Division found that the payment of the audit on October 29, 2019, did not pay for the transactions of the refund request dated December 27, 2019. Therefore, the Division concluded that the time period provided in § 59-1-1410(8)(a)(ii), allowing for a refund claimed "two years from the date the tax was paid," was not met, and the Division also concluded that the time period for requesting a refund in accordance with § 59-1-1410(8)(a) had expired. The Division's position is that the two-year statute of limitations applies to the payment of taxes on individual transactions. The Division asserted that the language found in Title 59, Chapter 12 shows the transactional nature of Utah sales taxes. Under § 59-12-103(1), sales and use tax is imposed on transactions, unlike income tax which is imposed on taxable income calculated over an entire tax year. The Division asserted that the Taxpayer paid the sales or use taxes on the transactions of the refund claim over two years before the Taxpayer filed the refund claim on December 27, 2019.

The Division asserted that federal interpretations of the language of "two years from the date the tax was paid" do not apply to interpreting the same language found in § 59-1-1410(8)(a)(ii) for Utah sales

tax purposes.<sup>5</sup> The Division distinguished the differing treatments of the same language, found in § 59-1-1410(8)(a)(ii), to be based on sales tax being a transactional tax. The Division explained that the federal government does not routinely involve itself with the collection of sales taxes. In response to the Taxpayer’s assertion that the Agreement did not reflect that the audit was for specific transactions rather than for specific tax periods or specific returns, the Division noted that the Agreement did not state that specific tax returns were being audited, either.

The Division was unaware of any precedent addressing the correct interpretation of § 59 1410(8)(a)(ii) for Utah sales and use tax purposes.

**F. The Taxpayer has not shown the Agreement provides a basis for the refund request to be considered timely.**

After reviewing the Agreement, if “waiver” found at the end of the second paragraph of the Agreement is interpreted as meaning “Sixth Waiver and Extension of Statute of Limitations,” then the Division would be correct. Alternatively, if “waiver” is interpreted as meaning the Taxpayer’s waiver detailed in the second paragraph of the Agreement, then the Taxpayer’s understanding that the Taxpayer had until December 31, 2019, to make its refund request would be correct. Within the body of the Agreement, “Waiver and Extension,” and “Waiver and Extension of Statute of Limitations” are used to refer to the Agreement as a whole. Possibly “waiver” at the end of the second paragraph refers to the Agreement as a whole, as well, if the Division’s interpretation of the Agreement is correct. Because the Taxpayer did not clearly dispute the Division’s interpretation of the Agreement, this order will follow the Division’s interpretation of the Agreement. Thus, the Agreement does not provide a basis for the Taxpayer’s refund request to be found to be timely.

**G. Discussion of the applicable law relating to § 59-1-1410(8)(a)(ii).**

Under § 59-12-103(1), “[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**: (a) retail sales of tangible personal property made within the state; [and on] (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 . . .” (emphasis added). Under R865-19S-2.A., “[t]he sales and use taxes are **transaction** taxes imposed upon certain retail sales and leases of tangible personal property, as well as upon certain services” (emphasis added). Furthermore, under R865-19S-2.B., “[t]he tax is not upon the articles sold or

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<sup>5</sup> Subsection 59-1-1410(8)(a)(ii) applies both to Utah income tax and to Utah sales and use taxes. The Division asserted that federal interpretations of the language of “two years from the date the tax was paid” do not apply to interpreting the same language found in § 59-1-1410(8)(a)(ii) *when Utah sales and use taxes are at issue*. The Division did not address the correct interpretation of the language of § 59-1-1410(8)(a)(ii) *when Utah income taxes are at issue*.

furnished, but upon the **transaction**, and the purchaser is the actual taxpayer. The vendor is charged with the duty of collecting the tax from the purchaser and of paying the tax to the state” (emphasis added). For use tax, § 59-12-107(2)(e) imposes a payment requirement, under which “[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 . . . stores . . . [,] uses . . . [,] or . . . consumes the tangible personal property . . . in the state” (emphasis added).

Subsection 59-12-107(4)(e)(i) states, “The use tax as computed in the **return** shall be based on the total amount of purchases for storage, use, or other consumption in this state made during the period for which the **return** is filed, including both cash and charge purchases” (emphasis added).

The Taxpayer is a monthly filer. For monthly filers, § 59-12-108(1) provides in part:

- (a) Notwithstanding Section 59-12-107, a seller that has a tax liability under this chapter of \$50,000 or more for the previous calendar year shall:
  - (i) file a **return** with the commission:
    - (A) monthly on or before the last day of the month immediately following the month for which the seller collects a tax under this chapter; and
    - (B) for the month for which the seller collects a tax under this chapter; and
  - (ii) except as provided in Subsection (1)(b), **remit with the return** required by Subsection (1)(a)(i) the amount the person is required to remit to the commission for each tax, fee, or charge described in Subsection (1)(c) . . .
- (c) Subsections (1)(a) and (b) apply to the following taxes, fees, or charges:
  - . . . .
  - (v) a tax under this chapter.
  - . . . .

(Emphasis added.)

Subsection 59-12-110.1(2) allows a purchaser to make refund request directly to the Tax Commission, with that subsection stating that “the process for a taxpayer to file a claim for a refund or credit with the commission [is found in] Section 59-1-1410.”

