

2009

# Ivory Homes, LTD. v. Utah State Tax Commission : Brief of Petitioner

Utah Supreme Court

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Susan L. Barnum; Assistant Attorney General; Attorneys for Respondent.

Wood Crapo; David J. Crapo; Attorneys for Petitioner.

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IVORY HOMES, LTD.,

**Petitioner,**

**V.**

**Case No. 20090679-SC**

UTAH STATE TAX COMMISSION,

**Respondent.**

## OPENING BRIEF OF PETITIONER

**PETITION FOR REVIEW OF  
AN ADMINISTRATIVE DECISION OF  
THE UTAH STATE TAX COMMISSION**

**Susan L. Barnum, #5444**  
**ASSISTANT ATTORNEY GENERAL**  
**160 East 300 South, 5th Floor**  
**P.O. Box 140874**  
**Salt Lake City, Utah 84114-0874**  
**(801) 366-0361**  
*Attorneys for Respondent*

**WOOD CRAPO LLC**  
**David J. Crapo, #5055**  
**60 E. South Temple, Suite 500**  
**Salt Lake City, Utah 84111**  
**(801) 366-6060**  
*Attorneys for Petitioner*

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(Title 17 US Code)

IVORY HOMES, LTD.,  
Petitioner,  
v.  
UTAH STATE TAX COMMISSION,  
Respondent.

**PETITION FOR REVIEW OF  
AN ADMINISTRATIVE DECISION OF  
THE UTAH STATE TAX COMMISSION**

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### **COMPLETE LIST OF ALL PARTIES**

Petitioner Ivory Homes is unaware of any parties other than those identified in the caption of this Opening Brief of Petitioner.

1. The Petitioner, Ivory Homes, Ltd., shall be referred to herein as “Ivory Homes.”
2. The Respondent, Utah State Tax Commission, shall be referred to herein as the “Commission.”

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## **STATEMENT OF JURISDICTION**

This appeal is from the Findings of Fact, Conclusions of Law, and Final Decision (the "Final Decision") of the Utah State Tax Commission (the "Commission") issued on August 4, 2009 and attached hereto as Addendum 1.<sup>1</sup> This Court has jurisdiction pursuant to Utah Code Ann. § 78A-3-102(3)(e)(ii).

## **ISSUES PRESENTED FOR REVIEW**

1. Did the Commission violate the "cardinal rule of statutory construction" prohibiting the inference of substantive terms into the statutory text when it held that Ivory Homes' liability for sales tax on delivery charges was established by the terms of the "invoices that were contemporaneous with those transactions," even though the statute (a) only requires itemization of delivery charges within "an invoice, bill or sale, or similar document," and (b) does not restrict the time within which such documentation must be provided in order to identify delivery charges.

**Standard of review:** "As questions of law, we review the Tax Commission's interpretations of the various statutory provisions implicated in this matter for correctness, according the Tax Commission's interpretations no deference." *ExxonMobil Corp. v. Utah State Tax Comm'n*, 2003 UT 53, ¶ 11, 86 P.3d 706, 709; Utah Code Ann. § 63G-4-

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<sup>1</sup> The Final Decision is set forth in the record at R. 111 through R. 115. All citations to the Final Decision contained herein will be made to the specific pages of the Record.

403 (appellate court shall grant relief when it determines that the agency has erroneously interpreted or applied the law).

2. Did the Commission err when it relied on the Seller's invoices to determine that delivery charges were subject to sales tax because title to the ready-mixed concrete passed after delivery had occurred even though: (a) the basis for this analysis (Utah Admin. Code R865-19S-71 (2004)) has been repealed; (b) the Utah Supreme Court has rejected sellers' invoices as evidence of intent to pass title; and (c) the Court has acknowledged industry custom and practice recognizing that title to ready-mixed concrete passes prior to delivery?

**Standard of review:** "As questions of law, we review the Tax Commission's interpretations of the various statutory provisions implicated in this matter for correctness, according the Tax Commission's interpretations no deference." *ExxonMobil*, 2003 UT 53 ¶ 11, 86 P.3d at 709; Utah Code Ann. § 63G-4-403.

#### **DETERMINATIVE LAW**

The relevant statutes which govern the outcome of this appeal are as follows:

- (c) "Purchase price" and "sales price" *do not* include:
- ...
- (ii) the following if separately stated on an invoice, bill of sale, or similar document provided to the purchaser: ...

...  
(D) a *delivery charge*; ...

Utah Code Ann. § 59-12-102(61)(c) (2005) (emphasis added).

- (21) (a) "Delivery charge" means a charge:
- (i) by a seller of:
    - (A) tangible personal property; or
    - (B) services; and
  - (ii) for preparation and delivery of the tangible personal property or services described in Subsection (21)(a)(i) to a location designated by the purchaser.
- (b) "Delivery charge" includes a charge for the following:
- (i) transportation;
  - (ii) shipping;
  - (iii) postage;
  - (iv) handling;
  - (v) crating; or
  - (vi) packing.

Utah Code Ann. § 59-12-102(21) (2005).

- (a) If a taxpayer pays a tax, penalty, or interest more than once or the commission erroneously receives, collects, or computes any tax, penalty, or interest, including an overpayment described in Subsection (1)(c), the commission shall:
- (i) credit the amount of tax, penalty, or interest paid by the taxpayer against any amounts of tax, penalties, or interest the taxpayer owes; and
  - (ii) refund any balance to the taxpayer or the taxpayer's successors, administrators, executors, or assigns.
- (b) Except as provided in Subsections (2)(c) and (d) or Section 19-2-124, a taxpayer shall file a claim with the commission to obtain a refund or credit under this Subsection (2) within three years from the day on which the taxpayer overpaid the tax, penalty, or interest.

Utah Code Ann. § 59-12-110(2) (2005).



## STATEMENT OF THE CASE

### **A. Nature of the Case**

This is an appeal of an administrative proceeding before the Commission concerning a statutory notice issued to Petitioner Ivory Homes by the Auditing Division of the Utah State Tax Commission (the "Division") which denied Ivory Homes' request for a sales tax refund.

### **B. Course of Proceedings**

On August 28, 2008, Ivory Homes filed a written request for a refund of Utah sales taxes with the Division for sales taxes paid on delivery charges from July 5, 2005 through August 9, 2008. R. 111. By statutory notice dated November 26, 2008, the Division denied the refund request for the tax period July 2005 to April 2008.<sup>2</sup> *Id.* Petitioner appealed the statutory notice to the Commission. R. 1. A formal hearing was held on April 22, 2009. R. 111. On August 4, 2009, the Commission issued its Findings of Fact,

<sup>2</sup> The Commission observed that the Statutory Notice identified the tax period as being from July 2005 to April 2008, rather than the full period for which Ivory Homes requested a refund which period ended August 9, 2008. R. 111 ¶ 4. The Division has never responded to Ivory Homes' refund request for the remaining period of May 2008 through August 9, 2008. R. 115 ¶ 7. The Commission held that, despite the fact that there is no pending appeal for the May 1, 2008 to August 9, 2008 time period, the outcome of this appeal should govern that remaining tax period. *Id.* Although there is no material difference in the facts for that time period, this Court does not have the jurisdiction to directly resolve the refund request for the May 1, 2008 to August 9, 2008 time period because there has been no denial of that request, nor is there a pending appeal. However, Ivory Homes anticipates that the Court's decision in this appeal will be applied to the pending refund request by the Division.

Conclusions of Law, and Final Decision denying Petitioner's refund request. R. 111-115.

Petitioner filed its Petition for Review on August 24, 2009.

### **C. Commission's Disposition of the Administrative Proceeding**

1. According to the Commission, the failure of the Seller to separately itemize delivery charges in the initial invoice resulted in the sale of a "delivered product" which could not be converted "into sales of goods plus delivery charges." R. 115 ¶ 6.

2. The Commission held that when delivery charges were not "separately stated on an invoice, bill of sale, or similar document provided to the purchaser," at the time the transaction occurs, those charges "became part of a transaction for delivered goods [which were] at the time of the Taxpayer's refund request, completed transactions." R. 115.

3. Although the Commission acknowledged that taxpayers have "the right and ability to correct errors in tax filings," R. 114, it ruled that "[t]he provisions of Utah law allowing for the correction of errors do not allow the Taxpayer to change completed transactions for delivered goods into sales of goods plus delivery charges." R. 115 ¶ 6.

The Commission refused to consider Ivory Homes' undisputed evidence separating and identifying the delivery charges because it concluded that "[t]he best evidence of the intent of the Taxpayer and the Supplier in their transactions come from invoices that were contemporaneous with those transactions." R. 114.

5. The Commission rejected Ivory Homes' characterization of the original invoices as containing error on the grounds that Ivory Homes "did not present evidence to indicate that, at the time of the transactions, the Taxpayer or the Supplier intended to enter into transactions for products other than delivered concrete as documented in the original invoices." *Id.*

**D. Statement of Relevant Facts**

1. Ivory Homes is a building contractor in the State of Utah which is primarily engaged in residential construction. R. 9.

2. In the course of conducting its construction business, Ivory Homes purchased ready-mixed concrete and related sand and aggregate products from Jack B. Parson Companies (the "Seller"). R. 111 ¶ 5, 112 ¶ 6.

3. When the Seller delivered its products to Ivory Homes during the period at issue, it provided invoices to Ivory Homes which included delivery charges, but did not separately identify such charges. R. 112 ¶ 6.

4. In those initial invoices, the Seller calculated sales tax on the total invoiced amount which included the delivery charges. *Id.*

5. Ivory Homes paid sales tax on the full invoiced amount, including delivery charges. *Id.*

6. The Seller subsequently provided Ivory Homes with detailed documentation breaking out the portions of the charges that were for "concrete materials" and the portions that were for "delivery charges." See Record at Hearing Exhibit No. 5.<sup>3</sup>

7. On August 28, 2008, Ivory Homes submitted a refund request to the Commission for the sales taxes which the Seller erroneously collected from Ivory Homes on non-taxable delivery charges for ready-mixed concrete products from July 5, 2005 to August 9, 2008. R. 111.

8. Ivory Homes also submitted a copy of the Seller's report that identified the delivery charges included, but not separately identified, in the original invoices, and identified the sales taxes which the Seller had erroneously collected on those delivery charges. R. 112.

9. On November 26, 2008, the Division issued a Statutory Notice to Ivory Homes denying its request for a refund of sales and use tax for the period of July 2005 through April 2008. R. 111.

10. Ivory Homes filed a timely Petition for Reconsideration and a Formal Hearing was held before the Commission on April 22, 2009. R. 111.

11. At the hearing, the Seller provided evidence identifying the amounts of the delivery charges that had been included in the lump sum amounts reported on the Seller's

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<sup>3</sup> This documentation is contained in the record, but has not been numbered. It is tabbed as Exhibit 5 to the hearing exhibits attached at the end of the numbered record.

original invoices. R. 112 ¶ 7. That evidence included corrected invoices which separately identified the non-taxable delivery charges and calculated sales tax only on the taxable sales thereby reducing Ivory Homes' sales tax liability. R. Hearing Exhibits 3 and 4

The evidence also included spreadsheets setting forth the delivery charges for each transaction, as well as identifying the amount of sales tax paid by Ivory Homes on those delivery charges for each transaction during the relevant time period. R. Hearing Exhibit 5.

13 There is no dispute regarding the accuracy of the documentation provided by the Seller.<sup>4</sup>

14 In prior cases, when the Division has found that individuals or entities had made errors in the preparation of tax returns or sales documents, it has allowed those parties to correct errors through refund requests or amended returns subject to applicable Utah law such as statutes of limitations. R. 112 ¶ 11.

15. On August 4, 2009, the Commission issued its Final Decision in which it held that Utah law does not allow Ivory Homes to request a refund by obtaining corrections of the Seller's errors in the original invoices because, once delivery has

<sup>4</sup> The Commission did not make a specific finding that the documentation was undisputed. However, the Division never disputed or challenged Ivory Homes' evidence of delivery charges and the amount of sales tax paid thereon.

occurred, the transaction is a "completed transaction for delivered goods" which cannot be converted into "sales of goods plus delivery charges." R. 115 ¶ 6.

