

1992

# Harper Investments, Inc., Harper Sand and Gravel, Inc., Harper Excavating, Inc., and Harper Contracting, Inc. v. Auditing Division, Utah State Tax Commission : Brief of Appellee

Utah Supreme Court

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**BRIEF**

IN THE SUPREME COURT  
OF THE STATE OF UTAH

HARPER INVESTMENTS, INC., )  
HARPER SAND AND GRAVEL, INC., )  
HARPER EXCAVATING, INC., AND )  
HARPER CONTRACTING, INC., )  
 )  
Petitioners-Appellants, )  
 )  
vs. )  
 )  
AUDITING DIVISION, UTAH )  
STATE TAX COMMISSION, )  
 )  
Respondent-Appellee )

Supreme Court No. 920310

Priority No. 15

## BRIEF OF APPELLEE

# An Appeal From A Decision Of The Utah State Tax Commission

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CLERK SUPREME COURT  
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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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HARPER SAND AND GRAVEL, INC.,	)	
HARPER EXCAVATING, INC., AND	)	
HARPER CONTRACTING, INC.,	)	
	)	
Petitioners-Appellants,	)	
	)	Supreme Court No. 920310
vs.	)	
	)	
AUDITING DIVISION, UTAH	)	Priority No. 15
STATE TAX COMMISSION,	)	
	)	
Respondent-Appellee	)	

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### STATEMENT OF JURISDICTION

The Utah Supreme Court does not have jurisdiction. Petitioners have failed to file a timely petition for judicial review as required by Utah Code Ann. § 63-46b-14.

### ISSUES PRESENTED FOR REVIEW

I. Does the court have jurisdiction where Petitioner fails to file a timely Petition for Review of Agency Action.

The standard of review for this questions is correction of error. See Savage Indus., Inc. v. State Tax Comm'n, 811 P.2d 664 (Utah 1991).

II. Did the Utah State Tax Commission reasonably conclude that sales of sand and gravel from Harper Excavating, Inc. to Harper Contracting, Inc., were taxable transactions.

The standard of review for this issue is the "abuse of discretion" standard pursuant to Utah Code Ann. 63-46b-16(h)(i). Therefore, the reviewing court should affirm the agency's decision unless it is unreasonable. See Morton Int'l Inc. v. Auditing Div. of the Utah State Tax Comm'n, 814 P.2d 581 (Utah 1991).<sup>1</sup>

### DETERMINATIVE LAW

The determinative provisions are set forth verbatim in the attached appendix.

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<sup>1</sup>. The Utah Administrative Procedure Act, Utah Code Ann. § 63-46-1 to -22 (1987), applies to this appeal inasmuch as all adjudicative proceedings below were commenced after January 1, 1988. Salt Lake County v. State Tax Comm'n, 819 P.2d 776 (Utah 1991).

**STATUTES - Appendix 1:**

1. Utah Code Ann. § 59-12-102(8) (1987).
2. Utah Code Ann. § 59-12-102(10) (1987).
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4. Utah Code Ann. § 59-12-103(1)(a) (1987).
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6. Utah Code Ann. § 63-46b-1(9) (1989 & Supp. 1992).
7. Utah Code Ann. § 63-46b-13 (1989 & Supp. 1992).
8. Utah Code Ann. § 63-46b-14 (1989 & Supp. 1992).

**STATEMENT OF THE CASE**

On appeal, Harper Investments, Inc., Harper Sand and Gravel, Inc., Harper Excavating, Inc., and Harper Contracting, Inc. (hereinafter "Petitioners") challenge the Utah State Tax Commission's finding that Petitioners were required to collect and remit sales taxes with respect to inter-subsidary sand and gravel sales.

**COURSE OF PROCEEDINGS**

An audit conducted during 1988 determined that Petitioners were liable for sales and use taxes in the amount of \$582,273.93 from sales of sand and gravel. (R. 213, 685-693). Statutory notices of the deficiencies were sent September 28, 1990. (R. 213, 685-693). Petitioners filed a combined Petition for Redetermination on October 26, 1990. (R. 11-39).

On July 30, 1991, the parties presented evidence before the Utah State Tax Commission. (Transcript). On January 9, 1992,

the Tax Commission issued its Findings of Fact, Conclusions of Law and Final Decision affirming the Auditing Division's assessment of sales tax, interest, and penalties. (R. 207-213).

Petitioners did not file a request for reconsideration of the Tax Commission's Final Decision within 20 days from the issuance of the January 9, 1992, Final Decision as required by Utah Code Ann. § 63-46b-13(1)(a). (Respondent's Memorandum in Support of its Motion to Dismiss, 2). Furthermore, Petitioners did not file a petition for review of final agency action within 30 days of the Tax Commission's Final Decision as required by Utah Code Ann. § 63-46b-14(3)(a). (Respondent's Memorandum in Support of its Motion to Dismiss, 2).

On February 24, 1992, Petitioners filed a motion with the Tax Commission, relying on Utah R. App. P. 4(e), requesting the Tax Commission to extend the time allowed for filing an appeal from the Final Decision. (Respondent's Memorandum in Support of its Motion to Dismiss, 2). On March 13, 1992, Petitioners filed an amended motion seeking permission to file a tardy petition for reconsideration. (R. 40). On April 15, 1992, the Tax Commission granted Petitioners permission to file a tardy petition for reconsideration. (R. 30).

On May 4, 1992, Petitioners filed their Petition for Reconsideration of the Tax Commission's Final Decision dated January 9, 1992. (R. 11). Pursuant to Utah Code Ann. § 63-46b-13(3)(b) a request for reconsideration is considered denied if

the agency does not issue an order within 20 days of the filing of the request. Time for filing an appeal of final agency action is from the time the order "is considered to have been issued under subsection 63-46b-13(3)(b)." Utah Code Ann. § 63-46b-14(3)(b). On June 3, 1992, the Tax Commission issued an order confirming that the petition for reconsideration was denied. (R. 8-9). On July 1, 1992, 147 days after the Commission's Final Order, and 38 days after Petitioners tardy motion for reconsideration was deemed denied, Petitioners filed a Petition for Review of Agency Action with the Supreme Court of the State of Utah. (R. 2).

On January 20, 1993, Respondent filed a Motion To Dismiss for Lack of Jurisdiction for failure to file a timely appeal pursuant to Utah Code Ann. § 63-46b-14(3)(a). On April 20, 1993, the Court denied the motion, reserving ruling on the issues presented until plenary presentation pursuant to Rule 10(f) of the Utah Rules of Appellate Procedure.

#### STATEMENT OF FACTS

1. Prior to 1986, Harper Excavating, Inc. operated a sand and gravel company that excavated, processed, hauled, and laid sand, gravel, and other materials. (R. at 208).

2. In May of 1986, in an attempt to limit legal liabilities, Rulon Harper, president of the parent and eventual subsidiary corporations, decided to reorganize the corporation by dividing and transferring the assets of Harper Excavating, Inc.

into three new, wholly owned subsidiaries, namely: Harper Sand and Gravel, Inc., Harper Excavating, Inc., and Harper Contracting, Inc., (R. at 208, 567).

3. The former Harper Excavating, Inc. changed its name to Harper Investments, Inc., and became the parent corporation of the three new and separate subsidiaries as a part of the reorganization. (R. at 208, 567).

4. At the close of business May 9, 1986, the listed assets and liabilities of Harper Excavating, Inc. were divided and allocated among the three new and separate entities by the controller of the former Harper Excavating, Inc., Steven Goddard. (R. at 208, 567; T. 66, Respondent's Exhibit 16 p. 6).

5. The gravel sales contracts between Rulon Harper and Harper Excavating, Inc. were not listed as an asset of Harper Excavating at the time reorganization occurred. (T. 49, 80 & 85).

6. Consequently, the rights created under those arguments were not assigned to any of the newly formed corporations. (T. 85).

7. A computerized accounting system was installed to facilitate the accounting procedures of each of the new subsidiaries, given the fact that each corporation performed separate business functions. (R. at 240, 568). This system accounted for expenses and revenue by job, by gravel pit, by labor, and by equipment. (R. 645).

8. The financial statements do not refer to the gravel sales agreements, nor do they list them as an asset of any of the corporations. (Respondent's Exhibits 15-27, T. 85, 124, 125 & 127).

9. Following the reorganization, Harper Sand and Gravel, Inc. purchased sand and gravel from land owned by Rulon Harper. (T. 85, 86 & 127, Respondent's Exhibits 17 p.7, 21 p.9).

10. Harper Sand and Gravel, Inc. paid Rulon Harper royalties for extracting gravel from pits owned by Rulon Harper (Respondent's Exhibits 2, 3, 21 p. 9, T. 28, 39, 86, 137 & 141).

11. Harper Sand and Gravel, Inc. continues to sell sand and gravel purchased from Rulon Harper to outside vendors. (T. 102 & 127).

12. During the audit period, Harper Excavating, Inc. would purchase sand and gravel from Harper Sand and Gravel, Inc. (R. 209, T. 61, Respondent's Exhibits 18 p. 9, 22 p. 9, 26 p. 10).

13. Harper Excavating, Inc. would sell the sand to and haul it for Harper Contracting, Inc. (R. 209, T. 61, Respondent's Exhibits 18 p. 9, 19 p. 9, 22 p. 6, 23 p. 7 & 9, 25 p. 8, 10, 27 p. 8-11).

14. The sale from Harper Excavating, Inc. to Harper Contracting, Inc. was a taxable transaction. (R. 211, T. 138).

15. Steven Goddard presented numerous invoices, statements, and checks that reflected inter-subsidiary transactions of sand and gravel between Harper Excavating, Inc. and Harper

Contracting, Inc. to Rulon Harper for his signature during the audit period. (T. at 22, 60).

16. Rulon Harper signed the checks that paid for the sand and gravel and its transportation costs for each sand and gravel transaction as described in the purchase scenario above. (R. at 248, 249; T. at 22, 61).

17. The independent auditing firm of Sorensen, Main and Nielsen, which conducted yearly audits of the Harper corporations, noted the transactions in the financial statements prepared for each corporation. (Respondent's Exhibits 15-28).

18. No sales taxes were collected or paid on any of the sand and gravel sales and hauling charges among the different corporations. (R. at 209).

19. In the latter part of 1988, the Auditing Division of the Utah State Tax Commission conducted an audit of the Petitioners for the period ranging from October 1, 1985 through September 30, 1988. (R. at 209, 210).

20. The audits uncovered a deficiency of \$582,273.93, excluding interest and penalties, in sales and use taxes primarily relating to sand and gravel sales between Harper Excavating, Inc. and Harper Contracting, Inc. during the period in question. (R. at 238).

21. In September of 1990, the Utah State Tax Commission issued statutory notices to Petitioners, which reflected the

sales taxes owing on the inter-subsidary sand and gravel transactions. (R. 684-696).

22. On July 30, 1991, both parties presented evidence and testimony regarding the sales tax assessment at a hearing before the Tax Commission. (T. 1-152).

23. On January 9, 1992, the Tax Commission issued its Findings of Fact, Conclusions of Law, and Final Decision, which affirmed the tax assessment, interest and penalties against the Harper corporations. (R. 207-214).

#### SUMMARY OF THE ARGUMENT

Petitioners' failure to file a timely appeal deprives this Court of jurisdiction. The Tax Commission issued its Final Decision on January 9, 1992. Petitioners did not petition for reconsideration of final agency decision by filing with the Tax Commission within twenty days of the Final Decision or file for judicial review within 30 days.

The Tax Commission's hearing of a tardy petition for reconsideration had no effect on the finality of the January 9, 1992 Final Decision. To conclude otherwise would grant the Tax Commission power to extend the time for seeking judicial review contrary to Utah Code Ann. § 63-46b-1(9). Therefore, Petitioners appeal is untimely and should be dismissed.

Sales between a parent and a subsidiary corporation, or between two subsidiaries, are subject to sales tax. Each entity, has a separate legal existence. As such, the Tax

Commission reasonably determined that the transactions between Harper Excavating, Inc. and Harper Contracting, Inc. were taxable.

### ARGUMENT

#### **I. PETITIONERS FAILED TO FILE A TIMELY APPEAL.**

Pursuant to the provisions in the Utah Administrative Procedures Act, a party can obtain judicial review of a final agency action pursuant to Utah Code Ann. § 64-46b-14; and, agency reconsideration pursuant to Utah Code Ann. § 64-46b-13.

In order to obtain judicial review of a final agency action pursuant to Utah Code Ann. § 63-46b-14, a party must file a petition for judicial review within 30 days from the date the decision was issued or is considered to be issued. See Utah Code Ann. § 63-46b-14(3)(a) (1989). This Court has ruled that an order is "issued" when it has been signed by the Commission. See Dusty's Inc. v. State Tax Comm'n, 199 Utah Adv. Rep. 7 (Utah 1992). In the case at bar, the Tax Commission issued its Final Decision on January 9, 1992. Petitioners did not file a request for review within 30 days. Pursuant to the express language of § 63-46b-14(3)(a) and Utah R. App. P. 14(a), a petition for review must be filed within 30 days of the Tax Commission's Final Decision. Therefore, because Petitioners failed to timely file,

this Court lacks jurisdiction over Petitioners' appeal and it should be dismissed.<sup>2</sup>

The Tax Commission's granting of Petitioners' untimely "Motion to Extend Time for Filing Notice of Appeal"<sup>3</sup> does not extend the time allowed for judicial review of the January 9, 1992 Final Decision. Section 63-46b-1(9) specifically states that an agency does not have the authority to extend the time requirements allowed for judicial review. See Utah Code Ann. § 63-46b-1(9) (1989 & Supp. 1992). This Court recently held that the Tax Commission cannot expand the time period established for

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<sup>2</sup>. Failure to file a timely appeal is jurisdictional in nature and can be raised at any time during the appellate proceedings. See Leonczynski v. Indus. Comm'n., 713 P.2d 706 (Utah 1985).

<sup>3</sup> A brief synopsis of the procedural history of relevant parts this case may be helpful.

January 9, 1992, the Tax Commission issued its Final Decision. (R. 207).  
February 24, 1992, Petitioners filed a Motion to Extend Time For Filing Notice of Appeal. (R. 165).  
March 13, 1992, Petitioners filed an Amended Motion For Relief to Challenge the Final Decision of the Tax Commission. (R. 40).  
April 15, 1992, the Tax Commission granted Petitioners' Motion for Extend Time for Filing of Appeal. (R. 30).  
May 4, 1992, Petitioners filed a Petition for Reconsideration of the Tax Commission's January 9, 1992, Final Decision. (R. 11).  
June 3, 1992, the Tax Commission denied Petitioners' Petition for Reconsideration.  
July 1, 1992, Petitioners filed a Petition for Review of Agency Action regarding the June 3, 1992 denial of Petitioner's Petition for Reconsideration and also of the January 9, 1992, Final Order. (R. 2).

judicial review. See Dusty's Inc. v. State Tax Comm'n, 199 Utah Adv. Rep. 7 (Utah 1992). Petitioners failed to file a petition for judicial review of the January 9, 1992, Final Decision within the 30 day time limit. The subsequent denial of Petitioners' tardy Request for Reconsideration does not have the effect of reviving Petitioners' rights to obtain judicial review as to the January 9, 1992 Final Decision.

The Utah Court of Appeals reached a similar conclusion in Hase v. Hase, 775 P.2d 943 (Utah Ct. App. 1989). Hase involved an appeal from a district court decision, but its reasoning is applicable to the facts of the case at bar. In Hase the court issued a final divorce decree on December 31, 1987, which disposed of all the Petitioner's claims. On January 15, 1989, the Petitioner filed a tardy "Objection to Order" pursuant to Utah R. Civ. P. 52(b). On February 5, 1988, the district court issued a "consolidated findings of fact, conclusions of law, decree of divorce and order." Petitioner then filed an appeal on March 4, 1988.

The Petitioner in Hase argued that its appeal was timely since it was filed within 30 days of the district court's February 5, 1988 decision. The Utah Court of Appeals rejected this argument by stating:

The Consolidated Decree of Divorce and Orders merely reiterated what the court had previously ordered in several different orders, referred to those orders specifically by date in most instances, and joined them in

one document, as appellants requested. We find that such an order cannot be used to extend the time for appeal because it does not resolve any issues extant, but merely refers to prior orders of the court. Thus the Consolidated Decree of Divorce and Orders does not constitute an appealable final order.

Id. at 945. (Emphasis added).

The Petitioner in Hase also argued that its tardy "Objection to Order" should stay the 30 day filing requirement for an appeal. The court of appeals rejected this argument as well stating that because the objection was not filed within 10 days as required, the objection did not qualify as a post-judgment order, which would have suspended the time for appealing the December 31, 1987 final order. Id.; see also Burgers v. Maiben, 652 P.2d 1320 (Utah 1982) (a tardy request for a new trial cannot stay the time limits imposed upon appeals); Vanjonora v. Draper, 30 Utah 2d 364, 517 P.2d 1320 (1974) (failure to file motion for a new trial does not stay the time constraints governing appeals).

Both the relevant statutes and the cited case law support the proposition that the agency has no authority to extend the time for judicial review. In the case at bar, Petitioners failed to petition for judicial review within the 30 day time limit. Therefore, the Tax Commission's subsequent denial of Petitioners'

untimely request cannot resurrect Petitioners' right to appeal the January 9, 1992 Final Decision.<sup>4</sup>

Even if the Tax Commission could extend the time period for filing a request for reconsideration and thus extend the time for judicial review, Petitioners' appeal is still untimely pursuant to section 63-46b-13(3)(b) of the Utah Code. Under § 63-46b-13(3)(b) an order denying a request for reconsideration is deemed to be issued 20 days after the filing of the request if the agency has taken no action.

In the case at bar, although the Tax Commission eventually issued a decision confirming the denial on June 3, 1992, the Tax Commission failed to take any action on Petitioners' request within the 20 day time period. Consequently, according to § 63-46b-13(3)(b) Petitioners' request is deemed denied as of May 25, 1992, 20 days after filing. In order to preserve their rights to judicial review, Petitioners would have had to file petition for review within 30 days of May 25, 1992, ie. June 24, 1992. The record indicates that Petitioners filed their petition for judicial review on July 1, 1992, which is clearly beyond the 30 day time limit set out in § 63-46b-14(3)(a). (R. 2).

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<sup>4</sup>. Federal Courts have long recognized that tardy motions for reconsideration cannot toll the statute of limitations governing appeals even if the trial court hears the motion for reconsideration. See Denley v. Shearson/American Exp. Inc., 733 F.2d 39 (6th Cir. 1984); Smith v. Evans, 853 F.2d 155 (3rd Cir. 1988); Martinez v. Trainer, 556 F.2d 818 (7th Cir. 1977).

This Court has strictly enforced the time requirements for the filing of an appeal. In Isaacson v. Dorius, 669 P.2d 849 (Utah 1983), this Court refused to extend the 30 day time limit for filing an appeal that was filed 2 days beyond the time limit. Likewise, in Dusty's Inc. v. State Tax Comm'n, 199 Utah Adv. Rep. 7 (Utah 1992), this Court also held that the 30 day time limit runs from the date of issuance of the final decision, not the date of notice to the parties.

The Tax Commission issued its Final Decision on January 9, 1992. Petitioner did not file a petition for judicial review within 30 days as required by Utah Code Ann. § 63-46b-14. The Commission does not have discretion to extend the time for judicial review. Utah Code Ann. § 63-46b-1(9). Even if the denial of Petitioners' untimely motion for reconsideration is a final appealable order, separate and apart from the January 9 order, Petitioners failed to timely file from the date the motion was deemed denied under Utah Code Ann. § 63-46b-13(3)(a).

This Court should therefore find that it lacks jurisdiction and dismiss Petitioners' appeal as untimely.

## II. INTERCOMPANY SALES OF SAND AND GRAVEL ARE TAXABLE TRANSACTIONS.

"There is levied a tax on the purchaser for the amount paid or charged for . . . retail sales of tangible personal property made within the state." Utah Code Ann. § 59-12-103 (1987). A retail is a sale to a "user or consumer." Utah Code Ann. § 59-

12-102(8)(a). Harper Excavating, Inc. sold, hauled, and delivered sand and gravel to Harper Contracting, Inc. (R. 209, Respondent's Exhibits 18 p.8., 19 p.9, 22 p.6, 23 pp. 7 & 9, 26 pp. 8 & 10, 27 pp. 8 & 11) Harper Contracting, Inc. issued checks to Harper Excavating, Inc. paying for the sand and gravel used in performing its contracts. (T. 131-136). Sales of sand and gravel from one entity to a separate, albeit a related entity, are taxable. Hales Sand and Gravel v. State Tax Comm'n, 200 Utah Adv. Rep. 3 (1992). This is true despite the claims that the two corporations are "the same entity for tax purposes." Id. at 7.

