

1993

Matrix Funding Corporation v. Auditing Division of the Utah State Tax Commission : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jan Graham; Utah Attorney General; Mark E. Wainwright; Assistant Attorney General; Attorneys for Respondent.

Craig C. Mortensen; Attorney for Petitioner.

Recommended Citation

Brief of Respondent, *Matrix v. Auditing*, No. 930355 (Utah Court of Appeals, 1993).
https://digitalcommons.law.byu.edu/byu_ca1/5262

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU
50

.A10

DOCKET NO.

930355

IN THE UTAH COURT OF APPEALS

MATRIX FUNDING CORPORATION,

:

Petitioner,

:

vs.

:

CASE NO. 930355-CA

AUDITING DIVISION OF THE
UTAH STATE TAX COMMISSION,

:

:

Priority No. 14

Respondent.

ON PETITION FOR REVIEW FROM THE UTAH STATE TAX COMMISSION

BRIEF OF RESPONDENT

Jan Graham, #1231
Utah Attorney General
Mark E. Wainwright, #4432
Assistant Attorney General
36 South State, Suite 1100
Salt Lake City, Utah 84111
(801) 533-3200

Attorneys for Respondent

Craig C. Mortensen, #2328
6925 Union Park Center, #250
Midvale, Utah 84047
(801) 566-9201

Attorney for Petitioner

FILED

Utah Appeals

1993

Wai

TABLE OF CONTENTS

JURISDICTION	3
ISSUE PRESENTED FOR REVIEW	3
DETERMINATIVE STATUTES	4
STATEMENT OF THE CASE	5
STATEMENT OF FACTS	6
SUMMARY OF THE ARGUMENT	10
ARGUMENT	11
I. THERE ARE TWO DISTINCT TRANSACTIONS - FIRST, A SALE FROM THE CUSTOMER TO MATRIX - SECOND, A LEASE FROM MATRIX TO THE CUSTOMER.	11
II. MATRIX'S TRANSACTION IS A TRUE LEASE UNDER THE UCC.	20
CONCLUSION	28
APPENDIX	
A - Declaratory Order	
B - Revised Stipulation of Facts	
C - Sale and Leaseback Agreement	
D - Master Lease Agreement	
E - Determinative Statutes and Regulations	
F - <u>Honeywell Bull, Inc. CRA Inc. v. Arizona Dep't of Revenue,</u> 1990 WL 92009 (Ariz. Bd. Tax. App. 1990)	

TABLE OF AUTHORITIES

CASES

<u>Allstate Ins. Co. v. Bliss,</u> 725 P.2d 1330 (Utah 1986)	10
<u>Arnold Machinery, Co. v. Ball,</u> 624 P.2d 678 (Utah 1981)	18
<u>Cedars-Sinai Medical Ctr. v. State Bd.,</u> 162 Cal. App.3d 1182, 208 Cal.Rpt. 837 (2nd Dist. Ct. App. 1984)	16
<u>Colonial Leasing Co. of New England v. Larson Brothers Constr.,</u> 731 P.2d 483 (Utah 1986)	18
<u>FMA Financial Corp. v. Pro-Printers,</u> 590 P.2d 803 (Utah 1979)	18, 23
<u>First Sec. Fin. v. Oakland Ltd. Inc.,</u> 750 P.2d 195 (Utah 1988)	18
<u>Footpress Corp. v. Strickland,</u> 251 S.E.2d 278 (Ga. 1978)	15
<u>Gulf Coast Rental Tool Serv., Inc. v. Collector of Revenue,</u> 98 So.2d 704 (La. App. 1957)	11
<u>Honeywell Bull, Inc. CRA Inc. v. Arizona Dep't of Revenue,</u> 1990 WL 92009 (Ariz.Bd.Tax.App. 1990)	14
<u>LMV Leasing, Inc. v. Conlin,</u> 805 P.2d 189 (Utah Ct. App. 1991)	19
<u>Larson v. Overland Thrift and Loan,</u> 818 P.2d 1316 (Utah Ct. App. 1991)	18
<u>Midwest Fed. Sav. & Loan Ass'n v. Commissioner of Revenue,</u> 259 N.W.2d 596 (Minn. 1977)	13
<u>Monarch Beverage v. Department of State Revenue,</u> 589 N.E.2d 1209 (Ind.Tax 1992)	15

<u>Morton Int'l, Inc. v. Auditing Div. of the Utah</u> <u>State Tax Comm'n,</u> 814 P.2d 581 (Utah 1991)	2
<u>Rust Tractor v. Bureau of Revenue,</u> 475 P.2d 779 (N.M. Ct. App. 1970), <u>Cert. den.</u> , 475 P.2d 778 (N.M. 1970)	11
<u>Transamerica Leasing Corp. v. Bureau of Revenue,</u> 450 P.2d 934 (N.M. 1969)	17
<u>Utah Dep't of Admin. Serv. v. Public Serv. Comm'n,</u> 658 P.2d 601 (1983)	2

STATUTES

Cal. Rev. & Tax Code § 6006(a)	16
UCC § 1-201(37)	17, 20
Utah Admin R. R865-19-32S (1992)	2, 12, 13, 22, 23
Utah Code Ann. § 59-12-102(10) (1992)	2, 4, 9, 10, 11, 12, 16
Utah Code Ann. § 59-12-103(1)	12
Utah Code Ann. § 59-12-103(1)(a), (k) (1992)	2, 4, 11, 12
Utah Code Ann. § 59-12-104(27) (1992)	2, 9
Utah Code Ann. § 59-12-610(1) (S.B. No. 243 (1993))	2
Utah Code Ann. § 63-46b-16 (1989)	1
Utah Code Ann. § 70A-1-201(37) (Supp. 1989) (amended 1990)	2, 3, 17, 20, 21, 24
Utah Code Ann. § 70A-1-203(37)(d)(i) (1990) (emphasis added)	21
Utah Code Ann. § 70A-2-106(1) (1990)	10
Utah Code Ann. § 78-2a-3(2)(k) (Supp. 1992)	1

OTHER AUTHORITIES

Steven R. Schoenfeld, <u>Commercial Law; The Financial Lease Under Annotated 2A of the Uniform Commercial Code</u> , 1989 Ann. Surv. of Am. L. 565, 574 (1989)	18
---	----

JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(k) (Supp. 1992). The appeal was timely filed before the Utah Supreme Court pursuant to Utah Code Ann. § 63-46b-16 (1989) and was properly transferred to the Utah Court of Appeals.

ISSUE PRESENTED FOR REVIEW

The issue before the Court of Appeals is whether the Tax Commission correctly found that the Petitioner's proposed Sale and Leaseback Agreement involved a transaction subject to sales tax pursuant to the Utah Sales and Use Tax Act.

The Utah Legislature has recently modified the standard of review to be applied on appeals from the Utah State Tax Commission. The proper standard of review for the Tax Commission's conclusions of law is a correction of error standard. See Taxpayer Appeal from Administrative Rulings, S.B. No. 243 (1993) (adding § 59-1-610(1)(b) to the Utah Code). For findings of fact, the standard of review grants deference to the agency's findings if they are supported by substantial evidence. Id. (adding § 59-1-610(1)(a) to the Utah Code). The issue before the Court of Appeals in this case involves a combined issue of fact and law.

The Legislature, in enacting the new standards of review,

did not specify the proper standard to be applied when an issue involves both factual findings and legal conclusions. However, under earlier law, the Utah Supreme Court has applied an intermediate standard for such issues. This intermediate standard essentially required the reviewing court to assure that the agency's findings fell within the bounds of reasonableness.¹ Utah Dep't of Admin. Serv. v. Public Serv. Comm'n, 658 P.2d 601, 610 (1983). Since the Utah Legislature has failed to provide a standard of review for mixed findings of fact and law, this Court should revert to the prior intermediary standard as developed by the Utah Supreme Court and apply a "bounds of reasonableness" test.

DETERMINATIVE STATUTES

STATUTES:

Utah Code Ann. § 59-12-102(10) (1992)

Utah Code Ann. § 59-12-103(1)(a), (k) (1992)

Utah Code Ann. § 59-12-104(27) (1992)

Utah Code Ann. § 59-12-610(1) (S.B. No. 243 (1993))

Utah Code Ann. § 70A-1-201(37) (Supp. 1989) (amended 1990)

Utah Code Ann. § 70A-1-201(37) (1990)

¹ The Utah Supreme Court has summarized the development of the intermediate standard of review in Morton Int'l, Inc. v. Auditing Div. of the Utah State Tax Comm'n, 814 P.2d 581, 585-86 (Utah 1991).

ADMINISTRATIVE RULES:

Utah Admin R. R865-19-32S (1992)

STATEMENT OF THE CASE

This case comes before the Utah Court of Appeals from a Tax Commission Declaratory Order dated December 11, 1992. (Appendix A, R. 5). The Declaratory Order essentially held that the lease transaction of the Petitioner's (hereinafter "Matrix") proposed Sale and Leaseback Agreement would be subject to sales tax. Matrix's proposed Sale and Leaseback Agreement provides that Matrix will purchase furniture and equipment (hereinafter "equipment") from a "Customer." The Customer will then agree to lease the equipment back for a period of sixty months with a purchase option at the end of the lease term. (R. 6).

The crux of Matrix's argument before the Tax Commission and now before the Court of Appeals is that the proposed agreement is merely a financing arrangement rather than two separate transactions, a sale and a lease. For support of this argument, Matrix argues that the Customer's leaseback of the equipment from Matrix is not a "true lease" under the Uniform Commercial Code's ("UCC") definition of a "security interest." See Utah Code Ann. § 70A-1-201(37) (1990) (Utah's version of the UCC is found in title 70A of the Utah Code). Matrix further argues that if the lease is considered a financing arrangement, then no sales tax can be assessed since loans are not transactions subject to sales

tax.

The Tax Commission rejected Matrix's argument and instead found that under the proposed agreement there would be a distinct and separate sale of the equipment from the Customer to Matrix. The Tax Commission based its finding upon the express language of the proposed contracts which state that title to the equipment will pass to Matrix. (Appendix A, R. 5). Having found that there would be a sale under the first transaction (the sale from the Customer to Matrix), it was not necessary for the Tax Commission to determine whether the second transaction (the leaseback by Matrix to the Customer) would constitute a true lease or a financing arrangement. If the second transaction is a true lease, it is subject to sales tax under Utah Code Ann. § 59-12-103(1)(k) (1992). If it is a financing arrangement, it is subject to sales tax as a sale from Matrix to the Customer, with Matrix retaining a security interest. See Utah Code Ann. § 59-12-102(10) (1992). Thus, it was irrelevant to the Tax Commission whether the second transaction was a true lease or a financing arrangement since under either scenario the transaction would be subject to sales tax.

STATEMENT OF FACTS

Matrix and Respondent have agreed to a stipulation of facts. (Revised Stipulation of Facts, Appendix B, R. 84). The facts relevant for this appeal are summarized below as follows.

1. Matrix will enter into a Sale and Leaseback Agreement with Customer which will consist of two transactions. (Sale and Leaseback Agreement, hereinafter "Sale Agreement," Appendix C, R. 90).

2. The first transaction is Matrix's purchase of equipment from the Customer. The second transaction is a lease of this same equipment by Matrix back to the Customer and is further evidenced by a separate Master Lease Agreement. (Master Lease Agreement, hereinafter "Lease Agreement," Appendix D, R. 93; Revised Stipulation of Facts ¶ 1, Appendix B, R. 84).

2. The Sale Agreement states that title to the equipment will pass from the seller, the Customer, to the buyer, Matrix. (Revised Stipulation of Facts ¶ 3, Appendix B, R. 85). Throughout the Sale Agreement, the terms "buyer" and "seller" are used to refer to Matrix and the Customer respectively. (Appendix C, R. 90-92).

3. Matrix has stipulated that it will purchase the equipment from the Customer at a price roughly equivalent to 72% of the Customer's original purchase price. (Stipulation of Facts ¶ 1, Appendix B, R. 84).

4. The Lease Agreement provides that the Customer will make sixty monthly payments. (Equipment Schedule, Appendix D, R. 102). If the Consumer Price Index (CPI) increases for any month during the first twelve months, then the thirteenth through sixtieth payments will increase to 128% of the original payment

amount. (Revised Stipulation of Facts ¶ 7, Appendix B, R. 86).

5. The Lease Agreement contains an option for the Customer to purchase the equipment at the end of the sixty month lease. (Equipment Schedule, Appendix D, R. 102-03).

6. The option price is calculated as a percentage of the original price that Matrix paid the Customer for the equipment. The option price is 46% of the price Matrix paid the Customer if there is no increase in the monthly payments after the first twelve months; otherwise, the option price is 19% of the amount Matrix paid the Customer. (Revised Stipulation of Facts ¶ 7, Appendix B, R. 86).