### SUMMARY

This appeal concerns an issue of statutory interpretation. Under Utah law, delivery charges which, prior to 2005, were defined as an element of the taxable "purchase price" or "sales price," are no longer included in the sales tax base. Therefore, this Court should interpret the relevant provisions of the Sales and Use Tax Act "liberally in favor of the taxpayer." *County Bd. of Equal. of Wasatch Co. v. Utah State Tax Comm'n and the Strawberry Water Users Ass'n*, 944 P.2d 370 (1997), quoting *Salt Lake County v. State Tax Comm'n*, 779 P.2d 1131, 1132 (Utah 1989). The more restrictive rule of interpretation applicable to exemptions does not apply because Ivory Homes is not relying on a statutory exemption.

When Ivory Homes purchased ready-mixed concrete from its supplier, the supplier included delivery charges in the total retail price and collected sales tax from Ivory Homes on the concrete and the delivery charges. R. 112. When Ivory Homes discovered the error, it filed a timely refund request and supported that request with documentation which separately identified the delivery charges on which Ivory Homes had paid sales tax. *Id.* The Commission refused to consider the documentation of delivery charges, finding instead that the initial invoices were "the best evidence of the intent of the Taxpayer and the Supplier." R. 114. According to the Commission, the Supplier's failure to separately

identify delivery charges in the original invoices, converted those charges to part of the "purchase price" of "delivered concrete." R. 114-115.

This conclusion constitutes reversible error for two reasons. First, the Commission's focus on the initial invoices as establishing the sales tax liability of Ivory Homes ignores a "cardinal rule of statutory construction [] that courts are not to infer substantive terms into the text that are not already there." *Berrett v. Purser & Edwards*, 876 P.2d 367, 370 (Utah 1994). The statute which requires separate identification of delivery charges does not require that such identification be set forth in the *initial* invoice nor does it prohibit subsequent corrections to that invoice. The Commission has acknowledged that "taxpayers have the right and the ability to correct errors in tax filings." R. 114. A purchaser should be able to obtain a corrected invoice or other documentation which segregates delivery charges, just as a purchaser would be entitled to obtain corrected documentation when the sales price is overstated by the seller and sales tax is overcollected. The Commission's rejection of Ivory Homes' documentation of delivery charges is an impermissibly narrow interpretation of a taxing provision and imposes restrictions which cannot be found in the statute.

Second, the Commission's focus on the parties' intent at the time of the transactions is based on passage of title analysis which was only relevant under an administrative rule which is no longer in effect. *Hales Sand & Gravel v. Audit Div. of State Tax Comm'n*, 842 P.2d 887 (Utah 1992). The Commission's reliance on the

invoices which were contemporaneous with the sales also ignores the Utah Supreme Court's declaration that, even under the Rule 71 analysis, invoices represent the unilateral intent of the seller and are not indicative of the purchaser's intent. *Id.* at 893. Even if passage of title analysis were relevant, the Utah Supreme Court has indicated its willingness to follow industry custom which recognizes that title to ready-mixed concrete passes before delivery occurs due to the unique nature of the product. *Id.*

The collection of sales tax on non-segregated delivery charges occurs, not because the taxable product is converted to a "taxable delivered product," but because the failure to segregate delivery charges simply makes it difficult to determine the correct amount of sales tax on the taxable product. Corrected documentation easily remedies this difficulty and, when submitted in a timely manner, should be deemed sufficient to identify the correct taxable amount and obtain a refund under the laws of this state.

**I. THE COMMISSION ERRED WHEN IT IGNORED A CARDINAL RULE OF STATUTORY CONSTRUCTION AND INFERRED SUBSTANTIVE TERMS INTO THE APPLICABLE STATUTE.**

Under Utah Code Ann. § 59-12-102(61)(c) (2005), delivery charges are not considered to be part of the taxable "purchase price" or "sales price" so long as those charges are "separately stated on an invoice, bill of sale, or similar document provided to the purchaser."<sup>5</sup> In determining the meaning of the statute, the Court must first look to

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<sup>5</sup> That particular statutory provision is now set forth at Utah Code Ann. § 59-12-102(82)(c) (2009).

the plain language of the statute. *ExxonMobil*, 2003 UT 53 ¶ 14, 86 P.3d at 710. Because this is a tax imposition statute rather than an exemption provision, any ambiguities within the statute must be liberally interpreted in favor of the taxpayer. *Id.*

Furthermore, “[a] cardinal rule of statutory construction is that courts are not to infer substantive terms into the text that are not already there. Rather, the interpretation must be based on the language used, and the court has no power to rewrite the statute to conform to an intention not expressed.” *Berrett*, 876 P.2d at 370.

In this case, the statute does not require the separate identification of delivery charges in *initial* invoices. Nor does it preclude submission of corrected invoices or other “similar documents” to verify delivery charges. The Commission’s inference of such requirements is contrary to the “cardinal rule of statutory construction” and is grounds for reversal. *Id.*

A. The Statute Does Not Require Separate Identification of Delivery Charges in the Initial “Invoice, Bill of Sale, or Similar Document Provided to the Purchaser.”

There is no dispute that the initial invoices included delivery charges and that Ivory Homes paid sales tax on such charges. However, when Ivory Homes attempted to comply with statutory requirements by documenting delivery charges, the Commission rejected that documentation because it was not the initial invoice which was provided to Ivory Homes at the time that the transactions had taken place. The statute on which Ivory Homes bases its refund request clearly requires that delivery charges be “separately stated

on an invoice, bill of sale, or similar document provided to the purchaser.” However, it does not require that the “document provided to the purchaser” have been created *contemporaneously with the sales transaction*, nor does it preclude corrective documentation. The Commission’s rejection of the evidence of delivery charges violates the “cardinal rule of statutory construction [] that courts are not to infer substantive terms into the text that are not already there.” *Berrett*, 876 P.2d at 370.

It would have been quite simple for the Legislature to require separate identification of delivery charges in the “first invoice” or the “initial invoice.” However, there is no such requirement in the applicable statute. The absence of such language is in stark contrast with just such a requirement in Ohio law. In *Giant Tiger Drugs, Inc. v. Kosydar, Tax Comm’r*, 43 Ohio St. 2d 103, 330 N.E. 2d 917 (1975), the Ohio Supreme Court held that the purchaser was not entitled to a refund for sales tax paid on labor charges which the vendor had not separately identified in the initial invoices as required by law. The applicable statute specifically required that “[s]uch separation must appear in the sales agreement or on the initial invoice or initial billing rendered by the vendor to the consumer.” *Id.*, 330 N.E.2d at 919, quoting R.C. 5739.01(H) (italics in original, emphasis added); see also *Spray Wax Car Wash v. Collins, Tax Commr.*, 46 Ohio St. 164, 346 N.E.2d 696 (1976) (Service charges were taxable because they were not separately identified in “initial invoice or initial billing” as specifically required by statute.).

Before the Ohio statute was amended to impose the "first invoice" or the "initial invoice" requirement, Ohio law required separate identification of non-taxable or exempt charges, but did not specifically require that identification of such charges be set forth in the vendor's "initial billing." Under that earlier version of the law, "price" did not include "consideration received for labor or services . . . if the consideration for such services is *separately stated* from the consideration received for the tangible personal property transferred in the retail sale." *Roberts v. Glander, Tax Commr.*, 156 Ohio St. 247, 249, 102 N.E.2d 242, 243 (1951) (*quoting* Section 5546-1, General Code). Consequently, in cases decided prior to the amendment, the court had held that the separate identification of services was not required to be set forth in the initial invoice.

For example, in *Roberts v. Glander*, the vendor/upholster was audited and assessed sales tax for labor charges which had not been separately identified on the invoices provided to the customers. The Tax Commissioner upheld the assessment because consideration received for labor was not "separately stated" from consideration for materials used in upholstery jobs. On review, the Ohio Supreme Court examined the statute and held that "nowhere in the act is it stipulated how or in what manner the consideration for services and that for materials shall be 'separately stated.'" 102 N.E.2d at 244. The court concluded that the purpose of the statutory requirement did not concern the purchaser inasmuch as "he ha[d] no obligation to compute, or make a return of the tax to the state." *Id.* Instead, the requirement was established to enable the Tax

Commissioner to determine the correct tax and to enable the seller to make accurate returns. Thus, the court concluded that the seller's books of account, which contained a breakdown of the charges, "sufficiently complied with the act." *Id.*, 102 N.E.2d at 245.

In *St. Francis Hospital Ass'n v. Bowers, Tax Commr.*, 99 Ohio App. 133, 131 N.E.2d 624 (1954), the Ohio Supreme Court held that the hospital's failure to bill patients separately for taxable services and exempt medications or other supplies did not make the entire bill subject to sales tax. Once again, the Court observed that "the purposes to be served in making the separation of charges are to enable the Tax Commissioner to determine and assess the tax and to enable the vendor to make his tax return to the state and claim his exception by keeping copies of his invoices or by keeping books of account reflecting the breakdown of the charges." The Court held the statutory requirement that charges be separately identified could be satisfied by available hospital records "from which specific charges could have been determined." 131 N.E.2d at 626.

The Utah statute specifically permits delivery charges to be separately identified in "an invoice, bill of sale, or similar document provided to the purchaser." Utah Code Ann. § 59-12-102(61)(c)(ii). By inferring a requirement that the delivery charges must be identified by the seller's *initial* invoice, the Commission ignores the "cardinal rule of statutory construction . . . that courts are not to infer substantive terms into the text that are not already there." *Berrett*, 876 P.2d at 370.

**B. The Plain Language of the Statute Allows the Taxpayer to Separately Identify Delivery Charges Using Documents Other Than Invoices.**

The Commission's decision also completely disregarded the statutory acknowledgment that separate itemization of delivery charges can occur in documents other than invoices. Because the statute at issue is not an exemption provision, it must be construed "liberally in favor of the taxpayer." *ExxonMobil*, 2003 UT 53 ¶ 19, 86 P.3d at 711.

The statute at issue permits separate identification of delivery charges using an "invoice, bill of sale, or similar document provided to the purchaser." Utah Code Ann. § 59-12-102(61)(c)(ii). Under the Commission's interpretation of the law, the initial invoice, unilaterally prepared by the vendor, represents the "best evidence" of the purchaser's intention and irrevocably establishes sales tax liability:

The best evidence of the intent of the Taxpayer and the Supplier in their transactions comes from invoices that were contemporaneous with those transactions. . . . Because the transactions were as the parties intended them at the time, tax on delivery charges not separately listed on invoices would be the correct tax rather than an overpayment of tax.

R. 114. The Commission found the invoices so compelling that it refused to acknowledge or consider subsequent, undisputed evidence submitted by the seller which identified the non-taxable delivery charges:

[T]he Taxpayer did not present evidence to indicate that, at the time of the transactions, the Taxpayer or the Supplier intended to enter into transactions for products other than delivered concrete as documented in the original invoices from the Supplier to the Taxpayer.

*Id.*

It strains reason to suggest that the invoices establish Ivory Homes "intention" to pay sales tax on charges which, by law, are not subject to sales tax. Even if Ivory Homes wanted to pay sales tax on delivery charges, that desire would not be sufficient to create sales tax liability. Ivory Homes would still be entitled to a refund under Utah law.

Moreover, this Court has already held that sales invoices are *not* evidence of a purchaser's intent. In *Hales Sand & Gravel*, 842 P.2d at 893, the Utah Supreme Court held that the seller's purchase orders and invoices were irrelevant to the determination of whether delivery charges were subject to sales tax because the unilateral subjective intent of a seller could not bind the purchaser:

The invoices and purchase orders [the seller] submitted may be firm evidence of [the seller's] own intent to pass title at point of shipment; however, without more, they do not provide an explicit agreement by the customers to take title at the point of shipment. . . . [U]nilateral subjective intent does not prove explicit agreement between the parties to pass title at the point of shipment. . . .

*Id.* at 893.

The Commission's refusal to accept alternative documentation as specifically permitted by the statute is also inconsistent with its acceptance of alternative documentation in several other instances. For example, in *Petitioner v. Customer Service Division*, *Appeal 97-1238*, the taxpayer had paid sales tax on a lump sum invoice for engineering services. The taxpayer filed a refund claim asserting that some of those engineering services had not been subject to sales tax. The Commission agreed and



allowed the parties to "provide a breakdown of the lump sum into its separate parts" so that the taxpayer would only have to pay sales taxes on the portions of the invoice which were taxable. *Findings of Fact, Conclusions of Law, and Final Decision*, Appeal No. 97-1238 (02/26/1999) (attached hereto as Addendum 2).