Once an entity elects to operate as a corporation, that entity must accept all responsibilities that attend to the corporate form. Institutional Laundry, Inc. v. Utah State Tax Comm'n, 706 P.2d 1066 (Utah 1985); see also Ogden Union Railway and Depot Co. v. State Tax Comm'n, 16 Utah 2d 23, 395 P.2d 57 (1964), modified on rehearing, 16 Utah 2d 255, 399 P.2d 145 (1965); Cal-Metal Corp. v. California State Board of Ed., 161 Cal. App. 3d 759, 207 Cal. Rptr. 783 (1984). In Institutional Laundry a subsidiary company, Institutional, claimed that the laundry service transactions between itself and its parent were not taxable because as a subsidiary, it had no separate legal existence. However, this Court held that a corporation, be it a parent or subsidiary, has its own legal status and existence, and that transactions between a parent corporation and its

subsidiaries are taxable. Institutional Laundry, 706 P.2d at 1067.

In response to Institutional's argument that as a subsidiary it had no separate corporate existence, this Court stated:

A corporation, be it parent or subsidiary, has its own identity and existence. Common ownership or control does not automatically destroy that separate identity. Although in appropriate cases equity may look through the corporate shell to its alter-ego to prevent fraud or wrongdoing, the general rule still applies that corporations are separate legal entities bound by obligations as well as the benefits . . . .

Having elected to operate as a corporation, for whatever benefits that separate status conferred upon Institutional and its parent, Institutional must also accept the tax burden and responsibility attendant to its corporate form. A corporation may not disregard or shed its corporate clothing to avoid tax consequences.

Id. at 1067.

Here, the Tax Commission found that the former Harper Excavating, Inc. attempted to limit its legal liability by dividing itself and allocating its assets among three separate subsidiaries. Each of the corporations performed different functions and tasks. Although some managerial overlap existed, the subsidiaries remained separate and distinct. As such, the Tax Commission reasonably concluded that the corporations were separate, that each must bear the responsibilities attendant to separate corporate existence. (R. 210-211).

The Tax Commission noted:

The primary reason for reorganization was to establish three separate legal entities in attempt to limit the potential liability from a then pending lawsuit. It is inconsistent for the Petitioner on the one hand to argue that each of the companies was a separate, independent legal entity and thus insulated from the liability of either of the others, yet on the other hand argue that the three companies are so interrelated that any transactions between them merely constitute intracompany transactions and not taxable transactions.

(R. 212). The Tax Commission's conclusion is consistent with the reasoning in the Institutional Laundry case, namely, once the choice is made as to whether a company will exist as an independent corporation, it must live with the burdens as well as the benefits. Institutional Laundry, 706 P.2d at 1067. The Commission's decision is also consistent with other jurisdictions, which have likewise held that sales between a parent and a subsidiary were subject to tax. See Standard Advertising Agency, Inc. v. Jackson, 735 S.W.2d 441 (Tenn. 1987); Commissioner of Revenue v. Globe Automatic Vending Co., Inc., 421 N.E.2d 1213, 1214 (Mass. 1981).

In a case similar to the one at bar, this Court held sand and gravel sales between two inter-related companies constituted taxable transactions. See Hales Sand and Gravel, Inc. v. State Tax Comm'n, 200 Utah Adv. Rep. 3 (Utah 1992). In Hales Sand and Gravel the sand and gravel contractor, Hales, sold materials to JTN Construction. JTN is a subcontracting corporation formed by three of Hales' shareholders in order to obtain federal

contracts. Hales argued that because the Utah Department of Transportation determined that the two corporations constituted a single unit for the purposes of federal contracts, Hales should not be liable for sand and gravel sales taxes between itself and JTN. This Court rejected Hales' argument and affirmed the Tax Commission's finding that Hales and JTN were separate legal entities and that the transactions were subject to sales tax. Id. at 7.

Petitioners ignore the two Utah cases directly on point Institutional Laundry and Hales Sand and Gravel and instead rely upon the definition of a person in the former Sales Tax Act, 59-15-2(1) (1986). That section states:

A 'person' includes any individual, firm, copartnership, joint adventure, corporation, estate, or trust, or any group or combination acting as a unit and in the plural as well as a singular number unless the intention to give a more limited meaning is disclosed by context. (Emphasis added)

In construing similar statutes this Court has applied the familiar rule of statutory construction "ejusdem generis." Ponderosa One v. Salt Lake City Suburban Sanitary Dist., 738 P.2d 635, 637 (Utah 1987). That maxim states:

Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the proceeding specific words.

Sutherland, 2A Statutes and Statutory Construction § 47.17 (Singer 5th ed 1992). The rule accomplishes the purposes of

giving effect to both the particular and general words by treating the particular words as indicating the class and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words. Id. at 189.

Using this framework, a limited liability company would be a "person" under the definition since it is of the same type or class as the specific words listed but is not among the specific designations. In the instance case, Petitioners are each corporations. They fall within the specific portion of the definition. Being specifically enumerated there is no question that each corporation is a "person" for purposes of the Sales Tax Act. Even the language of the statute limits the general language by stating "unless the intention to give a more limited meaning is disclosed by the context."<sup>5</sup>

Petitioners' argument requires several leaps beyond their initial interpretation of the statute. The first leap is to the

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<sup>5</sup> This language was eliminated in the 1987 amendment which defines person as follows:

Person includes any individual, firm, partnership, joint venture, association, corporation, estate, trust, business trust, receiver, syndicate, this state, any county, city, municipality, district or other governmental entity of the state, or any group or combination acting as a unit.

Utah Code Ann. § 59-12-102(5) (1987).

definition of vendor in Utah Code Ann. § 59-12-102(15) (1987) which states:

Vendor means any person receiving any payment or consideration upon a sale of tangible personal property or any other taxable item or service under subsection 59-12-103(1), or to whom such payment or consideration is payable. (Emphasis added)

Clearly for sales tax purposes any person receiving payment is the "vendor." In this instance, the "vendor" which received consideration upon the sale of tangible personal property was Harper Excavating, Inc. The duties of a vendor are set forth in Utah Code Ann. § 59-12-107. Petitioners' argue that since the definition of vendor includes the term "person" and since the duties of vendors include filing returns (§ 59-12-107(4)(b)), that Petitioners were justified in filing what they deemed to be "consolidated returns."<sup>6</sup> The Sales and Use Tax Act does not provide for "consolidated returns." That is a concept borrowed from corporate franchise tax. Utah Code Ann. § 59-7-124. It does not apply to sales tax. Under the Sales Tax Act "each vendor" is required to file. Utah Code Ann. § 59-12-107(1)(a).

Even if Petitioners' argument is taken at face value the mere filing of "consolidated returns" does not eliminate the separate corporate identity. This Court has recently analyzed the effect of filing a consolidated return in Savage Indus., Inc.

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<sup>6</sup> Petitioners' "consolidated returns" were actually individual returns for each corporation listing all of the liability on one return and zeros on the others. (T. 111.)

v. State Tax Comm'n, 811 P.2d 664 (Utah 1991). In interpreting Utah Code Ann. § 59-7-108(14)(f) (1987), which prohibits an acquiring corporation from using pre-acquisition losses of an acquired corporation, the Court stated that "corporations filing such returns maintain their separate identities although a single tax is calculated for the group." Id. at 10. Thus, even if the Utah Sales and Use Tax Act did provide that Petitioners could file a consolidated return, it would be irrelevant in determining the Petitioners' sales and use tax liability.

Petitioners assertion that the Tax Commission "conceded" that the Petitioners are "group acting as a unit" for the purposes of filing consolidated tax returns is disingenuous. Petitioners cite the prehearing order. (Petitioners' Brief at 24). The prehearing order merely states the issues as raised by Petitioners. This cannot be construed as a "concession" by any standard. Likewise, the manner in which Petitioners may have elected to file cannot be construed as an "admission" by the Commission. The Commission cannot prevent improper filings. Petitioners assert that someone at the Tax Commission confirmed that Petitioners were a group or combination acting as a unit based on Mr. Goddard's vague recollection that he telephoned a general number for some general clarification. (T. 54 & 55). An undocumented response without any knowledge of the question asked can not be binding on the Tax Commission. A telephone conversation to receive answers to general inquires is clearly

not an agency determination that would be binding under the standards set by UAPA. Under UAPA, an agency's determination are not even binding on the agency itself, so long as the agency justifies that its departure from prior practices by giving facts and reasons that demonstrate a fair and rationale basis for the inconsistency. Hales Sand & Gravel, 200 Utah Adv. Rep. at 7. See Utah Code Ann. § 63-46B-16H(ii); See also BJ Titan Services v. State Tax Comm'n, 183 Utah Adv. Rep 20, 26 (1992). Initial acceptance of the returns does not prevent correction by audit as in the instant case. Therefore, the Tax Commission properly concluded that even though Petitioners "may indeed have filed a consolidated sales tax return," that Petitioners should have reported the transactions between Harper Excavating, Inc. and Harper Contracting, Inc. as taxable sales. (R. 212).

Petitioners assertion that they have "reasonably interpreted" the Sales and Use Tax Act must be disregarded where their interpretation ignores controlling case law. Petitioners "reasonable" explanation does not explain how the definition of "person" leads to the conclusion that acts between related corporation are not taxable. Petitioners tortured construction of the statutes can not excuse them from the negligence penalty imposed where there are clear pronouncements of this court directly on point.

### **III. SALES TAXES WERE PROPERLY ASSESSED ON THE TRANSACTIONS.**

Petitioners' voluminous accounting ledgers and canceled checks conclusively indicate that retail sand and gravel transactions occurred between the separate entities. (T. 142-143). Here, Petitioners urge this Court to totally disregard these transactions and to have this Court look only to the "revised" financial reports. (Petitioners' Brief at 29, 30, 33). The Court should find difficulty with this request. In essence, Petitioners argue that an after-the-fact adjustment of their financial records should enable them to be exempt despite the fact that over a three year period taxable transactions occurred.

Petitioners argue that the audit is based merely on ledger entries that "record but do not create facts." See, e.g., Loftis v. Commissioner, 6 B.T.A 725, 728 (1927). However, this case, among others, also supports the general rule regarding the treatment of business records: courts generally consider such records as prima facie evidence of the facts they state. See One In All Corporation v. Fulton Nat'l Bank, 132 S.E.2d 116 (Ga. Ct. App. 1963); (business records when admitted under statute become prima facie evidence); Frederick J. O'Reilly, v. Cellco Indus., Inc., 402 A.2d 686 (Pa. 1978) (corporate ledgers were properly admitted to determine the amount of unauthorized advances).

The tax in this case is not based on mere paper transactions, but on real, concrete exchanges of tangible personal property for consideration between separate corporate

entities. There is no question that separate corporations were created. There is no question that Harper Sand & Gravel, Inc. actually extracted gravel, processed, washed, stacked and sold the gravel to Harper Excavating, Inc. (R. 117, 118, 209). Harper also sold sand and gravel to other entities and continues to do so. (Respondent's Exhibit 17 p. 3, T. 102). Harper Sand & Gravel, Inc. paid pit royalties to Rulon Harper for the rights to extract the gravel sold. (Respondent's Exhibits 2 and 3, T. 27, 85, 86, 141). Harper Excavating, Inc. sold processed sand and gravel to Harper Contracting, Inc. (R. 209, T. 61, Respondent's Exhibits 18 p. 9, 22 p. 9, 26 p. 10). Harper Contracting, Inc. failed to pay tax on its purchases of sand and gravel from Harper Excavating, Inc. as well as its purchases from other vendors. (R. 211, 341-346).

The transactions between Harper Excavating, Inc. and Harper Contracting, Inc. were no different then the transactions between Harper Contracting, Inc. and other vendors. This is not a situation where nothing happened but mere book entries. Physical exchanges of tangible personal property for consideration occurred over an extended period of time. Petitioners attempt to characterize these as mere accounting errors does not alter the fact that gravel was excavated, processed, hauled, delivered, sold, paid for and consumed. Petitioners after-the-fact characterizations of these transactions do not make them exempt from taxation.

Petitioners have attempted to reconstruct their records to eliminate any taxable transactions. These "restated" financial records do not reflect the transactions that actually took place and are based upon the assumption that an "erroneous" assignment of the assets of Harper Excavating, Inc. was made at the time of the corporate reorganization. In support of its contention, Petitioner's offer assignment agreements which purport to assign real property rights to Harper Contracting, Inc. (R. 584). These assignments do not effect the taxability of the transactions which occurred nor do they justify reliance on the "restated" financial statements created by Petitioners specifically for the hearing.

First, no "erroneous assignment" of the rights described in the assignment agreement took place. Although the gravel sale agreements between Rulon Harper and Harper Excavating, Inc, dated February 25, 1985, purport to create an interest in real property, they were not notarized, recorded, nor were they listed as an asset on the books of Harper Excavating, Inc. at the time of reorganization. (R. 572-643, T. 80 & 85). The comptroller, Steven Goddard, testified that he "took a list of everything we had, everything that was previously an asset or a liability of Harper Excavating, Inc. and I divided them up." (T. 66). Any rights created by the gravel sale agreement were not listed as an asset of Harper Excavating, Inc. and therefore could not have been "erroneously assigned" to Harper Sand and Gravel, Inc. (T.

85). In fact, Goddard testified that the sand and gravel was not listed as an asset of any of the companies on reorganization. (T. 85).

The assumption that Harper Sand & Gravel, Inc. was "erroneously assigned" the same real property interest purportedly created by the "secret" gravel sales agreement simply is not supported by the record. The record clearly shows that the gravel sale agreements did not appear as an asset of Harper Excavating, Inc. prior to reorganization. (T. 85). Steven Goddard testified that he took the list of the company's assets and reassigned them to the newly created companies. (T. 66). The assets do not appear on the financial statements of any of the companies for any of the years in question. (Respondent's Exhibits 15-27, T. 80, 81 & 85). The only record evidence that supports the assumption that any rights created by the gravel sale agreements were erroneously assigned to Harper Sand and Gravel, Inc. is contained on page 50 of the transcript, where it states:

Question: Now it was a fact, wasn't it that you determined from the accounting stand point, it made sense to assume that the sand and gravel company would own whatever there was to own as far as the -- the pits?

Answer: Yea. I mean, how could it sell something that it didn't have.

Question: Well, that's right. So you assumed it should have those assets 'cuz it was the "sand and gravel company?"

Answer: Correct.

This exchange is consistent with Goddard's testimony that whatever sand and gravel assets were on the books were assigned to Harper Sand and Gravel, Inc.. Goddard testified that he had never seen the gravel sales agreements and that they were not listed as an asset. (T. 49, 85). Therefore, any reference that the gravel sale agreements were "erroneously assigned" must be read in light of the foregoing facts.

Petitioners brief and arguments below center on the assumption that the rights created by the gravel sale agreements and purportedly assigned to Harper Contracting, Inc. by Rulon Harper the day after the corporate organization were somehow erroneously assigned to Harper Sand and Gravel. This assumption is not correct. All of the evidence in the record indicates that Goddard had no knowledge of either the gravel sale agreements or any assignments thereof and could not have assigned those rights in error. Therefore, Petitioners "restated" financial records are based upon a faulty premise.

There is likewise no evidence in the record to support Petitioners' assumption that the gravel purchased by Harper Contracting, Inc. came from the pits covered by the assignments. Petitioners maintained a complex accounting system recording each transaction by truck and by gravel pit. (R. 646). Therefore, this information was available to Petitioners and could have been presented by Petitioners if it would have supported their

assumption. As the record stands, Petitioner's offered nothing to support their assumption that the gravel purchased by Harper Contracting, Inc. came from pits identified in the gravel sale agreements. After the reorganization, Harper Sand and Gravel, Inc. continued to purchase sand and gravel from Rulon Harper. (T. 85). Rulon Harper owned the pits where the gravel is and was being extracted. (T. 80). This is demonstrated by the following exchange between Gene Nielson, Petitioner's CPA, and Commissioner Pacheco (T. 127):

Commissioner Pacheco: There is not -- I just looked through the financial statements, there's not a land account in the financial statements, nor could I find land in any of the two subsidiaries. Now, where would the -- where would you think that the land, -- where the sale of the sand and gravel would come if there is no land account in any of these companies?

The witness: OK. The land is owned by Rulon Harper personally.

Commissioner Pacheco: That's what you know now.

The witness: And it was at the time also, and we knew that.

Commissioner Pacheco: Alright. So it wasn't a question of who owned the land at the inception, it was only the assignment that you were not aware of?

The witness: Right.

Rulon Harper owned gravel pits not covered by the assignments. (R. 572, 588, 603, 617, 632). Harper Sand and Gravel, Inc. continued to purchase sand and gravel from pits owned by Rulon

Harper. (T. 85, 127). It paid pit royalties to Rulon Harper for the use of this gravel. (Respondent's Exhibits 2 & 3, T. 27, 137). Even after the purported "discovery" of the assignments, Harper Sand and Gravel, Inc. stills sells sand and gravel to third parties. (T. 102). Harper Sand and Gravel, Inc. sold sand and gravel during the audit period and is still selling sand and gravel that it purchases from Rulon Harper. (Id.). Rulon Harper owned the land the sand and gravel was taken from then and owns it now. (T. 127).

Harper Contracting, Inc., apparently with full knowledge of any rights that may have been created by the assignment, signed by its president<sup>7</sup>, contracted with Harper Excavating, Inc. for the purchase and delivery of gravel. (Respondent's Exhibit 19 p. 9). Harper Contracting, Inc. also purchased sand and gravel from third parties during this period. (R. 339-347). All of these transactions were taxable. (Id.). The record is clear that regardless of any rights that may have been created by such an assignment, Harper Contracting, Inc. purchased substantial amounts of gravel from both Harper Excavating, Inc. and other vendors during the audit period. (T. 61, Petitioner's Exhibits 15-29, R. 339-347).

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<sup>7</sup> The knowledge of a corporations president is imputed to the corporation. See City of Arkansas City v. Anderson, 762 P.2d 183, 189 (Kan. 1988).

The assignment documents simply cannot carry Petitioners argument. As stated above any rights that may have been created by the documents were not "erroneously assigned." Furthermore, there is no evidence that the documents effectively transferred any rights. The documents were not notarized, were not recorded, and were not acknowledged by the companies comptroller as company assignments or contracts. (T. 125). Neither Mr. Goddard or his successor, Mr. Carston, or the independent C.P.A., Mr. Nielsen, ever saw the assignments. (T. 49, 100, 126). They were not available when the auditors reviewed the company's books and records. (T. 142). The record does not indicate whether Harper Excavating, Inc. or Harper Contracting, Inc. exercised any rights purportedly granted by the gravel sales agreements or the assignments of those agreements.

There are several theories regarding the assignments that are a least as plausible as the assumptions made by Petitioners.

1. Novation. If Harper Sand and Gravel, Inc. rather than Harper Contracting, Inc. exercised any contractual rights created by the gravel sale agreement for an extended period, the parties may have changed the contract by their actions creating a novation.

2. Subsequent Assignment of Rights. Just as no one in the company had knowledge of the original assignment, perhaps no one has knowledge that there was a subsequent assignment of rights.

3. Prior Assignment of Rights. The financial statements of the companies (Respondent's Exhibit 15-28) state that all assets were reallocated at the close of business May 9, 1986. The assignments are dated May 10. If the gravel sales contracts had been listed as an asset of Harper Excavating, Inc. they would have been assigned to Harper Sand and Gravel, Inc. prior to the time they were purportedly assigned to Harper Contracting, Inc.

4. Breach of Contract. Rulon Harper may have sold sand and gravel to Harper Sand and Gravel, Inc. in breach of any rights created in the gravel sale agreement and subsequent assignment.

5. Lack of Consideration. No rights may have been created by the gravel sale agreement due to lack of consideration. There is no evidence that consideration was given for any rights created by the contract. (Nor is there any evidence other than the unsupported statement in the document that the assignment itself was supported by consideration).

6. Abandonment. The actions of Harper Contracting, Inc. in apparently not exercising its rights under the assignment may support an argument that those rights were abandoned.

7. Mistake. One could argue that the actions of the corporation over the audit period, meticulously documented, show that the assignment was in error rather than the acts of the corporations.

There was no "error" made by the comptroller in setting up the various corporations following reorganization. He was apparently given authorization to distribute the assets of Harper Excavating, Inc. to the newly created corporations. (T. 63). He took the assets as listed and distributed them. (T. 66). Any rights created by the gravel sale contracts and the assignments thereof were not listed as assets of the corporation and were not assigned. (T. 85). The only time any "error" was suspected is when Petitioners were notified following the audit that they had created taxable inner-company transactions by the manner in which they had restructured their corporation. (T. 101). In hindsight, this may have been an error. However, Petitioners, having elected their corporate form are saddled with the burdens as well as the benefits of limited liability they hoped to achieve. Institutional Laundry, 706 P.2d at 1067.