7. If the Customer chooses not to exercise its purchase option, Matrix will retain title and take possession of the equipment. In this event the Customer is required to pay Matrix a sum equal to 19% of the original price that Matrix paid the Customer for the equipment. (Revised Stipulation of Facts ¶ 7, Appendix B, R. 86).

8. The Lease Agreement refers to Matrix as the "lessor" and the Customer as the "lessee." It further refers to the monthly payments to be made under the lease as "Monthly Rental." (Appendix D, R. 93). Moreover, the Lease Agreement provides that the equipment "shall at all times remain the property of the Lessor or its Purchasers. Lessor may affix (or require the Lessee to affix) tags, decals or plates to the Equipment indicating Lessor's ownership, and Lessee shall not permit their

removal or concealment." (Appendix D, R. 95).

9. The Customer will record depreciation on the equipment and use the equipment for the term of the lease. (Revised Stipulation of Facts ¶ 11, Appendix B, R. 87).

10. Both the Customer and Matrix will treat the agreement as a financing arrangement on their Federal and State income tax returns. (Revised Stipulation of Facts ¶ 11, Appendix B, R. 87).

11. Matrix believes that the lease transaction will be treated as a financing agreement rather than as a true lease. (Revised Stipulation of Facts ¶ 5, Appendix B, R. 85). In contrast, Matrix presumes that the lease will be treated under Financial Accounting Standards Board [FASB] Standard 13 as an operational lease, not a capital lease. (Revised Stipulation of Facts ¶ 6, Appendix B, R. 85).

12. The useful life of the equipment is estimated to be ten to thirteen years from the date Matrix purchases the equipment. (Stipulation of Facts ¶ 12, Appendix B, R. 87).

13. At the time the purchase option may be exercised, the Customer estimates that the fair market value of the equipment will be 50% of the original price that Matrix paid the Customer for the equipment. (Stipulation of Facts ¶ 12, Appendix B, R. 88).

SUMMARY OF THE ARGUMENT

The Tax Commission's decision should be affirmed since it correctly applied the relevant provisions of the Utah Sales and Use Tax Act. The Tax Commission was correct in finding that a sale would occur since title to the equipment would be transferred from the Customer to Matrix pursuant to the contract. Similarly, the Tax Commission was correct in holding that Matrix's lease of the equipment back to the Customer would be subject to sales tax.

The Tax Commission's decision is supported by case law in other jurisdictions which have recognized two transactions under similar sale and leaseback agreements. In Matrix's case, the first transaction is the sale of the equipment from the Customer to Matrix. This sale is conclusively shown by the transfer of title. The second transaction is the lease of the equipment by Matrix to the Customer.

Matrix's argument, that this second transaction is not a true lease but merely a financing agreement, is misplaced for two reasons. First, even if the second transaction is not a true lease, it would still be subject to sales tax as a sale with Matrix retaining a security interest. Second, the lease transaction is indeed a true lease under the UCC and Utah case law.

ARGUMENT

- I. THERE ARE TWO DISTINCT TRANSACTIONS - FIRST,
A SALE FROM THE CUSTOMER TO MATRIX - SECOND,
A LEASE FROM MATRIX TO THE CUSTOMER.

Matrix would have this Court review both transactions which are contemplated by the Sale and Leaseback Agreement as a single transaction. This approach is flawed. Pursuant to the agreement, there are two transactions which the parties will enter into. The first transaction is the sale of the equipment to Matrix from the Customer. The second transaction is Matrix's lease of the equipment to the Customer. It is proper to analyze the application of the Utah Sales and Use Tax Act to each transaction.

A. The first transaction.

The first transaction encompasses the sale by the Customer to Matrix. The Utah Sales and Use Tax Act has an express provision which defines the term "sale" for sales and use tax purposes. See Utah Code Ann. § 59-12-102(10) (1992). Section 102(10) defines a sale as including "any transfer of title, exchange, or barter, conditional or otherwise, in any manner, of tangible personal property . . . for a consideration." (Emphasis added). Under this definition, a sale will have taken place if transfer of title has occurred. Here, the Sales Agreement expressly provides that title in the equipment will pass to Matrix in consideration of Matrix's purchase of the Customer's equipment. As such, the Tax Commission was correct in ruling

that there was a sale for sales and use tax purposes.

Even though this transaction constitutes a sale, it is specifically excluded from sales tax by Utah Code Ann. § 59-12-104(28) (1992) which exempts transactions involving tangible personal property which is purchased for resale. In this case, Matrix's purchase of the equipment will be for resale since it will lease the equipment back to the Customer. This lease is considered a resale pursuant to Utah Code Ann. § 59-12-102(10)(e) (1992) because the Customer will have possession and use of the property during the lease term.²

Matrix's argument, that the transfer of title is not determinative as to a sale, is unpersuasive for two reasons. First, the statute is clear and unambiguous in stating that transfer of title constitutes a "sale." It is true that a sale can occur under the Sales and Use Tax Act without title passing; however, when transfer of title does occur it is conclusive evidence of a sale. The second reason Matrix's argument is unpersuasive is its unjustified reliance upon the UCC definition of "sale." Matrix has not provided any evidence which indicates that a connection exists between the definition of "sale" contained in the Utah Sales and Use Tax Act, and the definition

² Matrix's purchase of the equipment would also be considered for resale if the second transaction is deemed a financing arrangement. If deemed a financing arrangement, the second transaction would be treated as a sale of the equipment by Matrix to the Customer, with Matrix retaining a security interest. See infra Part I.B.

of "sale" as provided in the UCC. See Utah Code Ann. §§ 70A-2-106(1) (1990) (this section contains the UCC definition of sale). In this regard, the Utah Supreme Court has stated "[w]hile the use of a term in one section may have relevance to its usage in another, the plain language of each section must first be considered." Allstate Ins. Co. v. Bliss, 725 P.2d 1330, 1333 (Utah 1986). Thus, the plain language of the Sales and Use Tax Act should prevail. See Utah Code Ann. § 59-12-102(10) (1992).

Matrix has also focused upon the fact that it will never have possession of the equipment. It is Matrix's misunderstanding that a sale cannot occur unless the purchaser has possession of the tangible personal property. Matrix fails to recognize that possession is not the only means of determining whether a sale has occurred under the Utah Sales and Use Tax Act. "Right to possession" is merely one right which could constitute a sale. There are other rights that a purchaser may have which would also constitute a sale. For instance, the "right to use" the tangible personal property will be a sufficient ownership right to warrant the recognition of a sale. See Utah Code Ann. § 59-12-102(10)(e) (1992). Matrix has the right to use the equipment since it has the right to lease the equipment. Other states have recognized the fact that a "use" exists on the part of the lessor by merely leasing the tangible personal property even though the lessor has never had actual possession of such property. See Gulf Coast Rental Tool Serv., Inc. v. Collector of

Revenue, 98 So.2d 704, 707 (La. App. 1957), Rust Tractor v. Bureau of Revenue, 475 P.2d 779 (N.M. Ct. App. 1970), Cert. den. 475 P.2d 778 (N.M. 1970).

B. The Second Transaction.

The second transaction occurring under the Sale and Leaseback Agreement is the leaseback of the equipment by the Customer from Matrix. The Tax Commission, in its decision, held that this lease was subject to sales tax pursuant to Utah Code Ann. § 59-12-103(1)(k). (R. 8). Section 59-12-103(1)(k) levies sales tax upon the purchaser for the amount paid or charged for "leases and rentals of tangible personal property."

Matrix has argued that this second transaction is not subject to sales tax since it is not a true lease. However, Matrix's argument becomes irrelevant once it has been established that a sale occurred in the first transaction. The irrelevancy of Matrix's argument can readily be seen by examining the sales tax consequences of the second transaction treated both as a lease and as a financing arrangement. If the second transaction is a true lease, then as it has already been explained, it is clearly subject to sales tax under Utah Code Ann. § 59-12-103(1)(k). If the second transaction is not a true lease, but a financing arrangement, then it is still subject to sales tax since it would be treated as a sale. See Utah Code Ann. §§ 59-12-103(1) and 102(10). In other words, if it is a financing arrangement, then the second transaction is an actual resale of

the equipment from Matrix to the Customer with Matrix retaining a security interest in the equipment.

Utah Admin. R. R865-19-32S(F) (1992) recognizes the general principle that sales tax liability does not turn upon whether a transaction is a lease or whether it is a sale accompanied by a financing arrangement. Utah Admin. R. R865-19-32S(F) states:

Notwithstanding anything to the contrary in this rule, a lessee may, at its option, treat a conditional sale lease as either a sale or lease for sales or use tax purposes.

A conditional sales lease is a lease in which:

1. the consideration the lessee is to pay the lessor for the right to possession and use of the property is an obligation for the term of the lease not subject to termination by the lessee, and
2. the total consideration to be paid by the lessee is fixed at the time the lease is executed and cannot be modified by use, condition, or market value, and either:
 - a. the lessee is bound to become the owner of the property; or
 - b. the lessee has an option to become the owner of the property for no additional consideration or nominal additional consideration upon compliance with the lease agreement. Nominal consideration in this sense means ten percent or less of the original lease amount.

(Emphasis Added). Utah Admin. R. R865-19-32S(F) recognizes that a lease may be a lease, or it may be a sale with a financing arrangement. In either case, the Rule recognizes that the transaction is subject to taxation. As such, Matrix's proposed Sale and Leaseback Agreement is subject to sales tax regardless

of whether it is a lease or a financing arrangement.

C. Other states have recognized that two transactions exist in similar sale and leaseback contracts.

The Minnesota Supreme Court recognized two distinct transactions in a sale and leaseback agreement similar to the one proposed by Matrix. In Midwest Fed. Sav. & Loan Ass'n v. Commissioner of Revenue, 259 N.W.2d 596 (Minn. 1977), the Minnesota Supreme Court held that the lease in a sale and leaseback agreement was subject to use tax. In Midwest, a contract between Midwest Federal and NCR provided that Midwest Federal would sell its equipment to NCR, and simultaneously, execute a lease agreement under which the equipment would be leased back to Midwest Federal.

Based upon these facts, the court concluded that two transactions had occurred under the sale and leaseback agreement. The court rejected Midwest Federal's argument that assessing use tax on the leaseback constituted double taxation. In the words of the Minnesota Supreme Court;

[n]o tax was paid on the sale of the equipment to NCR, since it was located in New York. The use tax imposed by the commissioner is based on the lease of the equipment to Midwest Federal, the third of three distinct transactions.

Id. at 599 (emphasis added). The Minnesota Supreme Court found three distinct transactions. The first was Midwest Federal's original acquisition of the equipment. The second transaction occurred under the terms of the sale and leaseback agreement when

NCR purchased the equipment from Midwest Federal. The final transaction, also pursuant to the sale and leaseback agreement, consisted of NCR's leaseback of the equipment to Midwest Federal. This identical situation is present in Matrix's proposed Sale and Leaseback Agreement.

The Arizona Department of Revenue in Honeywell Bull, Inc. CRA Inc. v. Arizona Dep't of Revenue, 1990 WL 92009 (Ariz.Bd.Tax.App. 1990) also found two transactions in a sale and leaseback agreement. See Appendix F for a copy of this decision. In Honeywell, CRA entered into an agreement with Blue Cross of Arizona in which Blue Cross sold its computer to CRA and CRA leased the equipment back to Blue Cross. The Arizona Department of Revenue considered this to be two transactions; Blue Cross's sale of the computer to CRA and the leaseback of the computer by Blue Cross. The taxpayer's argument in Honeywell, that it intended the agreement to be one transaction, was specifically rejected as not "sufficient basis" to justify treating it as one transaction.

A similar conclusion was reached by the Tax Court of Indiana in Monarch Beverage v. Department of State Revenue, 589 N.E.2d 1209 (Ind.Tax 1992). The agreement in Monarch involved three parties: Hackney, Monarch, and Gelco. According to the agreement, Monarch was to purchase trucks from Hackney. Monarch would then enter into a sale and leaseback agreement with Gelco whereby Gelco would purchase the trucks from Monarch and then

lease the trucks back to Monarch. It was asserted by Monarch that in substance only one transaction occurred. The court in Monarch rejected this argument and held that "[s]ales and use taxes are transactional taxes imposed upon the gross income received from a retail transaction. Therefore, sales or use tax can be collected more than once on the same item if the item is the subject of more than one non-exempt retail transaction." Id. at 1216 (citations omitted).

The court in Monarch reasoned that the sale from Hackney to Monarch was taxable. The court also held that the leaseback of the equipment by Monarch from Gelco was taxable. Only the sale of the equipment by Monarch to Gelco was exempt from taxation since Gelco purchased the equipment to lease it back to Monarch. Id. at 1214 n.14. The analysis used by the Indiana Tax Court is directly applicable to Matrix's proposed agreement. See supra part I.A.