In another appeal, the Division had assessed sales taxes on exempt installation charges because the taxpayer had not complied with Utah Admin. Code R865-19-51S.1E which required the seller to separately identify installation labor charges in the invoice. Some of the petitioner's invoices separately identified installation labor, while other labor charges were not separately identified on the invoices. The Commission allowed the petitioner to provide evidence of the non-segregated installation charges at the time of hearing and held that this evidence was sufficient to avail petitioner of the statutory exemption. *Informal Decision*, Appeal No. 87-1161 (8/25/1988) (attached hereto as Addendum 3).

In Appeal No. 04-0900, the Division had issued a deficiency assessment assessing sales tax on pre-press materials which the petitioner/printer insisted it had resold to its customers. *Order*, Appeal No. 04-0900 (Feb. 8, 2005) (attached hereto as Addendum 4). Until December 19, 2000, Rule 80 had permitted printers to purchase reusable pre-press materials tax-free, subject to the requirement that "[t]he printer's invoice must contain a statement on its face, that states that reusable pre-press materials associated with that transaction are included with the purchase." Utah Admin. Code R865-19S-80 (2000)

(emphasis added). Effective December 19, 2000, Rule 80 was amended to allow printers to purchase pre-press materials tax free "if the printer's invoice, *or other written material provided to the purchaser*, states that reusable pre-press materials are included with the purchase." R865-19S-80.2.c (2009) (emphasis added). The Commission applied the former Rule 80 to purchases before December 19, 2000, and held that the petitioner was liable for sales tax because its invoices did not contain the statement required by Rule 80. For the period after the rule change, the petitioner claimed that the bid sheets provided the requisite notice by separately identifying the pre-press materials. However, the Commission held that adequate notice had not occurred because the bid sheets did not specify that the customers were purchasing the materials. Nevertheless, the Commission allowed the petitioner to submit evidence at the hearing to supplement those bid sheets with testimony demonstrating that certain customers knew they were purchasing pre-press materials. The Commission concluded that the requirements of Rule 80 were satisfied by the bid sheets when the customers affirmed their understanding that they were purchasing pre-press materials.

It is important to note that Rule 80 concerned the application of an exemption, rather than a tax imposition provision. Therefore, the Commission applied the more restrictive rule of strict construction. However, even with the strict construction, the Commission recognized that Rule 80 did not require that the notice to the purchaser be set forth in the invoice. Accordingly, the Commission allowed the petitioner to rely on



written materials, other than the invoices, and to provide evidence to support its claim that the customers understood they were purchasing the pre-press materials.

In this case, the Commission acknowledged that “[t]he Supplier appeared at hearing and provided evidence as to what would have been the amounts of the delivery charges if they had been separately identified on the Supplier’s invoices.” R. 112 ¶ 7. This undisputed evidence complies with specific statutory requirements because it constitutes “similar document[ation]” as “an invoice, [or] bill of sale.”<sup>6</sup>

C. **The Statute Does Not Restrict the Time Frame in Which the “Invoice, Bill of Sale, or Similar Document” Separately Identifying the Delivery Charge Must Be “Provided to the Purchaser.”**

Under Utah Code Ann. § 59-12-110(2)(a), Ivory Homes has a statutory right to a refund for the overpayment of taxes within three years of the date on which those taxes were overpaid. However, the Commission’s decision effectively deprives Ivory Homes and all other taxpayers of their statutory right to a refund of sales taxes paid on delivery charges any time the seller neglects to itemize those charges in the *initial* invoice and collects sales tax on those charges.

The statute which requires separate identification of delivery charges does not establish a time frame during which such documentation must be provided. The

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<sup>6</sup> If there were any ambiguity regarding what kind of material constitutes “similar documentation,” then, because the provision in question is a tax imposition statute, the statute must be construed “liberally in favor of the taxpayer.” *ExxonMobil*, 2003 UT 53 ¶ 14, 86 P.3d at 710.

Commission’s refusal to accept the corrective documentation means that sales tax liability for delivery charges is irrevocably triggered by the failure of the seller to separately identify those charges on the first invoice delivered to the purchaser. This places the taxpayer at a serious disadvantage. The taxpayer should be able to request a corrected invoice from the seller as evidence that the seller collected and remitted sales tax on items that were not subject to tax. If the Commission is correct in its assertion, then a seller’s invoice which erroneously records the sale of ten items when only one item was purchased, would render a purchaser legally obligated to pay sales tax for all ten items. Yet no one would seriously question the purchaser’s right to obtain a corrected invoice or other appropriate documentation so that it does not incur a tax burden as a result of the seller’s error. When a seller fails to separate delivery charges from the other taxable charges, the delivery charges should not be taxable purely as a consequence of the seller’s error. Surely the Legislature did not intend that a taxpayer’s right to recover erroneously collected sales taxes could be so easily thwarted by a seller’s mistake.

The Commission’s own rule recognizes that a “portion of the selling price may not be subject to sales or use tax.” Utah Admin. Code R865-19S-27.C (2005). This acknowledgment means that a selling price is not determinative of whether all components of that price are subject to sales tax. A taxpayer has the right to submit evidence identifying the varied components of the sales price as well as their differing tax treatments.

In *Oregon-Washington Railroad & Navigation Co. v. Hoss*, 128 Ore. 347, 274 P. 314 (1929), the Oregon Supreme Court held that corrected invoices submitted more than one year after the sales transactions were sufficient evidence of the taxpayer's right to a refund. The court noted that the statute "require[d] that the affidavit for a refund must be accompanied by the 'original invoice.'" The court rejected the defendant's claim that this "refer[red] to the *first* invoice," stating, "it is clear the word 'original' as there employed is used in contradistinction to a copy and not in reference to time." *Id.* at 353.

The statute which permits separate identification of delivery charges on "an invoice, bill of sale, or similar document," does not establish a time frame within which such document must be provided. If the Commission's ruling is upheld, a purchaser would not be permitted to request a new "invoice, bill of sale, or similar document" which corrects that error—whether that request was made with one hour, one week, or one year after the initial invoice was received by the purchaser. The only appropriate limitation as to when such documentation can be provided is the three year limitations period set forth in Utah Code Ann. § 59-12-110(2)(a). The Commission's inference of a requirement that the documentation of delivery charges must occur at the time of the original sale effectively and illegally "rewrite[s] the statute to conform to an intention not expressed." *Berrett*, 876 P.2d at 370.

## II. THE COMMISSION ERRED WHEN IT RELIED ON PASSAGE OF TITLE ANALYSIS TO CONCLUDE THAT DELIVERY CHARGES ARE SUBJECT TO SALES TAX.

The Commission ruled that, because the initial invoices provided by the supplier did not separately identify delivery charges, the transactions at issue in this case were transactions for "delivered goods" rather than transactions for goods plus non-taxable delivery charges. R.115 ¶ 5. Notably, the Commission does not cite to a single statute, administrative rule, or any other legal precedent to support its conclusion that the failure to separately identify delivery charges in the initial invoice converts such charges to a permanent part of the "sales price."<sup>7</sup> Inasmuch as there was no statutory support for the Commission's conclusion, the Commission instead relied on the passage of title test to conclude that delivery charges were part of the taxable purchase price. However, as a result of changes to Utah law in 2005, the passage of title test is no longer relevant to the determination of whether delivery charges are subject to sales tax.

The use of the passage of title test to determine whether delivery charges are subject to sales tax had its genesis in Rule 71 of the Utah Administrative Code. *Hales Sand & Gravel*, 842 P.2d at 891. In *Hales Sand & Gravel*, the vendor ("Hales") had contested a deficiency assessment requiring Hales to pay sales tax on transportation costs incurred in the delivery of building materials to its customers. The Court rejected Hales'

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<sup>7</sup> Under the plain language of applicable law, the fact that delivery charges were not itemized, does not convert them to something other than "delivery charges." Utah Code Ann. § 59-12-102(21) (2005).

argument that it was entitled to the sales tax exemption for delivery by common carrier.

However, the Court concluded that the inclusion of delivery charges in the sales tax base depended on where passage of title occurred. The Court specifically relied on Rule 71 of the Utah Administrative Code as providing the test to determine whether delivery charges were part of the purchase price:

The transportation charges are taxable if they are incurred before the transfer of title because this increases the total selling price; transportation charges are not taxable if they are incurred after the passage of title because they are not part of the taxed sales transaction. While the text of the sales tax statute does not mention such a test, *see id.* § 59-12-103, this court has interpreted the predecessor statute as hinging taxability on the passage of title. *See Whitehill Sand & Gravel Co. v. State Tax Comm'n*, 106 Utah 469, 472, 150 P.2d 370, 371 (1944); *see also Ford J. Twaits Co. v. Utah State Tax Comm'n*, 106 Utah 343, 348, 148 P.2d 343, 345 (1944). *In fact, the Commission has promulgated a rule adopting the passage-of-title test for fixing the moment for determining the tax. See Utah Admin. R. 865-19-71S.*

*Id.*, 842 P.2d at 891 (emphasis added). Although the Court explained that the explicit agreement between the parties regarding the transfer of title could be established by written agreement, the Court rejected invoices and purchase orders as evidence of the purchaser's intent to take title at the point of shipment. *Id.* at 893 ("[U]nilateral subjective intent does not prove explicit agreement between the parties to pass title at the point of shipment.").

Subsequent to the *Hales Sand & Gravel* decision, Utah law was amended to specifically include "delivery charges" within the definition of "purchase price" and "sales price":

(b) "Purchase price" and "sales price" include:

(iv) a delivery charge; . . .

Utah Code Ann. § 59-12-102(57) (2004). However, effective July 1, 2005, the Legislature removed subsection (iv) from the definition of "purchase price" and "sales price," thereby eliminating "a delivery charge" as a specific element of price. The amended statute further explains that "'purchase price' and 'sales price' *do not* include [a delivery charge] if separately stated on an invoice, bill of sale, or similar document provided to the purchaser." Utah Code Ann. § 59-12-102(61)(c)(ii)(D) (emphasis added). At the same time, the Commission repealed Rule 71—the very rule which "adopt[ed] the passage-of-title test for fixing the moment for determining the tax." *Hales*, 842 P.2d at 891. The amendment deleting delivery charges as a component of the "purchase price" as well as the repeal of Rule 71 left no basis under Utah law for the Commission or this Court to use passage of title analysis to include delivery charges in a purchase price.

Notwithstanding these significant changes in Utah law, the Commission utilized the obsolete passage of title test to conclude that Ivory Homes had purchased a "delivered product" and, therefore, owed sales tax on all charges, including delivery charges. R. 114-115. The Commission's decision rests in large part on its opinion that the seller's invoices reflect the purchaser's intent, a conclusion flatly rejected by this Court in *Hales Sand & Gravel*. The Commission's erroneous application of the passage of title test, as

well as its misplaced reliance on the invoices unilaterally prepared by the seller, is evidenced by the following statements:

- “[T]he Taxpayer did not present evidence to indicate that, *at the time of the transactions*, the Taxpayer or the Supplier *intended* to enter into transactions for products other than delivered concrete as documented in *the original invoices* from the Supplier to the Taxpayer. R. 114 (emphasis added).
- The best evidence of the *intent of the Taxpayer and the Supplier* in their transactions come from invoices that were *contemporaneous with those transactions*. *Id.* (emphasis added).
- The Taxpayer has not provided any *contract* that would indicate that the terms of the transactions were as reflected in those invoices. *Id.* (emphasis added).
- Because the transactions were *as the parties intended them at the time*, tax on delivery charges not separately listed on the invoices would be the correct tax rather than an overpayment of tax. *Id.* (emphasis added).
- Transactions *for the times at issue in this case* were, at the time of the Taxpayer’s refund request, *completed transactions*. R. 115 ¶ 5 (emphasis added).
- The provisions of Utah law allowing for the correction of errors do not allow the Taxpayer to change *completed transactions for delivered goods* into sales of goods plus delivery charges. R. 115 ¶ 6 (emphasis added).

The definition of “delivery charges” and the exclusion of such charges from the sales tax base does not depend on the parties’ intention at the time the original transactions occur. Intention was only relevant under the application of repealed Rule 71, to establish whether the parties intended for title to pass prior to or after delivery had occurred. Furthermore, even if intent were relevant, the *Hales* Court explained that

“invoices and purchase orders . . . may be firm evidence of [the seller’s] intent to pass title at point of shipment; however, without more, they do not prove an explicit agreement by the customers to take title at the point of shipment.” *Hales Sand & Gravel*, 842 P.2d at 893. Thus, Ivory Homes’ intent cannot be established by invoices unilaterally prepared by one of its suppliers. The Commission’s focus on the original invoices as establishing the parties’ intention would bind the purchaser to errors contained in the original sales document. The law is not so rigid as to prohibit a purchaser from obtaining corrective documentation from suppliers of taxable tangible property.