Taxable transactions occurred over the duration of the audit period. Tax was not collected or paid. Petitioners' attempt to "restate" or recreate the transactions which occurred do not make them exempt. The commission properly assessed liability. The commission's decision should therefore be affirmed.

#### CONCLUSION

Because Petitioners failed to timely file for judicial review, this Court lacks jurisdiction over this appeal and the appeal should be dismissed. However, even if this Court finds that it has jurisdiction, the Court should affirm the Tax

Commission's Final Decision. Petitioners reorganized the original company into separate corporations in order to limit their potential liability from a pending lawsuit. Petitioners seek to disregard the consequences of that choice in an attempt to limit sales tax liability. The Court should affirm that once a corporation chooses the manner in which to operate, it must bear the risks attendant to separate corporate structure. The voluminous ledger entries and canceled checks indicate that sales of sand and gravel occurred between Harper Excavating, Inc. and Harper Contracting, Inc. The Tax Commission properly weighed all the evidence and determined that sales had in fact occurred between the subsidiaries. Such sales are taxable transactions. Institutional Laundry, 706 P.2d 1066. Therefore the order of the Tax Commission should be affirmed.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> of May, 1993.

  
CLARK L. SNELSON  
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 20<sup>th</sup> day of May,  
1993, I had delivered four true and accurate copies of the  
foregoing BRIEF OF RESPONDENT, to:

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## **APPENDIX 1**

- (a) poultry, dairy, and other livestock feed, and their components;
  - (b) baling ties and twine used in the baling of hay and straw;
  - (c) fuel used for providing temperature control of orchards and commercial greenhouses doing a majority of their business in wholesale sales, and for providing power for off-highway type farm machinery; and
  - (d) feed, seeds, and seedlings.
- (4) (a) "Medicine" means:
- (i) insulin, syringes, and any medicine prescribed for the treatment of human ailments by a person authorized to prescribe treatments and dispensed on prescription filled by a registered pharmacist, or supplied to patients by a physician, surgeon, or podiatrist;
  - (ii) any medicine dispensed to patients in a county or other licensed hospital if prescribed for that patient and dispensed by a registered pharmacist or administered under the direction of a physician; and
  - (iii) any oxygen or stoma supplies prescribed by a physician or administered under the direction of a physician or paramedic.
- (b) "Medicine" does not include:
- (i) any auditory, prosthetic, ophthalmic, or ocular device or appliance; or
  - (ii) any alcoholic beverage.
- (5) "Person" includes any individual, firm, partnership, joint venture, association, corporation, estate, trust, business trust, receiver, syndicate, this state, any county, city, municipality, district, or other local governmental entity of the state, or any group or combination acting as a unit.
- (6) "Purchase price" means the amount paid or charged for tangible personal property or any other taxable item or service under Subsection 59-12-103(1), excluding only cash discounts taken or any excise tax imposed on such purchase price by the Federal Government.
- (7) "Residential use" means the use in or around a home, apartment building, sleeping quarters, and similar facilities or accommodations.
- (8) (a) "Retail sale" means any sale within the state of tangible personal property or any other taxable item or service under Subsection 59-12-103(1), other than resale of such property item, or service by a retailer or wholesaler to a user or consumer.
- (b) "Retail sale" includes sales by any farmer or other agricultural producer of poultry, eggs, or dairy products to consumers if such sales have an average monthly sales value of \$125 or more.
- (9) "Retailer" means a person engaged in a regularly organized retail business in tangible personal property or any other taxable item or service under Subsection 59-12-103 (1), and selling to the user or consumer and not for resale, and includes commission merchants, auctioneers, and all persons regularly engaged in the business of selling to users or consumers within the state. "Retailer" does not include farmers, gardeners, stockmen, poultrymen, or other growers or agricultural producers producing and doing business on their own premises, except those who are regularly engaged in the business of buying or selling for a profit. When in the opinion of the commission it is necessary for the efficient administration of this chapter to regard salesmen, representatives, peddlers, or can-

vassers as the agents of the dealers, distributors, supervisors, or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, or employers, the commission may regard them and may regard the dealers, distributors, supervisors, or employers as retailers for purposes of this chapter.

(10) "Sale" means any transfer of title, exchange, or barter, conditional or otherwise, in any manner, of tangible personal property or any other taxable item or service under Subsection 59-12-103(1), for a consideration. It includes:

- (a) installment and credit sales;
- (b) any closed transaction constituting a sale;
- (c) any sale of electrical energy, gas, services, or entertainment taxable under this chapter;
- (d) any transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price; and
- (e) any transaction under which right to possession, operation, or use of any article of tangible personal property is granted under a lease or contract and such transfer of possession would be taxable if an outright sale were made.

(11) "State" means the state of Utah, its departments, and agencies.

(12) "Storage" means any keeping or retention of tangible personal property or any other taxable item or service under Subsection 59-12-103(1), in this state for any purpose except sale in the regular course of business.

(13) (a) "Tangible personal property" means:

- (i) all goods, wares, merchandise, produce, and commodities;
- (ii) all tangible or corporeal things and substances which are dealt in or capable of being possessed or exchanged;
- (iii) water in bottles, tanks, or other containers; and
- (iv) all other physically existing articles or things, including property severed from real estate.

(b) "Tangible personal property" does not include:

- (i) real estate or any interest therein or improvements thereon;
- (ii) bank accounts, stocks, bonds, mortgages, notes, and other evidence of debt;
- (iii) insurance certificates or policies;
- (iv) personal or governmental licenses;
- (v) water in pipes, conduits, ditches, or reservoirs;
- (vi) currency and coinage constituting legal tender of the United States or of a foreign nation; and
- (vii) all gold, silver, or platinum ingots, bars, medallions, or decorative coins, not constituting legal tender of any nation, with a gold, silver, or platinum content of not less than 80%.

(14) (a) "Use" means the exercise of any right or power over tangible personal property under Subsection 59-12-103(1), incident to the ownership or the leasing of that property, item, or service.

**59-12-103. Sales and use tax base — Rate.**

(1) There is levied a tax on the purchaser for the amount paid or charged for the following:

- (a) retail sales of tangible personal property made within the state;
- (b) amount paid to common carriers or telephone or telegraph corporations as defined by § 54-2-1, whether the corporations are municipally or privately owned, for all transportation, telephone service, or telegraph service;
- (c) gas, electricity, heat, coal, fuel oil, or other fuels sold or furnished for commercial consumption;
- (d) gas, electricity, heat, coal, fuel oil, or other fuels sold or furnished for residential use;
- (e) meals sold;
- (f) admission to any place of amusement, entertainment, or recreation, including seats and tables reserved or otherwise, and other similar accommodations;
- (g) services for repairs or renovations of tangible personal property or services to install tangible personal property in connection with other tangible personal property;
- (h) cleaning or washing of tangible personal property;
- (i) tourist home, hotel, motel, or trailer court accommodations and services for less than 30 consecutive days;
- (j) laundry and dry cleaning services;
- (k) leases and rentals of tangible personal property if the property situs is in this state, if the lessee took possession in this state, or if the property is stored, used, or otherwise consumed in this state; and
- (l) tangible personal property stored, used, or consumed in this state.

(2) Except for Subsection (1)(d), the rates of the tax levied under Subsection (1) shall be:

- (a)  $5\frac{3}{32}\%$  through December 31, 1989; and
- (b) 5% from and after January 1, 1990.

(3) The rates of the tax levied under Subsection (1)(d) shall be:

- (a)  $2\frac{3}{32}\%$  through December 31, 1989; and
- (b) 2% from and after January 1, 1990.

**History:** L. 1933, ch. 63, § 4; 1933 (2nd S.S.), ch. 20, § 1; 1937, ch. 111, § 1; C. 1943, 80-15-4; L. 1943, ch. 93, § 1; 1959, ch. 113, § 1; 1961, ch. 148, § 1; 1963, ch. 140, § 1; 1965, ch. 126, § 1; 1965, ch. 127, § 1; 1969, ch. 187, § 2; 1969 (1st S.S.), ch. 14, § 2; 1973, ch. 153, § 1; 1975, ch. 179, § 1; 1977, ch. 220, § 1; 1983, ch. 258, § 4; 1983, ch. 270, § 1; 1983 (1st S.S.), ch. 6, § 1; 1984, ch. 56, § 1; 1985, ch. 172, § 2; 1986, ch. 37, § 2; 1986 (2nd S.S.), ch. 4, § 2; C. 1953, 59-15-4; renumbered by L. 1987, ch. 5, § 23; 1987, ch. 148, § 6; 1987, ch. 221, § 1.

**Amendment Notes.** — The 1983 amendment by Chapter 258, inserted provisions for a  $\frac{1}{8}\%$  increase in sales tax from July 1, 1983, through June 30, 1987; and added the final paragraph.

The 1983 amendment by Chapter 270 in-

serted the exemption on the sale of currency and coinage and on gold, silver, and platinum ingots, bars, medallions and coins in Subsection (a).

The 1983 (1st S.S.) amendment added  $\frac{1}{2}\%$  to the sales tax rates herein for the period beginning October 1, 1983, and ending September 30, 1984.

The 1984 amendment added  $\frac{1}{2}\%$  to the sales tax rates herein beginning October 1, 1984.

The 1985 amendment substituted "June 30, 1986, (ii)  $4\frac{3}{64}\%$  from July 1, 1986, through December 31, 1989, and (iv)  $4\frac{1}{2}\%$  from January 1, 1990" for "June 30, 1987 and (ii)  $4\frac{1}{2}\%$  from July 1, 1987" in Subsection (a); substituted "June 30, 1986,  $4\frac{3}{64}\%$  from July 1, 1986, through December 31, 1989, and  $4\frac{1}{2}\%$  from January 1, 1990" for "June 30, 1987 and  $4\frac{1}{2}\%$  from July 1, 1987" in Subsections (b)(1), (b)(2)

## COLLATERAL REFERENCES

C.J.S. — 53 C.J.S. Licenses § 30.  
Key Numbers. — Licenses ☞ 15.1(1).

**59-12-107. Collection of tax — Liability for remittance and payment of tax — Out-of-state vendors — Returns — Direct payment by purchaser of motor vehicle — Credits — Use tax receipts — Deposit and sale of security — Excess amount collected — Penalties.**

(1) (a) Each vendor is responsible for the collection of the sales or use tax imposed under this chapter.

(b) The vendor is not required to maintain a separate account for the tax collected, but is deemed to be a person charged with receipt, safekeeping, and transfer of public moneys.

(2) Each person storing, using, or consuming tangible personal property under Subsection 59-12-103(1), is liable for the use tax imposed under this chapter.

(3) If any sale of tangible personal property or any other taxable item or service under Subsection 59-12-103(1), is made by a wholesaler to a retailer, upon the representation by the retailer that the personal property is purchased by the retailer for resale, and the personal property thereafter is not resold, the wholesaler is not responsible for the collection or payment of the tax imposed on the sale, but the retailer is solely liable for the tax.

(4) If any sale of property or service subject to the tax is made to a person prepaying sales or use tax in accordance with Chapter 51, Title 63, the Resource Development Act, or to a contractor or subcontractor of that person, the person to whom such payment or consideration is payable, upon the representation by the person prepaying the sales or use tax that the amount prepaid as sales or use tax has not been fully credited against sales or use tax due and payable under the rules promulgated by the commission, is not responsible for the collection or payment of the sales or use tax but the person prepaying the sales or use tax is solely liable for such payment, if any.

(5) (a) Each vendor shall pay or collect and remit the sales and use taxes imposed by this chapter if within this state the vendor directly or by any agent or other representatives: (i) has or utilizes an office, distribution house, sales house, warehouse, service enterprise, or other place of business; (ii) maintains a stock of goods; (iii) regularly solicits orders whether or not such orders are accepted in this state, unless the activity in this state consists solely of advertising or of solicitation by direct mail; (iv) regularly engages in the delivery of property in this state other than by common carrier or United States mail; or (v) regularly engages in any activity in connection with the leasing or servicing of property located within this state.

(b) If none of the conditions listed under Subsection (a) exist, the vendor is not responsible for the collection of the use tax but each person storing, using, or consuming tangible personal property is responsible for remitting the use tax.

- (vii) a notice of any right of further administrative reconsideration or judicial review available to aggrieved parties; and
- (viii) the time limits applicable to any appeal or review.

**History:** C. 1953, 63-46b-12, enacted by L. 1987, ch. 161, § 268; 1988, ch. 72, § 22.

**Amendment Notes.** — The 1988 amendment, effective April 25, 1988, designated the former introductory paragraph in Subsection (1) as present Subsection (1)(a), substituting "30 days" for "ten days" in that paragraph, and redesignated former Subsections (1)(a) to (d) as

present Subsections (1)(b)(i) to (iv); inserted "or within the time period provided by agency rule, whichever is longer" in Subsection (2); and made minor stylistic changes.

**Effective Dates.** — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

### 63-46b-13. Agency review — Reconsideration.

- (1) (a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63-46b-12 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.
- (b) Unless otherwise provided by statute, the filing of the request is not a prerequisite for seeking judicial review of the order.
- (2) The request for reconsideration shall be filed with the agency and one copy shall be sent by mail to each party by the person making the request.
- (3) (a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request.
- (b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied.

**History:** C. 1953, 63-46b-13, enacted by L. 1987, ch. 161, § 269; 1988, ch. 72, § 23.

**Amendment Notes.** — The 1988 amendment, effective April 25, 1988, subdivided Subsection (1) and rewrote Subsection (1)(a), which had read "Within ten days after the date that an order on review is issued, or within ten days after the date that a final order is issued for which agency review is unavailable, any party may file a written request for reconsideration

stating the specific grounds upon which relief is requested"; deleted "or the order on review" at the end in Subsection (1)(b); and substituted "reconsideration" for "rehearing" in Subsection (3)(b).

**Effective Dates.** — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

### 63-46b-14. Judicial review — Exhaustion of administrative remedies.

- (1) A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.
- (2) A party may seek judicial review only after exhausting all administrative remedies available, except that:
  - (a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required;
  - (b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:
    - (i) the administrative remedies are inadequate; or

- (i) encourage settlement;
- (ii) clarify the issues;
- (iii) simplify the evidence;
- (iv) facilitate discovery; or
- (v) expedite the proceedings; or
- (b) granting a timely motion to dismiss or for summary judgment if the requirements of Rule 12(b) or Rule 56, respectively, of the Utah Rules of Civil Procedure are met by the moving party, except to the extent that the requirements of those rules are modified by this chapter.
- (5) (a) Declaratory proceedings authorized by Section 63-46b-21 are not governed by this chapter, except as explicitly provided in that section.
- (b) Judicial review of declaratory proceedings authorized by Section 63-46b-21 are governed by this chapter.
- (6) This chapter does not preclude an agency from enacting rules affecting or governing adjudicative proceedings or from following any of those rules, if the rules are enacted according to the procedures outlined in Title 63, Chapter 46a, Utah Administrative Rulemaking Act, and if the rules conform to the requirements of this chapter.
- (7) If the attorney general issues a written determination that any provision of this chapter would result in the denial of funds or services to an agency of the state from the federal government, the applicability of those provisions to that agency shall be suspended to the extent necessary to prevent the denial. The attorney general shall report the suspension to the Legislature at its next session.
- (8) Nothing in this chapter may be interpreted to provide an independent basis for jurisdiction to review final agency action.
- (9) Nothing in this chapter may be interpreted to restrict a presiding officer, for good cause shown, from lengthening or shortening any time period prescribed in this chapter, except those time periods established for judicial review.

**History:** C. 1953, 63-46b-1, enacted by L. 1987, ch. 161, § 257; 1988, ch. 72, § 15; 1990, ch. 306, § 2; 1991, ch. 207, § 39; 1991, ch. 212, § 5; 1991, ch. 259, § 51; 1992, ch. 30, § 128; 1992, ch. 280, § 57; 1992, ch. 303, § 12.

**Amendment Notes.** — The 1990 amendment, effective March 13, 1990, in Subsection (2)(c), inserted "to actions and decisions of the Psychiatric Security Board relating to discharge, conditional release, or retention of persons under its jurisdiction," deleted "or mental institution" after "any correctional facility," and inserted "the Utah State Hospital, the Utah State Training School, or persons in the custody or jurisdiction of the Division of Mental Health."

The 1991 amendment by ch. 207, effective July 1, 1991, substituted "Developmental Center" for "Training School" in Subsection (2)(c) and changed the style of the chapter references in Subsections (2)(h) and (6).

The 1991 amendment by ch. 212, effective April 29, 1991, in Subsection (2), made a minor stylistic change in Subsection (f), substituted

"wildlife licenses, permits, tags, and certificates of registrations, and" for "hunting or fishing licenses, or" in Subsection (n), added the Subsection (o) designation, and made related changes

The 1991 amendment by ch. 259, effective April 1, 1992, in Subsection (2)(f), substituted "Utah" for "the" and inserted "of 1973"; rewrote Subsection (2)(h), which formerly read "state agency actions under Article 3, Chapter 1, Title 7, and Chapters 2, 8a, and 19, Title 7, and Chapter 30, Title 63 or judicial review of those actions;" in Subsection (2)(i), substituted "Chapter 1, Title 35, Worker's Compensation, and Chapter 2, Title 35, Utah Occupational Disease Disability Law" for "Chapters 1 and 2, Title 35"; in Subsection (2)(k), substituted "Title 26, Utah Emergency Medical Services System Act, Chapter 11, Title 26, Utah Water Pollution Control Act, Chapter 12, Title 26, Utah Safe Drinking Water Act, Chapter 13, Title 26, Air Conservation Act, or Chapter 14, Title 26, Solid and Hazardous Waste Act" for "Chapter 8, 11, 12, 13 or 14, Title 26"; in Subsection

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

(3) (a) A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued under Subsection 63-46b-13(3)(b).

(b) The petition shall name the agency and all other appropriate parties as respondents and shall meet the form requirements specified in this chapter.

**History:** C. 1953, 63-46b-14, enacted by L. 1987, ch. 161, § 270; 1988, ch. 72, § 24.

**Amendment Notes.** — The 1988 amendment, effective April 25, 1988, divided former Subsection (1) into present Subsections (1) and (2) and redesignated former Subsection (2) as present Subsection (3); added "or is considered

to have been issued under Subsection 63-46b-13(3)(b)" in Subsection (3); and made minor stylistic changes.

**Effective Dates.** — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988.

### **63-46b-15. Judicial review — Informal adjudicative proceedings.**

(1) (a) The district courts shall have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings.

(b) Venue for judicial review of informal adjudicative proceedings shall be as provided in the statute governing the agency or, in the absence of such a venue provision, in the county where the petitioner resides or maintains his principal place of business.

(2) (a) The petition for judicial review of informal adjudicative proceedings shall be a complaint governed by the Utah Rules of Civil Procedure and shall include:

(i) the name and mailing address of the party seeking judicial review;

(ii) the name and mailing address of the respondent agency;

(iii) the title and date of the final agency action to be reviewed, together with a duplicate copy, summary, or brief description of the agency action;

(iv) identification of the persons who were parties in the informal adjudicative proceedings that led to the agency action;

(v) a copy of the written agency order from the informal proceeding;

(vi) facts demonstrating that the party seeking judicial review is entitled to obtain judicial review;

(vii) a request for relief, specifying the type and extent of relief requested;

(viii) a statement of the reasons why the petitioner is entitled to relief.

(b) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure.

(3) (a) The district court, without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings.

## **APPENDIX 2**

1           A     Not to my recollection.

2           Q     All right. Then subsequently, did you review to  
3 determine internally what assets were where and how the  
4 accounts were running and whether--whether payments were  
5 being made back and forth from company to company?

6           A     No.

7           Q     Well, how--as the owner of this business and as  
8 the president of this business, what did you do to try to  
9 know whether you're making or losing money and whether  
10 this--this operation is being successful?

11          A     Well, it--the consolidated financial statements is  
12 all I looked at; as far as the individual companies, if one  
13 needed one or one needed the other, it was all transferred  
14 back and forth.

15          Q     All right. Did you have any concern, for instance,  
16 about whether Sand & Gravel was making or losing money as  
17 opposed to the consolidated result?

18          A     No.

19          Q     And you did sign a lot of checks that went around  
20 from company to company and back and forth, didn't you?

21          A     Yes.

22          Q     And how come--why were you signing these checks?

23          A     Sign all the checks.

24          Q     All right. For control, to make sure you know--

25          A     I do--I look at all the bills and sign all the

1 enough to--you're going to have to give me a better copy.

2 Q Okay. This is under Exhibit No. 6 also, I think  
3 this is Page 6. It might be a little bit--it's a different  
4 check, however, it's a little better copy. I think it's  
5 Page 6 under Exhibit No. 1.