Matrix has cited case law from other jurisdictions which may appear to reach a different conclusion than that reached by Tax Commission in this case. However, these cases can easily be distinguished. For example, Matrix cites Footpress Corp. v. Strickland, 251 S.E.2d 278 (Ga. 1978), in support of its argument that its Sale and Leaseback Agreement is merely one agreement, a financing arrangement. Footpress is distinguishable by the very fact that the lessor and lessee were the same company. McCall was the lessee and McCall created Footpress for the sole purpose

of acting as a lessor in its sale and leaseback agreement. The court in Footpress noted that the Commissioner treated "McCall and Footpress as identical entities" Id. at 279.

Indeed, it would be very difficult to find a sale and a lease transaction between the same entity. This unique fact pattern is not present in Matrix's situation and was not before the Tax Commission. Matrix and the Customer are completely separate and independent corporations. Therefore, the decision in Footpress is of little relevance to this case.

Matrix also unjustly relies upon a California case, Cedars-Sinai Medical Ctr. v. State Bd., 162 Cal. App.3d 1182, 208 Cal.Rpt. 837 (2nd Dist. Ct. App. 1984). This reliance is unjustified since the court construed California's definition of "sale" as not requiring a finding of sale when transfer of title has occurred.³ Thus, the court in Cedars-Sinai did not find a separate sale. In contrast, Utah Code Ann. § 59-12-102(10) expressly provides that transfer of title constitutes a sale for sales and use tax purposes. Given this distinction between California and Utah law, the decision rendered in Cedars-Sinai is of little relevance.

Transamerica Leasing Corp. v. Bureau of Revenue, 450 P.2d

³ California's definition of "sale" at issue in Cedars-Sinai contained the language "any transfer of title or possession" Cal. Rev. & Tax Code § 6006(a). The court in Cedars-Sinai cited to California precedent which stated that this definition of "sale" was intended to parallel the UCC definition of "sale" which does not conclusively recognize a sale by mere title transfer.

934 (N.M. 1969) is also of little relevance to the Tax Commission's finding of two transactions. Transamerica did not involve a sale and leaseback agreement, but rather involved a sale versus lease distinction.

II. MATRIX'S TRANSACTION IS A TRUE LEASE UNDER THE UCC.

Even if this Court does not find two distinct transactions, a sale and a lease, this Court should still affirm the Tax Commission's decision since Matrix's Sale and Leaseback Agreement is a true lease under the UCC, not a financing arrangement.

A. The UCC's new definition of true lease does not require consideration of the intent of the parties.

Matrix has argued that its agreement is not a true lease, but rather a loan. Matrix has based its argument upon the definition of a "true lease" as contained in the UCC. See Utah Code Ann. § 70A-1-201(37) (1990). Unfortunately, Matrix has cited case law in support of its conclusion from cases dealing with the prior UCC definition of lease. UCC § 1-201(37) has recently been modified and amended. The Utah legislature adopted this new definition in 1990. (Appendix E reprints both the new and old versions of the UCC definition). For this reason, reliance upon the Utah cases applying the old version of the UCC definition of lease should only be taken with careful

consideration of the 1990 amendments to that definition.⁴

The most notable difference between the new UCC definition of lease and the prior version is the absence of the term "intended." The prior definition required a subjective analysis of whether or not the parties intended the agreement to be a lease. The new definition eliminates the term "intended." As a result, the focus is changed "from the intent of the parties to the economic distinctions between leases and secured transactions." Steven R. Schoenfeld, Commercial Law; The Financial Lease Under Annotated 2A of the Uniform Commercial Code, 1989 Ann. Surv. of Am. L. 565, 574 (1989). Therefore, Matrix's argument that the parties to the agreement intended it to create a security interest is no longer relevant. Similarly, Matrix's reliance upon FMA for support of its intent argument is likewise irrelevant since FMA applied the prior UCC definition of a true lease. See FMA 590 P.2d 803.

B. The UCC definition for true lease requires an objective analysis of the express terms of the contract.

The Utah Court of Appeals has recently enumerated the proper steps to be followed when determining whether a transaction yields a true lease or a security interest. In Larson v.

⁴ Matrix cited the following cases which apply the old version of the UCC definition of true lease: FMA Financial Corp. v. Pro-Printers, 590 P.2d 803 (Utah 1979), Arnold Machinery, Co. v. Ball, 624 P.2d 678 (Utah 1981), Colonial Leasing Co. of New England v. Larson Brothers Constr., 731 P.2d 483 (Utah 1986), and First Sec. Fin. v. Oakland Ltd. Inc., 750 P.2d 195 (Utah 1988).

Overland Thrift and Loan, 818 P.2d 1316 (Utah Ct. App. 1991) the court retroactively applied the new version of the UCC definition of lease. In applying this definition, the court noted that the first step is to look at the express terms of the contract: "[i]f the terms of an agreement are clear and unambiguous, we interpret them according to their plain and ordinary meaning and extrinsic or parol evidence is generally not admissible to explain the intent of the parties." Id. at 1319 (citations omitted).

The unambiguous language of Matrix's Lease Agreement can only lead to the conclusion that the agreement was a true lease. The Lease Agreement itself is labeled "master lease agreement." Moreover, the document refers to Matrix as the "lessor" and the Customer as the "lessee." The terms of the Lease Agreement indicate a lease since they provide that the equipment "shall at all times remain the property of the Lessor or its Purchasers. Lessor may affix (or require the Lessee to affix) tags, decals or plates to the Equipment indicating Lessor's ownership, and Lessee shall not permit their removal or concealment." (Appendix D, R. 95). The Lease Agreement further refers to the payments made under the lease as "rent payments." Given these unambiguous and express terms, the lease document should be construed as a true lease.

In LMV Leasing, Inc. v. Conlin, 805 P.2d 189 (Utah Ct. App. 1991), the court likewise held that "the language used by the parties [in their contract] repeatedly manifested their intent

that the agreement was a lease." Id. at 194. In reaching this decision, the court noted that:

The agreement was entitled 'Preferred Vehicle Lease Agreement'. LMV was referred to as lessor; MCO was denominated lessee. Payments made under the agreement were called rent payments. The language of the agreement, i.e., the form of the agreement, would therefore support the conclusion that this was a lease."

Id. at 194 (emphasis added). The Court of Appeals concluded that these terms constituted a lease. The court further stated that "when the interpreting court finds no dispositive evidence that the parties intended the agreement to be other than what it purports to be by its unambiguous terms, that court should decline to construe the agreement contrary to those terms." Id. at 195.

Since the agreement between Matrix and its Customers is unambiguous and the unambiguous terms denote that the agreement is a lease, the next step is to look at the terms of the agreement to see if they function as a lease or as a security arrangement. This step requires the application of UCC § 1-201(37) containing the definition of a true lease. See Utah Code Ann. § 70A-1-201(37) (1990).

The UCC defines a lease transaction as a security interest if the agreement is not subject to termination by the lessor and the lease meets one of four additional criteria. The only additional criteria even remotely applicable to Matrix's situation is criteria number "IV." Under "IV", the lessee must

have an "option to become the owner of the goods for no additional consideration or nominal consideration upon compliance with the lease agreement." Utah Code Ann. § 70A-1-201(37)(b)(iv) (1990). Therefore, for Matrix to successfully argue that its lease is not a true lease under the UCC, it must prove that its lease agreement is not terminable and that the purchase option price is nominal consideration.

Since Matrix's Lease Agreement is not terminable at the Lessor's discretion, the first requirement is satisfied. However, the Lease Agreement does not contain a purchase option which equates to per se nominal consideration under the UCC. Consideration is per se nominal under the UCC "if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised." Utah Code Ann. § 70A-1-201(37)(d)(ii) (1990). Here, the terms of the contract specifically provide that the option purchase price is either 19% or 46% of the amount originally paid by Matrix to the Customer. These amounts are not less than the Customer's cost to perform under the lease since the Customer will pay 19% of the amount originally paid by Matrix to the Customer if it chooses not to exercise its purchase option. Thus, Matrix has not shown that its lease agreement contains a per se nominal consideration purchase option under the UCC.

The UCC also states that "[a]dditional consideration is not nominal if . . . when the option to become the owner of the goods

is granted to the lessee the price is stated to be the fair market value of the goods determined at the time the option is to be performed." Utah Code Ann. § 70A-1-203(37)(d)(i) (1990) (emphasis added). It is impossible to determine from the facts available on this appeal whether the fair market value of the equipment is equal to the purchase option price at the time the purchase option is to be exercised. The option purchase price is stated as a percentage of the amount Matrix purchased the equipment from its Customer. Moreover, the amount paid by Matrix to purchase the equipment is stated as a percentage of the amount the Customer had originally paid for the equipment. Therefore, before a determination can be made that the purchase option equates to nominal consideration, this court must consider a number of factors. These factors include the fair market value, age, and condition of the equipment at the time the Sale and Leaseback Agreement is entered into by Matrix and its Customer. Matrix has not provided this factual data.⁵ As such, no determination as to nominal consideration can be made.

C. The Customer's purchase option is not nominal consideration under Utah law.

Since it cannot be determined from the UCC whether or not

⁵ The Stipulation of Facts states that the Customer estimates the fair market value of the equipment to be 50% of the original purchase price. (Stipulation of Facts ¶ 12, Appendix B, R. 88). The Tax Commission has not stipulated that this is an accurate estimate or that the Customer was qualified to make such an estimate.

the Customer's purchase option is for nominal consideration, this Court should consider other nominal consideration definitions. Utah Admin. R. R865-19-32S(F)(2)(b) defines nominal consideration as "ten percent or less of the original lease amount." If this definition is applied, the facts of this case conclusively show that the Customer's purchase option price is not nominal consideration. The option price is, at the very least, 19% of the original lease amount. The original lease amount is the amount Matrix paid to the Customer for the equipment.

Utah Admin. R. R865-19-32S(F)(2)(b) is merely an adoption of the nominal consideration definition endorsed by the Utah Supreme Court in FMA. See FMA, 590 P.2d 803 (Utah 1979). In FMA, it was noted that courts had applied three tests⁶ to determine nominal consideration. Id. The court considered all three tests but noted that all are related and that "each can offer insight into the nature of the transaction" In FMA, the court focused on the first test since no evidence had been introduced concerning the projected fair market value of the equipment at the end of the lease. The first test required a comparison between the purchase option price and the original cost of the equipment. The Court in FMA noted that "[m]ost courts using this

⁶ The three tests are: "(1) Compare the option price with the original list price or cost of the property; (2) Compare the option price with 'sensible alternatives'; (3) Compare the option price to the fair market value of the property at the time the option is to be exercised." FMA 590 P.2d at 805-06.

test have concluded that a purchase option which is 10 percent or less of the lessor's cost is nominal." Id. at 806. This test was applied in FMA and is identical to the nominal consideration definition contained in Utah Admin. R. R865-19-32S(F)(2)(b).

Of interest in FMA is the court's discussion of the third test which requires a comparison between the option price and the fair market value of the equipment at the time the option is to be exercised. This test has since been codified by the UCC and has been previously discussed. See the discussion of Utah Code Ann. § 70A-1-201(37)(d)(i) (1990), supra. The court in FMA noted the importance of this test. However, the court pointed out that in FMA, "no testimony exists concerning the projected fair market value of the equipment at the end of the lease." Id. at 806. Without this information, the court concluded that it could not apply the fair market value test, but was required to apply the 10 percent or less rule as conclusive evidence of nominal consideration. Id.

This Court is faced with the same circumstances as was the court in FMA. Here, there is no evidence of the fair market value of the equipment at the time the purchase option is to be exercised. As such, this Court should apply the 10 percent or less test for nominal consideration and conclude that the purchase option is not nominal consideration. If the Customer's purchase option price is not nominal consideration, then application of the UCC definition for a true lease leads to the

conclusion that Matrix's proposed Sale and Leaseback Agreement is indeed a true lease, not a financing arrangement. This Court should make this decision accordingly and affirm the Tax Commission's decision.


CONCLUSION

The Sale and Leaseback agreement between Matrix and the Customer contemplates two separate transactions. The first transaction is the sale of the equipment to Matrix. The contract specifically transfers title to the equipment to Matrix in connection with this sale. Transfer of title is conclusive evidence of a sale under the Utah Sales and Use Tax Act. The second transaction is the lease of this equipment back to the Customer, a transaction which is subject to sales tax whether treated as a true lease or a financing arrangement.

Even if the Sale and Leaseback Agreement was deemed to contemplate a single transaction, the lease of the equipment back to the Customer is not a financing arrangement under the UCC definition of true lease since the Customer's purchase option price does not constitute nominal consideration. As a true lease, the lease is subject to sales tax.

Under either approach, Matrix's proposed Sale and Leaseback Agreement is subject to sales tax. For this reasons, the Tax Commission's decision should be affirmed.

RESPECTFULLY SUBMITTED this 6th day of July, 1993.