Finally, even if passage of title were a relevant consideration in this matter, the Utah Supreme Court has indicated its willingness to follow the generally recognized industry custom that, when the product sold was ready-mixed concrete, title passed prior to delivery. In *Hales Sand & Gravel*, the Court acknowledged that, “[b]ecause of ready-mix concrete’s short lifespan, industry custom and practice recognize that title passes when the ingredients are mixed.” 842 P.2d at 893. Therefore, even under the law in effect prior to July 1, 2005, this Court would have recognized that title to the ready-mixed concrete would have transferred to Ivory Homes prior to delivery and, therefore, delivery charges were not considered part of the “purchase price” or “sales price.”

Utah law requires itemization of delivery charges simply because, when the portion of the invoice attributable to non-taxable delivery charges has not been specified, the correct purchase price which is subject to sales and use tax remains unclear. In an

abundance of caution, sales tax is collected on the entire amount. This does not mean, however, that delivery charges are part of the sales tax base. Indeed, it is clear, based on the omission of "delivery charge" from the definition of "purchase price" and "sales price," that the Legislature intends that delivery charges not be subject to sales tax.

The Commission acknowledged that the invoices prepared by the Supplier at the time of purchase included, but did not separately identify, delivery charges and that, as a consequence, Ivory Homes paid sales tax on non-taxable delivery charges. Because "a delivery charge" is not part of the purchase price, when a taxpayer obtains documentation separately identifying such charges and files a timely refund request, the taxpayer is entitled to a refund under Utah law.

### III. UNDER UTAH LAW, IVORY HOMES IS ENTITLED TO A REFUND OF SALES TAXES PAID ON DELIVERY CHARGES.

The law which allows a taxpayer to obtain a refund of its overpayments of tax provides as follows:

- (a) If a taxpayer pays a tax, penalty, or interest more than once or the commission erroneously receives, collects, or computes any tax, penalty, or interest, including an overpayment described in Subsection (1)(c), the commission shall:
  - (i) credit the amount of tax, penalty, or interest paid by the taxpayer against any amounts of tax, penalties, or interest the taxpayer owes; and
  - (ii) refund any balance to the taxpayer or the taxpayer's successors, administrators, executors, or assigns.

- (b) Except as provided in Subsections (2)(c) and (d) or Section 19-2-124, a taxpayer shall file a claim with the commission to obtain a refund or credit under this Subsection (2) within three years from the day on which the taxpayer overpaid the tax, penalty, or interest.

Utah Code Ann. § 59-12-110(2) (2005).

The Commission acknowledged that "Utah taxpayers have the right and the ability to correct errors in tax filings." R. 114. However, the Commission held that this relief was not available to Ivory Homes stating, "[t]he provisions of Utah law allowing for the correction of errors do not allow the Taxpayer to change completed transactions for delivered goods into sales of goods plus delivery charges." R. 115 ¶ 6.

As explained in the foregoing section, the Commission's characterization of Ivory Homes' purchases as being "transactions for delivered goods" is based on obsolete passage of title analysis. Thus, the Commission's conclusion that Ivory Homes would be altering the nature of its transactions is incorrect. Furthermore, there is no basis for the Commission to conclude that Ivory Homes did not pay sales tax on "delivery charges."

Utah law clearly defines "delivery charges" as charges for "transportation, shipping, postage, handling, crating, or packing." Utah Code Ann. § 59-12-102(21). The Commission even acknowledged that this appeal concerns "*delivery charges* for ready-mixed concrete products." R. 111 ¶ 5 (emphasis added). It also found that the Supplier's invoices neglected to "separately identify[] delivery charges." R. 112 ¶ 6. The Supplier

presented uncontroverted evidence of the delivery charges. There is no dispute that the prices reflected in the original invoices included non-taxable "delivery charges."

Ivory Homes' overpayments of sales tax occurred as a direct result of the seller's invoicing practices. Because the seller neglected to separately identify the delivery charges, the seller collected sales tax on those non-taxable charges from Ivory Homes and remitted those taxes to the Commission. The Commission has refused to return those overcharges to the taxpayer even though there is no dispute that Ivory Homes paid taxes on delivery charges, nor is there any dispute regarding the amount of the overpayment.

In *Roberts v. Glander*, the Ohio court explained that the requirement that consideration paid for services be "separately stated" on the invoice was not a requirement established for the purchaser "as he has no obligation to compute, or make a return of the tax to the state." 102 N.E.2d at 244. Instead, the requirement was intended to "enable the Tax Commissioner to determine and assess the tax and to enable the seller to make his tax return to the state." *Id.* Similarly, the requirement in Utah law that sellers "keep records of their sales and exemptions is to prevent tax evasion and tax fraud." *Tummuuru Trades v. Utah State Tax Comm'n*, 802 P.2d 715, 718 (Utah 1990). This purpose is not furthered by penalizing the purchaser when the seller mistakenly includes delivery charges in the retail price set forth in the invoice.

The seller is the party who knows what its delivery costs are and is the party who prepares and issues the invoice. If the seller issues the original invoice and does not

separately identify the amount of the non-taxable delivery charges, then, according to the Commission's interpretation, the purchaser would be forever barred from requesting a refund.

In *Harper Investments, Inc. v. Auditing Div., Utah State Tax Comm'n*, 868 P.2d 813 (Utah 1994), the Utah Supreme Court held that sales tax should not have been assessed when it was based on documentation which erroneously reflected that a taxable transaction had occurred. An accountant for Harper had recorded certain sales contracts as belonging to the subsidiary Harper Sand and Gravel, even though they had actually been assigned to Harper Contracting. Each time material was delivered by Harper Contracting to the contracting customers, the books reflected a sale from Harper Sand and Gravel to Harper Contracting. After the Commission audited Harper's books, it issued a deficiency assessment against Harper for failure to pay sales tax on intra-unit sales. Harper petitioned for redetermination and, although the Commission recognized that the contracts had been "mistakenly assigned" to Harper Sand and Gravel, it affirmed the sales tax assessment. *Id.*, at 816. Harper appealed to the Utah Supreme Court which recognized that the identifications of the transactions as sales were the "result of an indisputably good faith error by the accountant." The Court held that "accounting records 'are no more than evidential, being neither indispensable nor conclusive. The decision must rest upon the actual facts.'" *Id.* The Court held that "the Commission [could] not assess a sales tax on those nonexistent transactions."

The invoices which were contemporaneous with the transactions at issue in this appeal are likewise "no more than evidential, being neither indispensable nor conclusive." Inasmuch as Ivory Homes has provided documentation of delivery charges, and has provided evidence that the first invoices contained delivery charges and that sales tax was erroneously collected thereon, Ivory Homes is entitled to a refund of the sales tax collected on those non-taxable charges.

Clearly the Commission has the right to audit sales tax records and impose sales taxes in excess of amounts reflected by vendor invoices when it concludes that the original invoices contain errors. The Commission is not bound by the restrictions it seeks to impose on Ivory Homes. For example, if a seller does not collect sales tax because it believes a purchase is exempt, the Commission has the right to audit the sale and impose sales tax if it believes the seller's characterization of that sale was incorrect. If the Commission is correct in its assertion that the sales price is the price for the goods when title transfers, then the Commission would not have the right to question the original documentation. Just as the Commission can recalculate tax liabilities and assess sales tax deficiencies, so too should a taxpayer be permitted to provide documentation of another party's error to support its own refund request. The Legislature has provided a three-year period of limitations for sales tax refunds and Ivory Homes' refund request does not extend beyond this three-year period authorized by the Legislature. Utah Code Ann. § 59-12-110 (2)(b).

## CONCLUSION

Ivory Homes respectfully requests that this Court give effect to the plain language of Utah Code Ann. § 59-12-102(61) (2005) and find that the documentation provided by the Supplier which correctly identifies delivery charges sufficiently complies with statutory requirements. Inasmuch as there is no factual dispute regarding the accuracy of the Supplier's calculation of delivery charges or the amount of sales tax which Ivory Homes paid on non-taxable delivery charges, Ivory Homes respectfully requests this Court to reverse the Commission's decision.

DATED this 24<sup>th</sup> day of February, 2010.

WOOD CRAPO LLC

  
David J. Crapo  
Attorneys for Petitioner

**CERTIFICATE OF MAILING**

I certify that on the 24<sup>th</sup> of February, 2009, I caused two true and correct copies of the foregoing ***OPENING BRIEF OF PETITIONER***, as well as a courtesy electronic copy on CD in searchable PDF format, to be mailed in the U.S. Mail, first class postage prepaid, to the following:

Susan L. Barnum  
ASSISTANT ATTORNEY GENERAL  
160 East 300 South, 5th Floor  
P.O. Box 140874  
Salt Lake City, Utah 84114-0874





BEFORE THE UTAH STATE TAX COMMISSION

IVORY HOMES/JACK B. PARSONS CO.

Petitioner.

v.

TAXPAYER SERVICES DIVISION OF THE  
UTAH STATE TAX COMMISSION,

Respondent.

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND FINAL DECISION**

Appeal No. 08-2583

Account No. 11985318

Tax Type: Sales and Use Tax

Tax Period: July 2005 to April 2008

Judge: Jensen

**Presiding:**

Pam Hendrickson, Commission Chair

R. Bruce Johnson, Commissioner

Clinton Jensen, Administrative Law Judge

**Appearances:**

For Petitioner: Mr. David Crapo, Attorney for Ivory Homes

Mr. Shane Hintze, Controller for Ivory Homes

For Respondent: Ms. Susan Barnum, Assistant Attorney General

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on April 22, 2008.

On the basis of the evidence and testimony presented at the hearing, the Tax Commission makes its:

FINDINGS OF FACT

1. On August 28, 2008, Petitioner Ivory Homes (the "Taxpayer"), acting through its representative, made a written refund request for Utah sales taxes to Respondent Taxpayer Services Division of the Utah State Tax Commission (the "Division").
2. The Taxpayer's refund request included invoices from July 5, 2005 to August 9, 2008.
3. On November 26, 2008, the Division issued a Statutory Notice in which it denied the Taxpayer's refund request.
4. In its Statutory Notice, the Division identified tax periods from July 2005 to April 2008. The parties did not address the difference between the April 2008 ending date in the Statutory Notice and the August 9, 2008 ending date in the refund request from the Taxpayer.
5. At issue in the Taxpayer's refund request are delivery charges for ready-mixed concrete products from Jack Parsons Company, a supplier of, among other things, ready mixed concrete (the "Supplier").

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6. For ready-mixed concrete and related sand and aggregate products ("Products") that the Supplier delivered to the Taxpayer during the periods at issue, the Supplier generally provided invoices to the Taxpayer showing a single price for Products without separately identifying delivery charges. The Supplier's invoices generally included tax on the entire amount of the purchase and the Taxpayer paid sales tax as invoiced.

7. The Supplier's accounting system allowed for the tracking of delivery charges as a separate item from the cost of the Products themselves. The Supplier appeared at hearing and provided evidence as to what would have been the amounts of the delivery charges if they had been separately identified on the Supplier's invoices.

8. The Division denied the Taxpayer's request for sales tax on the amounts that the Supplier later identified as delivery charges. It acknowledged that delivery charges are not always subject to sales tax. The Division denied the Taxpayer's refund request on the basis of its determination that the transaction, as concluded between the parties, was for delivered goods rather than for goods plus separate delivery charges.

9. The Taxpayer acknowledged that, with rare exceptions, invoices for Products from the Supplier reflected a single charge for delivered Products. However, the Taxpayer maintains that even though delivery charges were not separately identified on invoices, the Supplier and the Taxpayer have the ability to correct invoices that were in error. The Taxpayer relies on Utah State Tax Commission Private Letter Ruling 06-013 (the "PLR") for the proposition that delivery charges on the Products are not taxable.

10. The Supplier provided evidence that while sales of ready-mixed concrete products without delivery are infrequent, it has the ability to sell, and has sold, its ready-mixed concrete products to customers with their own equipment for the transportation of ready-mixed concrete. When the Supplier sold ready-mixed concrete products without delivery, it did so at a reduced price compared to ready-mixed concrete products with delivery.