6 A Okay.

7 Q Who is that issued to?

8 A To me.

9 Q Does it state anything else besides your name on  
10 the front of the check?

11 A Pit royalty.

12 Q And who is that from?

13 A Harper Sand & Gravel.

14 Q Is that your signature on the front? Is that--  
15 is there a signature on there?

16 A Yes.

17 Q In what capacity have you signed the check? In  
18 your--in what capacity have you signed--have you placed  
19 your name on the check? As president, vice president of  
20 what company?

21 A No, I don't know what you mean. I sign on the--  
22 on the checks, what do you--I don't know what you mean.

23 Q You've signed the check on be--

24 A What capacity? I don't know what you mean by  
25 that.

1           Q     You've signed the check on behalf of who?

2           A     Rulon Harper. Me.

3           Q     But what company? Did you sign the check, for

4 Harper Sand & Gravel?

5           A     Yeah. I sign on all of them, yeah.

6           Q     But in this check, it says Harper Sand & Gravel;

7 is that correct?

8           A     Yes.

9           Q     And is it a fact that at the time you signed

10 this check as president of Harper Sand & Gravel that you

11 knew it was for pit royalties?

12          A     Yeah.

13               MR. CARLTON: At this time, I'd like to introduce

14 that into the record.

15               MR. PETERSON: There's no objection.

16               THE HEARING OFFICER: It's my understanding,

17 Mr. Peterson and Mr. Carlton, that the plaintiff's--or

18 respondent's documents which are contained in this binder

19 are all at some point going to be introduced into evidence

20 and that you have no objections to them; is that correct?

21               MR. PETERSON: That is right.

22               THE HEARING OFFICER: All right. Then that will

23 be received as well as all of the other documents as you go

24 along, Mr. Carlton.

25               MR. CARLTON: Okay.

1 month and you're not--you don't know whether or not you're  
2 receiving \$11,000 a month under a promissory note?

3 THE WITNESS: No.

4 THE HEARING OFFICER: I think you testified that  
5 currently all the companies are insured together; is that  
6 correct?

7 THE WITNESS: Yes. And they always have been.

8 THE HEARING OFFICER: What then was the benefit  
9 to--to restructuring because of an insurance problem when  
10 you did in '86?

11 THE WITNESS: I don't know. I think you'd be  
12 better to ask Mr. Skeen that. I don't--I--

13 MR. SKEEN: If you don't mind, let me just  
14 explain. The benefit of restructuring was because you  
15 couldn't get insurance of the magnitude he needed so that  
16 you want a corporation with the rolling stock to be separate  
17 of another corporation, so--

18 THE HEARING OFFICER: Is this just to limit his  
19 liabilities so they can't get past--

20 MR. SKEEN: It's all--

21 THE HEARING OFFICER: --Sand & Gravel if they went  
22 after Sand & Gravel and--

23 MR. SKEEN: So they can't get past, that's right.  
24 That's it. And the problem was--was not to buy insurance,  
25 the problem was you couldn't buy it. If you could buy it

1     took place, I just--it was decided to set up four companies,  
2     a contracting one, a sand and gravel one and a trucking one,  
3     and those were the logical boundaries, and so whatever  
4     transactions took place before the reorganization between  
5     Rulon and Harper Excavating I assumed took place between  
6     Rulon and Harper Sand & Gravel, as far as the gravel was  
7     concerned, the land.

8           Q     All right. Now, before the reorganization, Harper  
9     Excavating was the only company, so it had--it had the  
10    gravel sales agreements; right?

11          A     I assume so. I never saw any. I--

12          Q     Okay. And so afterwards, it would have been  
13    necessary, would it not, to--for Harper Excavating to assign  
14    those sand and gravel agreements to one of the other--to  
15    one of the three subsidiaries?

16          A     Yeah, I would--I would do that.

17          Q     Yeah, but did you have the actual assignments  
18    documents when you started devising this system?

19          A     No. There--there really--I mean it all happened  
20    so fast, there wasn't much of anything. You know, we went  
21    to work splitting everything apart entirely, as far as the  
22    procedures, the accounting and setting up checking accounts  
23    and trying to handle just all the paper flow, and you know,  
24    the--Dick Skeen started working on putting together all the  
25    documentation.

1 Q On the legal side?

2 A On the legal side.

3 Q Now, it was a fact, wasn't it, that you determined  
4 from the accounting standpoint, it made sense to assume that  
5 the sand and gravel company would own whatever there was to  
6 own as far as the--the pits?

7 A Yeah. I mean, how could it sell something it  
8 didn't have.

9 Q Well, that's right. So you assumed that it should  
10 have those assets 'cause it was the, quote, "The Sand &  
11 Gravel Company"?

12 A Correct.

13 Q All right. And--and basically operating on that  
14 assumption then, you did set up the inter-company accounts  
15 in that fashion?

16 A Yes.

17 Q And you showed sand and gravel going from the  
18 sand and gravel company to excavating, et cetera?

19 A Yes.

20 Q Now, from--if in fact you had known that Sand &  
21 Gravel company didn't own those assets, but in fact they  
22 were owned by the contracting company, would you have set  
23 up the accounts differently, as far as showing ownership  
24 and sales of sand and gravel?

25 A Yeah. I mean if--I would have sold them out of

1           Q     So you were in the presence at the time Mr. Harper  
2     received some of these checks, statements and invoices; is  
3     that correct?

4           A     Yes.

5           Q     Did he ever say to you that, boy, this is  
6     incorrect, you shouldn't be allocating this money or these  
7     invoices for these purchases, or anything of that nature?

8           A     No.

9           Q     Did he ever mention your record keeping was  
10    incorrect?

11          A     No.

12          Q     Even after he saw some of these checks?

13          A     No, I just--I told him that I was just--  
14    transferred all to my personal account and don't worry  
15    about it and he just laughed; he knew he was just putting  
16    it from one pocket to another, and so he didn't really--  
17    he didn't really care whether what I did was right or wrong.  
18    To him, the money still stayed in his control.

19          Q     Were you ever in the presence when he signed any  
20    of these checks?

21          A     I'm sure I was. I--

22          Q     Did--did--do you know if he ever looked at the  
23    check stubs?

24          A     I think when it came to inter-company transactions,  
25    he pretty much just took my word for whatever was there and

1       figured it was all just kind of a big pain anyway.

2           Q     Do you know if he ever read the checks, what  
3       were on the checks?

4           A     I don't know.

5           Q     Okay. In your opinion, Mr. Goddard, were the  
6       checks signed by Rulon Harper as president of Harper  
7       Contracting for consideration to Harper Excavating for the  
8       sand and gravel that was flowing back and forth between  
9       Harper Sand and Gravel and Harper Excavatingd?

10          A     Well, that was the purpose of all of this was to,  
11       you know, Harper--I mean, under the philosophy that I,  
12       you know, set up, Harper Sand & Gravel owned some sand and  
13       gravel and it needed to go out on a job that was done  
14       through Harper Contracting, then we'd have a--an internal,  
15       or an inter-company sale where Harper Sand & Gravel would  
16       sell that sand and gravel to Harper Contracting, you know,  
17       Harper Sand & Gravel would record it as a receivable,  
18       a--counts receivable from Harper Contracting, Harper  
19       Contracting would record it as an accounts payable, and  
20       then--then we'd write checks, you know, from one corpora--  
21       we'd write a check from Harper Contracting to pay for it.

22          Q     Did any of those checks or check stubs state on  
23       there, sand and gravel purchases?

24          A     I don't know.

25          Q     Why don't we turn to Exhibit No. 5? You have the

1 books?

2 A Yes. On each company's books.

3 Q Would there be paperwork surrounding that sale?

4 A As much as possible.

5 Q And you would be aware of that type of transac-  
6 tion?

7 A Yes. I would think so.

8 Q Were there any sales that you knew of in  
9 particular of something of that nature?

10 A I don't think there were any. I think we pretty  
11 much set all those up, you know, when we split it out so  
12 there wasn't any need to. I mean, one--like Harper  
13 Excavating owned dump trucks, you know, we--you know, I  
14 don't think there was any backhoes put into that corporation  
15 so there wouldn't have been a need to transfer it that way.  
16 It was all done right at the start.

17 Q So any of the transfers that you were aware of  
18 were made at the time--May 10th, I--May 10th, 1986, and you  
19 were informed of those?

20 A Well, I was the one that really did it. I just  
21 took a list of everything we had, everything that was  
22 previously an asset and a liability of Harper Excavating  
23 and I divided them up, put this backhoe in this corporation  
24 and this dump truck in another, and put the debt, any debt  
25 associated with that in the proper corporation, to match the

1           COMMISSIONER PACHECO: Is that--okay. And there  
2 were all these assets in the company and at the time of  
3 reorganization, then you, in communication with the  
4 attorney, you broke them out and put them in the companies  
5 you thought they should go into, I guess?

6           THE WITNESS: Yes.

7           COMMISSIONER PACHECO: Okay. So you--you made the  
8 accounting the best way you thought it had to be done,  
9 everything in communication with the other people involved?

10          THE WITNESS: Yes.

11          COMMISSIONER PACHECO: Okay. My first question  
12 is, where--where did this all start? Where were the  
13 minerals? Was that in the land account that originally  
14 existed, is that--

15          THE WITNESS: That was a--all's I knew at the  
16 time was that the land was owned by Rulon Harper,  
17 personally.

18          COMMISSIONER PACHECO: Okay. And I guess my  
19 question is, does that land in which the minerals are  
20 being extracted from the sand and gravel?

21          THE WITNESS: That's my understanding, yes.

22          COMMISSIONER PACHECO: Okay. And that land  
23 account, was it the land account that was on the books?

24          THE WITNESS: No, because it was not owned by the  
25 corporation.

1                   COMMISSIONER PACHECO: So it was outside and you  
2 would not have had any knowledge about that--  
3                   THE WITNESS: No.  
4                   COMMISSIONER PACHECO: --pit, or I refer to it as  
5 a mineral, meaning the raw material.  
6                   THE WITNESS: That's okay.  
7                   COMMISSIONER PACHECO: So you did not account for  
8 it then in that sense?  
9                   THE WITNESS: No. There was no asset called land  
10 on the books of Harper Excavating prior to the reorganiza-  
11 tion 'cause it wasn't owned by the corporation.  
12                   COMMISSIONER PACHECO: Okay. My next question  
13 has--deals with--you stated that the CPA firm prepared  
14 audited financial statements on a consolidated basis for a  
15 period after the--after the reorganization?  
16                   THE WITNESS: Yes. I believe we had individual  
17 ones as well.  
18                   COMMISSIONER PACHECO: Okay. Just focusing on the  
19 consolidated, was there a--in the--any indication in the  
20 financial statements, a note to the financial statement  
21 that there was a lease or an assignment or a significant  
22 transaction that took place between any of the parties  
23 regarding the extraction?  
24                   THE WITNESS: Well, I think there was the--the  
25 traditional related party transaction footnote that, you

1 COMMISSIONER PACHECO: Okay. That's fine.

2 THE HEARING OFFICER: I had a question,

3 Mr. Goddard. Now you stated that prior to reorganization,

4 the--to your knowledge, the land from which the sand and

5 gravel was extracted belonged to Rulon Harper; is that

6 correct?

7 THE WITNESS: Yes.

8 THE HEARING OFFICER: And that wasn't carried

9 on the books of Harper Excavating as an asset; is that

10 correct?

11 THE WITNESS: That's correct.

12 THE HEARING OFFICER: And then after the reorgani-

13 zation, you then included the sand and gravel land as an

14 asset in one of the companies; is that correct?

15 THE WITNESS: No.

16 THE HEARING OFFICER: You didn't?

17 THE WITNESS: No.

18 THE HEARING OFFICER: What did you do.

19 THE WITNESS: I did exactly what was being done

20 before the reorganization, after; just--just it went through

21 Sand & Gravel--Harper Sand & Gravel instead of Harper

22 Excavating.

23 THE HEARING OFFICER: So you were assuming then

24 that Sand & Gravel was continuing to pay Mr. Harper

25 personally for--for the--for the sand and gravel--

1 THE WITNESS: Yes.

2 THE HEARING OFFICER: --extracted; is that right?

3 THE WITNESS: Yes.

4 THE HEARING OFFICER: So it wasn't carried as an  
5 asset per se, but--

6 THE WITNESS: No.

7 THE HEARING OFFICER: --simply as a purchase from  
8 Mr. Harper and then a sale to Harper Excavating; is that  
9 correct?

10 THE WITNESS: Yeah, that's correct.

11 THE HEARING OFFICER: Okay, thank you. I have no  
12 further questions.

13 MR. PETERSON: Just--your question, when you  
14 asked him, you said it continued to be that way; it didn't  
15 continue because Sand & Gravel wasn't in existence, it was  
16 new. There was no Sand & Gravel company prior to the  
17 reorganization.

18 THE HEARING OFFICER: I understand that.

19 MR. PETERSON: Okay.

20 THE HEARING OFFICER: Thank you.

21 Thank you, Mr. Goddard. You may step down.

22 MR. PETERSON: One question I think you might--  
23 and I think you might have been misled Commissioner  
24 Pacheco about.

25

1           A     Yes. Harper Contracting pays Rulon.

2           Q     And Harper--why does Harper Contracting pay?

3           A     Because I have now--we've got the gravel sale  
4 agreements in place as far as who owns the tract of land  
5 within the gravel pits, and Harper Contracting has legal  
6 title to those tracts of land.

7           Q     And as far as any promissory notes on past due  
8 sales, are those the responsibility of Harper Contracting  
9 or Harper Sand & Gravel?

10          A     That note that was first brought up has now been  
11 rewritten in Harper Contracting.

12          Q     I'm going to pass to you Plaintiff's Exhibits 1  
13 through 10 which are gravel sales agreement and assignments  
14 of gravel sales agreements, and ask you if you are familiar  
15 with these documents. Why don't I just break them all apart?

16               THE HEARING OFFICER: Are those the documents  
17 that are attached to your brief, Mr. Peterson?

18               MR. PETERSON: Probably. I'm trying to remember,  
19 I think they are among the documents that are attached.  
20 I've written too many briefs lately, I can't remember.  
21 I'll just distribute these, one copy for both of you.  
22 Those are the same, are they not?

23               THE HEARING OFFICER: I think so.

24               MR. PETERSON: Okay.

25               There are--I think I did not have, for some

1           A     Well, we were operating as one--as one company  
2 and it was treated as such.

3           Q     And so it was all a wash-out in the inter-company  
4 accounts?

5           A     Correct.

6           Q     And as far as sales taxes on a consolidated basis,  
7 did it make any difference?

8           A     No.

9           Q     Now, from--on an ongoing basis then, on a current  
10 account basis, are there any sales for inter-company  
11 obligations reflected on the ledgers currently for sales  
12 of sand and gravel from the sand and gravel company to  
13 Excavating or to Contracting?

14          A     There is an inter-company transaction between  
15 Contracting and Sand & Gravel now, because Sand & Gravel  
16 still operates the gravel pit operations and they will  
17 sell sand and gravel to outside vendors, and there is a  
18 transaction that is created for the sale between Contracting  
19 and Sand & Gravel, an exempt sale, and then Harper Sand &  
20 Gravel then sells it to an outside vendor and collects  
21 sales tax and we remit the sales tax on our sales tax  
22 return.

23          Q     But Harper Contracting no longer purchases sand  
24 and gravel?

25          A     No.

1           A     Yes.

2           Q     Okay.

3           MR. PETERSON: I have no further questions.

4           THE HEARING OFFICER: Mr. Carlton?

5           MR. CARLTON: Yeah, I have a couple questions.

6                               CROSS-EXAMINATION

7   BY MR. CARLTON:

8           Q     Is it standard procedure for an auditor to go  
9 through and look at all the contracts and assignments?

10          A     Yeah, anything that's material to the financial  
11 statements.

12          Q     And your testimony I guess is then that those  
13 were not present at the time that you were looking at the  
14 books?

15          A     Didn't--did not obtain them.

16          Q     Did you ask for them?

17          A     Yes.

18          Q     Who did you ask for those documents?

19          A     The comptroller.

20          Q     And his name is?

21          A     Steve Goddard.

22          Q     And Mr. Goddard represented that what he gave you  
23 was the totality of all the documents; is that correct?

24          A     Yeah.

25          Q     Can you remember when that took place?

1           A     When what took place?

2           Q     When you met--you met with them yearly; was there  
3 a certain period of time that that would have occurred  
4 each year, or is it--

5           A     Yeah, it would--for this financial statement, it  
6 would have occurred approximately--we would have probably  
7 met right near the end of February of '87, and then through-  
8 out the period of the audit, which would have extended from  
9 probably the first part of March until the report date.

10          Q     So annually you would meet with Mr. Goddard and  
11 go over the contracts and assignments that--that Harper  
12 Investment, Harper Sand & Gravel and the other companies  
13 entered into; is that correct?

14          A     Yes.

15          Q     And each year he represented that these are the  
16 totality of all the assignments and contracts that I have  
17 in my--

18          A     Yes.

19          Q     And for each of those years, you never saw the  
20 assignments that you're basing your amended financial  
21 statements on?

22          A     Right.

23          Q     Were you privileged to see the agreements--I'm  
24 not talking about the assignments, I'm talking about the  
25 agreements?

1           A     The agreements where the companies split up?

2           Q     No. The agreements--the agreement between the

3     Harpers and Harper Excavating to sell this sand and

4     gravel?

5           A     Did not see those.

6           Q     Did you have any meetings about these types of

7     financial statements with Mr. Harper at any time?

8           A     At the end of the audit, we always meet and go

9     over the financial statements. Mainly, we talk about the

10    consolidated re--financial statement.

11          Q     Can you remember if you went over the financial

12    statement you have in front of you with Mr. Harper?

13          A     I cannot. He's interested in the consolidated,

14    and I know we go over that; as far as if we go over each

15    of the individual, or if we did at this point in time, I

16    cannot say.

17          Q     Did you present Mr. Harper with all these financial

18    statements?

19          A     I'm not sure if we gave them directly to him.

20          Q     Do you know if he made any comments about your

21    financial statement, your report?

22          A     I can't--I can't recall any.

23                MR. CARLTON: I have no further questions.

24                THE HEARING OFFICER: Any redirect, Mr. Peterson?

25                MR. PETERSON: No.

1 THE HEARING OFFICER: Commissioner Pacheco, any  
2 questions?

3 COMMISSIONER PACHECO: One question. The Harper  
4 Contracting Company was selling sand and gravel, okay?

5 THE WITNESS: Okay.

6 COMMISSIONER PACHECO: There is not--I just  
7 looked through the financial statements, there's not a  
8 land account in the financial statements, nor could I find  
9 land in any of the other two subsidiaries. Now, where  
10 would the--where would you think that the land--or the sale  
11 of sand and gravel would come from if there's no land  
12 account in any of the companies?

13 THE WITNESS: Okay. The land is owned by Rulon  
14 Harper personally.

15 COMMISSIONER PACHECO: That's what you now know.

16 THE WITNESS: And it was at that time also, and we  
17 knew that.

18 COMMISSIONER PACHECO: All right. So it wasn't  
19 a question of who owned the land at inception, it was only  
20 the assignment you were not aware of?

21 THE WITNESS: Right.

22 COMMISSIONER PACHECO: Okay.

23 THE WITNESS: Right.

24 COMMISSIONER PACHECO: That's all the questions I  
25 have.

1 ended February 29th, 1988. Go to Page 4, you'll again see  
2 the income as reported on the financial statement for  
3 Harper Con--for Harper Excavating and you'll see that  
4 amount is \$6,262,769, which is the same figure that's  
5 reported on the income tax return.

6 And then if you go to Page 8 of Exhibit 22, you  
7 see a statement at the bottom of that Statement No. 6,  
8 related party transactions where it says the company--  
9 speaking of Harper Excavating--has entered into an agreement  
10 with a wholly-owned subsidiary of its parent company to  
11 sell sand and gravel and provide the hauling of material  
12 to job sites. Sand and gravel sales and material hauling  
13 income of \$4,436,237 are included in the financial statement  
14 as part of the contracting income for the year ended  
15 February 29, 1988.

16 So of that \$6 million figure that's on the  
17 financial statement and the income tax return for Harper  
18 Excavating, \$4,436,237 of that represents the sale from  
19 Harper Excavating to Harper Contracting.

20 And then just one last overlay. I'd just like  
21 to document with this overlay as noted in the left-hand  
22 corner the royalty, pit royalty payments from Harper Sand  
23 & Gravel to the owners of the pits, and that refers to  
24 Exhibit No. 1. You see the first check there is made out,  
25 I can't see the amount, to Rulon Harper, for pit royalties

1 Q I--I remember those checks.

2 A --pit royalties.

3 Q That's right, and I understand the conclusion you  
4 drew from those checks; but I'm just--if we confine  
5 ourselves now to these income statements, I don't think  
6 that we'll find any sand and gravel listed as an asset.