MARK E. WAINWRIGHT
Assistant Attorney General
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above Brief of Respondent was mailed, postage pre-paid on this 6th day of July, 1993 to the following:

Craig C. Mortensen
6925 Union Park Center, #250
Midvale, Utah 84047

by 

APPENDIX A

BEFORE THE UTAH STATE TAX COMMISSION

MATRIX FUNDING CORP.,)	
	:	
Petitioner,)	DECLARATORY ORDER
	:	
v.)	
	:	
AUDITING DIVISION OF THE)	Appeal No. 91-1304
UTAH STATE TAX COMMISSION,	:	
)	Tax Type: Sales & Use
Respondent.	:	

STATEMENT OF CASE

This matter came before the Utah State Tax Commission for a formal hearing on the Petitioner's Request for Declaratory Judgment on September 1, 1992, from an advisory opinion issued by the Commission on July 11, 1992. Paul F. Iwasaki, Presiding Officer, heard the matter for and on behalf of the Commission. Present and representing the Petitioner was Craig Mortensen, Esq. Present and representing the Respondent was Mark Wainwright, Assistant Utah Attorney General.

Based upon the facts as stipulated to by the parties, briefs, oral arguments of counsel for the respective parties, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax in question is sales tax.
2. The Petitioner provides funding for commercial transactions. In the instant case, the Petitioner seeks a declaratory order concerning the sales tax status of a proposed lease-back transaction.

3. In the proposed transaction, the Petitioner would purchase from and lease back to its customer approximately 4,500 non-inventory items of furniture, equipment and other depreciable personal property owned by the customer.

4. Under the terms of the agreement, the Petitioner's customer would repay the amount loaned in 60 monthly payments plus a final fixed guaranteed amount. If during the first 12 months of the agreement the consumer price index increases, the monthly payment would correspondingly increase. The repayment agreement is structured so that the Petitioner will receive the principal amount loaned plus a commercially common interest rate.

5. The terms of the sale and lease back agreement between the Petitioner and its customer are contained in a Sale and Lease Back Agreement, as well as a Master Lease Agreement and an Equipment Schedule.

6. Under the terms of the agreement, title to the property passes from the customer to the Petitioner and the equipment at all times thereafter remains the property of the Petitioner.

7. The purpose for entering into the lease back and financing agreement is to provide the Petitioner's customer with additional operating capital by pledging the furniture and equipment as collateral.

8. For sales tax purposes, the Petitioner argues that the transaction should be characterized as a secured loan rather than a sale and lease-back arrangement.

9. In support of its argument, the Petitioner argues that under federal income tax law they would be required to treat such a transaction as a loan. Therefore, the Petitioner would not be able to take depreciation deductions for the equipment and the lessee would not be able to deduct the loan payments as a business expense.

10. By entering into this kind of arrangement, the Petitioner's customers, under Financial Accounting Standards Board's Statement Number 13, would be able to characterize the transaction as an "operating lease" for financial accounting and reporting purposes. Under such a provision, the Petitioner's customer would not be required to report the debt in their financial statements. The Petitioner argues however, that in spite of this characterization as a "operating lease" the intention of it and its customers is to create a secured loan transaction and not a lease as is used in the traditional sense of that term.

CONCLUSIONS OF LAW

There is levied a sales and use tax on the purchaser for the amount paid or charged for leases and rentals of tangible personal property if the property site is in the state, if the lessee took possession in this state, or if the property stored, used, or otherwise consumed in this state. (Utah Code Ann. §59-12-103(1)(k)).

DECISION AND ORDER

In the present case, the issue before the Commission is whether the transaction between the Petitioner and its customers

constitutes a lease within the meaning of Utah Code Ann. §59-12-103(1)(k), or whether the transaction constitutes a secured interest loan which would not be subject to sales and use tax.

In support of its position, the Petitioner argues that the intent of it and its customers in entering the transaction is to create a secured interest loan and not a lease. Further the Petitioner argues that it does not receive any benefits of ownership. Specifically, the Petitioner argues that it cannot sell the property at fair market value but must sell it at a set price. The Petitioner also argues that it has no burdens of ownership since the customer is responsible for payment of all property tax, repairs, and maintenance. Additionally, the Petitioner notes that the customer retains possession to the property.

Under the facts of the present case, the Tax Commission finds that the transaction entered into by the Petitioner with its customers is a sale and lease back arrangement which is subject to sales and use tax as provided for by Utah Code Ann. §59-12-103(1)(k). Of primary importance in arriving at this determination is the fact that by the specific terms of the agreements, title to the equipment passes to the Petitioner and thereafter the equipment remains the property of the Petitioner unless and until its customer makes all necessary payments and exercises its option to purchase the equipment.

The Commission acknowledges the fact that the intention of the parties may be to create a financing arrangement rather than a lease arrangement and this arrangement is fashioned the way that


Appeal No. 91-1304

it is only because of certain accounting considerations. Nevertheless, the express terms of the agreements governing the transaction specifically create a taxable transaction and it is those written agreements which will govern.

Based upon the foregoing, the Tax Commission finds the sale and lease back arrangement proposed by the Petitioner to be a transaction subject to sales and use tax as provided for by Utah Code Ann. §59-12-103(1)(k). It is so ordered.


DATED this 16th day of December, 1992.


BY ORDER OF THE UTAH STATE TAX COMMISSION.


R. H. Hansen
Chairman

AGENT

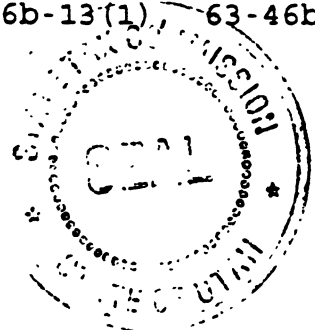
Roger O. Tew
Commissioner


Joe B. Pacheco
Commissioner


S. Blaine Willes
Commissioner

NOTICE: You have twenty (20) days after the date of the final order to file a request for reconsideration or thirty (30) days after the date of final order to file in Supreme Court a petition for judicial review. Utah Code Ann. §§63-46b-13(1), 63-46b-14(2)(a).

PFI/ed/91-1304.ord



Appeal No. 91-1304

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing
Decision to the following:

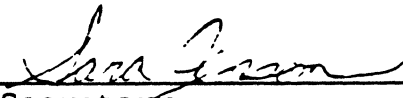
Matrix Funding Corporation
c/o Craig C. Mortensen
6925 Union Park Center, Ste 250
Midvale, UT 84047

Craig Sandberg
Assistant Director, Auditing
Heber M. Wells Building
Salt Lake City, UT 84134

James H. Rogers
Director, Auditing Div.
Heber M. Wells Bldg.
Salt Lake City, UT 84134

Mark Wainwright
Assistant Attorney General
36 South State, 11th Floor
Salt Lake City, UT 84111

DATED this 11th day of December, 1992.


Secretary

APPENDIX B

BEFORE THE UTAH STATE TAX COMMISSION

MATRIX FUNDING CORPORATION,)	
a Utah corporation)	
)	REVISED
Petitioner,)	STIPULATION OF FACTS
v.)	
)	Appeal No. 91-1304
AUDITING DIVISION, UTAH STATE)	
TAX COMMISSION,)	Tax Type: Sales & Use
)	
Respondent.)	

The parties hereby stipulate that, for the purpose of this case, the following statements may be accepted as true, except as qualified herein, and all exhibits referred to herein and attached hereto, are incorporated in this stipulation and made a part hereof. Either party may introduce other and further evidence not inconsistent with the facts herein stipulated or the contents of the exhibits. In addition, the parties have stipulated as to the issues to be determined by the Utah State Tax Commission ("Commission").

1. Matrix and its Utah customer ("Customer") will enter into a Sale and Leaseback Agreement ("Leaseback Agreement", Exhibit "A") which provides that Customer will sell to and leaseback from Matrix approximately 4,500 separate non-inventory items of furniture, equipment and other depreciable personal property ("furniture and equipment") presently owned by Customer and used in its business operations. The amount Matrix will pay to Customer for the furniture and equipment is approximately 72% of the original purchase price paid by Customer. The furniture and equipment

subject to this transaction represent a substantial portion of the furniture and equipment owned and used by Customer in its business operations.

2. The terms of the leaseback are contained in a Master Lease Agreement ("Master Agreement", Exhibit "B") and accompanying Equipment Schedule ("Schedule", Exhibit "C"). The Master Agreement and Schedule are referred to herein collectively as the "Financing Agreement". In connection with the Financing Agreement, Matrix and Customer will execute and file a UCC-1 financing statement with the State of Utah to perfect Matrix's alleged security interest in the furniture and equipment.

3. Customer is a retailer of goods generally of a type different from the furniture and equipment.

4. Customer paid Utah sales and/or use tax on the furniture and equipment at the time it was originally purchased.

5. Customer's business purpose in entering into the Leaseback Agreement and Financing Agreement is to obtain additional operating capital through a loan by pledging the furniture and equipment as collateral.

6. Customer desires to characterize the transaction as an "operating lease" for financial accounting and reporting purposes. An "operating lease" is a term defined by Financial Accounting Standards Board Statement No. 13 ("FASB 13"), a pronouncement which contains rules governing the reporting of leases by Certified Public Accountants in audited financial statements. FASB 13 provides that the user of personal property under an "operating

lease" is not required to report the obligation to make future lease payments as a liability on its audited financial statements.

7. The Financing Agreement provides that Customer will be required to make 60 base monthly payments, each in the same fixed amount ("base payments"). If, during the first 12 months of the lease, there occurs any increase in the Consumer Price Index ("CPI") over the CPI in effect for the month immediately before such 12 month period, each base payment will increase, starting with the 13th payment and continuing through the 60th payment, to an amount equal to 128% of the base monthly payment ("contingent payment"). At the end of the 60 month lease term, Customer shall have an option to purchase all, but not less than all, of the equipment for one of the following amounts: (a) In the event contingent payments were not made, the option price will be 46% of the original amount Matrix paid to Customer for the furniture and equipment ("base purchase option price"); and (b) In the event contingent payments were made, the option price will be 19% of the original amount Matrix paid to Customer for the furniture and equipment ("contingent purchase option price"). If, at the end of the 60 month lease term, Customer decides to return the furniture and equipment to Matrix, it is required to pay to Matrix an additional amount equal to 19% of the original amount Matrix paid to Customer for the furniture and equipment. Since 1954, the CPI has always increased at some point during any 12 month period over the CPI in effect for the month just prior to the start of such 12 month period (See Exhibit "D" attached).

8. Matrix's receipt of either (a) the 60 monthly base payments and the "base purchase option price" or (b) the first 12 monthly base payments, the next 48 monthly contingent payments and the "contingent purchase option price", will return to Matrix the original amount paid to Customer plus interest at a commercially reasonable rate.

9. Matrix and Customer believe that the use of contingent payments as provided in the Schedule will qualify the Lease as an "operating lease" under FASB 13. Were it not for Customer's desire to classify the transaction as an "operating lease" under FASB 13, the parties would have structured the transaction as a traditional loan with a promissory note and security agreement.

10. Matrix and Customer intend that Customer shall be entitled to the benefits of legal and beneficial ownership of the furniture and equipment during the entire transaction.

11. Customer will continue to depreciate the furniture and equipment in accordance with its previously established methods and will consider itself the owner for federal and state income tax purposes. Matrix will not claim depreciation on the furniture and equipment or consider itself the owner for federal and state income tax purposes. Both parties will treat the transaction as an interest bearing loan for federal and state income tax purposes.

12. Customer has determined it will need the furniture and equipment for its business operations for a period of at least 10 to 13 years from the date the Financing Agreement is entered into with Matrix. At the end of the transaction after 60 months,

Customer estimates the furniture and equipment will have a fair market value equal to 50% of the original amount Matrix paid to Customer. Given the payment terms under the Financing Agreement, the furniture and equipment's fair market value after 60 months and the high replacement costs for similar furniture and equipment, Customer has concluded it would not be economically feasible for it to return the furniture and equipment to Matrix at the end of the 60 month payment period. It is Customer's intent to exercise one of the two purchase options at the end of the 60 month lease term and retain all of the furniture and equipment for use in its business operations for the duration of its economic life which Customer estimates to be 10 to 13 years from the date of the Financing Agreement.

13. The furniture and equipment will at all times remain in possession of Customer at its current Utah location and will continue to be used by customer in the same manner after the Financing Agreement is in place. Matrix will never take possession of the furniture and equipment, except pursuant to its remedies under the Financing Agreement in the event of a Customer payment default.

14. Under the Financing Agreement, Customer will be liable for and obligated to pay all costs and expenses in connection with the ownership, possession and use of the furniture and equipment, including but not limited to, license fees, assessments, property taxes, insurance and maintenance. Customer will assume all risk of loss with respect to the equipment. Customer will not look to

Matrix for any breach of warranties concerning the condition of the furniture and equipment.

15. Matrix has no use for and is not interested in purchasing the furniture and equipment other than to permit Customer to possess and use it under the terms of the Financing Agreement. Matrix does not have the capacity to absorb and use any portion of the furniture and equipment for its internal purposes.