11. In prior cases in which it found that individuals or entities had made errors in the preparation of tax returns or sales documents, the Division has allowed those parties or entities to correct errors through refund requests or amended returns subject to applicable Utah law such as statutes of limitation.

#### APPLICABLE LAW

1. Utah Code Annotated Section 59-12-103(1)<sup>1</sup> provides, in pertinent part, as follows:

<sup>1</sup> All citations are to the Utah Code Annotated as it existed from July 1, 2005 through August 2008. Although revisions in other subsections caused renumbering of some of the subsections at issue, the Commission is not aware of any substantive changes to applicable law during the period at issue.

- (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;

....

2. Utah Code Annotated Section 59-12-102(72)(2008) defines the terms "purchase price" and "sales price," in pertinent part, as follows:

(72)(a) "Purchase price" and "sales price" mean the total amount of consideration:

- (i) valued in money; and
- (ii) for which tangible personal property or services are:
  - (A) sold;
  - (B) leased; or
  - (C) rented.

(b) "Purchase price" and "sales price" include:

- (i) the seller's cost of the tangible personal property or services sold;
- (ii) expenses of the seller, including:
  - (A) the cost of materials used;
  - (B) a labor cost;
  - (C) a service cost;
  - (D) interest;
  - (E) a loss;
  - (F) the cost of transportation to the seller; or
  - (G) a tax imposed on the seller; or
- (iii) a charge by the seller for any service necessary to complete the sale.

(c) "Purchase price" and "sales price" do not include:

- (i) the cost of the tangible personal property or services sold;
- (ii) the following if separately stated on an invoice, bill of sale, or similar document provided to the purchaser:

- ....
- (D) a delivery charge; or
- (E) an installation charge.

3. For purposes of determining the "purchase price" or "sales price" of an item or service, the term "delivery charge" is defined in Utah Code Annotated Section 59-12-102(24) (2008) as follows:

(24) (a) "Delivery charge" means a charge:

- (i) by a seller of:
    - (A) tangible personal property; or
    - (B) services; and
  - (ii) for preparation and delivery of the tangible personal property or services described in Subsection (24)(a)(i) to a location designated by the purchaser.
- (b) "Delivery charge" includes a charge for the following:
- (i) transportation;
  - (ii) shipping;
  - (iii) postage;
  - (iv) handling;

- (v) crating; or  
(vi) packing.

#### DISCUSSION

The Taxpayer notes, correctly, that Utah taxpayers have the right and the ability to correct errors in tax filings. Amended returns and refund requests are two avenues for the correction of errors. The Taxpayer characterizes the inclusion of delivery costs on invoices without separate identification of those delivery costs as errors. The problem with characterization of these actions and their invoicing was that the Taxpayer did not present evidence to indicate that, at the time of the transactions, the Taxpayer or the Supplier intended to enter into transactions for products other than delivered concrete as documented in the original invoices from the Supplier to the Taxpayer. The Supplier provided invoices for delivered Products and did so for a period of more than two years. Fuel surcharges, on the other hand, were separately computed and Supplier generally charged no tax on these amounts. The Taxpayer paid those invoices without requesting a change in the terms of the transactions. Later, when the Taxpayer discovered that it would have received tax savings if it has structured its transactions differently, it sought to have the Supplier amend its invoices to show separate delivery charges.

The best evidence of the intent of the Taxpayer and the Supplier in their transactions comes from invoices that were contemporaneous with those transactions. The Taxpayer had not provided any contract that would indicate that the terms of the transactions were as reflected in those invoices. Because the transactions were as the parties intended them at the time, tax on delivery charges not separately listed on invoices would be the correct tax rather than an overpayment of tax. The Supplier had sufficient records to show that it could have accurately identified delivery costs. On that basis, it was willing to provide new invoices to identify those delivery charges. However, it did not provide any evidence to show that the transactions at issue were for other than delivered concrete or that there was any error in its invoices as originally prepared and as originally paid.

#### CONCLUSIONS OF LAW

1. Utah Code Annotated Section 59-12-103(1) provides for a tax on the retail sales of tangible personal property made within the state.
2. Utah Code Annotated Section 59-12-102(2)(2008) defines the terms "purchase price" and "sales price," to exclude, "if separately stated on an invoice, bill of sale, or similar document provided to the purchaser . . . a delivery charge."

3. The PLR provides that delivery charges for ready-mixed concrete products are exempt from tax if the delivery charge is "separately stated on the invoice." The PLR does not extend to delivery charges that are not separately stated on the invoice.

4. To the extent that delivery charges such as fuel surcharges and truck waiting time were "separately stated on an invoice, bill of sale, or similar document provided to the purchaser," they are not subject to sales tax.

5. To the extent that delivery charges from Supplier were not "separately stated on an invoice, bill of sale, or similar document provided to the purchaser," they became part of a transaction for delivered goods. Transactions for the times at issue in this case were, at the time of the Taxpayer's refund request, completed transactions.

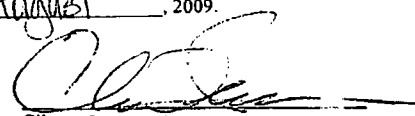
6. The provisions of Utah law allowing for the correction of errors do not allow the Taxpayer to change completed transactions for delivered goods into sales of goods plus delivery charges.

7. Because the Division has not responded to the Taxpayer's refund request for the period from the end of April 2008 through August 9, 2008, there is currently no pending appeal with regard to that period. However, in the absence of a material difference in facts, the reasoning of this order should apply to all open periods.

#### DECISION AND ORDER

On the basis of the foregoing, the Tax Commission orders the Division to make sales tax refunds to the extent that those delivery charges were separately identified on invoices from the Supplier to the Taxpayer. As to delivery charges that were included in the sales price without separate identification on invoices, bills of sale, or similar documents provided to the Taxpayer, the Commission sustains the actions of the Division in denying the Taxpayer's refund request. It is so ordered.

DATED this 4 day of August, 2009.

  
Clinton Jensen  
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION:

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this 4 day of August, 2009.

*Pam Hendrickson*  
Pam Hendrickson  
Commission Chair

*R. Bruce Johnson*  
R. Bruce Johnson  
Commissioner

*Marc B. Johnson*  
Marc B. Johnson  
Commissioner



*D'Arcy Dixon*  
D'Arcy Dixon Pignatelli  
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. 63-46b-13. 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. Sections 59-1-601 and 63-46b-13 et. seq.

CDJ/08-2583.fof

Certificate of Mailing

Ivory Homes/Jack B Parson Co vs Taxpayer Services Division

08-2583

David Crapo  
Wood Crapo LLC  
60 E South Temple #500  
Salt Lake City, UT 84111

Attorney for Petitioner

Dee Talbot  
Director of Taxpayer Services  
210 North 1950 West  
Salt Lake City, UT 84134

Respondent

Ivory Homes  
Jack B Parson Co  
978 Woodoak LN  
SLC, UT 84117

Petitioner

Susan Barnum  
160 East 300 South, 5th Floor  
Salt Lake City, UT 84114

Attorney for Respondent

\*\*\*CERTIFICATION\*\*\*

I hereby certify that I mailed a copy of the foregoing document addressed to each of the above named parties.

8-4-09  
Date

Susan Barnum  
Signature

8/04/09

10:28 am

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PETITIONER, Petitioner, v. CUSTOMER SERVICE DIVISION OF THE UTAH  
STATE TAX COMMISSION, STATE OF UTAH, Respondent., 97-1238, 02/26/1999

**PETITIONER, Petitioner, v. CUSTOMER SERVICE  
DIVISION OF THE UTAH STATE TAX COMMISSION,  
STATE OF UTAH, Respondent.**

**Case Information:**

**Docket/Court:** 97-1238, Utah State Tax Commission

**Date Issued:** 02/26/1999

**Tax Type(s):** Sales and Use Tax

or Petitioner:

or Respondent: Brian L. Tarbet, Assistant Attorney General

**OPINION**

**Presiding:** Richard B. McKeown, Chairman

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL  
DECISION**

**STATEMENT OF THE CASE**

This matter came before the Utah State Tax Commission ("Tax Commission") for a Formal Hearing on July 7, 1998. Chairman Richard B. McKeown heard the matter for and on behalf of the Tax Commission. ATTORNEYS Petitioner PETITIONER ("PETITIONER"). Brian L. Tarbet, Assistant Attorney General, represented Respondent Customer Service Division of the Utah State Tax Commission ("Customer Service Division"). Having considered the evidence presented at the formal hearing, the memoranda, pleadings on file, and the arguments of respective counsel, the Tax Commission now enters its Findings of Fact, Conclusions of Law and Final Decision.

**FINDINGS OF FACT**

1. The tax in question is Sales and Use Tax.
2. On June 26, 1997, PETITIONER filed a Request for Agency Action by Way of Declaratory Judgment and Request for Refund of sales taxes paid to vendors for certain purchases of services and tangible personal property related to the 1996 "expansion" of its cement plant near Leamington, Utah ("the Leamington facility").
3. PETITIONER is a STATE Corporation whose principal place of business is in CITY STATE. PETITIONER operates five cement manufacturing facilities in the western United States, one of which is near CITY, Utah, located on ADDRESS.
4. Increasing demand in markets served by PETITIONER CITY facility prompted PETITIONER to develop and construct a substantially larger cement manufacturing plant. The expanded facility has increased capacity by approximately 25%.
5. The machinery and equipment currently in use at the CITY facility did not need replacement. In fact, the CITY facility was only sixteen years old and still in the early stages of economic life. The equipment was properly maintained and was expected to operate successfully well into the future.
6. On January 19, 1996, COMPANY and PETITIONER entered into a contract by which COMPANY would design and build PETITIONER expanded CITY facility.
7. Expansion of PETITIONER CITY facility began on or about March 1, 1996 and was substantially completed by July 1, 1996, except for further modification and warranty responsibilities.
8. The manufacture of cement primarily involves the extracting, crushing, grinding and blending of RESOURCE and other raw materials into a chemically proportioned mixture which is then processed in a MACHINE to produce an intermediate product called PRODUCT." The PRODUCT is cooled and ground with a relatively small amount of RESOURCE to produce finished cement.
9. Both before and after the expansion, the CITY facility incorporated the more fuel efficient "dry process" technology. In MACHINE, the most modern application of this technology, the raw materials are processed through a MACHINE that utilizes RESOURCE from the MACHINE to effect partial PROCESS of the raw materials before they enter the MACHINE.
10. The following is a description of additions or changes to the CITY facility made during its expansion in 1996:
  - a. Increased capacity of the MACHINE by converting the first compartment to a more efficient SYSTEM.
  - b. Installed a new SYSTEM in the LOCATION to improve fuel efficiency and to increase the amount of product PROCESSED.
  - c. CONVERTED ONE MACHINE TO ANOTHER, and enlarged PART, to allow additional RESOURCES to flow through the MACHINE without increasing the RESULT THROUGH THE MACHINE.
  - d. Installed PARTS to cool RESOURCES as they leave the MACHINE.
  - e. Installed an PART directly after the PART, to induce OF ADDITIONAL PRODUCT.
  - f. Installed more efficient MACHINE and MACHINE.
  - g. Installed a PART in the existing MACHINE to increase the capacity of the PLACE to keep pace with the increased fuel demand of the PROCESS.
  - h. Converted the SYSTEM to an indirect system by addition of a new PART in series with the PLACE. This allowed PRODUCE from the PLACE to be separated from the PRODUCT, AND PROCESSED IN A DIFFERENT WAY.
  - i. Modified the SYSTEM to handle the increased volume of PRODUCT. Install higher capacity units for the two MACHINES.
  - j. Modified the SYSTEM to handle the additional MACHINE feed.
  - k. Installed a SYSTEM on the existing raw mill to reduce PROCESS. Again, this allowed PROCESS TO EXPAND.
  - l. Modifications included piling foundations for the PLACE, PLACE, and several towers for the SYSTEM, a new tower for the SYSTEM, new supports for the

tertiary PART, three new towers for the SYSTEM and major modifications to the existing PLACE, to support the NEW PROCESS.

m. Installed a SYSTEM for the existing control system. This involved installing the PART throughout the plant, installing new operator stations in the control room, and installing specially designed software to automate much of the plant operations. A key component of this system is PART, which when properly tuned, is able to operate major areas of the plant for extended periods of time with minimal operator input.