7 Now, can it--in terms of sales taxes, can a  
8 company, wholly apart from sales taxes, can a company sell  
9 something to someone if it doesn't own it?

10 A I guess if it doesn't belong to them, no, they  
11 couldn't do that.

12 Q All right. And when you--when you conducted this  
13 audit, or when your staff did and you reviewed it, you were,  
14 in a sense, dependent upon the--the records and the  
15 information and other things provided to you by the company;  
16 were you not?

17 A Yes. That's correct.

18 Q All right. And are you familiar with--I don't  
19 want to overstate it; but are you familiar with computers  
20 at all? Do you know the GIGO principle?

21 A I don't believe I do, no.

22 Q GIGO principle is garbage in garbage out, and I  
23 don't want to--I'm not trying to be perjorative, but that's  
24 just another way of stating that if you've got that  
25 information, you're going to get that results; isn't that

1 true?

2 A I guess that would be true.

3 Q And it is the unfortunate case, is it not, that  
4 when you were doing your audit, when your staff was out  
5 there, the company didn't--didn't give you, Mr. Goddard  
6 didn't give you, Mr. Carston, they just didn't have, in the  
7 stuff you looked at, those--those sales contracts and the  
8 assignments weren't there for you, were they?

9 A That is correct.

10 Q And so you were--in a sense, you're handicapped,  
11 you're not--you're not given everything you need?

12 A Obviously we were not.

13 Q Now--

14 MR. PETERSON: I don't--I don't have any further  
15 questions. Thank you.

16 THE HEARING OFFICER: Redirect, Mr. Carlton?

17 MR. CARLTON: No redirect.

18 THE HEARING OFFICER: I have a question,  
19 Mr. Ashcroft. Does the fact that you now know of those  
20 assignments and sales contracts change your determination  
21 of whether or not a taxable transaction occurred between  
22 two entities in question?

23 THE WITNESS: I don't think it does, as I've  
24 just demonstrated through the overlays, you can see that  
25 there are transactions occurring between those different

## **APPENDIX 3**

RESPONDENT'S EXHIBIT 17

HARPFER LAND AND GRAVEL, INC.

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FINANCIAL STATEMENTS

WITH

REPORT OF CERTIFIED PUBLIC ACCOUNTANTS

FOR THE PERIOD FROM JULY 1, 1981 (INCEPTION) THROUGH FEBRUARY 28, 1987

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**Sorensen, Chiodo & May**  
Certified Public Accountants

HARPER SAND AND GRAVEL, INC.

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**Sorensen, Chiodo & May**  
Certified Public Accountants

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Telephone (801) 566-5644

A Professional Corporation  
Other Office:  
Denver, Colorado

REPORT OF CERTIFIED PUBLIC ACCOUNTANTS

Board of Directors and Stockholders  
Harper Sand and Gravel, Inc

We have examined the statement of financial position of Harper Sand and Gravel, Inc., as of February 28, 1987 and the related statements of income and retained earnings, and changes in financial position for the period from May 10, 1986 (inception) through February 28, 1987. Our examination was made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the financial statements referred to above present fairly the financial position of Harper Sand and Gravel, Inc., as of February 28, 1987 and the results of its operations and changes in its financial position for the period from May 10, 1986 (inception) through February 28, 1987 in conformity with generally accepted accounting principles.

Our examination was made primarily for the purpose of forming an opinion on the basic financial statements taken as a whole. The accompanying supplementary financial information is not considered necessary for a fair presentation of the basic financial statements and is presented for analytical purposes only. The supplementary information was derived from the accounting records tested by us as part of our examination of the aforementioned financial statements and, in our opinion, is fairly stated in all material respects in relation to the basic financial statements taken as a whole.

*Sorensen Chiodo & May*

May 8, 1987

HARPER SAND AND GRAVEL, INC.  
STATEMENT OF FINANCIAL POSITION

February 28, 1987

ASSETS

Current Assets:	
Cash	\$ 4,124
Accounts receivable (net of allowance for doubtful accounts of \$2,000)	76,096
Receivables from related entities	<u>503,257</u>
Total current assets	<u>583,477</u>
 Equipment:	
Construction equipment	664,456
Crushing equipment	<u>397,390</u>
	<u>1,061,846</u>
 Less: Accumulated depreciation	<u>803,465</u>
Net equipment	<u>258,381</u>
 Total Assets	<u><u>\$ 841,858</u></u>

Continued on next page -

(continued)

STATEMENT OF FINANCIAL POSITION

LIABILITIES AND STOCKHOLDERS' EQUITY

Current Liabilities:	
Accounts payable	\$ 4,125
Accrued expenses	4,939
Income taxes payable	2,825
Payables to related entities	120,450
Current portion of long-term debt	<u>165,994</u>
Total current liabilities	<u>298,333</u>
 Long-term debt, excluding current portion	 191,001
Commitment	<u>          </u>
Total liabilities	489,334
 Stockholders' Equity:	
Common stock; no par, stated value \$100, authorized 50,000 shares, issued and outstanding 1,000 shares	100,000
Additional paid-in capital	211,030
Retained earnings	<u>41,494</u>
Total stockholders' equity	<u>352,524</u>
 Total Liabilities and Stockholders' Equity	 <u><u>\$841,858</u></u>

The accompanying notes are an integral  
part of the financial statements.

HARPER SAND AND GRAVEL, INC.

STATEMENTS OF INCOME AND RETAINED EARNINGS

For the Period From May 10, 1986 (Inception) Through February 28, 1987

INCOME:	
Contracting income	\$1,753,217
Direct costs	<u>1,481,668</u>
Gross profit	<u>271,549</u>
EXPENSES:	
General and administrative	242,130
Interest	<u>25,885</u>
	<u>268,015</u>
Net operating income	3,534
OTHER INCOME:	
Interest income	26,189
Other income	<u>446</u>
Income before provision for income taxes	30,169
Income tax benefit	<u>11,325</u>
Net Income	<u>\$ 41,494</u>
Retained earnings, beginning of period	\$ -0-
Add: Net income	<u>41,494</u>
Retained earnings, end of period	<u>\$ 41,494</u>

The accompanying notes are an integral  
part of the financial statements.

HARPER SAND AND GRAVEL, INC.

STATEMENT OF CHANGES IN FINANCIAL POSITION

For the Period From May '10, 1986 (Inception) Through February 28, 1987

Funds Provided:

From operations:

Net income	\$ 41,494
Items which do not use (provide)	
working capital:	
Depreciation	119,844
Deferred taxes	(14,150)
Working capital provided by operations	<u>147,188</u>

From other sources:

Long-term debt borrowings	335,190
Issuance of common stock	<u>311,030</u>
Total funds provided	<u>793,408</u>

Funds Applied:

Acquisition of equipment	120,468
Current maturities and repayment of	
long-term debt	193,418
Long-term assets less long-term liabilities	
spun off from Harper Excavating, Inc.	<u>194,378</u>
Total funds applied	<u>508,264</u>

Increase in Working Capital \$285,144

Changes in Components of Working Capital:

Increase (decrease) in current assets:

Cash	\$ 4,124
Accounts receivable	76,096
Receivables from related entities	<u>503,257</u>
	<u>583,477</u>

(Increase) decrease in current liabilities:

Accounts payable	(4,125)
Accrued expenses	(4,939)
Income taxes payable	(2,825)
Payables to related entities	(120,450)
Current portion of long-term debt	<u>(165,994)</u>
	<u>(298,333)</u>

Increase in Working Capital \$285,144

The accompanying notes are an integral  
part of the financial statements.

HARPER SAND AND GRAVEL, INC.

NOTES TO FINANCIAL STATEMENTS

1. Summary of Significant Accounting Policies

a. Business Information

On May 10, 1986, Harper Excavating, Inc. performed a tax free reorganization pursuant to section 351 of the Internal Revenue Code. As a result of this reorganization, three new corporations were formed.

At the close of business on May 9, 1986 Harper Excavating, Inc. transferred at book value all fixed assets and liabilities relating to the sand and gravel operations to Harper Sand & Gravel, Inc., in exchange for 1,000 shares of Harper Sand & Gravel, Inc. no par common stock. Harper Excavating, Inc. then changed its corporate name to Harper Investments, Inc. and Harper Investments, Inc. changed its corporate name to Harper Excavating, Inc. The Company was organized to carry on sand and gravel operations.

b. Equipment and Depreciation

Equipment is stated at cost. Depreciation is provided on the straight-line method over a 3 to 8 year period. Major replacements which extend the useful lives of equipment are capitalized and depreciated over the remaining useful life. Normal maintenance and repair items are charged to costs and expenses as incurred.

The Company uses accelerated methods of depreciation for income tax purposes. These methods provide more depreciation expense in the early years than in the later years of the life of the asset.

Upon the retirement or disposal of equipment, the costs and related accumulated depreciation amounts are eliminated and any gain or loss is included in operations in the year of disposition.

c. Income Taxes

Income tax expense is provided based on earnings reported for financial statement purposes. Certain items of income and expense are recognized in different periods for tax and financial accounting purposes. The timing difference is created by other accounting methods used for depreciation for tax reporting purposes, the effects of such difference is reported as deferred income taxes.

Harper Sand and Gravel, Inc.  
Notes to Financial Statements - continued

2. Receivables/Payables with Related Entities

Receivables from the Parent Company at February 28, 1987, represents receivables for cash deposits made into the Parent Company cash accounts.

Receivables from a wholly-owned subsidiary of the Parent Company represents receivables due from sand and gravel sold to the company.

Payables to the Parent Company represents amounts due for management fees charged and other miscellaneous expenses paid for by the Parent Company.

Payables to other wholly-owned subsidiaries of the Parent Company represents rental charged for the use of trucks, fuel and repairs and maintenance of equipment.

Following is a schedule of the receivables/payables with related entities:

Parent Company	\$469,629	\$ 72,066
Other wholly-owned subsidiaries of the Parent Company	<u>33,628</u>	<u>48,384</u>
	<u>\$503,257</u>	<u>\$120,450</u>

The amounts receivable/payable are non interest bearing and are expected to be collected/paid in 1987.

3. Income Taxes

Provision for income taxes is made based on earnings reported in the financial statements for the amount of income taxes payable currently and in the future (deferred income taxes). Deferred taxes arise from computing depreciation using accelerated methods for tax purposes. Deferred taxes attributable to the amounts attributable to accelerated depreciation are shown as long-term.

The (provision) benefit for income taxes consists of the following:

Current income taxes:	
Federal provision	\$ (2,100)
State provision	<u>(725)</u>
Current income tax expense	(2,825)
Deferred tax benefit	<u>14,150</u>
(Provision) benefit for income taxes	<u>\$ 11,325</u>

Harper Sand and Gravel, Inc.  
Notes to Financial Statements - continued

4. Long-Term Debt

Long-term debt obligations at February 28, 1987 consist of the following:

10.25% and 12.75% notes payable, due  
in monthly installments of \$8,596 and  
\$3,036 including interest. Notes are  
due March 1988 and December 1989,  
secured by equipment. \$273,577

Prime + 1% note payable due in monthly  
installments of \$2,381 including  
interest due May 1988, secured by  
equipment. 30,917

Prime + .9% note payable, due in monthly  
installments of \$1,944 plus interest  
due July 1989, secured by equipment. 52,501

Total long-term debt 356,995  
Less current portion of long-term debt 165,994  
Total long-term debt excluding  
current portion \$ 191,001

Aggregate maturities of long-term debt in each of the next five years are  
as follows: 1988 - \$165,994, 1989 - \$119,274, 1990 - \$ 71,727, 1991 - \$  
--, 1992 - \$ -- .

Equipment pledged as collateral for the  
above existing debt obligations:

Construction equipment \$982,893  
Less: Accumulated depreciation 678,255  
Book value of pledged equipment \$304,638

Of the above book value of pledged equipment, \$154,788 is also pledged as  
collateral for debt obligations of related Companies.

5. Related Party Transactions

The Company sells sand and gravel to a wholly-owned subsidiary of its  
Parent Company. Sand and gravel sales of \$1,049,979 are included in the  
financial statements as part of contracting income for the period ended  
February 28, 1987. The Company shows a receivable from this company in  
the amount of \$30,056 as of February 28, 1987 (Note 2) related to sand and  
gravel sales.

Harper Sand and Gravel, Inc.  
Notes to Financial Statements - continued

The Company has its equipment maintained and repaired by a wholly-owned subsidiary of its Parent Company. Maintenance and repairs of \$380,528 are included in the financial statements as part of direct costs for the period ended February 28, 1987. The Company shows a payable to this company in the amount of \$44,000 as of February 28, 1987 (Note 2) related to these maintenance and repairs.

The Company also uses trucks owned by a wholly-owned subsidiary of its Parent Company. Rental expense for these trucks amounted to \$1,065 and are included in the financial statements as part of direct costs for the period ended February 28, 1987. The Company shows a payable to this company in the amount of \$1,065 as of February 28, 1987 (Note 2) related to truck rentals.

The Company has also entered into an agreement with its Parent Company, whereby it pays a monthly management fee for record keeping and management services provided by the Parent Company. Management fees, pursuant to this agreement, of \$179,750 are included in the financial statements for the period ended February 28, 1987. The Company shows a payable to its Parent Company in the amount of \$32,000 as of February 28, 1987 (Note 2) related to management fees.

6. Employee Benefit Plans

The Company has a contributory profit sharing and retirement plan for the benefit of all employees who have completed one year of service (1,000 hours) and attained the age of 25. The plan provides for normal retirement on the anniversary of the plan nearest the 65th birthday and participants become fully vested after 10 years of service. The Company may make contributions to the plan out of its net or cumulative earnings. At February 28, 1987 the Company accrued no contributions to the plan.

7. Commitment

The Company entered into an agreement on June 12, 1986 with its Parent Company to pay \$700,000, due in annual installments of \$70,000 together with accrued interest on February 25 until paid. The interest rate is based on the applicable federal rate for ten year loans that is in effect in the month of January in the year preceding the year each payment is due. Cash payments on the commitment will be made in the form of dividends.

The Parent Company has a secured interest in all personal property, accounts receivable and equipment of the Company.

HARPER SAND AND GRAVEL, INC.

SUPPLEMENTARY INFORMATION

HARPER SAND AND GRAVEL, INC.  
GENERAL AND ADMINISTRATIVE EXPENSES

For the Period From May 10, 1986 (Inception) through February 28, 1987

Advertising	\$ 159
Bad debts	2,038
Bank charges	93
Insurance	44,301
Management fees	179,750
Office supplies	3,201
Repairs and maintenance	4,260
Taxes, licenses and permits	1,232
Telephone and utilities	6,293
Miscellaneous	<u>803</u>
GENERAL AND ADMINISTRATIVE EXPENSES	<u><u>\$242,130</u></u>

**RESPONDENT'S EXHIBIT 18**

HARPER EXCAVATING, INC.

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FINANCIAL STATEMENTS

WITH

REPORT OF CERTIFIED PUBLIC ACCOUNTANTS

FOR THE PERIOD FROM MAY 10, 1986 (INCEPTION ) THROUGH FEBRUARY 28, 1987

---

**Sorensen, Chiodo & May**  
Certified Public Accountants

HARPER EXCAVATING, INC.

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Sorensen, Chiodo & May  
Certified Public Accountants

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A Professional Corporation  
Other Office  
Denver, Colorado

REPORT OF CERTIFIED PUBLIC ACCOUNTANTS

Board of Directors and Stockholders  
Harper Excavating, Inc.

We have examined the statement of financial position of Harper Excavating, Inc., as of February 28, 1987 and the related statements of (loss) and retained earnings (deficit), and changes in financial position for the period from May 10, 1986 (inception) through February 28, 1987. Our examination was made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the financial statements referred to above present fairly the financial position of Harper Excavating, Inc., as of February 28, 1987 and the results of its operations and changes in its financial position for the period from May 10, 1986 (inception) through February 28, 1987, in conformity with generally accepted accounting principles.

Our examination was made primarily for the purpose of forming an opinion on the basic financial statements taken as a whole. The accompanying supplementary financial information is not considered necessary for a fair presentation of the basic financial statements and is presented for analytical purposes only. The supplementary information was derived from the accounting records tested by us as part of our examination of the aforementioned financial statements and, in our opinion, is fairly stated in all material respects in relation to the basic financial statements taken as a whole.

*Sorensen, Chiodo & May*

May 8, 1987

HARPER EXCAVATING, INC.

STATEMENT OF FINANCIAL POSITION

February 28, 1987

ASSETS

Current Assets:

Cash	\$ 127,953
Accounts receivable	1,800
Receivables from related entities	<u>348,705</u>
Total current assets	<u>478,458</u>

Building and Equipment:

Building	54,311
Shop equipment	30,259
Construction equipment	<u>2,181,141</u>
	2,265,711

Less: Accumulated depreciation	<u>1,802,078</u>
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Net building and equipment	<u>463,633</u>
----------------------------	----------------

Total Assets	<u><u>\$ 942,091</u></u>
--------------	--------------------------

(continued)

STATEMENT OF FINANCIAL POSITION

LIABILITIES AND STOCKHOLDERS' EQUITY

Current Liabilities:	
Accounts payable	308,039
Accrued expenses	25,035
Payables to related entities	112,904
Current portion of long-term debt	<u>72,031</u>
Total current liabilities	<u>518,009</u>
Long-term debt, excluding current portion	41,473
Commitment	<u>—</u>
Total liabilities	559,482
Stockholders' Equity:	
Common stock; no par, stated value \$100, authorized 50,000 shares, issued and outstanding 1,000 shares	100,000
Additional paid-in capital	357,319
Retained earnings (deficit)	<u>(74,710)</u>
Total stockholders' equity	<u>382,609</u>
Total Liabilities and Stockholders' Equity	<u><u>\$942,091</u></u>

The accompanying notes are an integral  
part of the financial statements.

HARPER EXCAVATING, INC.

STATEMENTS OF (LOSS) AND RETAINED EARNINGS (DEFICIT)

For the Period from May 10, 1986 (Inception) Through February 28, 1987

INCOME:

Contracting income	\$4,732,603
Direct costs	<u>4,328,807</u>
Gross profit	<u>403,796</u>

EXPENSES:

General and administrative	534,502
Interest	<u>16,047</u>
	<u>550,549</u>

Net operating (loss) (146,753)

OTHER INCOME:

Interest income	1,006
Rental income	15,682
Other income	<u>10,705</u>

(Loss) before provision for income taxes (119,360)

Income tax benefit 44,650

Net (Loss) \$ (74,710)

Retained earnings, beginning of period \$ -0-

Add: Net (loss) (74,710)

Retained earnings (deficit), end of period \$ (74,710)

The accompanying notes are an integral  
part of the financial statements.

HARPER EXCAVATING, INC.

STATEMENT OF CHANGES IN FINANCIAL POSITION

For the Period from May'10, 1986 (Inception) Through February 28, 1987

Funds Provided:

From operations:

Net (loss)	\$(74,710)
Items which do not use (provide)	
working capital:	
Depreciation	218,671
Deferred taxes	<u>(44,650)</u>
Working capital provided by operations	99,311

From other sources:

Long-term debt borrowings	47,110
Issuance of common stock	<u>457,319</u>
Total funds provided	<u>603,740</u>

Funds Applied:

Acquisition of equipment	59,865
Current maturities and repayment of	
long-term debt	135,876
Long-term assets less long-term liabilities	
spun off from Harper Excavating, Inc.	<u>447,550</u>
Total funds applied	<u>643,291</u>

(Decrease) in Working Capital \$(39,551)

Changes in Components of Working Capital:

Increase (decrease) in current assets:

Cash	\$127,953
Accounts receivable	1,800
Receivables from related entities	<u>348,705</u>
	<u>478,458</u>

(Increase) decrease in current liabilities:

Accounts payable	(308,039)
Accrued expenses	(25,035)
Payables to related entities	(112,904)
Current portion of long-term debt	<u>(72,031)</u>
	<u>(518,009)</u>

(Decrease) in Working Capital \$(39,551)

The accompanying notes are an integral  
part of the financial statements.

HARPER EXCAVATING, INC.

NOTES TO FINANCIAL STATEMENTS

1. Summary of Significant Accounting Policies

a. Business Information

On May 10, 1986, Harper Excavating, Inc. performed a tax free reorganization pursuant to section 351 of the Internal Revenue Code. As a part of this reorganization, three new corporations were formed.

At the close of business on May 9, 1986 Harper Excavating, Inc. transferred at book value all fixed assets and liabilities relating to the trucking operations to Harper Investments, Inc., in exchange for no par common stock. Harper Excavating, Inc. then changed its corporate name to Harper Investments, Inc. and Harper Investments, Inc. changed its corporate name to Harper Excavating, Inc.