Following are the issues presented to the Commission for determination:

1. Is the transaction a "financing" arrangement or is the transaction a true sale followed by a leaseback?

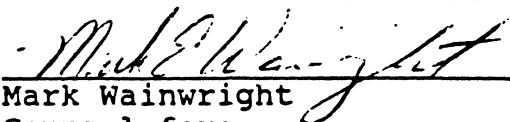
2. Does Matrix have a "security interest" or does Matrix have an "ownership" interest in the furniture and equipment?

3. Are any of the payments made by Matrix to Customer or by Customer to Matrix under the transaction subject to Utah sales or use tax?

Dated as of May 19, 1992.



Craig C. Mortensen
Counsel for:
Matrix Funding Corporation
Petitioner



Mark Wainwright
Counsel for:
Auditing Division,
Utah State Tax Commission
Respondent

APPENDIX C

EXHIBIT "A"

SALE AND LEASEBACK AGREEMENT

This Sale and Leaseback Agreement ("Agreement") is dated and effective this ____ day of ____, 1992, by and between ____ ("Seller") and MATRIX FUNDING CORPORATION, 6925 Union Park Center, #250, Midvale, Utah 84047 ("Buyer").

WHEREAS, Buyer is purchasing equipment ("Equipment") from Seller and Seller desires to use the Equipment under the terms and conditions of Master Lease Agreement, dated and effective as of ____ ("Lease Agreement");

THEREFORE, in consideration of the mutual promises herein, Seller and Buyer agree as follows:

1. **Sale and Leaseback.** Buyer agrees to purchase the Equipment set forth in each Equipment Schedule to the Lease Agreement and to lease the Equipment to the Seller pursuant to the terms and conditions contained in the Lease Agreement and Equipment Schedule.

2. **Purchase Price and Payment.** Buyer and Seller agree that the purchase price of the Equipment is \$_____, which shall be payable to Seller on the Closing Date which is set for _____, or such later date as the parties shall mutually agree to in writing.

3. **Title.** The parties agree that title to the Equipment shall pass from Seller to Buyer on the Closing Date.

4. **Buyers Purchase and Performance.** Seller agrees that Buyer's obligations hereunder are expressly subject to the following conditions:

- a. Buyer's receipt of the executed Lease Agreement, the Equipment Schedule, and UCC-1 financing statement(s).
- b. Buyer's receipt of Corporate resolutions or incumbency certificates in form satisfactory to Buyer authorizing Seller's entry into this sale and leaseback transaction with Buyer.

5. **Seller's Representations and Warranties.** Seller represents and warrants to Buyer that:

- a. Seller is a corporation duly organized, validly existing and in good standing under the laws of the State of Utah and in all jurisdictions where such qualification is required for it to conduct its business.
- b. Seller has all requisite power and authority to conduct its business, to own and lease its properties and to enter into and perform all of its obligations under this Agreement.
- c. This Agreement has been duly authorized by Seller and constitutes the valid, legal and binding obligation of Seller enforceable in accordance with its terms.

- d. No event has occurred or is continuing which constitutes an event of default under this Agreement. There is no action, suit or proceeding pending or threatened against or effecting Seller before or by any court, administrative agency or other governmental authority which brings into question the validity of the transaction contemplated by this Agreement or which might materially impair the ability of Seller to perform its obligations under this Agreement or the transaction contemplated hereby.
- e. Neither the execution and delivery by the Seller of this Agreement, nor the compliance by the Seller with the provisions of any thereof, conflicts with or results in a breach of any of the provisions of the Articles of Incorporation, or By-Laws of Seller, or of any applicable law, judgment, order, writ, injunction, decree, rule or regulation of any court, administrative agency or other governmental authority, or of any agreement or other instrument to which the Seller is a party or by which it is bound, or constitutes or will constitute a default under any thereof.
- f. The transaction contemplated by this Agreement complies with all applicable federal and state laws, rules and regulations.
- g. No consent, approval or authorization of or by any court, administrative agency or other governmental authority is required in connection with the execution, delivery or performance by Seller of, or the consummation by Seller of the transaction contemplated by this Agreement.
- h. Seller is transferring to Buyer good title to the Equipment, free and clear of all liens and encumbrances of any kind or description.

7. **Manufacturer's Warranties.** In the event Seller does not exercise its option to purchase the Equipment from Buyer upon termination of the Lease, Seller agrees to assign to Buyer, to the extent assignable, all manufacturer and vendor warranties and indemnities with respect to the Equipment.

8. **Successors.** Buyer and Seller agree that this Agreement shall inure to the benefit of and shall be binding upon Seller and Buyer, their respective successors and assigns. Any assignment by Buyer shall not require Seller's prior written approval provided such assignee agrees to observe Lessor's covenant of quiet enjoyment under the Lease. Seller shall not assign any interest in this Agreement without Buyer's prior written consent.

9. **Survival of Covenants.** Buyer and Seller agree that the warranties, covenants and agreements contained in this Agreement shall survive the passing of title to the Equipment.

10. **Limitations.** Buyer or its respective successors and assigns, shall not be liable for any indirect, special or consequential damages, in connection with or arising by reason of this Agreement; nor shall Buyer, or its respective successors and assigns, be liable for any event beyond its control.

11. **Miscellaneous.** Section titles are not intended to, and shall not limit or otherwise affect the interpretation of this Agreement. If any provision of this Agreement shall be held to be invalid or unenforceable, the validity and enforceability of the remaining provisions hereof shall not be affected or impaired in any way. Any modifications to this Agreement shall be in writing and shall be signed by both parties and their last known assignees, if any. Any terms capitalized herein shall

have the meanings set forth in the Lease Agreement and Equipment Schedule, which are incorporated herein by reference.

12. **Entire Agreement.** Seller and Buyer agree that this Agreement, the Equipment Schedule and the Lease Agreement shall constitute the entire Agreement and supersede all proposals, oral or written, all prior negotiations and all other communications between them with respect to the Equipment.

13. **Legal and Administrative Expenses.** Each party shall be responsible for its own legal and administrative expenses incurred in connection with this sale/leaseback transaction.

14. **No Brokers Fee.** Each party represents it has retained no brokers in this transaction and indemnifies the other party against any brokers' or other fees which might result from the indemnifying party's actions.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed on the date set forth below by their authorized representatives.

MATRIX FUNDING CORPORATION
("Buyer")

("Seller")

By:_____

By:_____

Title:_____

Title:_____

APPENDIX D

EXHIBIT "B"

MATRIX FUNDING CORPORATION

6925 Union Park Center, Suite 250
Midvale, Utah 84047

MASTER LEASE AGREEMENT

This Agreement is made this ____ day of ____, 1992, between MATRIX FUNDING CORPORATION, with its principal office at 6925 Union Park Center, Suite 250, Midvale, Utah 84047 (the "Lessor"), and _____ with its principal office at _____ (the "Lessee").

1. LEASE:

Lessor agrees to lease to Lessee, and Lessee agrees to lease from Lessor, the Equipment (the "Equipment") described in any Equipment Schedule executed and delivered by Lessor and Lessee concurrently with this Agreement or subsequent thereto. Neither Lessor nor Lessee shall have any obligations hereunder until the execution and delivery of the first such Equipment Schedule. The terms and conditions contained herein (including any Supplement or Rider annexed hereto) and in said Equipment Schedule shall govern the leasing and use of the Equipment.

2. ADDITIONAL DEFINITIONS:

(a) The "Installation Date" means, as to the Equipment designated on any Equipment Schedule, the earlier to occur of (a) the date specified as the Installation Date in the applicable Equipment Schedule, (b) the date Lessee accepts the Equipment as set forth in the Certificate of Installation signed by the Lessee, or (c) the date which is determined by the manufacturer or vendor of the Equipment to be the date of installation of such Equipment.

(b) The "Commencement Date" means, as to the Equipment designated on any Equipment Schedule, where the Installation Date for such Equipment Schedule falls on the first day of the month, that date, and, in any other case, the first day of the month following the month in which such Installation Date falls.

3. TERM OF LEASE:

The term of this Agreement, as to all Equipment designated on any Equipment Schedule, shall commence on the Installation Date for such Equipment, and shall continue for an initial period ending that number of months from the applicable Commencement Date as is specified on such Equipment Schedule (the "Initial Period").

4. RENT AND PAYMENT:

As to all Equipment leased hereunder, the Monthly Rental payable by Lessee to Lessor shall be as set forth in the applicable Equipment Schedule. The Monthly Rental shall begin on the Installation Date and shall be due and payable by Lessee in arrears on the last day of each month through the end of the Initial Period. If the Installation Date does not fall on the first day of a month, the first payment shall be a pro rata portion of the Monthly Rental, calculated on a 30-day basis, and shall be due and payable on the Installation Date.

Late charges on any past due payments shall accrue at the rate of 1 1/2% per month, or if such rate shall exceed the maximum rate allowed by law, then at such maximum rate, and shall be payable on demand, or, if late charges are levied by a lending institution due to any late payment, Lessee agrees to be responsible for payment of such late charges. Lessee agrees to make payment for any late charges promptly upon demand by Lessor.

5. TAXES:

Lessee shall pay to Lessor an amount equal to all taxes paid, payable or required to be collected by Lessor, however designated, which are levied or based on the Monthly Rental or on the possession, use, operation, control or value of the Equipment, including, without limitation, state and local privilege or excise taxes, sales and use taxes, property taxes, and taxes or charges based on gross revenue, but excluding taxes based on Lessor's net income. Lessor shall invoice Lessee for all such taxes in advance of their payment due date, and Lessee shall promptly remit to Lessor all such taxes and charges upon receipt of such invoice from Lessor. Lessee agrees to pay all penalties and interest resulting from its failure to timely remit such taxes to Lessor. Charges for penalties and interest shall be promptly paid by Lessee when invoiced by Lessor. Lessor agrees to file all required sales and use tax and property tax returns and reports concerning the Equipment with all applicable governmental agencies.

6. SHIPPING, DELIVERY AND ACCEPTANCE:

(a) Lessor shall use its best efforts to ship on or before the estimated shipping date specified in any purchase order delivered to Lessor or vendor of the Equipment. Lessor shall not be liable for any delay or failure to deliver resulting from circumstances which are beyond Lessor's control.

(b) Delivery shall be FOB point of shipment. In the absence of specific written instruction from Lessee, Lessor or its supplier will select a carrier, but Lessor shall have no liability in connection with shipment. Risk or loss shall pass to Lessee upon delivery to the carrier and Lessee shall be responsible all in transit insurance.

(c) Lessee shall be responsible for preparation of the installation site and for receipt of and installation of the Equipment upon delivery. Lessee will provide the required suitable electric current to operate the Equipment. Lessee may separately contract with a manufacturer approved installer to install the Equipment at the location indicated in the Equipment Schedule.

7. USE; ALTERATIONS AND ATTACHMENTS:

(a) Lessee shall be entitled to unlimited usage of the Equipment during the Initial Period and any extension or renewal periods.

(b) Lessee will at all times keep the Equipment in its sole possession and control. The Equipment shall not be moved from the locations stated in the Equipment Schedule without the prior written consent of Lessor.

(c) Lessee may not make alterations in or add attachments to the Equipment without first obtaining the written consent of Lessor. Any such alterations or attachments shall be made at Lessee's expense and shall not interfere with the normal and satisfactory operation or maintenance of the Equipment. The manufacturer may incorporate engineering changes or make temporary alterations to the Equipment upon request of Lessee. Unless Lessor shall otherwise agree in writing, all such alterations and attachments shall be and become the property of Lessor or, at the option of Lessor, shall be removed by Lessee at the termination of the applicable Lease and the Equipment restored at Lessee's expense to its original condition, reasonable wear and tear only excepted.

8. MAINTENANCE AND REPAIRS:

(a) Lessee shall, during the continuance of this Agreement, at its expense, keep the Equipment in good working order and condition and make all necessary adjustments, repairs and replacements and shall not use or permit the Equipment to be used for any purpose for which, in the opinion of the manufacturer, the Equipment is not designed or reasonably suitable.

(b) Without limiting the generality of the foregoing, Lessee may, during the continuance of this Agreement, at its own expense, enter into and maintain in force a contract with the manufacturer or other qualified maintenance organization for maintenance of each item of Equipment. Such contract as to each item may commence upon expiration of the manufacturer's warranty period, if any, relating to such item. Lessee shall furnish Lessor with a copy of such contract, if any, upon demand.

(c) At the termination of an Equipment Schedule, Lessee shall, at its expense, return the Equipment listed thereon to Lessor (at the location designated by Lessor within the Continental United States) in the same operating order, repair, condition and appearance as on the Installation Date, reasonable wear and tear only excepted with all engineering changes prescribed by the manufacturer prior thereto incorporated therein, and Lessee shall arrange and pay for such repairs as are necessary for the manufacturer or qualified maintenance organization to accept the Equipment under contract maintenance at its then standard rates.