11. The CITY facility produces portland cement. Classification 3241 of the Standard Industrial Classification Manual describes cement manufacturing facilities as "[e]stablishments primarily engaged in manufacturing hydraulic cement, including portland, natural, masonry and pozzolana cements."

## APPLICABLE LAW

1. In November 1996, the Legislature amended and renumbered Utah Code Ann. § 59-12-104(16), which exempts certain manufacturing equipment from the sales and use tax. In addition, the Legislature gave this amended statute an effective date of July 1, 1995. Accordingly, it is this amended statute that applies to PETITIONER February, 1996, through July, 1996, purchases of tangible personal property to "expand" its cement operations. The amended Section 59-12-104(16) provided the following exemptions:
  - (a) the following purchases or leases by a manufacturer on or after July 1, 1995:
    - (i) machinery and equipment:
      - (A) used in the manufacturing process;
      - (B) having an economic life of three or more years; and
      - (C) used:
        - (i) to manufacture an item sold as tangible personal property; and
        - (ii) in new or expanding operations in a manufacturing facility in the state; and
      - (ii) subject to the provisions of Subsection (15)(b), normal operating replacements that:
        - (A) have an economic life of three or more years;
        - (B) are used in the manufacturing process in a manufacturing facility in the state;
        - (C) are used to replace or adapt an existing machine to extend the normal estimated useful life of the machine; and
        - (D) do not include repairs and maintenance;
    - (b) the rates for the exemption under Subsection (15)(a)(ii) are as follows:
      - (i) beginning July 1, 1996, through June 30, 1997, 30% of the sale or lease described in Subsection (15)(a)(ii) is exempt;
      - (ii) beginning July 1, 1997, through June 30, 1998, 60% of the sale or lease described in Subsection (15)(a)(ii) is exempt; and
      - (iii) beginning July 1, 1998, 100% of the sale or lease described in Subsection (15)(a)(ii) is exempt;
    - (c) for purposes of this subsection, the commission shall by rule define the terms "new or expanding operations" and "establishment"; ...
2. To administer the manufacturing equipment exemption of Section 59-12-104, the Commission has defined the terms "machinery," "equipment," "new or expanding operations" and "normal operating replacements" in Utah Admin. Code R865-195-85. Subsequent to the Legislature's 1996 amendment to this exemption, Rule R865-195-85 was also amended. However, the amended rule did not have an effective date until August 21, 1997. Accordingly, the amended rule is not applicable to PETITIONER 1996 purchases. The rule in effect during the February, 1996 to July, 1996, period in which PETITIONER "expanded" its cement operations provided the following:
  - A. Definitions:



1. "Machinery" means electronic or mechanical machines incorporated into a manufacturing or assembling process from the initial stage where actual processing begins, through the completion of the finished end product, and including final processing, finishing, or packaging of articles sold as tangible personal property. This definition includes automated material handling and storage machinery when that machinery is part of the integrated continuous production cycle.

2. "Equipment" means any independent device separate from any machinery but essential to an integrated or continuous manufacturing or assembly process or any subunit comprising a component of any machinery or auxiliary thereof, including such items as dies, jigs, patterns, molds, and similar items used in manufacturing, processing, or assembling. Qualifying equipment also includes devices necessary to the control or operation of machinery and equipment qualifying under this rule even though not located in the specific manufacturing area.

3. (a) "New or expanding operations" means manufacturing, processing, or assembling activities that:

- (1) are substantially different in nature, character, or purpose from prior activities;
- (2) are begun in a new physical location in Utah; or
- (3) increase production or capacity.

(b) The definition of new or expanding operation is subject to limitations dealing with normal operating replacements

...

6. "Normal operating replacements" means machinery or equipment that replaces existing machinery or equipment of a similar nature, even if the use results in increased plant production or capacity.

(a) If new machinery or equipment that is purchased or leased has the same or similar purpose as machinery or equipment retired from service within twelve months before or after the purchase date, that new machinery or equipment is considered as replacement and is not exempt.

(b) If existing machinery or equipment is kept for back-up or infrequent use, any new, similar machinery or equipment that is purchased is considered as replacement and is not exempt.

7. "Improvement" is defined in Section 59-2-102(11).

B. The machinery and equipment exemption applies only to tangible personal property. It does not apply to real property or to tangible personal property that is purchased and becomes an improvement to real property. The exemption does not apply to charges for labor to repair, renovate, or clean machinery or equipment.

C. Machinery or equipment used for an activity that is not part of the manufacturing process is not exempt. Examples of nonexempt activities include:

1. research and development;
2. refrigerated or other storage of raw materials, component parts, or finished product; or
3. shipment of the finished product.

3. An exemption from sales and use tax on certain purchases associated with pollution control facilities is found in Utah Code Ann. § 59-12-104(12)(1996), which provides an exemption for "sales or use of property, materials, or services used in the construction of or incorporated in pollution control facilities allowed by Sections 19-2-123 through 19-2-127."

4. Utah Code Ann. § 59-12-103(1)(1996) lists those transactions on which sales and use tax is imposed. Among these taxable transactions are those of Subsection 59-12-103(1)(g), which include "services for repairs or renovations of tangible personal property or services to install tangible personal property in connection with other tangible personal property."

5. Utah Admin. Code R865-195-58(B) provides that "[t]he sale of real property is not subject to sales tax, nor is the labor performed on real property. For example, the sale of a completed home or building is not subject to the tax, but sales of materials and supplies to contractors for use in building the home or building are taxable transactions as sales to final consumers."

## ANALYSIS AND CONCLUSIONS OF LAW

Prior to the expansion of the CITY facility, PETITIONER had advised the Auditing Division that it would pay sales and use tax on all purchases in connection with the expansion as if the project were fully taxable, then request a refund for all taxes paid on nontaxable and exempt transactions. In its subsequent refund request, PETITIONER seeks a refund of sales and use taxes paid on three types of purchases in connection with the expansion of the CITY facility.

The first type of purchases are for professional services, which PETITIONER claims are not taxable under Utah Code Ann. § 59-12-103(1). Included as professional services are engineering and project management services. The second type of purchases are for labor used in connection with the installation and conversion of tangible personal property to real property, also pursuant to Section 59-12-103(1).

The third type of purchases on which refunds are requested are for machinery and equipment purchases that qualify either under the manufacturing exemption of Utah Code Ann. § 59-12-104(16) and/or the pollution control exemption of Utah Code Ann. § 59-12-104(12). Several subissues have arisen and must also be addressed concerning the purchases of this machinery and equipment. Specifically, PETITIONER has requested the refund of sales and use tax paid on materials incorporated into certain large structures, which Respondent claims should be characterized not as machinery and equipment, but as real property. Another issue is whether certain items are used in activities that are not part of the manufacturing process and thus ineligible for the manufacturing equipment exemption.

Exhibit P-Livesay-4 provides a list of all transactions associated with the expansion project. These transactions are separated into the three types of purchases for which PETITIONER is requesting a refund of taxes. Under its contract with Fuller, PETITIONER was separately invoiced for each type of purchase it made from Fuller. We shall separately address each of these types of purchases and the additional issues raised.

## I. Professional Services

Sales and use taxes are levied upon the purchaser for "sales of tangible personal property," including "repairs and renovations of tangible personal property or services to install tangible personal property in connection with other tangible property." Utah Code Ann. § 59-12-103(1) (1996). At question is whether various professional charges incurred by PETITIONER during its expansion are taxable under this statutory language.

The majority of the charges for professional services that are listed in Column 1 of Exhibit P-Livesay-4 are the professional services fees charged by NAME. NAME provided three types of professional services that are represented in this charge, specifically: (1) project engineering that is related to an individual piece of machinery or equipment, (2) project engineering that is related to the entire scope of work of the project; and (3) project management that is also related to the entire scope of the project. ~~Fuller advised that these services are not taxable under the statute because they are not for the repair or renovation of tangible personal property, but rather are for the design and construction of real property.~~

~~Fuller also stated that the parties agreed to provide stipulation language to this effect to be included in the order, but have not done so. So, instead we accept the stipulation terms proposed by the parties at the hearing, as follows: [REDACTED]~~

~~[REDACTED]~~

## II. Labor on Personal Property Converted to Real Property

PETITIONER contract with Fuller anticipated that NAME would act as a "builder" and convert certain tangible personal property into real property. Charges for labor, with respect to converting the tangible personal property to real property, have been separately identified in NAME'S invoices to PETITIONER. In Exhibit P-Livesay-4, these charges are found in Column 2-Labor. PETITIONER has paid sales and use tax on these specific labor charges and asks that these taxes be refunded.

Utah Admin. Code R865-19S-58(B) provides that "the sale of a completed home [, real property,] is not subject to the [sales and use] tax, but sales of materials and supplies [, tangible personal property,] to contractors and subcontractors are taxable transactions to final consumers." Necessarily excluded from taxation, therefore, is real property contract labor. Accordingly, charges for labor to convert tangible personal property to real property are not subject to sales and use tax, and to the extent that Ash Grove has paid taxes on such charges, these taxes should be refunded.

However, PETITIONER offers an alternative argument at the hearing, claiming that Exhibit P-Livesay-4 should be amended to remove all charges currently in Column 2 (for those items that were converted from tangible personal property to real property) and transfer them to Column 3 (for items that remained tangible personal property). PETITIONER wishes to identify these items as having remained tangible personal property instead of having become real property. Such a move might benefit PETITIONER because charges for items that remain tangible personal property and the labor to install these items may both be exempt from taxes under the manufacturing equipment exemption of Section 59-12-104(16). Should the tangible personal property instead be identified as having been converted to real property, only the labor is nontaxable (because Utah Admin. Code R865-19S-85(B) states that the manufacturing equipment exemption does not apply to real property or to tangible personal property that is purchased and becomes an improvement to real property).

PETITIONER argues that the items it originally designated in Column 2 as having been converted to real property are not really buildings, but are instead structures in support of the tangible personal property. These items include concrete foundations, structural steel and pilings that are put into place to support the machinery and equipment. Testimony is offered that when machinery and equipment are capitalized, the structures that support them are also capitalized because the structures are usually destroyed should the equipment be removed.

The majority of the charges in Column 2 relate to a silo that is used to store the finished cement prior to shipment. There is no chemical transformation of the cement after it arrives at the silo, and it is unlikely that the silo could be moved as it has a diameter of 80 feet and is over 150 feet tall. PETITIONER argues that the new silo is needed because of the increased output of the expanded facility and is a necessary component of the production process because a portion of the finished cement would be "lost" were a storage facility unavailable. PETITIONER also points out it depreciates the silo in the same manner as it does other manufacturing equipment.

In *Morton Int'l, Inc. v. Utah State Tax Comm'n*, 163 Utah Adv. Rep. 34, 814 P.2d 581, (Utah 1991), the Utah Supreme Court was confronted with a similar issue as to whether tangible personal property was converted to real property or remained tangible personal property for purposes of the manufacturing equipment exemption. In that case, Morton argued that the shells of its production facilities functioned as equipment by preventing, localizing, and directing accidental explosions, preventing toxic exposure to workers and the environment, providing structural support for specialized pieces of machinery, and providing access to machinery. The Commission rejected this argument, determining that the facilities constituted real property not subject to the manufacturing equipment exemption. The Supreme Court declined to disturb the Commission's ruling.

The facility shells in *Morton Int'l* served a similar support function for equipment as does the steel, concrete, and pilings that PETITIONER has installed to support its equipment. In both cases, these items were attached to the land and have become real property. As to the silo, its size and method of attachment to the ground leads us to believe it is real property, also. For these reasons, we confirm PETITIONER original characterization of



these items as tangible personal property converted to real property. We do not believe these structures to be equipment, and, thus, they are ineligible for the manufacturing equipment exemption of Section 59-12-104(16). Accordingly, as we have determined that these structures, including the silo, are real property, any invoiced charges for labor to convert the tangible personal property to real property are nontaxable charges and should be refunded to the extent PETITIONER has paid sales and use tax on them.

One additional point should be addressed concerning the silo. Had we concluded that the silo was equipment, it still would not have qualified for the manufacturing equipment exemption because it is used for an activity outside the manufacturing process. Rule R865-19S-85(C) states that machinery or equipment used for an activity that is not part of the manufacturing process does not qualify for the exemption. The rule lists, as an example of equipment outside the production process, equipment used in the storage of finished product. It is clear that PETITIONER delivers its finished product, cement, to the new silo and that the silo is not used to process the cement. Not only is the silo real property instead of equipment, but its use is outside the cement's manufacturing process. For both these reasons, the silo does not qualify for the manufacturing equipment exemption.