The Company was organized to carry on trucking operations and perform repairs and maintenance for other wholly-owned subsidiaries of its Parent Company.

b. Building, Equipment and Depreciation

Building and equipment are stated at cost. Depreciation is provided on the straight-line method on the estimated lives of the various classes of assets. Building is depreciated over 15 years and equipment over a 3 to 8 year period. Major replacements which extend the useful lives of equipment are capitalized and depreciated over the remaining useful life. Normal maintenance and repair items are charged to costs and expenses as incurred.

The Company uses accelerated methods of depreciation for income tax purposes. These methods provide more depreciation expense in the early years than in the later years of the life of the asset.

Upon the retirement or disposal of equipment, the costs and related accumulated depreciation amounts are eliminated and any gain or loss is included in operations in the year of disposition.

c. Income Taxes

Income tax expense is provided based on earnings reported for financial statement purposes. Certain items of income and expense are recognized in different periods for tax and financial accounting purposes. The timing difference is created by other accounting methods used for depreciation for tax reporting purposes, the effects of such difference is reported as deferred income taxes.

Harper Excavating, Inc.  
Notes to Financial Statements - continued

2. Receivables/Payables with Related Entities

Receivables from the Parent Company at February 28, 1987, represents receivables for cash deposits made into the Parent Company cash accounts and rental charged for the use of the Company's trucks.

Receivables from other wholly-owned subsidiaries of the Parent Company represents sale of sand and gravel, hauling of material, sale of fuel and repairs and maintenance of equipment.

Payables to the Parent Company represents amounts due for management fees charged and other miscellaneous expenses paid for by the Parent Company.

Payables to other wholly-owned subsidiaries of the Parent Company represents sand and gravel purchases by the company.

Following is a schedule of receivables/payables with related entities:

	<u>Receivables</u>	<u>Payables</u>
Parent Company	\$ 48,010	\$ 82,848
Other wholly-owned subsidiaries of the Parent Company	<u>300,695</u>	<u>30,056</u>
	<u>\$348,705</u>	<u>\$112,904</u>

The amounts receivable/payable are non-interest bearing and are expected to be collected/paid in 1987.

3. Income Taxes

Provision for income taxes is made based on earnings reported in the financial statements for the amount of income taxes payable currently and in the future (deferred income taxes). Deferred taxes arise from computing depreciation using accelerated methods for tax purposes. Deferred taxes attributable to the amounts attributable to accelerated depreciation are shown as long-term.

The (provision) benefit for income taxes consists of the following:

Current income taxes:	
Federal provision	\$   —
State provision	<u>—</u>
Current income tax expense	--
Deferred tax benefit	<u>44,650</u>
(Provision) benefit for income taxes	<u>\$ 44,650</u>

Harper Excavating, Inc.  
Notes to Financial Statements - continued

The current year loss of the Company will be made available as an offset against other taxable income by filing a consolidated tax return with its Parent Company and other wholly-owned subsidiaries for the current year.

4. Long-Term Debt

Long-term debt obligations at February 28, 1987 consist of the following:

9.5% and 10.25% notes payable, due in monthly installments of \$605 and \$865 including interest due November 1990 and March 1987 respectively, secured by equipment.	\$ 44,800
Prime + 1% note payable, due in monthly installments of \$5,291 including interest due May 1988, secured by equipment.	<u>68,704</u>
Total long-term debt	113,504
Less current portion of long-term debt	<u>72,031</u>
Total long-term debt excluding current portion	<u>\$ 41,473</u>

Aggregate maturities of long-term debt in each of the next five years are as follows: 1988 - \$72,031, 1989 - \$25,628, 1990 - \$9,179, 1991 - \$6,666, 1992 - \$ -- .

Equipment pledged as collateral for the above existing debt obligations:

Construction equipment	\$268,995
Less: Accumulated depreciation	<u>110,774</u>
Book value of pledged equipment	<u>\$158,221</u>

5. Related Party Transactions

The Company has entered into an agreement with a wholly-owned subsidiary of its Parent Company to sell sand and gravel and provide the hauling of material to job sites. Sand and gravel sales and material hauling income of \$3,430,932 are included in the financial statements as part of contracting income for the period ended February 28, 1987. The Company shows a receivable from this company in the amount of \$143,474 as of February 28, 1987 (Note 2) related to this income.

Harper Excavating, Inc.

Notes to Financial Statements - continued

The Company maintains and repairs equipment for wholly-owned subsidiaries of its Parent Company. Maintenance and repairs of \$1,149,435 are included in the financial statements as part of contracting income for the period ended February 28, 1987. The Company shows a receivable from these companies in the amount of \$137,000 as of February 28, 1987 (Note 2) related to these maintenance and repairs.

The Company also rents trucks owned by it to these companies. Rental income for these trucks amounted to \$15,682 and are included in the financial statements as rental income for the period ended February 28, 1987. The Company shows a receivable from these companies in the amount of \$15,682 as of February 28, 1987 (Note 2) related to these truck rentals.

The Company has also entered into an agreement with its Parent Company, whereby it pays a monthly management fee for record keeping and management services provided by the Parent Company. Management fees, pursuant to this agreement, of \$318,250 are included in the financial statements for the period ended February 28, 1987. The Company shows a payable to its Parent Company in the amount of \$36,000 as of February 28, 1987 (Note 2) related to management fees.

The Company also purchases sand and gravel from a wholly-owned subsidiary of its Parent Company. Sand and gravel purchases of \$1,049,979 are included in the financial statements as part of direct costs for the period ended February 28, 1987. The Company shows a payable to this company in the amount of \$30,056 as of February 28, 1987 (Note 2) related to sand and gravel purchases.

6. Employee Benefit Plans

The Company has a contributory profit sharing and retirement plan for the benefit of all employees who have completed one year of service (1,000 hours) and attained the age of 25. The plan provides for normal retirement on the anniversary of the plan nearest the 65th birthday and participants become fully vested after 10 years of services. The Company may make contributions to the plan out of its net or cumulative earnings. At February 28, 1987 the Company accrued no contributions to the plan.

7. Commitment

The Company entered into an agreement on June 12, 1986 with its Parent Company to pay \$1,000,000 due in annual installments of \$100,000 together with accrued interest on February 25 until paid. The interest rate is based on the applicable federal rate for ten year loans that is in effect in the month of January in the year preceding the year each payment is due. Cash payments on the commitment will be made in the form of dividends.

The Parent Company has a secured interest in all personal property, accounts receivable and equipment of the Company.

HARPER EXCAVATING, INC.

SUPPLEMENTARY INFORMATION

HARPER EXCAVATING, INC.  
GENERAL AND ADMINISTRATIVE EXPENSES  
For the Period From May 10, 1986 (Inception) Through February 28, 1987

Advertising	\$ 257
Bank charges	2,815
Insurance - general	131,430
Insurance - health	10,576
Management fees	318,250
Office supplies	1,061
Property taxes	10,946
Taxes, licenses and permits	43,344
Miscellaneous	<u>15,823</u>

GENERAL AND ADMINISTRATIVE EXPENSES	<u><u>\$534,502</u></u>
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**RESPONDENT'S EXHIBIT 19**

HARPER CONTRACTING, INC.

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FINANCIAL STATEMENTS

WITH

REPORT OF CERTIFIED PUBLIC ACCOUNTANTS

FOR THE PERIOD FROM MAY 10, 1986 (INCEPTION) THROUGH FEBRUARY 28, 1987

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Sorensen, Chiodo & May  
Certified Public Accountants

HARPER CONTRACTING, INC.

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**Sorensen, Chiodo & May**  
Certified Public Accountants

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A Professional Corporation  
Other Office:  
Denver, Colorado

**REPORT OF CERTIFIED PUBLIC ACCOUNTANTS**

Board of Directors and Stockholders  
Harper Contracting, Inc.

We have examined the statement of financial position of Harper Contracting, Inc., as of February 28, 1987 and the related statements of (loss) and retained earnings (deficit), and changes in financial position for the period from May 10, 1986 (inception) through February 28, 1987. Our examination was made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the financial statements referred to above present fairly the financial position of Harper Contracting, Inc., as of February 28, 1987 and the results of its operations and changes in its financial position for the period from May 10, 1986 (inception) through February 28, 1987, in conformity with generally accepted accounting principles.

Our examination was made primarily for the purpose of forming an opinion on the basic financial statements taken as a whole. The accompanying supplementary financial information in the accompanying schedules 1 & 2 is not considered necessary for a fair presentation of the basic financial statements and is presented for analytical purposes only. The supplementary information was derived from the accounting records tested by us as part of our examination of the aforementioned financial statements and, in our opinion, is fairly stated in all material respects in relation to the basic financial statements taken as a whole.

*Sorensen, Chiodo & May*

May 8, 1987

HARPER CONTRACTING, INC.

STATEMENT OF FINANCIAL POSITION

February 28, 1987

ASSETS

Current Assets:

Cash	\$ 38,683
Accounts receivable (net of allowance for doubtful accounts of \$100,000)	999,737
Costs and estimated earnings in excess of billings on uncompleted contracts	150,616
Receivables from related entities	<u>125,818</u>
Total current assets	<u>1,314,854</u>

Building and Equipment:

Building	10,062
Construction equipment	<u>3,049,702</u>
	3,059,764

Less: Accumulated depreciation 2,147,757

Net building and equipment 912,007

Total Assets \$2,226,861

(continued)

STATEMENT OF FINANCIAL POSITION

LIABILITIES AND STOCKHOLDERS' EQUITY

Current Liabilities:

Accounts payable	\$ 118,419
Accrued expenses	16,370
Billings in excess of costs and estimated earnings on uncompleted contracts	138,311
Payables to related entities	342,678
Deferred income taxes - current	220,300
Current portion of long-term debt	<u>347,036</u>

Total current liabilities	<u>1,183,114</u>
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Note payable-related entity	708,000
Long-term debt, excluding current portion	264,514
Deferred income taxes	68,200
Commitment	<u>—</u>
Total liabilities	<u>2,223,828</u>

Stockholders' Equity:

Common stock; no par, stated value \$100, authorized 50,000 shares, issued and outstanding 1,000 shares	100,000
Additional paid-in capital	2,221
Retained earnings (deficit)	<u>(99,188)</u>
Total stockholders' equity	<u>3,033</u>

Total Liabilities and Stockholders' Equity	<u><u>\$2,226,861</u></u>
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The accompanying notes are an integral  
part of the financial statements.

HARPER CONTRACTING, INC.

STATEMENTS OF (LOSS) AND RETAINED EARNINGS (DEFICIT)

For the Period From May 10, 1986 (Inception) Through February 28, 1987

INCOME:	
Contracting income	\$8,466,577
Direct costs	<u>7,438,087</u>
Gross profit	<u>1,028,490</u>
EXPENSES:	
General and administrative	1,060,545
Interest	<u>67,131</u>
	<u>1,127,676</u>
Net operating (loss)	(99,186)
OTHER INCOME:	
Interest income	<u>7,298</u>
(Loss) before provision for income taxes	(91,888)
Income tax (expense)	<u>(7,300)</u>
Net (Loss)	<u><u>\$ (99,188)</u></u>
Retained earnings, beginning of period	\$ -0-
Add: Net (loss)	<u>(99,188)</u>
Retained earnings (deficit), end of period	<u><u>\$ (99,188)</u></u>

The accompanying notes are an integral  
part of the financial statements.

HARPER CONTRACTING, INC.

STATEMENT OF CHANGES IN FINANCIAL POSITION

For the Period From May'10, 1986 (Inception) Through February 28, 1987

Funds Provided:

From operations:

Net (loss)	\$ (99,188)
Items which do not use (provide)	
working capital:	
Depreciation	303,700
Deferred income taxes	36,500
Working capital provided by operations	<u>241,012</u>

From other sources:

Note payable-related entity	708,000
Long-term debt borrowings	203,977
Issuance of common stock	102,221
Total funds provided	<u>1,255,210</u>

Funds Applied:

Acquisition of building and equipment	153,754
Current maturities and repayment of	
long-term debt	297,743
Long-term assets less long-term liabilities	
spun off from Harper Excavating, Inc.	671,973
Total funds applied	<u>1,123,470</u>

Increase in Working Capital \$ 131,740

Changes in Components of Working Capital:

Increase (decrease) in current assets:

Cash	\$ 38,683
Accounts receivable	999,737
Costs and estimated earnings in excess of	
billings on uncompleted contracts	150,616
Receivables from related entities	125,818
	<u>1,314,854</u>

(Increase) decrease in current liabilities:

Accounts payable	118,419
Accrued expenses	16,370
Billings in excess of costs and estimated	
earnings on uncompleted contracts	138,311
Payables to related entities	342,678
Deferred income taxes - current	220,300
Current portion of long-term debt	347,036
	<u>1,183,114</u>

Increase in Working Capital \$ 131,740

HARPER CONTRACTING, INC.

NOTES TO FINANCIAL STATEMENTS

1. Summary of Significant Accounting Policies

a. Business Information

On May 10, 1986, Harper Excavating, Inc. performed a tax free reorganization pursuant to section 351 of the Internal Revenue Code. As part of this reorganization, three new corporations were formed.

At the close of business on May 9, 1986 Harper Excavating, Inc. transferred at book value all fixed assets and liabilities relating to the construction operations to Harper Contracting, Inc., in exchange for 1,000 shares of Harper Contracting, Inc. no par common stock. Harper Excavating, Inc. then changed its corporate name to Harper Investments, Inc. and Harper Investments, Inc. changed its corporate name to Harper Excavating, Inc. The Company was organized to carry on excavation operations.

b. Building, Equipment and Depreciation

Building and equipment are stated at cost. Depreciation is provided on the straight-line method on the estimated useful service lives of the various classes of assets. The building is depreciated over 15 years and equipment over a 3 to 8 year period. Major replacements which extend the useful lives of equipment are capitalized and depreciated over the remaining useful life. Normal maintenance and repair items are charged to costs and expenses as incurred.

The Company uses accelerated methods of depreciation for income tax purposes. These methods provide more depreciation expense in the early years than in the later years of the life of the asset.

Upon the retirement or disposal of equipment, the costs and related accumulated depreciation amounts are eliminated and any gain or loss is included in operations in the year of disposition.

c. Accounting for Construction Contracts

The Company records revenues on construction contracts on the percentage-of-completion method. Contract revenues are accrued based upon the ratio of incurred costs to date to total estimated contract costs. Changes to total estimated contract costs and losses, if any, are recognized in the period they are determined. Revenues recognized in excess of amounts billed are classified as current assets. Amounts billed in excess of revenues recognized to date are classified as current liabilities. It is anticipated that substantially all contract work in progress at February 28, 1987 will be billed and collected in the next fiscal year.

Harper Contracting, Inc.

Notes to Financial Statements - continued

The Company reports revenues on construction contracts on the percentage-of-completion capitalized-cost method for income tax purposes. Under this method, 40 percent of the items with respect to long term contracts are taken into account under the percentage-of-completion method and 60 percent of the items are taken into account under the completed-contract method.

2. Receivables/Payables with Related Entities

Receivables from the Parent Company at February 28, 1987, represents receivables for cash deposits made into the Parent Company cash accounts.

Payables to the Parent Company represents amounts due for management fees charged and other miscellaneous expenses paid for by the Parent Company.

Payables to other wholly-owned subsidiaries of the Parent Company represents rental charged for the use of trucks, fuel, repairs and maintenance, sand and gravel purchases and the hauling of material.

Following is a schedule of the receivables/payables with related entities:

	<u>Receivables</u>	<u>Payables</u>
Parent Company	\$125,818	\$ 86,795
Other wholly-owned subsidiaries of the Parent Company	<u>—</u>	<u>255,883</u>
	<u>\$125,818</u>	<u>\$ 342,678</u>

The amounts receivable/payable are non interest bearing and are expected to be collected/paid in 1987.

3. Income Taxes

Provision for income taxes is made based on earnings reported in the financial statements for the amount of income taxes payable currently and in the future (deferred income taxes). Deferred taxes arise from computing depreciation using accelerated methods and the percentage-of-completion capitalized-cost method of recognizing revenue on construction contracts for tax purposes. Deferred taxes attributable to the percentage-of-completion capitalized-cost method of accounting are recorded as a current liability and amounts attributable to accelerated depreciation are shown as long-term.

Harper Contracting, Inc.  
Notes to Financial Statements - continued

The (provision) benefit for income taxes consists of the following:

Current income taxes:	
Federal provision	\$     --
State provision	--
	<hr/>
Current income tax (expense)	--
 Deferred tax (expense)	 <hr/>
	 (7,300)
 (Provision) benefit for income taxes	  \$ (7,300)
	<hr/>

The current year loss of the Company will be made available as an offset against other taxable income by filing a consolidated tax return with its Parent Company and other wholly-owned subsidiaries for the current year.

4. Note Payable - Related Entity

The Company entered into a promissory note agreement on June 12, 1986 with its Parent Company for funds advanced it at the inception of the Company. The note is a continuously adjustable revolving loan with the maximum amount of borrowings not to exceed \$708,000. The interest rate is based on the applicable federal rate for ten year loans that is in effect in the month of January in the year preceding the year each payment is due.

The unpaid principal balance at February 28, 1987 is \$708,000 and is due June, 1996. The note is secured by the Company's accounts receivable.

5. Long-Term Debt

Long-term debt obligations at February 28, 1987 consist of the following:

10% - 13.8% notes payable, due in monthly installments of \$15,377 including interest due at various times through November 1990, secured by equipment.	\$178,588
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Prime + 1% note, due in monthly installments of \$2,646 including interest due May 1988, secured by equipment.	34,351
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Prime + 1% note, due in monthly installments of \$10,168 including interest due July 1989, secured by equipment.	245,629
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Harper Contracting, Inc.  
Notes to Financial Statements - continued

12.75% note, due in monthly installments of \$6,853 including interest due March 1988, secured by equipment.	76,842
Prime + .9% note, due in monthly installments of \$2,820 plus interest due July 1989, secured by equipment.	<u>76,140</u>
Total long-term debt	611,550
Less current portion of long-term debt	<u>347,036</u>
Total long-term debt excluding current portion	<u>\$ 264,514</u>

Aggregate maturities of long-term debt in each of the next five years are as follows: 1988 - \$347,035, 1989 - \$166,682, 1990 - \$ 77,652, 1991 - \$20,181, 1992 - \$ — .

Equipment pledged as collateral for the above existing debt obligations:

Construction equipment	\$ 1,548,635
Less: Accumulated depreciation	<u>726,458</u>
Book value of pledged equipment	<u>\$ 822,177</u>

Of the above book value of pledged equipment, \$88,183 is also pledged as collateral for debt obligations of related companies.

6. Related Party Transactions

The Company has entered into an agreement with a wholly-owned subsidiary of its Parent Company to purchase sand and gravel and provide the hauling of materials to job sites. Sand and gravel purchases and material hauling expenses, pursuant to this agreement, of \$3,430,932 are included in the financial statements as part of direct costs for the period ended February 28, 1987. The Company shows a payable to this company in the amount of \$143,474 as of February 28, 1987 (Note 2) related to sand and gravel purchases and the hauling of material.

The Company has its equipment maintained and repaired by a wholly-owned subsidiary of its Parent Company. Maintenance and repairs of \$770,629 are included in the financial statements as part of direct costs for the period ended February 28, 1987. The Company shows a payable to this company in the amount of \$93,000 as of February 28, 1987 (Note 2) related to repairs and maintenance.

Harper Contracting, Inc.  
Notes to Financial Statements - continued

The Company also uses trucks owned by a wholly-owned subsidiary of its Parent Company. Rental expense for these trucks amounted to \$9,777 and are included in the financial statements as part of direct costs for the period ended February 28, 1987. The Company shows a payable to this company in the amount of \$9,777 as of February 28, 1987 (Note 2) related to the truck rentals.

The Company has also entered into an agreement with its Parent Company, whereby it pays a monthly management fee for record keeping and management services provided by the Parent Company. Management fees, pursuant to this agreement, of \$747,000 are included in the financial statements for the period ended February 28, 1987. The Company shows a payable to its Parent Company in the amount of \$75,000 as of February 28, 1987 (Note 2) related to management fees.

7. Employee Benefit Plans

The Company has a contributory profit sharing and retirement plan for the benefit of all employees who have completed one year of service (1,000 hours) and attained the age of 25. The plan provides for normal retirement on the anniversary of the plan nearest the 65th birthday and participants become fully vested after 10 years of services. The Company may make contributions to the plan out of its net or cumulative earnings. At February 28, 1987 the Company accrued no contributions to the plan.

8. Commitment

The Company entered into an agreement on June 12, 1986 with its Parent Company to pay \$800,000 due in annual installment of \$80,000 together with accrued interest on February 25 until paid. The interest rate is based on the applicable federal rate for ten year loans that is in effect in the month of January in the year preceding the year each payment is due. Cash payments on the commitment will be made in the form of dividends.

The Parent Company has a secured interest in all personal property, accounts receivable and equipment of the Company.

HARPER CONTRACTING, INC.