9. OWNERSHIP AND INSPECTION:

(a) The Equipment shall at all times remain the property of the Lessor or its purchasers. Lessor may affix (or require Lessee to affix) tags, decals or plates to the Equipment indicating Lessor's ownership, and Lessee shall not permit their removal or concealment.

(b) Lessee shall keep the Equipment free and clear of all liens and encumbrances except those permitted by Lessor or its assigns.

(c) Lessor, its assigns and their agents shall have free access to the Equipment at all reasonable times during normal business hours for the purpose of inspecting the Equipment and for any other purpose contemplated in this Agreement.

(d) Lessee shall immediately notify Lessor in writing of all details concerning any damage or loss to the Equipment arising from the alleged or apparent improper manufacture, functioning or operation of the Equipment.

10. WARRANTIES:

(a) LESSEE ACKNOWLEDGES THAT IT HAS SELECTED THE EQUIPMENT ITSELF, AND THAT LESSOR HAS NOT MADE ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, WITH RESPECT TO THE DESCRIPTION, CONDITION OR PERFORMANCE OF THE EQUIPMENT, ITS MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR WITH RESPECT TO PATENT INFRINGEMENT OR THE LIKE, AND LESSOR EXPRESSLY DISCLAIMS ALL SUCH WARRANTIES. LESSOR SHALL HAVE NO LIABILITY TO LESSEE FOR ANY CLAIM, LOSS OR DAMAGE OF ANY KIND OR NATURE WHATSOEVER, INCLUDING SPECIAL OR CONSEQUENTIAL DAMAGES.

(b) Provided no Event of Default exists, Lessor assigns to Lessee all assignable warranties on the Equipment during the Initial Period.

11. NET LEASE; OBLIGATIONS ABSOLUTE AND UNCONDITIONAL:

Lessee agrees that this is a net lease, and that, as between Lessor and Lessee, Lessee shall be responsible for all costs and expenses of every nature whatsoever arising out of or in connection with or related to this Agreement or the Equipment (such as, but not limited to, transportation in and out, rigging, drayage, packing, installation and deinstallation charges).

Lessee further agrees that its Monthly Rental and other obligations hereunder shall be absolute and unconditional and shall not be subject to any abatement, reduction, recoupment, defense, offset or counterclaim available to Lessee against Lessor; nor, except as otherwise expressly provided herein or as agreed to by Lessor in writing, shall this Agreement terminate for any reason whatsoever prior to the end of the Initial Period.

12. ASSIGNMENT:

Lessee shall not assign this Agreement or any of its rights hereunder or sublease the Equipment without the prior written consent of Lessor, except that Lessee may assign this Agreement or sublease the Equipment to any parent or subsidiary corporation, or to a corporation which shall have acquired all or substantially all of the property of Lessee by merger, consolidation or purchase. No permitted assignment or sublease shall relieve Lessee of any of its obligations hereunder.

Lessor shall be entitled to assign this Agreement or any Equipment Schedule hereunder, either outright or as collateral security for loans made, and upon receipt of notice of any such assignment and instructions from Lessor, Lessee shall pay its rental and other obligations hereunder to the third party (or to another party designated by the third party), and Lessee's obligations to such assignee hereunder shall be absolute and unconditional.

Notwithstanding any assignment, neither the assignee nor any of its assignees shall be deemed to have assumed or be obligated to perform any of the obligations of Lessor.

13. RISK OF LOSS ON LESSEE:

Until the Equipment is returned to Lessor as provided in this Agreement, Lessee shall bear all risk of loss, damage or destruction to the Equipment, howsoever caused. If any item of Equipment is rendered unusable as a result of any physical damage to or destruction of the Equipment, Lessee shall give to Lessor immediate notice thereof and this Agreement as to such item shall continue in full force and effect without any abatement of any rental. Lessee shall determine, within fifteen (15) days after the date of occurrence of such damage or destruction, whether such item of Equipment can be repaired. In the event Lessee determines that such item of Equipment can be repaired, Lessee shall cause such item of Equipment to be promptly repaired. In the event Lessee determines that the item of Equipment cannot be repaired, Lessee at its expense shall promptly replace such item of Equipment and convey title to such replacement to Lessor free and clear of all liens and encumbrances, and this Lease shall continue in full force and effect as though such damage or destruction had not occurred. All proceeds of insurance received by Lessor or Lessee under any insurance policy shall be applied toward the cost of any such repair or replacement.

14. INSURANCE:

During the continuance of this Agreement as to each Equipment Schedule, Lessee shall, at its own expense, keep in effect (a) an all risk casualty insurance policy covering the Equipment designated in such Schedule for not less than its replacement cost and designating Lessor and its assigns as additional loss payees, and (b) a public liability policy in amounts acceptable to Lessor and designating Lessor and its assigns as co-insureds. Such insurance shall be written by licensed insurance companies acceptable to Lessor. Certificates or other evidence of such insurance coverage shall be furnished to Lessor upon demand. Each written policy shall provide that no less than thirty days written notice shall be given Lessor prior to cancellation of such policy for any reason. Lessee shall be responsible for any deductibles on such policies.

15. INDEMNIFICATION:

Except for the gross negligence or willful misconduct of Lessor or as otherwise provided herein, Lessee agrees to indemnify Lessor against and hold Lessor harmless of any and all claims, (INCLUDING, WITHOUT LIMITATION, CLAIMS INVOLVING STRICT OR ABSOLUTE LIABILITY), actions, suits, proceedings, costs, expenses, damages and liabilities at law or in equity, including attorney's fees, arising out of, connected with or resulting from this Lease or the Equipment, including, without limitation the delivery, possession, use, operation, condition, lease, return, storage or disposition thereof. For purpose of this Paragraph, the term "Lessor" shall include lessor, its successors and assigns, shareholders, directors, officers, representatives and agents, and the provisions of this Paragraph shall survive expiration of this Lease with respect to events occurring prior thereto.

16. EVENTS OF DEFAULT AND REMEDIES:

The occurrence of any one or more of the following events (each an "Event of Default") shall constitute a default of this Agreement:

(a) Lessee fails to pay any Monthly Rental when the same becomes due and such failure shall continue uncured for ten (10) days after written notice thereof is given to Lessee.

(b) Lessee attempts to remove, sell, transfer, encumber, sublet or part with possession of the Equipment or any items thereof, except as expressly permitted herein.

(c) Lessee shall fail to observe or perform any of the other obligations required to be observed or performed by Lessee hereunder and such failure shall continue uncured for ten (10) days after written notice thereof is given to Lessee.

(d) Lessee's representations and warranties made in this Agreement or in connection herewith shall be false or misleading in any material respect.

(e) Lessee ceases doing business as a going concern, makes an assignment for the benefit of creditors, admits in writing its inability to pay its financial obligations as they become due, files a voluntary petition in bankruptcy, is adjudicated a bankrupt or an insolvent, files a petition seeking for itself any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar arrangement under any present or future statute, law or regulation or files an answer admitting the material allegations of a petition filed against it in any such proceeding, consents to or acquiesces in the appointment of a trustee, receiver or liquidator of it or of all or any substantial part of its assets or properties, or if it or its shareholders shall take any action looking to its dissolution or liquidation.

(f) Within 30 days after the commencement of any proceedings against Lessee seeking reorganization, arrangement, readjustment, liquidation, dissolution or similar relief under any present or future statute, law or regulation, such proceedings shall not have been dismissed, or if within 30 days after the appointment without Lessee's consent or acquiescence of any trustee, receiver or liquidator of it or of all or any substantial part of its assets and properties, such appointment shall not be vacated.

Upon the occurrence of an Event of Default, Lessor may at its option do any or all of the following: (i) enforce this Agreement according to its terms; (ii) by notice to Lessee terminate this Lease as to any or all Equipment Schedules; (iii) whether or not this Lease is terminated as to any or all Equipment Schedules, take possession of any or all of the Equipment listed on any or all Equipment Schedules, wherever situated, and for such purpose, Lessor may enter upon any Lessee's premises without liability for so doing or, Lessor may cause Lessee, and Lessee hereby agrees, to return the Equipment to Lessor as provided in the Lease; (iv) recover from Lessee, as liquidated damages for loss of a bargain and not as a penalty, an amount equal to the present value of (A) all future Monthly Rentals to be paid by Lessee during the remainder of the Initial Period and (B) the amount, if any, set forth in the Equipment Schedule which Lessee is required to pay to Lessor upon return of the Equipment, discounted at the rate of eight percent (8%) per annum, which present value amount shall become immediately due and payable; and (v) sell, dispose of, hold, use or lease any Equipment as Lessor in its sole discretion may determine without any duty, except as provided below, to account to Lessee (and Lessor shall not be obligated to give preference to the sale, lease or other disposition of the Equipment over the sale, lease or other disposition of similar equipment owned or leased by or through Lessor).

In the event Lessee shall have paid to Lessor all liquidated damages referred to in clause (iv) above, Lessor hereby agrees to pay to Lessee, promptly after receipt thereof, all rentals or proceeds received from (a) the reletting of the Equipment during the remainder of the Initial Term or successive period then in effect (after deduction of an amount equal to all Lessor's Damages defined below) or (b) any sale of the Equipment occurring during the remainder of the Initial Term or successive period then in effect less an amount equal to the estimated fair market value of the Equipment at the end of the Initial Term or successive period then in effect (after deduction of an amount equal to all Lessor's Damages defined below), said amount never to exceed the amount of the liquidated damages paid by Lessee. Any remaining amounts from reletting or sale shall be

retained by Lessor. Lessee shall in any event remain fully liable for all sums due and payable for all periods up to and including the date on which Lessor has declared this Lease to be in default, and for all reasonable damages as provided by law, and for all costs and expenses incurred by Lessor on account of such default including, but not limited to, all court costs and reasonable attorneys' fees (collectively, "Lessor's Damages"). Lessee further agrees that, in any event, it will be liable for any deficiency after any sale, lease or other disposition by Lessor. The rights and remedies afforded Lessor hereunder shall not be deemed to be exclusive, but shall be in addition to any rights or remedies provided by law.

17. REPRESENTATIONS AND WARRANTIES:

(a) Lessee represents and warrants as follows:

- (1)** Lessee is a corporation, duly organized, validly existing and in good standing under the laws of the state of its incorporation and in all jurisdictions where the leased equipment will be located or operated under the Agreements.
- (2)** Lessee has all requisite power and authority to conduct its business, to own and lease its properties and to enter into and perform all of its obligations under the Agreements.
- (3)** This Agreement has been duly authorized by Lessee and constitutes the valid, legal and binding obligation of Lessee and is enforceable in accordance with its terms.
- (4)** No event has occurred or is continuing which constitutes an event of default under the Agreement. There is no action, suit, order or proceeding pending or threatened against or affecting Lessee before or by any court, administrative agency or other governmental authority which brings into question the validity of the transaction contemplated by the Agreements or which might materially impair the ability of Lessee to perform its obligations under the Agreement.
- (5)** Neither the execution and delivery by Lessee of the Agreement, nor the compliance by Lessee with the provisions hereof, conflicts with or results in a breach of the provisions of the Articles of Incorporation, or bylaws of Lessee, or any applicable law, judgment, order, writ, injunction, decree, rule or regulation of any court, administrative agency or other governmental authority, or of any agreement or other instrument to which Lessee is bound, or constitutes or will constitute a default under any thereof.

(b) Lessor represents and warrants as follows:

- (1)** Lessor is a corporation duly organized, validly existing and in good standing under the laws of its state of incorporation and in all jurisdictions where such qualification is required for it to conduct its business.
- (2)** Lessor has all requisite power and authority to conduct its business, to own and lease its properties and to enter into and perform all of its obligations under this Agreement.

- (3) This Agreement has been duly authorized by Lessor and constitutes the valid, legal and binding obligation of Lessee enforceable in accordance with its terms.

18. COVENANT OF QUIET POSSESSION:

Lessor agrees that so long as no Event of Default has occurred and is continuing, Lessee shall be entitled to quietly possess the Equipment subject to an in accordance with the terms and conditions of this Agreement.

19. GENERAL:

(a) This Agreement together with any Supplements or Riders hereto and Equipment Schedules executed hereunder shall constitute the entire agreement between the parties with respect to the items of Equipment listed on each such Equipment Schedule.

(b) This Lease may not be amended or modified except by a writing signed by a duly authorized representative of each party.

(c) The invalidity of any provision hereof shall not affect the validity or binding effect of any other provision hereof.

(d) No failure of either party to exercise any right or remedy will constitute a waiver thereof.

(e) Notices hereunder shall be in writing and addressed to the other party at the address herein or such other address provided by notice hereunder and shall be effective upon dispatch if by telegram, telex or similar means and, if mailed, shall be effective three (3) days after deposit in the channels of the U.S. mails, postage prepaid and addressed to the other party.

(f) Paragraph headings are provided for convenience of reference only and shall not limit or modify any term thereof.