### III. Tangible Personal Property

PETITIONER asks for a refund of sales and use taxes paid on purchases of tangible personal property that remained tangible personal property after its installation. PETITIONER indicates that two exemptions apply to the purchase of these items, the manufacturing exemption of Section 59-12-104(16) and/or the pollution control exemption of Section 59-12-104(12). The transactions that relate to this portion of the refund request are listed in Column 3 of Exhibit P-Livesay-4.

#### A. Manufacturing Equipment Exemption

In November, 1996, the Legislature amended the manufacturing equipment exemption of Section 59-12-104(16), retroactive to July 1, 1995. The amended statute allowed an exemption for machinery and equipment with an economic life of three or more years if purchased or leased by a manufacturer in new or expanding operations and used in the manufacturing process to manufacture an item sold as tangible personal property. The version of this statute in effect prior to July 1, 1995 and the amended statute both required the Tax Commission to define the term "new or expanding operations" in rule f. purposes of the manufacturing exemption.

Prior to July 1, 1995, the Tax Commission, in fulfillment of its statutory duty, had defined the term "new or expanding operations" in Rule R865-19S-85 ("Rule 85"), which remained unchanged during the period PETITIONER expanded its CITY facility,<sup>1</sup> as follows:

A.3.(a) "New or expanding operations" means manufacturing, processing, or assembling activities that:

- (1) are substantially different in nature, character, or purpose from prior activities;
- (2) are begun in a new physical location in Utah; or
- (3) increase production or capacity.

(b) The definition of new or expanding operation is subject to limitations dealing with normal operating replacements.

Subpart (A)(3)(b) of the above definition bars any machinery or equipment that qualifies as normal operating replacements from also qualifying as machinery or equipment used in new or expanding operations. Rule 85 defines the term "normal operating replacements" as follows:

A.6. 'Normal operating replacements' means machinery or equipment that replaces existing machinery or equipment of a similar nature, even if the use results in increased plant production or capacity.

If any machinery or equipment constitutes "normal operating replacements," analysis of whether that machinery or equipment meets the definition of new or expanding operations in Subpart (A)(3)(a) is unnecessary.

The rule, on its face, would appear to preclude any "replacement" from qualifying for the exemption, regardless of the purpose of the replacement. For example, a taxpayer that replaces a state-of-the-art widget maker because it can produce only 100 widgets an hour would be denied an exemption for an otherwise similar machine purchased only because it can produce 10,000 widgets an hour. This application has the virtue of simplicity and may be consistent with guidance this Commission has given to the Auditing Division in the past.<sup>2</sup> We now believe, however, that this application is unduly narrow. In interpreting the statute, we have the duty to give effect to all of its terms. The statute does not exclude all "replacements." It excludes "normal operating replacements" which is clearly a narrower term. See *Eaton Kenway v. Auditing Division*, 906 P.2d 882, 887 (1995).

The new machinery and equipment replaces other machinery and equipment of a similar nature. We determine that the new equipment that PETITIONER purchased for its 1996 expansion "replace[d] existing machinery and equipment of a similar nature" even though those replacements resulted in increased plant production or capacity. PETITIONER counsel concedes that the nature and character of the cement facility after the expansion is similar to the prior facility and that the purpose of the facility is the same prior to and after the expansion. We do not disagree with the counsel's conclusion. The plant produced cement both before and after the expansion. The new machinery and equipment replaced machinery and equipment of a similar nature, character, and purpose. For example, an existing coal system was converted to an indirect system by addition of a new dust collector so the moist gases could be vented, and existing kiln units received an upgrade with higher capacity units. Even though this new equipment increased PETITIONER productivity, it did not change the basics of cement production. For these reasons, we agree that the new machinery and equipment replaced existing machinery or equipment of a similar nature.<sup>3</sup>

These replacements are not "normal operating replacements." We have found that the new machinery and equipment is similar in nature to the old equipment that was retired and thus qualifies as "replacement" equipment. To determine if these replacements qualify for the exemption, however, we must determine whether they are "normal operating replacements" within the meaning of the statute.

The Utah Supreme Court, in *Eaton Kenway*, has determined that replacement equipment purchased pursuant to a significant modernization and plant upgrade may constitute "normal operating replacements." In that case, the Court held (*ibid*):

After examining the exemption we do not agree with Eaton and Amici that it should apply broadly to manufacturers upgrading and modernizing existing machinery and equipment ... Modernizing and upgrading machinery and equipment are normally done in the regular course of business even though the replaced items may be in good working order .... notably, the statute does not simply deny the exemption to normal operating replacements - but "normal operating replacements ... even though they may increase plant production or capacity." Utah Code Ann. § 59-12-104(15) (emphasis added). This language indicates that the legislature intended to deny the exemption to purchases of replacements normally made in the regular course of business even though through advanced technology the replacement machinery and equipment are more efficient and productive.

See also *Newspaper Agency Corp. v. Auditing Division*, 938 P.2d 266 (1997) .

*Eaton Kenway* provides that replacements purchased to modernize existing facilities or maintain a competitive advantage are made in the "regular course of business" and are normal operating replacement, even if they increase production. Upgrades are often necessary in business to meet stricter federal or state guidelines, to replace obsolete equipment, or just to remain competitive. Such upgrades or modernizations are in the "regular course of business" because they maintain a business's current production potential and competitive position or allow the business to adapt to new market variables, such as stricter pollution level guidelines. This type of upgrade is made in the "regular course of business" even if increased production is a secondary result.

On the other hand, upgrades that have little purpose other than to increase production are an expansion of a business, not the regular course of business. In such an instance, the business is not maintaining its current production potential and competitive position or adapting to variable market conditions, but is upgrading primarily to increase production. It is these types of upgrades that we feel are expansionary replacements, not normal operating replacements.

What stands out in the long list of equipment replaced at PETITIONER is the fact that the new machinery and equipment almost always had a larger capacity than the old machinery and equipment. While the Respondent argues that the changes were aimed at simply upgrading equipment to a more technologically advanced and convenient process, we do not believe this was a major goal or result of the upgrade. While some of the new equipment may be more technologically advanced than the previous equipment, that was not the purpose for the expansion. There is little or no evidence that efficiency was improved by the new equipment or that pollution levels dropped because of the new equipment. In fact, the CITY facility was already the most efficient plant that PETITIONER owned, even prior to the expansion. Nor is evidence offered that efficiency or pollution level concerns even precipitated or influenced the expansion decision.

Instead, the testamentary evidence overwhelmingly shows that PETITIONER reconfigured its cement manufacturing plant primarily, if not solely, in order to increase its production capacity. PETITIONER was not seeking to modernize or update its machinery and equipment in its old plant. In fact, the machinery and equipment in the plant were working normally and properly at full potential capacity and would have continued to do so for many years in the future. PETITIONER reconfigured its plant for one reason - to increase production capacity. Documentary evidence supports the fact that PETITIONER production capacity has increased approximately 25 percent because of the expansion. PETITIONER did not just "upgrade" or "modernize" its plant. It added or replaced machinery and equipment at its CITY plant to increase its production capacity.

Accordingly, PETITIONER 1996 expansion is not a substitution normally made in the regular course of business. The goal and result were not to increase the plant's efficiency, or modernize or upgrade the equipment. The goal and result both were to enable PETITIONER to produce more cement. PETITIONER upgrades were primarily, if not solely, for expansionary purposes. Therefore, we find PETITIONER purchases of machinery and equipment for its 1996 expansion were not made in the "regular course of business," and thus are not normal operating replacements.

Because the machinery and equipment are not "normal operating replacements," we need to analyze whether the equipment qualifies for use in "new or expanding operations" as outlined in subpart (A)(3)(a) of the rule. This subpart lists three activities that qualify purchases as "new or expanding operations." As the three activities are listed disjunctively, the existence of any one of the three activities is sufficient to result in a "new or expanding operations" designation. It is clear from the facts that PETITIONER 1996 expansion at the CITY facility did increase its production of cement and its capacity to produce cement. Accordingly, the PETITIONER purchases of machinery and equipment for the 1996 expansion are in "new or expanding operations" in a manufacturing facility in the state, a requirement of Section 59-12-104(16)(a).

PETITIONER is also a manufacturer of cement, the purchases are for machinery and equipment that have an economic life of three years or more and are used in the manufacturing process to manufacture tangible personal property (cement) for sale. No evidence is given to suggest otherwise. Thus, PETITIONER's 1996 expansion of its CITY facility meets all the requirements necessary to qualify its purchases of machinery and equipment for the manufacturing equipment exemption for "new or expanding operations."

## B. Pollution Control Exemption

PETITIONER also requests that some of the purchases pertaining to the 1996 expansion of the CITY facility may be exempted from taxation under Section 59-12-104(12), which allows a sales and use tax exemption on the purchase "of property, materials, or services used in the construction of or incorporated in pollution control facilities allowed by Sections 19-2-123 through 19-2-127." Utah Code Ann. § 19-2-123(2) provides that a facility may receive the pollution control exemption only upon obtaining a certification of pollution control from the Department of Environmental Quality. As the CITY facility has not been certified as a pollution control facility by the Department of Environmental Quality, the pollution control exemption is not available.

## DECISION AND ORDER

Based upon the foregoing, the Tax Commission finds that PETITIONER purchases of professional services are taxable or exempt in part (depending upon the taxability of the underlying equipment) and nontaxable in part. PETITIONER should receive a refund of taxes paid on the exempt and nontaxable purchases of professional services.

Also, PETITIONER should receive a refund of taxes paid on labor to convert tangible personal property to real property. Lastly, the machinery and equipment purchased to expand the CITY facility qualify as new or expanding operations and are thus eligible for the full manufacturing equipment exemption. Thus, PETITIONER should receive a refund of taxes paid on this "new or expanding" machinery and equipment. However, PETITIONER does not qualify for any refund of taxes pursuant to the pollution control exemption. It is so ordered.

DATED this 26TH day of February, 1999.

Richard B. McKeown

Chairman

R. Bruce Johnson

Commissioner

Pam Hendrickson

Commissioner

Joe B. Pacheco

Commissioner

1  
Because of the November, 1996, amendment to the statute, Rule R865-19S-85 was also amended. But, the amended rule did not have an effective date until September 21, 1997. Accordingly, the amended rule with an effective date of September 21, 1997, is not applicable to the 1996 purchases for the Leamington facility expansion.

2  
Ease of administration is not irrelevant and furthers the important goals of treating taxpayers equally and allowing them to predict the tax consequences of their proposed actions. Administrative convenience, however, cannot justify a disregard of the words of a statute.

3  
We do not require any exact matching of individual pieces of equipment. It is sufficient that Ash Grove's new machinery and equipment, taken as a whole, replaced previous machinery and equipment of a similar nature. See *Eaton Kenway*, where a state-of-the-art computer numerically controlled machine replaced six manually assisted cutting and drilling machines.

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**87-1161 - Sales**

## BEFORE THE STATE TAX COMMISSION OF UTAH

XXXXXX

Petitioner,

: INFORMAL DECISION

v.