SUPPLEMENTARY INFORMATION

HARPER CONTRACTING, INC.  
GENERAL AND ADMINISTRATIVE EXPENSES,  
For the Period From May, 10, 1986 (Inception) Through February 28, 1987

Advertising	\$ 40
Bad debts	108,589
Bank charges	154
Insurance-general	164,743
Insurance-health	22,417
Management fees	747,000
Office supplies	1,609
Taxes, licenses and permits	6,393
Telephone and utilities	38
Miscellaneous	<u>9,562</u>
GENERAL AND ADMINISTRATIVE EXPENSES	<u><u>\$1,060,545</u></u>

HARTER CONTRACTING, INC.

SUMMARY OF UNCOMPLETED CONTRACTS

FEBRUARY 28, 1987

Job No.	Contract Amount	Costs to Date	Estimated Costs To Complete	Total Estimated Job Costs	Estimated Gross Profit (Loss)	Per Cent Complete	Earned Profit to Date	Earned Billings to Date	Actual Billings to Date	Costs and Estimated Earnings in Excess of Billings	Billings in Excess of Costs and Estimated Earnings
670	\$184,622	\$141,031	\$12,000	\$153,031	\$31,591	92%	\$29,113	\$170,144	\$175,240	\$	\$5,096
679	292,987	168,674	16,000	184,674	108,313	91%	98,928	267,602	265,085	2,517	—
682	616,525	410,207	22,541	432,748	183,777	95%	174,204	584,411	568,402	16,009	—
739	87,999	57,438	6,072	63,510	24,429	90%	22,093	79,531	83,600	—	4,069
742	17,741	22,778	1,897	24,675	(6,934)	92%	(6,401)	16,377	15,103	1,274	—
745	77,603	63,428	3,000	66,428	11,175	95%	10,670	74,098	75,952	—	1,854
751	183,373	140,034	23,222	163,260	20,113	86%	17,252	157,290	134,431	22,859	—
755	98,515	44,167	57,000	101,167	(2,652)	44%	(1,158)	43,009	47,307	—	4,298
760	75,142	30,330	12,000	42,330	32,752	72%	23,480	53,870	67,628	—	13,758
761	82,230	28,329	31,122	59,451	22,779	48%	10,854	39,183	43,781	—	4,598
762	56,427	6,160	32,655	38,815	17,612	16%	2,795	8,955	11,285	—	2,330
763	107,038	50,127	54,453	104,580	2,458	48%	1,178	51,305	63,151	—	11,846
767	23,000	8,155	5,000	13,155	4,072	38%	1,555	14,258	23,000	—	—
768	96,300	35,228	57,000	92,228	58,872	82%	48,248	36,783	30,565	6,218	—
773	141,995	68,123	15,000	83,123	4,072	96%	1,555	116,371	89,163	27,208	—
774	131,749	73,388	3,301	76,689	55,060	96%	52,689	126,077	121,238	4,839	—
776	6,400	3,137	700	3,837	2,563	82%	2,095	5,222	1,994	3,228	—
777	49,729	36,627	25,000	61,627	(11,913)	59%	(7,075)	29,551	19,895	9,656	—
779	7,300	1,689	2,000	3,709	3,591	46%	1,635	3,324	1,825	1,499	—
780	256,544	49,304	125,672	174,976	81,568	28%	22,983	72,287	49,610	22,677	—
781	175,543	72,345	86,796	159,141	16,402	45%	7,456	79,801	159,690	—	79,889
783	116,897	7,412	64,836	72,248	44,649	10%	4,580	11,992	—	11,992	—
784	6,700	2,634	1,046	3,680	3,020	72%	2,161	4,795	6,626	—	1,831
785	884,233	5,243	834,778	840,021	44,212	1%	275	5,518	—	5,518	—
786	185,123	14,499	163,219	177,718	7,405	8%	604	15,103	—	15,103	—
	<u>\$ 3,961,665</u>	<u>\$ 1,540,551</u>	<u>\$1,656,352</u>	<u>\$ 3,196,903</u>	<u>\$ 764,762</u>		<u>\$ 526,316</u>	<u>\$2,056,867</u>	<u>\$2,054,562</u>	<u>\$ 150,616</u>	<u>\$ 138,311</u>

## **APPENDIX 4**

HALES SAND & GRAVEL, INC. v. AUDITING DIVISION  
OF THE UTAH STATE TAX COMMISSION OF UTAH

Cite as  
200 Utah Adv. Rep. 3

IN THE SUPREME COURT  
OF THE STATE OF UTAH

HALES SAND & GRAVEL, INC.,  
Petitioner,

v.  
AUDIT DIVISION OF THE STATE TAX  
COMMISSION OF UTAH,  
Respondent.

No. 910008

FILED: November 12, 1992

Original Proceeding in this Court

ATTORNEYS:

David Nuffer, Lyle R. Drake, E. Scott  
Awerkamp, St. George, for Hales Sand and  
Gravel

R. Paul Van Dam, Brian L. Tarbet, Salt Lake  
City, for State Tax Commission

This opinion is subject to revision before  
publication in the Pacific Reporter.

ZIMMERMAN, Justice:

This is a proceeding to review a sales tax deficiency assessment by the Utah State Tax Commission. Hales Sand and Gravel, Inc., petitions for review of the Commission's order requiring Hales to pay sales tax on transportation costs incurred in the delivery of building materials to its customers. We affirm the Commission's deficiency assessment but reverse the negligence penalty it assessed Hales for nonpayment.

Because a party seeking review of an order of an administrative agency must demonstrate that the agency's factual determinations are not supported by substantial evidence, we state the facts and all legitimate inferences drawn therefrom in the light most favorable to the agency's findings. *Zissi v. State Tax Comm'n*, 198 Utah Adv. Rep. 15, 15-16 (Oct. 27, 1992); *First Nat'l Bank of Boston v. County Bd. of Equalization of Salt Lake County*, 799 P.2d 1163, 1165 (Utah 1990). We state the facts in this case accordingly.

Hales is a Utah corporation with its principal office in Redmond, Utah. Its primary business involves retail sales of sand, gravel, asphalt, and concrete. Purchasers may pick these materials up themselves; however, during the period at issue, approximately 95 percent of Hales' gravel purchasers and 70 percent of its asphalt purchasers had Hales deliver their orders. When a customer elected to have the materials delivered, Hales either delivered the materials in its own trucks or arranged for transportation by a common carrier and billed the customer for

the carrier's charges. If Hales delivered the material itself, its transportation charges were commensurate with those a common carrier would have charged.

Before March 1, 1987, Hales collected and remitted sales tax on the total charge for materials and transportation. After March 1, 1987, Hales recorded and invoiced material and transportation charges separately, collecting and remitting tax only on charges for materials, not on transportation charges. Hales employed this bifurcated method of record keeping and invoicing for all its sales, including sales to JTN Construction, Inc., a Utah corporation that three of Hales' four shareholders established to perform federal contracts.<sup>1</sup> Nor did Hales collect or remit sales tax for the "small-batch charges" it added to concrete batches that were too small to absorb the costs of delivery.

After an audit of Hales' records for the period of January of 1985 to December of 1987, the Auditing Division of the Utah State Tax Commission determined that under section 59-12-103(1)(a) and (b) of the Code, Hales should have collected and remitted sales taxes on its transportation charges after March 1, 1987, including the charges for small batches and for delivery to JTN. *See* Utah Code Ann. §59-12-103(1)(a), (b). The total deficiency assessed was \$128,792.49, which included a negligence penalty of \$9,712.82. *See id.* §§59-1-401(3)(a), -12-110(5).

Hales contested the assessment, claiming that its transportation charges were exempt from sales tax. The Commission rejected Hales' claim, reasoning as follows: First, the Commission decided that Hales did not qualify for a tax exemption under section 59-12-104, which exempts "intrastate movements of freight and express or street railway fares" from Utah's sales and use taxes. *See id.* §59-12-104(18) (1987) (amended 1991) (current version at §59-12-104(17)). The Commission interpreted the provision as applying only to common carriers. Second, the Commission decided that under its rule 865-19-71S, Hales did not pass title to its gravel, sand, concrete, and asphalt until it delivered the materials to its customers. This rule provides in relevant part that unless otherwise agreed, title passes on delivery when a sales contract requires delivery at a particular place. *See* Utah Admin. R. 865-19-71S. The Commission concluded that since Hales completed its performance only upon delivery, its transportation costs should be considered part of the price of the sale and the entire transaction should be subject to sales tax. *See* Utah Code Ann. §59-12-103(1)(a), (b). Because Hales had collected sales tax only on the purchase price of its materials, the Commission assessed Hales sales tax for the transportation costs.

The Commission also considered two related matters. First, Hales claimed that it should not have had to collect or remit sales tax for the small-batch charges it added to concrete

orders that were too small to absorb delivery costs. The Commission disagreed, finding that the small-batch charges were essentially nothing more than transportation charges, which therefore were subject to sales tax. Second, Hales argued that the Commission should credit it for taxes it had paid on sales to JTN that were made before March 1, 1987, because the Utah Department of Transportation had determined that Hales and JTN were the same entity for the purposes of federal labor law. Again the Commission disagreed, finding that Hales and JTN were separate legal entities and that their transactions were subject to sales tax. In sum, the Commission assessed Hales \$41,739.95 for total sales tax due and \$9,712 as a negligence penalty.<sup>2</sup>

Before our court, Hales challenges all aspects of the Commission's order. See *id.* §78-2-2(3)(e)(ii). Before examining Hales' claims, we note the applicable standards of review. This review presents questions of both law and fact. As provided by the Utah Administrative Procedures Act ("UAPA"), we grant deference to an agency's factual findings and will overturn those findings only if the petitioner marshals the facts and shows that in light of the record as a whole, the agency's findings are not supported by substantial evidence. See *id.* §63-46b-16(4)(g); *First Nat'l Bank of Boston*, 799 P.2d at 1165. On the other hand, we grant no such deference to the agency's interpretation or application of law, which we review for correctness.<sup>3</sup> Utah Code Ann. §63-46b-16(4)(d); *Morton Int'l, Inc. v. Auditing Div.*, 814 P.2d 581, 588 (Utah 1991); *Savage Indus. v. Utah State Tax Comm'n*, 811 P.2d 664, 669-70 (Utah 1991). With these standards in mind, we turn to the merits of this case.

We begin with Hales' first contention--that the Commission erred when it limited the section 59-12-104(18) tax exemption to common carriers. That section reads as follows:

The following sales and uses are exempt from the taxes imposed by this chapter:

...;

(18) intrastate movements of freight and express or street railway fares[.]

Utah Code Ann. §59-12-104(18). Hales argues that the provision's plain language exempting intrastate "movements of freight" is not limited to common carriers but should extend to all transportation costs. We disagree.

In construing a statute, we view it as a comprehensive whole, not as an unrelated collection of provisions. See *Silver v. Auditing Div.*, 820 P.2d 912, 914 (Utah 1991); *Amax Magnesium Corp. v. Utah State Tax Comm'n*, 796 P.2d 1256, 1258 (Utah 1990); *Peay v. Board of Ed. of Provo City Schools*, 14 Utah 2d 63, 66, 377 P.2d 490, 492 (Utah 1962). Applying this principle to the statute before us, we look first to section 59-12-103, which

amounts paid to "common carriers" for "all" transportation. Utah Code Ann. §59-12-103(1)(b). While the section 59-12-104(18) exemption for intrastate transportation of freight does not mention common carriers, it is a logical inference that the legislature imposed the general tax on common carriers in section 59-12-103(1)(b) and then sought to limit its application to *common carriers* in section 59-12-104(18).

Other provisions in the statutes have a similar structure of a general imposition of tax followed by specific limitations. For example, although section 59-12-103 taxes "meals sold," *id.* §59-12-103(1)(e), section 59-12-104 exempts airline food and certain vending machine food sales from the "meals sold" tax, *id.* §59-12-104(3), (4). This pattern supports the inference that the legislature intended section 59-12-104(18) to do nothing more than limit the tax specifically imposed on common carriers.

Although we generally construe taxing statutes in favor of the taxpayer and against the taxing authority, we construe statutes providing tax exemptions strictly against the taxpayer. *Parson Asphalt Prods., Inc. v. Utah State Tax Comm'n*, 617 P.2d 397, 398 (Utah 1980). We therefore construe section 59-12-104(18) against Hales. Because the construction that limits the exemption to common carriers finds logical support in the structure of the statute, we reject Hales' broader gloss. We hold that section 59-12-104(18)'s sales tax exemption is limited to common carriers. Utah Code Ann. §59-12-104(18). Because Hales is not a common carrier, it is not entitled to the benefits of the exemption.

We next turn to Hales' contention that even without the exemption, its transportation charges were not subject to sales tax. The provision at issue is section 59-12-103(1)(a), which reads as follows:

(1) There is levied a tax on the purchaser for the amount paid or charged for the following:

(a) retail sales of tangible personal property made within the state[.]

*Id.* §59-12-103(1)(a). Hales claims that its asphalt, sand, concrete, and gravel sales were completed at its pit or plant and that therefore any transportation charges accrued after the sale were complete. In other words, it argues that title to the merchandise passed at the point of sale instead of at delivery and that it had no obligation to collect and remit sales tax on the transportation charges.

Hales' argument breaks into two subsidiary issues. First, what is the proper legal standard for determining passage of title? Second, applying that standard, is the Commission finding that Hales did not pass title until delivery correct? We take each question in turn.

We begin with the common ground. Because Hales and the Commission agree that passage of title is the moment upon which the transaction is to be valued for the purposes of the tax. T

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.<sup>4</sup> *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.*

While Hales and the Commission agree that passage of title determines the taxability of the transportation charges, they differ as to who has the burden of proving the point of passage. Each contends that *Whitehill* requires the other to prove when title passed. The Commission argues that title passes to the buyer on delivery unless the seller produces evidence to the contrary. Hales insists that *Whitehill* requires the Commission to prove that title passed on delivery by producing evidence in support of its conclusion. Because the Commission did not produce such evidence here, Hales argues, this court should presume that title passed at the point of shipment. We disagree with Hales for two reasons. First, we are unconvinced that *Whitehill* stands for the proposition Hales asserts. Second, even if *Whitehill* did establish a rebuttable presumption that title passes at shipment, Utah's adoption of the Uniform Commercial Code overruled its holding and established a new test for passage of title under which it is clear that Hales passed title to its merchandise at delivery, not before. We discuss these points in turn.

We first address Hales' interpretation of *Whitehill*. In *Whitehill*, the plaintiff showed that in some of the transactions included in a deficiency tax assessment, the parties had contracted explicitly to pass title at point of shipment, before the materials were transported to the customer. 106 Utah at 474-75, 150 P.2d at 372. The court concluded that while the Commission correctly assessed sales tax deficiencies for two transactions where the parties had agreed that title would pass at delivery, *id.* at 475, 150 P.2d at 372, in the majority of the transactions, the facts were not so clear cut, *id.* at 475, 150 P.2d at 372-73. The court set aside the assessment and remanded for a rehearing on the question of when title passed in those ambiguous transactions. In so doing, it held that the Commission could not infer that title had passed on delivery from the mere fact that invoices listed the pit price plus delivery charge as a single item, with the sales tax applied only to the pit price for the sand or gravel. *Id.* at 475, 150 P.2d at 372.

Notwithstanding this holding, it is important to note that for some of its transactions, the taxpayer in *Whitehill* had adduced evidence of an explicit agreement to pass title at the point of shipment. Consequently, the *Whitehill* court may not have meant that in the absence of *any* evidence as to the parties' intent, it would infer that title passed on shipment. Instead, its refusal to infer that title had passed on delivery may stem solely from the fact that *Whitehill* had produced some evidence rebutting that presumption. We reject Hales' contention that *Whitehill* prohibits an inference that title passes at shipment.

Second, even if *Whitehill* established a rebuttable presumption that title passes on shipment, which we do not think it did, Utah's adoption of the Uniform Commercial Code (the "UCC") overruled *Whitehill's* holding by creating a new test for determining passage of title. Section 70A-2-401(2) provides:

Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading

(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) if the contract requires delivery at destination, title passes on tender there.

Utah Code Ann. §70A-2-401(2). This section establishes a new test in cases where the parties have not "explicitly agreed" when title shall pass. This test hinges the passage of title on whether the contract requires delivery at destination. *Cf. O'Kelley-Eccles Co. v. State*, 324 P.2d 683, 686 (Cal. Ct. App. 1958). Because a purchase agreement will always either specify or not specify delivery at destination, the *Whitehill* presumption is irrelevant. In adopting the UCC, the legislature declared that when a contract requires delivery at destination, title passes at destination unless the parties explicitly agree otherwise. *See Utah Code Ann. §70A-2-401(2).* This is the test applicable to this case. This is also the test, codified in the Commission's rules, that the Commission applied in determining that Hales did not pass title to its merchandise until delivery. *See Utah Admin. R. 865-19-71S(B)(1), (3).*

Having determined that the Commission applied the correct legal test to Hales' case, we next review its finding that Hales did not pass title until delivery. As an initial matter, we note that Hales anticipated our analysis under section 70A-2-401(2) and has argued that its sales contracts did not "require" delivery at

because its customers could elect to collect their orders at the pit or plant. Therefore, it contends, title to its merchandise passed at shipment under section 70A-2-401(2). We disagree. Once a customer elected to have the material delivered rather than picking it up, Hales and the customer had a contract for delivery at destination. See *East Brewton Materials, Inc. v. State Dep't of Revenue*, 233 So. 2d 751, 757 (Ala. Civ. App. 1970); *TOBI Transp., Inc. v. State Bd. of Equalization*, 163 Cal. Rptr. 778, 780 (Ct. App. 1980); *Santa Clara Sand & Gravel Co. v. State Bd. of Equalization*, 37 Cal. Rptr. 506, 508-09 (Ct. App. 1964); *O'Kelley-Eccles Co.*, 324 P.2d at 686. Absent an explicit agreement to the contrary, title to Hales' materials passed when Hales fulfilled its contract and made delivery. See *Santa Clara Sand & Gravel Co.*, 37 Cal. Rptr. at 508-09, 511.

As an alternative challenge to the Commission's findings, Hales argues that the transactions in question satisfy the first line of section 70A-2-401(2)--"unless otherwise explicitly provided"--because the purchase orders show an agreement between Hales and its customers to pass title at the point of shipment. As evidence, Hales submitted several purchase orders and invoices showing separate entries for costs of materials and transportation. These separate entries do not prove a bilateral agreement to pass title at shipment instead of delivery, as required by section 70A-2-401(2). Under the UAPA, Hales has the burden of demonstrating that no substantial evidence supports the Commission's finding that no explicit bilateral agreement existed on the subject of title transfer. See Utah Code Ann. §63-46b-16(4)(g); *First Nat'l Bank of Boston*, 799 P.2d at 1165. The invoices and purchase orders it submitted may be firm evidence of Hales' own 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. Because unilateral subjective intent does not prove explicit agreement between the parties to pass title at point of shipment, see Utah Code Ann. §70A-2-401(2); *O'Kelley-Eccles Co.*, 324 P.2d at 686, Hales has failed to marshal the facts to show that the Commission's finding is not supported by substantial evidence. See *First Nat'l Bank of Boston*, 799 P.2d at 1165. Consequently, we affirm the Commission's finding that Hales did not pass title until delivery. Because it did not pass title until delivery, Hales was obligated to collect and remit sales tax on its transportation charges.

In its brief, Hales points to several foreign cases, arguing that other jurisdictions have held that title passes at or before shipment. Hales is correct as to the holdings of these cases; however, they have been rendered in circumstances far different from those in the present case. The court in *Revenue Cabinet v. Corum & Edwards, Inc.*, 673 S.W.2d 736 (Ky.

that title passed before delivery on the unique nature of ready-mix concrete, which spoils if the customer rejects delivery. Because of ready-mix concrete's short lifespan, industry custom and practice recognize that title passes when the ingredients are mixed. *Id.* at 739. The court explicitly noted that it was basing its determination on the custom of the industry, not on Kentucky's version of section 70A-2-401(2), *id.*, thereby implying that but for the custom of the particular industry, title would have passed at delivery under Kentucky's counterpart to section 70A-2-401(2). This implication bolsters the Commission's position in this case because in *Revenue Cabinet*, as here, the sales tax statute did not impose a test for passage of title, and an administrative rule did impose a test for passage of title. *Id.* at 738-39. Here, Hales makes no claim that the impermanence of its material results in a generally understood, implicit agreement to pass title at some point before delivery. Moreover, our statute requires an explicit agreement on passage of title before the statutory presumption can be rebutted; there is no obvious provision in this statute for an implicit understanding, which the Kentucky court thought sufficient. Consequently, the fact of *Revenue Cabinet* are inapposite and its result is inapplicable to the case at bar.<sup>5</sup> See also *Kurt Concrete, Inc. v. Spradling*, 560 S.W.2d 858, 862 (Mo. 1978) (en banc) (holding that title passes on mixture of ready-mix concrete because of usage of trade).