(g) This Lease shall be governed by and shall be interpreted pursuant to the laws of the State of Utah.

(h) Lessee shall provide to Lessor copies of its annual audited financial statements.

(i) With respect to each Equipment Schedule, Lessee shall provide to Lessor an opinion of its counsel as to Lessee's representations and warranties contained in this Agreement.

(j) In the event a court of competent jurisdiction or other governing authority shall determine that this Agreement is not a "true lease" or that Lessor (or its assigns) does not hold legal title to or is not the owner of the Equipment, then this Agreement shall be deemed to be a security agreement with Lessee, as debtor, having granted to Lessor, as secured party, a security interest in the Equipment effective the date of this Agreement; and Lessor shall have all of the rights, privileges and remedies of a secured party under the Utah Uniform Commercial Code, which shall constitute the governing law for this Agreement.

IN WITNESS WHEREOF, Lessor and Lessee have executed this Agreement on the day and year first above written.

LESSOR:

LESSEE:

MATRIX FUNDING CORPORATION

BY: _____

BY: _____

TITLE: _____

TITLE: _____

EXHIBIT "C"

MATRIX FUNDING CORPORATION
6925 Union Park Center, Suite 250
Midvale, Utah 84047

EQUIPMENT SCHEDULE NO. 1

SCHEDULE DATE: _____

To Master Lease Agreement, dated _____, between MATRIX FUNDING CORPORATION as Lessor and _____, as Lessee. The terms and conditions of the Master Lease Agreement are incorporated herein by reference.

1. Equipment: See Attached Schedules
2. Equipment Location: See Attached Schedules
3. Acceptance Date: Acceptance Date of the Equipment as specified in the Certificate of Acceptance.
4. Commencement Date: Upon Funding
5. Initial Period: 60 months from Commencement Date.
6. Monthly Rental in Arrears: \$ _____ A _____
7. Contingent Rentals. The Consumer Price Index for the United States ("CPI") shall mean the U.S. City Average All Urban Consumers (CPI-U). The CPI in effect for this equipment schedule is _____ and is referred to herein as the "Base CPI".

Rental Adjustment. During the first twelve months of the lease if there have been any monthly increases above the Base CPI since the inception of the Lease, then the monthly rental for the remainder of the Lease shall be increased to \$ _____ B _____ per month beginning with the thirteenth month.

Lessee's Option to Pay Contingent Rentals. In the event there occurs no increase in the CPI, Lessee shall have the option to elect all future monthly rental payments to increase as provided in the preceding paragraph of this Section such that Lessee shall pay the higher contingent rentals for all remaining months of the Lease, in which case Lessee shall have the option at the end of the Lease to purchase all, but not less than all, of the Equipment for a price of \$ _____ C _____. In the event contingent rentals become due and payable under any Equipment Schedule under the Lease, they shall become due and payable under this Equipment Schedule.

8. Purchase Option. So long as no default exists hereunder and the lease has not been early terminated, Lessee may at lease expiration, upon at least ninety (90) days prior written notice to Lessor purchase all of the equipment described in said Schedule (and not merely a part thereof) upon the expiration of the initial lease term for \$ _____ D _____. The said purchase price shall be due and payable by Lessee in full within ten (10) days after expiration of the initial lease term.

If all Contingent Rental Payments have been made, the Purchase Option shall be reduced to an amount of \$ C .

In the event Lessee does not elect to exercise the Purchase Option and returns the Equipment to Lessor, Lessee shall pay to Lessor an amount of \$ C upon return of the Equipment.

Upon receipt by the Lessor of the full purchase price, Lessor will furnish Lessee with a bill of sale warranting good title to the equipment, but excepting any impairment thereof by reason of any acts by the Lessee or those making claim against the Lessee. The bill of sale will also provide that the purchase shall be "as is", "where is" and without any other warranties, express or implied.

Dated: _____

LESSOR:

LESSEE:

MATRIX FUNDING CORPORATION

By: _____

By: _____

Title: _____

Title: _____

	JANUARY	FEBRUARY	MARCH	APRIL	MAY	JUNE	JULY	AUGUST	SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER	ANNUAL
13.6	13.7	13.7	13.7	13.8	13.8	13.7	13.7	13.7	13.7	13.7	13.8	13.0	13.7
13.0	13.0	13.7	13.7	13.7	13.7	13.0	13.9	14.0	14.0	14.0	14.0	14.0	13.9
14.1	14.1	14.2	14.3	14.3	14.1	14.4	14.5	14.5	14.6	14.6	14.5	14.4	14.4
14.2	14.1	14.1	14.2	14.2	14.1	14.1	14.1	14.1	14.1	14.0	14.0	14.0	14.1
14.0	13.9	13.9	13.8	13.8	13.8	13.8	13.8	13.8	14.1	14.0	14.0	14.0	13.9
13.9	14.0	14.0	14.0	14.0	14.0	14.1	14.0	14.0	14.0	14.0	14.0	14.1	14.0
14.1	14.1	14.2	14.3	14.3	14.1	14.7	14.7	15.1	15.1	15.3	15.4	15.5	14.7
15.7	15.0	16.0	16.1	16.3	16.3	16.3	16.4	16.5	16.5	16.7	16.8	16.9	16.3
16.9	16.9	17.2	17.4	17.5	17.5	17.5	17.4	17.3	17.4	17.4	17.4	17.4	17.3
17.4	17.4	17.4	17.5	17.5	17.5	17.6	17.7	17.7	17.7	17.7	17.7	17.8	17.6
17.0	17.8	17.8	17.8	17.9	17.9	18.1	18.1	18.1	18.1	18.1	18.1	18.2	18.0
18.2	18.1	18.3	18.4	18.5	18.5	18.7	19.8	20.2	20.4	20.8	21.3	21.5	19.5
21.5	21.5	21.9	21.9	21.9	21.9	22.0	22.2	22.5	23.0	23.0	23.1	23.4	22.3
23.7	23.5	23.4	23.8	23.9	23.9	24.1	24.4	24.5	24.5	24.4	24.2	24.1	24.1
24.0	23.8	23.8	23.9	23.9	23.8	23.9	23.7	23.7	23.9	23.7	23.8	23.6	23.8
23.5	23.5	23.6	23.6	23.7	23.7	23.8	24.1	24.3	24.4	24.6	24.7	25.0	24.1
25.4	25.7	25.8	25.8	25.9	25.9	25.9	25.9	25.9	26.1	26.2	26.4	26.5	26.0
26.5	26.3	26.3	26.4	26.4	26.4	26.5	26.7	26.7	26.7	26.7	26.7	26.7	26.5
26.6	26.5	26.6	26.6	26.7	26.7	26.8	26.8	26.9	26.9	27.0	26.9	26.9	26.7
26.9	26.9	26.9	26.7	26.7	26.7	26.9	26.9	26.9	26.8	26.8	26.8	26.7	26.5
26.7	26.7	26.7	26.7	26.7	26.7	26.7	26.8	26.8	26.9	26.9	26.9	26.8	26.5
26.8	26.8	26.8	26.9	26.9	27.0	27.2	27.4	27.3	27.4	27.5	27.5	27.6	27.1
27.6	27.7	27.8	27.9	28.0	28.0	28.1	28.3	28.3	28.3	28.3	28.4	28.4	28.1
28.6	28.6	28.8	28.9	28.9	28.9	28.9	29.0	29.0	29.0	29.0	29.0	29.0	28.5
29.0	29.0	29.0	29.0	29.0	29.0	29.1	29.2	29.2	29.3	29.4	29.4	29.4	29.1
29.3	29.4	29.4	29.5	29.5	29.5	29.6	29.6	29.6	29.6	29.8	29.8	29.8	29.4
29.8	29.8	29.8	29.8	29.8	29.8	29.8	30.0	29.9	30.0	30.0	30.0	30.0	29.5
30.0	30.1	30.1	30.2	30.2	30.2	30.2	30.3	30.3	30.4	30.4	30.4	30.4	30.2
30.4	30.4	30.5	30.5	30.5	30.5	30.6	30.7	30.7	30.7	30.8	30.8	30.9	30.4
30.9	30.9	30.9	30.9	30.9	30.9	31.0	31.1	31.0	31.1	31.2	31.2	31.2	31.0
31.2	31.2	31.3	31.4	31.4	31.4	31.6	31.6	31.6	31.6	31.7	31.7	31.8	31.1
31.8	32.0	32.1	32.3	32.3	32.3	32.4	32.5	32.7	32.7	32.9	32.9	32.9	32.1
32.9	32.9	33.0	33.1	33.2	33.2	33.4	33.4	33.5	33.6	33.7	33.8	33.9	33.1
34.1	34.2	34.3	34.4	34.5	34.5	34.7	34.9	35.0	35.1	35.3	35.4	35.5	34.1
35.6	35.8	36.1	36.3	36.4	36.4	36.6	36.8	37.0	37.1	37.3	37.5	37.7	36.1
37.8	38.0	38.2	38.5	38.6	38.6	38.8	39.0	39.0	39.2	39.4	39.6	39.8	38.1
39.8	39.9	40.0	40.1	40.3	40.3	40.6	40.7	40.8	40.8	40.9	40.9	41.1	40.1
41.1	41.3	41.4	41.5	41.6	41.6	41.7	41.9	42.0	42.1	42.3	42.4	42.5	41.1
42.6	42.9	43.3	43.6	43.9	43.9	44.2	44.3	45.1	45.2	45.6	45.9	46.2	44.1
46.6	47.2	47.8	48.0	48.6	48.6	49.0	49.4	50.0	50.6	51.1	51.5	51.9	49.1
52.1	52.5	52.7	52.9	53.2	53.2	53.6	54.2	54.3	54.6	54.9	55.3	55.5	53.1
55.6	55.8	55.9	56.1	56.5	56.5	56.8	57.1	57.4	57.6	57.9	58.0	58.2	56.1
58.5	59.1	59.5	60.0	60.3	60.3	60.7	61.0	61.2	61.4	61.6	61.9	62.1	60.1
62.5	62.9	63.4	63.9	64.5	64.5	65.2	65.7	66.0	66.5	67.1	67.4	67.7	65.1
68.3	69.1	69.8	70.6	71.5	71.5	72.3	73.1	73.8	74.6	75.2	75.9	76.7	72.1
77.8	78.9	80.1	81.0	81.8	81.8	82.7	82.7	83.3	84.0	84.8	85.5	86.3	82.1
87.0	87.9	88.5	89.1	89.8	89.8	90.6	91.6	92.3	93.2	93.4	93.7	94.0	90.1
94.3	94.6	94.5	94.9	95.0	95.0	97.0	97.5	97.7	97.9	98.2	98.0	97.6	96.1
97.8	97.9	97.9	98.6	98.6	98.6	99.5	99.9	100.2	100.7	101.0	101.2	101.3	99.1
101.9	102.4	102.6	103.1	103.4	103.4	103.7	104.1	104.5	105.0	105.3	105.3	105.3	103.1
105.5	106.0	106.4	106.9	107.3	107.3	107.6	107.8	108.0	108.3	109.0	109.3	109.3	107.1
109.6	109.3	109.8	109.6	109.9	109.9	109.5	109.5	109.7	110.2	110.3	110.4	110.5	109.1
111.2	111.6	112.1	112.7	113.1	113.1	113.5	113.8	114.4	115.0	115.4	115.4	115.4	113.1
115.7	116.0	116.5	117.1	117.5	117.5	118.0	118.5	119.0	119.8	120.2	120.3	120.5	118.1
121.1	121.6	122.3	123.1	123.8	123.8	124.1	124.4	124.6	125.0	125.6	125.9	126.1	124.1
127.4	128.0	128.7	129.9	129.2	129.2	129.9	130.4	131.6	132.7	133.5	133.8	133.8	127.4

APPENDIX E

APPENDIX E

Determinative Statutes and Regulations

STATUTES:

Utah Code Ann. § 59-12-102 (1992)

- (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 if 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 the transfer of possession would be taxable if an outright sale were made.

Utah Code Ann. § 59-12-103 (1992)

- (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;
 - (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

Utah Code Ann. § 59-12-104 (1992)

- (27) property purchased for resale in this state, in the regular course of business, either in its original form or as an ingredient or component part of a manufactured or compounded product;

Utah Code Ann. § 59-1-610 (S.B. No. 243 (1993))

- (1) When reviewing formal adjudicative proceedings commenced before the commission, the Court of Appeals or Supreme Court

shall:

- (a) grant the commission deference concerning its written findings of fact, applying a substantial evidence standard on review; and
 - (b) grant the commission no deference concerning its conclusions of law, applying a correction of error standard, unless there is an explicit grant of discretion contained in a statute at issue before the appellate court.
- (2) This section supercedes Section 63-46b-16 pertaining to judicial review of formal adjudicative proceedings.