Subsection 59-1-1410(8)(a) states the following:

**[T]he commission may not make a credit or refund unless a person files a claim with the commission within the later of: (i) three years from the due date of the return, including the period of any extension of time provided in statute for filing the return; or (ii) two years from the date the tax was paid.**

(Emphasis added.) The parties agree that § 59-1-1410(8)(a)(i) is unmet. This order interprets § 59 1 1410(8)(a)(ii).

R865-19S-4 provides the following about offsets a company may and may not make when the company is seller in some transactions and a purchaser in others:

- (5) A seller that collects an excess amount of sales or use tax must either refund the excess to the purchasers from whom the seller collected the excess or remit the excess to the commission.
  - (a) A seller may offset an undercollection of tax on sales against any excess tax collected in the same reporting period.
  - (b) A seller may not offset an underpayment of tax on the seller's purchases against an excess of tax collected.

Subsection (5)(b) of R865-19S-4 specifically prohibits a “seller [from offsetting] an underpayment of tax on the seller's purchases against an excess of tax collected.” Thus, a taxpayer, who is also a seller, cannot avoid its own tax liability by, first, underpaying its own sales and/or use taxes and then, second, offsetting that underpayment against the sales taxes paid by its customers to that seller. Notably, Subsection (5)(b) does not prohibit a seller from offsetting underpayments and overpayments of tax for the same reporting period on its own purchases.

**H. The Taxpayer’s refund request was timely made in accordance with § 59-1-1410(8)(a)(ii).**

After reviewing the parties’ arguments, information, and the applicable law, the Taxpayer’s refund request meets § 59-1-1410(8)(a)(ii).<sup>6</sup> R865-19S-4(5) shows that in certain circumstances a company may offset sales tax paid on different transactions. Through the refund request, the Taxpayer is requesting to offset an underpayment of tax on the Taxpayer’s purchases, found through the audit assessment, against an overpayment of tax on the Taxpayer’s purchases found by the Taxpayer in an account that was not audited. Both the underpayment of tax on the Taxpayer’s purchases and the overpayment of tax on the Taxpayer’s purchases are for transactions that fall within the time period of January 1, 2012 through January 31, 2017. R865-19S-4(5)(b) does not prohibit this offset of overpayment and underpayment of sales and use taxes where the Taxpayer was the purchaser for all of the offsetting transactions.

The next question is whether the Taxpayer made its refund request within the time limit of “two years from the date the tax was paid,” as provided in § 59-1-1410(8)(a)(ii). The Taxpayer paid \$\$\$\$ as part of the total of \$\$\$\$ paid for the time period of January 1, 2012 through January 31, 2017 on October 29, 2019. The \$\$\$\$ is a payment for taxes on transactions for which the Taxpayer was the purchaser, rather than the seller. The Taxpayer made its refund request on December 27, 2019, for transactions within the payment’s time period of January 1, 2012 through January 31, 2017. The refund request date of December 27, 2019, is within two years of that payment’s date. The refund request amount of \$\$\$\$

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<sup>6</sup> The Taxpayer’s refund claim is not limited to the possible claims that could have been made in accordance with the “Sixth Waiver and Extension of Statute of Limitations” agreement or limited to the appeal rights created by the final audit report. The right to appeal a denied refund request is separate from any right to appeal a final audit report.

for the overpayment of taxes on the Taxpayer's purchases is less than the \$\$\$\$ payment applied to the Taxpayer's underpayment of taxes on other purchases from January 1, 2012 through January 31, 2017.<sup>7</sup> Thus, the Taxpayer's refund request is for taxes overpaid on transactions made within the time period of the payment and that refund request was filed within two years from the date of that payment. Therefore, the Tax Commission is authorized to make a refund of the \$\$\$\$ in accordance with § 59-1-1410(8)(a).

The Division's argument about sales tax being transactional in nature does not change the conclusions of this order. The Division is correct that the Utah Code imposes the tax on transactions, as seen by § 59-12-103(1), § 59-12-107(2)(e), and R865-19S-2. The Utah Code also shows that transactions are combined in calculating use taxes owed (*see* § 59-12-107(4)(e)(i)) and that sales tax payments are remitted to the Tax Commission according to the tax periods of returns (*see* § 59-12-108(1)). Additionally, R865-19S-4(5) clearly allows a company to offset the taxes from certain transactions. Thus, the transactional nature of sales and use taxes does not prevent a refund from being made for this appeal.

This Initial Hearing Order does not remand the matter back to the Division. Instead, the Commission prefers that a party timely request a Formal Hearing, in accordance with the instructions at the end of this Initial Hearing Order, if that party disagrees with this order or with the correct amount of the refund.

Aimee Nielson-Larios  
Administrative Law Judge

#### DECISION AND ORDER

Based on the foregoing, the Commission grants the Taxpayer's refund request of \$\$\$\$ . It is so ordered.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed, or emailed, to the address listed below and must include the Petitioner's name, address, and appeal number:

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<sup>7</sup> The Taxpayer argued that it could make a refund request up to the total payment amount of \$\$\$\$ . This order does not determine whether the Taxpayer could have made a refund request up to the total payment amount of \$\$\$\$ . However, R865-19S-4(5)(b) prohibits certain offsets.

Utah State Tax Commission  
Appeals Division  
210 North 1950 West  
Salt Lake City, Utah 84134

or emailed to:  
taxappeals@utah.gov

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

DATED this 19th day of July, 2021.

John L. Valentine  
Commission Chair

Michael J. Cragun  
Commissioner

Rebecca L. Rockwell  
Commissioner