We hold that the Commission applied the correct legal test in finding that Hales did not pass title until delivery and therefore was required to collect and remit sales taxes on its transportation costs.

We next consider Hales' contention that even if the Commission's order was correct generally, Hales' small-batch charges and sales JTN should not be subject to sales tax and that the Commission should credit Hales for a taxes it paid on sales to JTN before March 1987. We take the small-batch and JTN issues turn.

The small-batch question can be disposed quickly. Hales admits that the small-batch charge is, in essence, a transportation charge added to the price of batches of concrete that are too small to absorb the cost of delivery. Under the passage of title analysis outlined above, therefore, small-batch charges are taxable unless the parties explicitly agree otherwise. Hales produced no evidence of such agreement. The case it cites in support of exempting small-batch charges from taxation is inapposite because it relies on an explicit statutory exemption of freight charges. See *Maryland Redi-Mix, Inc. v. Comptroller of the Treasury*, Sales Tax No. 2 1985 WL 6114 (Md. Tax Aug. 2, 1985). Because Utah has no comparable statute or ruling, *Maryland Redi-Mix* is of no assistance. See *S v. Anderton*, 69 Utah 53, 63, 252 P. 280, (1926).

Similarly unconvincing is Hales' contention that transfers of materials to JTN should not be taxable. Hales paid taxes on sales to JTN before March 1, 1987, but now seeks reimbursement of those payments and a tax exemption for later payments because, it says, the two corporations are the same entity for tax purposes. Hales bases its argument on the fact that the Utah Department of Transportation, as instructed by the United States Department of Labor, found that JTN and Hales should be considered a single construction subcontractor for the purposes of setting the salaries of employees performing federal contracts as required by the Davis-Bacon Act. See 40 U.S.C. §§276a to 276a-5. Because the Utah Department of Transportation considers Hales and JTN to be a single entity for purposes of federal contracts, Hales argues, this court should estop the State of Utah from assessing sales tax against Hales for sales to JTN.

This position lacks support from either state or federal law. First, we have never held that one agency's determination is binding on the deliberations of another agency. In fact, under the UAPA, an agency's determinations are not even binding on that agency itself, so long as the agency justifies its departure from prior practice by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency. See Utah Code Ann. §63-46(b)-16(h)(iii); see also *BJ-Titan Servs. v. State Tax Comm'n*, 183 Utah Adv. Rep. 20, 26 (Mar. 31, 1992). As the Commission points out in its brief, "If an administrative body is not bound by its own prior determinations, that agency certainly should not be constrained by the determinations of a different agency."

Second, federal labor law criteria are simply irrelevant to a determination of state taxability.<sup>6</sup> As this court stated in 1964, "[T]he impact of federal requirements on the operations of plaintiff do not affect Utah's power to tax sales of services and property where title and delivery pass[] within the state." *Ogden Union Ry. & Depot Co. v. State Tax Comm'n*, 16 Utah 2d 23, 28, 395 P.2d 57, 61 (Utah 1964).

Third, the Davis-Bacon Act protects employees, not their employers. "As a basic proposition, it is settled that contractors can claim no legal rights growing solely out of Davis-Bacon Act minimum wage determinations by the Secretary of Labor, for such provisions are not incorporated in the contract for their benefit." *Morrison-Hardeman-Perine-Leavell v. United States*, 392 F.2d 988, 995 (Ct. Cl. 1968). Because Hales' position seems to lack any legal basis, we affirm both the Commission's refusal to reimburse Hales for tax paid on transactions with JTN before March 1, 1987, and the Commission's deficiency assessment against Hales for JTN transactions after March 1, 1987.

The final issue is whether Hales should be liable for a 10-percent negligence penalty for failing to collect and remit taxes on its sales

since March 1, 1987. See Utah Code Ann. §§59-1-401(3)(a), -12-110(5). A 10-percent negligence penalty is appropriate when the taxpayer has failed to pay taxes and a reasonable investigation into the applicable rules and statutes would have revealed that the taxes were due. A 15-percent penalty for intentional disregard of the law is imposed when the taxpayer has failed to pay taxes, a reasonable investigation into the applicable rules and statutes would have revealed that the taxes were due, and the Commission has informed the taxpayer that the taxes were due. See *id.* §§59-1-401(3)(b); *Chicago Bridge & Iron Co. v. State Tax Comm'n*, 196 Utah Adv. Rep. 18, 21-22 (Sept. 30, 1992). In both instances, the taxpayer can escape the penalty if he or she can show that he or she based the nonpayment of taxes on a legitimate, good faith interpretation of an arguable point of law. Cf. *Chicago Bridge & Iron Co.*, 196 Utah Adv. Rep. at 21-22.

Applying this standard to the facts before us, we find that Hales should not be subject to the negligence penalty because it based its nonpayment of taxes on a legitimate, good faith interpretation of an arguable point of law. Hales advanced two primary reasons for its nonpayment of taxes. First, it argued that its transportation charges were exempt from sales tax; second, it argued that title to its merchandise passed at the point of shipment and that therefore transportation costs were not part of the price of the sale. Although we find that Hales' reliance on the second ground was neither reasonable nor legitimate,<sup>7</sup> we do recognize that the statute listing the sales tax exemptions presented a potential ambiguity as to the scope of the exemption for intrastate movements of freight, which may have misled Hales. See Utah Code Ann. §59-12-104(18) (1987) (amended 1991) (current version at §59-12-104(17)). The Commission recognized as much in its hearing memorandum. Because of the existence of this ambiguity, we reverse the \$9,712 negligence penalty assessed against Hales.

Affirmed in part, reversed in part.

WE CONCUR:

Gordon R. Hall, Chief Justice

Richard C. Howe, Associate Chief Justice

I. Daniel Stewart, Justice

Christine M. Durham, Justice

1. The record suggests that the shareholders formed JTN to avoid paying Hales' employees the higher, federally mandated wages required of companies performing federal contracts. See *The Davis-Bacon Act*, 40 U.S.C. §§276a to 276a-5.

2. The parties stipulated to these amounts before the Commission. The record is unclear as to why these amounts differ from those initially assessed against Hales by the Auditing Division.

3. We recently have indicated that we will grant intermediate deference to an agency's interpretation or application of specific laws when the legislature has explicitly or implicitly delegated discretion.

agency to interpret or apply that law. *See Morton Int'l, Inc v Auditing Div.*, 814 P.2d 581, 589 (Utah 1991). Because here there is no explicit delegation of discretion and because the questions at issue are of general law and specific statutory construction on which the Commission's experience and expertise will be of no real assistance, *see Sandy City v. Salt Lake County*, 827 P.2d 212, 218 (Utah 1992), *Chris & Dick's Lumber v. Tax Comm'n*, 791 P.2d 511, 513-14 (Utah 1990), we do not apply the standard of intermediate deference to the legal issues in this case. *See Zissi*, 198 Utah Adv. Rep. at 16 n.2, *Morton*, 814 P.2d at 588-89.

4. The predecessor to the taxation statute differs slightly from that at issue here, but both Hales and the Commission agree that the differences are insignificant.

5. The other cases Hales cites are equally unconvincing. The court in *Clarion Ready Mixed Concrete Co. v. Iowa State Tax Commission*, 107 N.W.2d 553 (Iowa 1961), exempted transportation costs from sales tax in a situation totally unlike that before us. There, the statutory exemption for transportation costs was not limited to common carriers, the state did not recognize passage of title as the pivotal fact for determining taxability, the merchandise was perishable ready-mix concrete instead of the comparatively permanent materials at issue in the instant case, and the court found that both the buyer and the seller intended that the contracts for sale and transportation be independent. *Id.* at 556-58. Because of these distinctions, *Clarion* offers little guidance in resolving this case. Similarly, the court in *In re Sales & Use Tax Determination*, 225 N.W.2d 571 (N.D. 1974), held only that incidental but separate bargaining for transportation costs implies an agreement to pass title at the point of shipment. *Id.* at 574, 576, 578. Because Hales has adduced no evidence of separate bargaining for transportation costs, *In re Sales* does not aid its argument.

6. Although we make no ruling on this issue, federal labor law criteria probably are also irrelevant to a determination of *federal* taxability. In concluding that JTN and Hales should be treated as one entity because of their shared equipment, facilities, records, management, and employees, the Department of Labor took pains to emphasize that the factors relevant to its determination were completely independent of those "that may be of paramount importance to other governmental agencies, such as the Internal Revenue Service . . . ." Letter from Arthur M. Kerschner, Jr., Employment Standards Admin., U.S. Dep't of Labor, to E. Jane Casper, Construction Div., Utah Dep't of Transp. (Aug 3, 1989) (emphasis added).

7. The law extant in March of 1987, the month Hales stopped collecting and remitting sales taxes, made clear that taxation of transportation charges depended on passage of title, *see Whitehill*, 106 Utah at 472, 150 P.2d at 371, and that absent an explicit agreement to the contrary, title passed on delivery, *see Utah Code Ann.* §70A-2-401(2). Moreover, the first edition of the Utah Administrative Code, which went into effect July 1, 1987--only five months after Hales stopped collecting and remitting taxes--not only presented the Commission's rules for passage of title, but also provided examples of how those rules would be applied. *See Utah Admin. R.* 865-72S-1 (1987-88).

Cite as

200 Utah Adv. Rep. 8

## IN THE SUPREME COURT OF THE STATE OF UTAH

Richard H. NIELSEN,  
Plaintiff and Appellant,

v.

Mark O'REILLY, Linda R. French, and  
Metropolitan Property & Liability  
Insurance Co.,  
Defendants and Appellees.

No. 900489

FILED: November 13, 1992

Third District, Salt Lake County  
The Honorable Homer F. Wilkinson

### ATTORNEYS:

L. Rich Humpherys, Karra J. Porter, Salt  
Lake City, for Richard Nielsen  
Glenn C. Hanni, Barbara L. Maw, Salt Lake  
City, for Metropolitan Property

This opinion is subject to revision before  
publication in the Pacific Reporter.

### HALL, Chief Justice:

Plaintiff Richard H. Nielsen appeals the judgment of the Third Judicial District Court that \$250,000 is the maximum recovery possible under the uninsured motorist provision of an insurance policy issued by defendant Metropolitan Property & Liability Insurance Co. ("Metropolitan"). We affirm.

The facts of this case are undisputed. Prior to April of 1983, Nielsen purchased an insurance policy from Metropolitan. The policy insured two automobiles owned by Nielsen and was in force at all relevant times. Among other coverages, the policy included uninsured motorist protection with a limit of \$250,000 for "each person" and \$500,000 for "each accident." Metropolitan charged a separate premium for each vehicle.

On April 28, 1983, Nielsen and his son were involved in an automobile accident with two uninsured motorists, Mark O'Reilly and Linda French. As a result of the accident, both Nielsen and his son sustained personal injuries and filed claims with Metropolitan. Metropolitan settled the claim of Nielsen's son and made a partial payment of \$1,707 to Nielsen. However, no settlement was reached on the remaining portion of Nielsen's claim. Ultimately, Nielsen filed suit against Metropolitan, O'Reilly, and French seeking an apportionment of fault and determination of Nielsen's damages and Metropolitan's liability.

INSTITUTIONAL LAUNDRY, INC. V. UTAH STATE TAX COMMISSION

ants' failure to comply with Rule 2.9(b) of the Rules of Practice in the District Courts and Circuit Courts of the State of Utah. Rule 2.9(b) states:

Copies of the proposed Findings, Judgments, and/or Orders shall be served on opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections thereto shall be submitted to the court within (5) days after service.

Compliance with Rule 2.9(b) is necessary in order that a judgment be "filed" as we have construed that term under Rule 58A(c) of the Utah Rules of Civil Procedure. *Larsen v. Larsen*, Utah, 674 P.2d 116, 117 (1983); *Bigelow v. Ingersoll*, Utah, 618 P.2d 50, 52 (1980). The record indicates that no copies of the proposed judgment and findings were sent to counsel for plaintiffs, and there is nothing in the trial transcript to show that the trial court waived that requirement. Therefore, no judgment has been "filed" within the meaning of the Rule, and this appeal is premature. Utah R. Civil P., Rules 58A(c) and 72(a).

The appeal is dismissed, and the case is remanded to the trial court for a proper filing of the judgment in compliance with Rule 2.9(b), from which plaintiffs may take a timely appeal if they so desire.



**INSTITUTIONAL LAUNDRY, INC.,**

**Plaintiff and Appellant,**

**v.**

**UTAH STATE TAX COMMISSION,**

**Defendant and Respondent.**

**No. 19390.**

**Supreme Court of Utah.**

**Sept. 26, 1985.**

Subsidiary corporation brought action challenging sales tax assessment for laundry services provided by it to parent corporation. The Third District Court, Salt Lake County, Timothy R. Hanson, J., upheld sales tax assessment, and subsidiary appealed. The Supreme Court held that sub-

siary, with separate corporate existence, was liable for sales tax in regard to laundry services provided for parent corporation on nonprofit basis.

**Affirmed.**

**1. Corporations ⇨1.5(3)**

Corporation, be it parent or subsidiary, has its own legal identity and existence, and common ownership or control does not automatically destroy that separate identity.

**2. Corporations ⇨1.5(1)**

Although in appropriate cases equity may look through corporate shell to corporation's alter ego to prevent fraud or wrongdoing, general rule is that separate corporations are separate legal entities bound by obligations as well as benefits.

**3. Corporations ⇨1.6(11)**

Corporate structure will not be disregarded just to facilitate tax avoidance; corporation may not disregard or shed its corporate clothing to avoid tax consequences.

**4. Taxation ⇨1261**

When taxpayer has chosen to conduct business under particular arrangement, it cannot disregard consequences of that arrangement when it would otherwise be to taxpayer's disadvantage.

**5. Taxation ⇨1261**

Subsidiary corporation was subject to sales tax for laundry services provided to parent corporation on nonprofit basis, notwithstanding that subsidiary owned no property, kept no separate corporate records, and had same board of directors as parent; having elected to operate as corporation, for whatever benefits that status offered, subsidiary was also required to accept tax burdens of that status. U.C.A. 1953, 59-15-4(g), 59-15-5.

**6. Taxation ⇨1201**

Liability for sales tax does not depend upon existence of profit.

M. Stephen Coontz, Park City, for plaintiff and appellant.

David L. Wilkinson, Atty. Gen., Mark K. Buchi, Salt Lake City, for defendant and respondent.

PER CURIAM:

Appellant Institutional Laundry, Inc. (hereafter "Institutional") challenges a sales tax assessment by the Tax Commission for laundry services provided by Institutional to its parent corporation.

The facts providing the basis for the assessment are undisputed. During 1978 and 1979, Institutional was a Utah corporation owned 100% by Wasatch Medical Management Services, Inc. (hereafter "WMMS"), a health care provider. Institutional owned no property and kept no separate corporate records. Its board of directors was the same as the board of directors of WMMS. Institutional existed only for the administrative convenience of WMMS, providing laundry services for the parent on a nonprofit basis. Subsequent to 1979, the formal corporate status of Institutional was terminated and it became a division of WMMS. During 1978 and 1979, medicare and medicaid programs reimbursed WMMS on a nonprofit basis for laundry care services received from Institutional.

Pursuant to U.C.A., 1953, § 59-15-4(g) (as amended), the State Tax Commission assessed sales tax for the laundry services that were provided from July 1978 through December 1979 by Institutional and charged to WMMS. Institutional appealed the assessment by filing a petition in the district court. On cross-motions for summary judgment, Institutional's motion was denied and the motion of the Tax Commission granted. We affirm the summary judgment.

A sales tax is specifically imposed under U.C.A., 1953, § 59-15-4(g) (as amended) on amounts charged by Institutional for laundry and dry cleaning services. The laundry services performed by Institutional are clearly within the language of the statute. Institutional has the responsibility for the collection and remittance of the tax to the State Tax Commission. U.C.A., 1953, § 59-15-5 (as amended). However, Institutional claims that its nonprofit transactions with its parent corporation are not taxable. Although none of the statutory exemptions

to our sales tax under U.C.A., 1953, § 59-15-6 (as amended) are applicable, Institutional argues that as a wholly owned subsidiary of WMMS, it has no real separate corporate existence and is therefore exempt from tax.

[1-3] A corporation, be it parent or subsidiary, has its own legal identity and existence. Common ownership or control does not automatically destroy that separate identity. Although in appropriate cases equity may look through the corporate shell to its alter-ego to prevent fraud or wrongdoing, the general rule still applies that corporations are separate legal entities bound by the obligations as well as the benefits. *Surgical Supply Center v. Industrial Commission of Utah, Dept. of Employment Security*, 118 Utah 632, 223 P.2d 593, 595 (1950); *Messick v. PHD Trucking Service, Inc.*, Utah, 678 P.2d 791 (1984). The corporate structure will not be disregarded just to facilitate tax avoidance. *Western States Bankcard Association v. City & County of San Francisco*, 19 Cal.3d 208, 137 Cal.Rptr. 183, 561 P.2d 273 (1977).

[4, 5] Having elected to operate as a corporation, for whatever benefits that separate status conferred upon Institutional and its parent, Institutional must also accept the tax burden and responsibility attendant to its corporate form. A corporation may not disregard or shed its corporate clothing to avoid tax consequences. *Ogden Union Railway and Depot Co. v. State Tax Commission*, 16 Utah 2d 23, 395 P.2d 57 (1964), *modified on rehearing*, 16 Utah 2d 255, 399 P.2d 145 (1965); *Cal-Metal Corp. v. California State Board of Equalization*, 161 Cal.App.3d 759, 207 Cal. Rptr. 783 (1984). When a taxpayer has chosen to conduct business under a particular arrangement, it cannot disregard the consequence of that arrangement when it would otherwise be to the taxpayer's disadvantage. 19 Cal.3d at 219, 137 Cal.Rptr. 183, 561 P.2d 273; *Mercedes-Benz of North America, Inc. v. State Board of Equalization*, 127 Cal.App.3d 871, 179 Cal.Rptr. 758 (1982); *Montgomery Ward & Co. v. State*,

Colo., 628 P.2d 85 (1981); *Simplicity Pattern Co. v. State Board of Equalization*, 27 Cal.3d 900, 167 Cal.Rptr. 366, 615 P.2d 555 (1980).

The claim that nonprofit transactions between parent and subsidiary corporations are nontaxable events was settled by this Court in *Ogden Union Railway and Depot Co. v. State Tax Commission*, *supra*. In *Ogden Union Railway*, the plaintiff provided railway depot services and supplies on a nonprofit basis to its parent companies Union Pacific Railroad and Southern Pacific Company. We held that transactions between parent and subsidiary are within the purview of the sales tax notwithstanding that the business of the subsidiary is nonprofit and exclusively with and for the convenience of the parent. We also rejected as unpersuasive the case of *Valier Coal Co. v. Department of Revenue*, 11 Ill.2d 402, 143 N.E.2d 35 (1957), upon which Institutional relies here. 16 Utah 2d at 27-28, 395 P.2d 57. See also *Superior Coal Co. v. Department of Finance*, 377 Ill. 282, 36 N.E.2d 354, 358 (1941); annot., 64 A.L.R.2d 769 (1959).

In addition to *Valier Coal Co.*, appellant Institutional relies upon *Mapo, Inc. v. State Board of Equalization*, 53 Cal. App.3d 245, 125 Cal.Rptr. 727 (1975). Although in *Mapo* the transactions between parent and subsidiary were exclusive and nonprofit, that court found other factors significant which are not present in the instant case. The sole reason for Mapo's existence was merely to simplify union employment agreements. All other aspects of the company, including payroll and manufacturing, were entirely controlled by the grandfather company, Walt Disney Produc-

tions. Also, Mapo had previously obtained a favorable ruling from the taxing board based upon California sales tax provisions not found in our statute. 53 Cal.App.3d at 248-49, 125 Cal.Rptr. 727.

[6] Institutional also argues that its charges for laundry services provided to WMMS are nontaxable to the extent WMMS was paid by medicare or medicaid on a nonprofit basis. We also rejected a similar contention in *Ogden Union Railway*. 16 Utah 2d at 28, 395 P.2d 57. Liability for sales tax does not depend upon the existence of a profit. There was no state medicaid or federal medicare regulation which required Institutional to limit its services to WMMS or imposed any price limitation on the amount Institutional could charge for its service. The only restriction by either medicare or medicaid was the amount which that program was willing to pay the health care provider. It was not required to accept medicare or medicaid assistance. There is no showing by plaintiff that the state controlled or restricted Institutional's business or activities. Institutional was free to make whatever business arrangement it chose with WMMS or any other customer.

We do not find any basis for departing from our prior decision and affirm the summary judgment below in favor of the State Tax Commission.