Utah Code Ann. § 70A-1-201 (37) (Supp. 1989) (amended 1990) [In relevant part]

Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not itself make the lease one intended for security, and (b) an agreement that upon compliance with the term of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

Utah Code Ann. § 70A-1-201 (37)(b) (1990)

- (b) Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and:
- (i) the original term of the lease is equal to or greater than the remaining economic life of the goods;
 - (ii) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;
 - (iii) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement; or
 - (iv) the lessee has an option to become the owner of

the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

(c) A transaction does not create a security interest merely because it provides that:

- (i) the present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into;
- (ii) the lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods;
- (iii) the lessee has an option to renew the lease or to become the owner of the goods;
- (iv) the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed; or
- (v) the lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

(d) For purposes of this subsection:

- (i) Additional consideration is not nominal if, when the option to renew the lease is granted to the lessee, the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed, or when the option to become the owner of the goods is granted to the lessee the price is stated to be the fair market value of the goods determined at the time the option is to be performed.
- (ii) Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised.
- (iii) "Reasonably predictable" and "remaining economic life of the goods" are to be determined with reference to the facts and circumstances at the

time the transaction is entered into.

(iv) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate is not manifestly unreasonable at the time the transaction is entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

ADMINISTRATIVE RULES:

Utah Admin. R. R865-19-32S (1992)

F. Notwithstanding anything to the contrary in this rule, a lessee may, at its option, treat a conditional sale lease as either a sale or lease for sales or use tax purposes.

A conditional sales lease is a lease in which:

1. the consideration the lessee is to pay the lessor for the right to possession and use of the property is an obligation for the term of the lease not subject to termination by the lessee, and
2. the total consideration to be paid by the lessee is fixed at the time the lease is executed and cannot be modified by use, condition, or market value, and either:
 - a. the lessee is bound to become the owner of the property; or
 - b. the lessee has an option to become the owner of the property for no additional consideration or nominal additional consideration upon compliance with the lease agreement. Nominal consideration in this sense means ten percent or less of the original lease amount.

G. If the lessee treats a conditional sale lease as a sale, and if the lessor is also the vendor of the property, the sales price for sales tax purposes must be at least equal to the average sales price of similar property.

H. If the lessee treats a conditional sale lease as a sale, the sales tax must be collected by the lessor on the full purchase price of the property at the time of the purchase.

APPENDIX F

Citation	Database	Mode	
1990 WL 92009	FOUND DOCUMENT	AZIX-ADMIN	P
(Cite as: 1990 WL 92009 (Ariz.Bd.Tax.App.))			

1 HONEYWELL BULL, INC. CRA, INC. Appellants
v.
ARIZONA DEPARTMENT OF REVENUE. Appellee
Docket No. 646-89-S
January 23, 1990

Appellants subsequently submitted claims for refund to the Arizona Department of Revenue (Department) for the Arizona transaction privilege taxes paid by BC when the computer was purchased from Honeywell Bull and when BC made each monthly rental payment to CRA Inc. The bases for Appellants' claims are that: a) the sale of the computer to BC was a tax exempt sale for resale; b) the acquisition of the computer was a single transaction that should be subject to Arizona transaction privilege taxes only one time; and, c) the sale/leaseback of the computer was solely a financing transaction which is not subject to Arizona transaction privilege taxes.

NOTICE OF DECISION: FINDINGS OF FACT AND CONCLUSIONS OF
LAW

The State Board of Tax Appeals, Division Two, having considered all evidence and arguments presented, and having taken the matter under advisement, finds and concludes as follows:

FINDINGS OF FACT

Blue Cross (BC) is an insurance company which conducts business within the state of Arizona. In the spring of 1986, BC decided to acquire a computer through a sale-leaseback transaction. It subsequently placed an order with Appellant, Honeywell Bull, and began discussing sale-leaseback arrangements with equipment leasing companies.

Honeywell Bull installed and tested the computer ahead of schedule. When payment was requested, BC had not yet committed to a sale-leaseback arrangement with a leasing company, so it decided to pay for the computer with a bank line of credit. On July 16, 1986, BC paid Honeywell Bull a total of \$5,178,757.53 which included Arizona transaction privilege tax, Maricopa County excise tax, and City of Phoenix transaction privilege tax.

BC needed to complete the sale-leaseback transaction before the end of 1986 because: a) its line of credit would become due; and, b) it would fail to comply with the data processing investment limitation of A.R.S. s 20-560 if the computer were still showing on its 1986 annual statement.

Appellant, CRA Inc., submitted a sale-leaseback proposal to BC on August 18, 1986. After numerous discussions, BC entered into a sale-leaseback agreement with CRA Inc. on December 17, 1986. BC sold the computer for \$4,885,834, and leased it back for \$96,175 per month plus all applicable taxes. BC's total monthly payment of \$102,618.75 includes Arizona transaction privilege tax, Maricopa County excise tax, and City of Phoenix transaction privilege tax. On May 7, 1987, BC issued a retroactive Arizona resale certificate to Honeywell Bull which certified that it was engaged in the business of selling insurance and that it purchased the computer for resale in the regular course of business.

(Cite as: 1990 WL 92009, *1 (Ariz.Bd.Tax.App.))

The Department denied Appellants' claims. Appellants protested the denials, and the Department held an administrative hearing on the matter on November 22, 1988. The Hearing Officer denied Appellants' protests, concluding that: a) Honeywell Bull sold the computer to BC in a retail sale subject to the transaction privilege tax; and, b) BC sold the computer to CRA Inc., which leased it back to BC; The gross receipts from the lease are subject to the transaction privilege tax.

*2 Appellants timely appealed the decision of the Hearing Officer to this Board on the same grounds. The Department contends that: a) Honeywell Bull's sale of the computer was not a sale for resale; b) Honeywell Bull's sale of the computer to BC may not be viewed as a single transaction with the sale/leaseback between BC and CRA Inc.; and, c) the sale/leaseback was not a mere financing transaction.

DISCUSSION

Was the Sale of the Computer to BC a Sale for Resale?:

There is a transaction privilege tax levied upon the business of selling tangible personal property at retail. A.R.S. s 42-1315 (1986). A sale at retail is defined as a sale for any purpose other than for resale in the regular course of business in the form of tangible personal property. s 42-1301(18) (1986). The burden of proving that a sale of tangible personal property was not a sale shall be upon the person who made it, unless such person has taken from the purchaser a certificate signed by and bearing the name and address of the purchaser that the property was purchased for resale in the ordinary course of business and that he has a valid license, with the number thereof, to sell the kind of property purchased. A.R.S. s 42-1328 (1986).

Honeywell Bull contends that it has met its burden of proof because BC provided it with a resale certificate some 10 months after the sale of the computer. The Department argues that Honeywell has failed to meet its burden because: a) BC is not in the business of selling computers, so the resale cannot be in the ordinary course of BC's business as required by statute and A.A.C. R15-5-1811(A); b) without a valid resale certificate at the time of purchase, Honeywell Bull's claim that BC intended to resell the computer is insufficient to meet its burden of proof; and, c) Honeywell Bull has not demonstrated that it maintains resale records separately from its retail records.

In Mountain Coin Machine Distributors, Docket No. 385-85-S, (Ariz.B.T.A., Div. 2 Apr. 7, 1987), the Appellant was engaged in the business of selling video game machines. Appellant did not pay the transaction privilege tax on gross receipts of sales to "turnkey operators" who were in the business of setting up

arcades and then selling them.

Although the Department demonstrated that some of the customers who provided resale certificates at the time of sale did not purchase Appellant's goods for resale, the Appellant in this case had a good faith belief and a reasonable basis to believe that those customers did in fact buy its goods for resale.

This Board found that the Appellant had met the burden of proof necessary to show that its sales were exempt from the transaction privilege tax by producing resale certificates pursuant to A.R.S. s 42-1328 which were obtained at the

(Cite as: 1990 WL 92009, *2 (Ariz.Bd.Tax.App.))

time of the sales. See Mountain Coin, slip op. at 3.

In the case at bar, there are significant factual differences: a) BC was not in the business of selling computers like the one it purchased from Honeywell Bull; b) there was no reasonable basis for Honeywell Bull to believe that BC sold such computers, especially since the computer was purchased for use to process BC's subscriber claims; and, c) the resale certificate was not provided at the time of the sale.

*3 Even if Honeywell Bull were able to show that it keeps separate records for retail and resale sales, it has not met the burden of proving a sale for resale outlined in Mountain Coin. Id.

Was the Acquisition of the Computer a Single Transaction?:

The burden of proof is upon the Appellants as to all issues of fact. A.A.C. R16-3-118 (1980).

Although Appellants contend that the acquisition of the computer should be considered as a single transaction, they fail to provide any legal support for this argument. Even if BC's intent was for this entire matter to constitute one transaction, Appellants have not demonstrated that BC's intent is a legally sufficient basis to deem this to be one transaction. Appellants have failed to meet the burden of proof with regard to this issue.

Was the Sale/Leaseback a Mere Financing Arrangement?:

Appellants rely heavily upon this Board's decision in Mark Realty Development, Inc. v. Ariz. Dept. of Revenue, Docket No. 357-85-S (Ariz.BTA, Div. 2 Feb. 5, 1987) in advocating the position that the sale and leaseback of the computer was a non-taxable financing arrangement. Appellants assert that the Board's holding in the case exempted capital lease payments from the transaction privilege tax. Appellants' reliance is misplaced, as Mark Realty has little, if any applicability to the case at bar.

A. Mark Realty

The issue in Mark Realty was whether or not a contract to develop and operate a workcamp facility was a lease of real property which established a landlord-tenant relationship. Mark Realty, slip op. at 4. The focus of the decision was upon leases of real property rather than leases of chattel. See id. at 4-12.

The discussion of capital lease financing in Mark Realty was just one part of a five-step analysis to determine whether the contract in question had the attributes necessary to be considered a lease of real property. Id. at 9-10. The holding of the decision was that there was neither a lease nor a landlord-tenant relationship established by the contract. Id. at 13.

B. Sale/Leaseback Transactions

In the federal income tax area, sale/leaseback transactions have been given some beneficial treatment. See Equipment Leasing, Tax Mgmt. (BNA) 12-6th, p. A-2; 1 S. Guerin, Taxation of Real Estate Dispositions 6-40 (1982). There are no similar provisions in the Arizona transaction privilege tax statutes. See generally A.R.S. ss 42-1301 to -1347 (1988). In a financial leasing situation, a known disadvantage to the seller-lessee is that the lessee will contract to maintain the equipment, insure it, and pay all taxes in connection with it;

(Cite as: 1990 WL 92009, *3 (Ariz.Bd.Tax.App.))

payment of sales tax on rental payments are included. See Equipment Leasing, Tax Mgmt. (BNA) 12-6th, p. A-2; 1 S. Guerin, Taxation of Real Estate Dispositions 6-40 (1982).

In Arizona, receipts derived from engaging in the business of leasing or renting personal property are taxable. A.R.S. s 42-1310 (1988). BC sold the Honeywell computer to CRA, and then entered into a lease agreement with CRA for the computer. CRA is undisputedly in the business of leasing and renting personal property for a consideration. CRA is thereby liable for the transaction privilege tax on the rental receipts, despite the fact that this transaction may have been structured to facilitate financing of the DP-90 computer. See *id.* The incidence of the tax is on CRA, not BC; CRA is not legally required to pass the cost of the tax on to its customers. See generally A.R.S. ss 42-1301 to -1347 (1988). The Department cannot be expected to subsidize BC's failure to contemplate all known ramifications of a sale-leaseback transaction.

CONCLUSIONS OF LAW

- *4 1. The sale of the computer by Honeywell to BC was not a tax-exempt sale for resale. See *Mountain Coin*, slip op. at 3.
2. Appellants have failed to meet its burden of proving that the purchase and subsequent sale-leaseback of the computer by BC constituted one transaction. A.A.C. R16-3-118 (1980).
3. Mark Realty did not hold that capital lease payments are not subject to the transaction privilege tax. *Id.* at 13.
4. A known disadvantage to lessees in sale-leaseback transactions is sales tax in proportion to the amount of rentals paid. See *Equipment Leasing, Tax Mgmt.* (BNA) 12-6th, at A-2; 1 S. Guerin, *Taxation of Real Estate Dispositions* at 6-40 (1982).
5. The Arizona transaction privilege statutes do not give beneficial treatment to sale-leaseback transactions. See generally A.R.S. ss 42-1301 to -1347 (1988).
6. CRA is liable for the transaction privilege tax on rental receipts from BC. A.R.S. s 42-1310 (1988).
7. The Department's denial of Appellants' refund claims was valid.

ORDER

THEREFORE, IT IS HEREBY ORDERED that Appellants' appeal is denied, and that

the Final Order of the Department Director is affirmed.

This decision becomes final upon the expiration of thirty (30) days from

receipt, unless either the State or the taxpayer brings an action in Superior Court as provided in A.R.S. s 42-124.

DATED this 23rd day of January, 1990.

Wilma Langfitt
Chairman
Division Two

Board of Tax Appeals