AUDITING DIVISION OF THE

: Appeal No. 87-1161

UTAH STATE TAX COMMISSION,

: Acct. No. XXXXXX

Respondent

:

STATEMENT OF CASE

This is an appeal to the Utah State Tax Commission from an audit report prepared by the Auditing Division of the Utah State Tax Commission (Respondent) for the period XXXXXX. An informal hearing was held on XXXXXX in the offices of the Utah State Tax Commission. David J. Angerhofer, Hearing Officer, heard the matter for the Tax Commission. XXXXXX, Attorney at Law, represented the Petitioner. XXXXXX represented the Respondent. The audit includes sales and use tax along with penalty and interest assessed on two large jobs which Petitioner completed in XXXXXX. Petitioner sold and installed two gas processing or separating plants, one for XXXXXX and one for XXXXXX. Petitioner raised several issues regarding the audit. First, the sales are not subject to Utah sales tax because they were negotiated and consummated in XXXXXX. Petitioner is a nonresident of Utah and has no duty to collect sales tax for the state of Utah. Use tax may be due on the transactions but is properly remitted by the purchasers of the property, XXXXXX. The second issue is whether the installation of the gas processing plants constitutes an improvement to real property or whether the plant remains personal property. Labor involved with an improvement to real property is not taxable. Petitioner stated that the Commission is without authority to distinguish between tangible, personal property which becomes real property upon installation and tangible, personal property which remains personal property after installation. To exempt installation charges from sales tax only if the labor is separately stated on tangible, personal property which remains personal property after installation is contrary to a XXXXXX letter received from a Tax Commission employee and is contrary to the Utah Code. The third issue raised by Petitioner is that Utah Code Ann. 59-15-6(4) (1953) (recodified to 59-12-104(15)) exempts sales in excess of \$500,000 used in the "new construction, expansion, or modernization" of any "mine." Oil and gas wells are included in the Utah definition of "mines." Petitioner claimed further exemptions for tax paid to the state of Wyoming and for tax assessed on freight charges. The fourth issue raised by Petitioner concerned the

<http://tax.utah.gov/research/decisions/1987/87-1161.htm> (1 of 3) [11/21/2007 1:08:13 PM]

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propriateness of penalties given the circumstances of this case. Respondent noted that the gas ant is mounted on skids and is considered personal property for investment tax credit purposes well as for sales and use tax purposes. Respondent stated that the property is subject to use tax ice it was purchased for use in the state of Utah. A nonresident vendor is required to collect the x unless the vendor's only contact is through the mail. Respondent stated that a gas processing ant is excluded from the exemption set forth in 59-12-104(15) because it is a refinery.

#### FINDINGS

The Tax Commission finds that the sales in question were not consummated in the state of XXXXX but were consummated in Utah at the conclusion of the installation. The sales of the is processing plants are sales of property subject to Utah sales and use tax. Since Petitioner stalled the plants, Petitioner had a sufficient nexus with the state of Utah to incur the duty of ollecting the tax. Given that the gas processing plant is mounted on skids, the Tax Commission ids that the installation of the gas processing plant constitutes the installation of tangible, rsonal property which is attached to real property but which remains personal property. Tax ommission Rule R865-51S-1 applies. Installation labor is exempt if separately stated. Since the stallation labor on the XXXXX was invoiced separately, it is exempt. Petitioner did not parately invoice the labor for the XXXXX, but provided evidence of the charges for labor, ofit, and freight at the time of the hearing. Because the XXXXX letter by the Tax Commission gent did not specify the requirement of separately stating the installation charges and because etitioner did provide the installation charges at the hearing, the Tax Commission hereby empts the installation labor, the profit, and the freight charges for the XXXXX project. Labor install tangible, personal property to real property is exempt, but labor to install personal roperty in connection with other personal property is taxable pursuant to Rule R865-51S-1. lthough some of the labor involved in the installation of the gas processing plant constituted stallation of personal property in connection with other personal property, the Tax Commission nds that all labor involved with the installation of the gas processing plant ultimately was labor r installing tangible, personal property to real property but which remained personal property. espondent properly applied a tax rate of 5.5 percent to the sales in question. This was the rate plicable in XXXXX during the audit period and included the local tax. A credit for XXXXX x due is properly deducted from the tax due in Utah and not properly deducted from the total ntract price. The Tax Commission finds sufficient basis on which to waive the penalty in this attter.

#### DECISION AND ORDER

Based on the foregoing, it is the decision and order of the Utah State Tax Commission at Petitioner had the obligation to collect and remit the sales and use taxes to the state of Utah. he installation of the gas processing plants constitutes the installation of tangible, personal roperty which is attached to real property but which remains personal property. The labor arges, freight, and profit as set forth on exhibit A of Petitioner's brief in support of the petition r redetermination are properly excluded from sales and use tax. Sales tax paid to the state of XXXXX is properly deducted from the sales and use tax assessed by the state of Utah. Penalty is

hereby abated. The Auditing Division of the Utah State Tax Commission is ordered to adjust i records in accordance with this decision.

DATED this 25 day of August, 1988.

BY ORDER OF THE STATE TAX COMMISSION OF UTAH.

R. H. Hansen  
Chairman

Roger O. Tew  
Commissioner

Joe B. Pacheco  
Commissioner Commissioner

G. Blaine Davis



16 of 17 DOCUMENTS

**PETITIONER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX  
COMMISSION, Respondent.**

Appeal No. 04-0900; Account No. #####

UTAH STATE TAX COMMISSION

*2005 Utah Tax LEXIS 4*

February 8, 2005

[\*1]

Kerry R. Chapman, Administrative Law Judge, Pam Hendrickson, Commission Chair, Palmer DePaulis, Commissioner, R. Bruce Johnson, Commissioner, Marc B. Johnson, Commissioner

Appearances: For Petitioner: PETITIONER REPRESENTATIVE 1, President; PETITIONER REPRESENTATIVE 2

For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General; RESPONDENT REPRESENTATIVE 2, from Auditing Division; RESPONDENT REPRESENTATIVE 3, from Auditing Division; RESPONDENT REPRESENTATIVE 4, from Auditing Division

**OPINION:**

**ORDER**

Tax Type: Sales Tax

Audit Period: 7/1/00 - 6/30/

Judge: Chapman

**STATEMENT OF THE CASE**

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5, on January 12, 2005.

The Petitioner is in the printing business. Among the items sold by the Petitioner are printed items and associated pre-press materials. Pursuant to an audit, Auditing Division ("Division") issued an Amended Statutory Notice of sales tax liability to the Petitioner, which Petitioner timely appealed. The only portion of the audit assessment at issue concerns the Petitioner's sales of pre-press materials to its resale customers.

The Division [\*2] asserts that the Petitioner is liable for sales and use tax on pre-press materials associated with printed items it sold tax-free to its resale customers. The Petitioner asserts that its customers purchased the pre-press

NO. 502.5



materials tax-free and that it took the necessary steps to sell them the items as such. The Division asserts that the Petitioner is liable because it did not inform the customers that their purchase included reusable pre-press materials in accordance with Utah Admin. Code R865-195-80(B)(3) ("Rule 80"). Without such notice, the Division argues, the resale customer may believe that it did not purchase pre-press materials on which it may itself be subsequently liable for tax.

The Petitioner believes that it has complied with Rule 80(B)(3) because it provided a written bid sheet to its customers that included a line item identifying the cost of the pre-press materials. The Division asserts, however, that this written bid sheet does not, as required by Rule 80(B)(3), "[state] that reusable pre-press materials are included in the purchase." When ownership of the printed items is transferred at the time of sale, the Petitioner presents an invoice with no separate line itemization [\*3] for pre-press materials and no statement such materials are included in the purchase. While the Petitioner contends that the bid sheet provides such notice, the Division responds that a resale customer under these circumstances may not realize that it has purchased prepress materials, instead believing that it is reimbursing the Petitioner for items the Petitioner consumed to produce the printing job.

The Division states that the Petitioner was given an opportunity to contact its customers to have them confirm that they accepted responsibility for the tax on the pre-press materials under these circumstances. It further states that the only sales remaining at issue are those where the customer did not affirmatively accept liability.

#### APPLICABLE LAW

To administer the taxation of printers and its sales of pre-press materials, the Tax Commission has adopted Rule 80. The audit period at issue is July 1, 2000 through June 30, 2003. During the audit period, on December 19, 2000, the Commission amended Rule 80, including those provisions affecting pre-press materials. Prior to this amendment, "Old Rule 80" provided, in part:

....  
E. Printers may purchase tax free reusable pre-press [\*4] materials . . . used in the preparation of printed matter for resale provided title to said tangible personal property passes to the customer.  
....

2. The printer's invoice must contain a statement on its face, that states that reusable pre-press materials associated with that transaction are included with the purchase. A description and the quantity of the actual items used in the order is not necessary. The statement must not restrict the customer from taking physical possession of those items if so desired.  
....

"New Rule 80" became effective on December 19, 2000. It provides for the taxation of pre-press materials, as follows:

....  
B.3. A printer may purchase pre-press materials tax free if the printer's invoice, or other written material provided to the purchaser, states that reusable pre-press materials are included with the purchase. A description and the quantity of the actual items used in the order is not necessary. The statement must not restrict the customer from taking physical possession of the pre-press materials.  
....

Upon the adoption of New Rule 80, Tax Commission Bulletin 16-00 became effective and addressed the sale of pre-press materials as follows: [\*5]  
....

Pursuant to [New Rule 80], a printer may purchase pre-press materials tax free if the printer's invoice, or other written material provided to the purchaser, states that reusable pre-press materials are included with the purchase. The statement need not describe the pre-press materials, and may not restrict the purchaser from taking physical possession of those materials.  
....

#### DISCUSSION

The Division argues that under both Old Rule 80 and New Rule 80, the Petitioner did not provide its resale customers adequate notice that its tax-free purchases included reusable pre-press materials. The Commission is aware that a resale customer who purchases printed items and pre-press materials tax-free for resale does not always sell the pre-press materials to the final consumer of the printed materials. Under such circumstances, the resale customer should remit use tax on its consumption of the pre-press materials, but often does not. Both Old Rule 80 and New Rule 80 contain provisions to ensure that a printer provides notice to its resale customers that they have purchased reusable pre-press materials and, thus, may be liable for tax on the materials.

Old Rule 80. [\*6] For those transactions prior to December 19, 2000, the Commission must apply Old Rule 80 to determine whether the Petitioner is liable for the taxes assessed by the Division. Section E.2. of Old Rule 80 requires a printer's invoice to contain a statement on its face that reusable pre-press materials associated with the transaction are included with the purchase. The Petitioner's invoices did not contain such a statement. For this reason, the Petitioner did not provide adequate notice as required under Old Rule 80. Accordingly, for those sales at issue during the audit period that occurred prior to December 19, 2000, the Petitioner is liable for tax on the pre-press materials.

New Rule 80. This rule applies to those sales in the audit period occurring on or after December 19, 2000. Section B.3. of New Rule 80, as well as Tax Bulletin 16-00, requires a printer selling pre-press materials tax-free to provide its resale customers a written document that "states that reusable pre-press materials are included with the purchase." The Petitioner provided a written document to its customers, a bid sheet, on which it itemized the pre-press materials incorporated into the cost of the bid. [\*7] However, the information on this sheet does not distinguish whether the resale customer is purchasing reusable pre-press materials or only reimbursing the Petitioner for consumed pre-press materials. Under the latter circumstance, the Petitioner, not the resale customer, is responsible for sales and use tax on the pre-press materials. For these reasons, the Commission finds that the itemization of the pre-press materials on the bid sheet, without any further explanation, was not adequate notice to satisfy New Rule 80(B)(3).

The Commission also notes that although taxing statutes are generally construed in favor of the taxpayer and against the taxing authority, the Utah Supreme Court has held that statutes providing tax exemptions are construed strictly against the taxpayer. *Parson Asphalt Prods., Inc. v. Utah State Tax Comm'n*, 617 P.2d 397, 398 (Utah 1980). The issue before the Commission involves a sales tax exemption. For these reasons, the Commission finds that the Petitioner is also liable for sales and use tax on its tax-exempt sales of pre-press materials on or after December 19, 2000.

The Petitioner stated that it believed its customers knew [\*8] they were purchasing reusable pre-press materials when they received the bid sheets on which the pre-press materials were listed. The Petitioner was allowed an opportunity to prove its assertion and contacted its customers for confirmation. Many of its customers confirmed that they had taken responsibility for the tax associated with the pre-press materials purchased from the Petitioner. The Division states that it no longer considers the Petitioner liable for these sales. The Commission agrees that the Petitioner is not liable for the tax on these sales because the resale customers have confirmed that it has notice of its liability for the tax. However, for those sales where the resale customer did not confirm that it purchases reusable pre-press materials from the Petitioner, the Petitioner is responsible, as discussed earlier.

#### DECISION AND ORDER

Based on the foregoing, the Commission finds that the Petitioner is liable for sales and use tax on its sales of pre-press materials to tax-exempt resale customers, except in those instances where the Petitioner's resale customers accepted responsibility for the taxes on the prepress materials in writing. It is so ordered.

This decision [\*9] 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 to the address listed below and must include the Petitioner's name, address, and appeal number:

Utah State Tax Commission

Appeals Division

210 North 1950 West

Salt Lake City, Utah 84134

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

DATED this    day of    , 2005.

Kerry R. Chapman

Administrative Law Judge.

BY ORDER OF THE UTAH STATE TAX COMMISSION.

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this    day of    , 2005.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Tax LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTax LawState & Local TaxesPersonal  
Property TaxTangible PropertyGeneral OverviewTax LawState & Local TaxesUse TaxLimitations