

1995

# Vermax of Florida, Inc. v. Auditing Division of the Utah State Tax Commission : Brief of Petitioner

Utah Court of Appeals

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VERMAX OF FLORIDA, INC.  
Petitioner,  
  
v.  
  
AUDITING DIVISION OF THE  
UTAH STATE TAX COMMISSION,  
  
Respondent.

UTAH SUPREME COURT  
DOCUMENT  
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BRIEF  
DOCKET NO. 950125

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**FILED**

**FEB - 9 1995**

**COURT OF APPEALS**

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IN THE UTAH SUPREME COURT

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VERMAX OF FLORIDA, INC.

Petitioner,

v.

AUDITING DIVISION OF THE  
UTAH STATE TAX COMMISSION,

Respondent.

)  
)  
) BRIEF OF PETITIONER  
) VERMAX OF FLORIDA, INC.  
)  
) Subject to Assignment to  
) the Court of Appeals  
)  
) Account No. D46403 - Sales Tax  
)  
) Docket No. 940436  
)  
) Priority No. 14

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UPON A WRIT OF REVIEW TO THE UTAH STATE TAX COMMISSION

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February 10, 1995

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CLERK OF THE COURT,  
UTAH

Geoffrey J. Butler, Clerk  
Utah Supreme Court  
3321 State Capitol Building  
Salt Lake City, Utah 84114

Re: Supplement to Petitioner Vermax of Florida, Inc.'s Brief.  
Case No. 940436, Vermax of Florida, Inc. v. Auditing Division of the Utah State Tax Commission.

Dear Geoff:

It was nice to see you and Pat again yesterday. Thank you for pointing out the revision to Rule 24(a)(5) of the Utah Rules of Appellate Procedure requiring citations to the record showing that the issue was preserved for appeal.

As we discussed, it is not entirely clear how the revised Rule operates in the case of an appeal from a decision of the Utah State Tax Commission involving issues of law. Nevertheless, the following is a list of citations to the record where the legal issues addressed in Vermax of Florida's brief were argued before the Tax Commission. The issues are numbered as they appear at pages 1-2 of Vermax of Florida, Inc.'s brief in the section entitled "Statement of Issues and Standards of Review." All citations are to the record, as noted by the abbreviation R. followed by a page number.

- Issue one appears at R. 0013-0015, R. 0149-0150, and R. 0181.
- Issue two appears at R. 0153 and R. 0186-0187. However, the Tax Commission's Findings of Fact and Conclusions of Law do not address this issue. See R.0004-0008.
- Issue three appears at R. 0050-0151, R. 1078-0181, R. 0188, and R. 0197-0198.<sup>1</sup>

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<sup>1</sup> At R. 0197-0198, Vermax of Florida argued under § 59-12-104(34), which was subsequently renumbered as § 59-12-104(33)

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Geogfrey J. Butler, Clerk

February 10, 1995

Page 2

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- Issue four appears at R. 0148-1049, R. 0178-0179, and R. 0204-0205.
- Issue five appears at R. 0066-0067 of the State's Pre-hearing Memorandum. The Tax Commission's adoption of the State's argument in its Findings of Fact and Conclusions of Law, see R. 0007, required the Tax Commission to make an implied finding of fact.
- Issue six appears at R. 0150 and R. 0197.
- Issue seven appears at R. 0151, R. 0183-0185, and R. 0205-0206.

Thank you for your attention to this matter.

Very truly yours,



Mark O. Morris

Amy E. Weissman

AEW:md

### **STATEMENT OF JURISDICTION**

The Supreme Court has jurisdiction in this matter pursuant to section 78-2-2(3)(e)(ii), Utah Code Ann. 1953, as amended.

### **STATEMENT OF ISSUES AND STANDARDS OF REVIEW**

1. Did the Tax Commission err by concluding that the existence of installation contracts relating to products that Vermax of Florida had already sold to out-of-state customers gave rise to sales tax liability? This issue poses a question of law, to which a non-deferential correction of error standard applies. Utah Code Ann. § 59-1-610(1)(b) (1994).

2. Did the Tax Commission err by failing to address Vermax of Florida's argument that its purchases of raw materials were exempt as wholesale sales of components, which were not otherwise taxable in Utah and did not become taxable when Vermax of Florida entered into separate contracts with independent contractors to install its finished products already sold to out-of-state purchasers? This issue poses a question of law, to which a non-deferential correction of error standard applies. Utah Code Ann. § 59-1-610(1)(b) (1994).

3. Did the Tax Commission err in concluding that the statutory exemption found in Utah Code Ann. § 59-12-104(33) did not become effective until after December, 1990, and thus did not apply to Vermax of Florida's alleged "furnish and install" contracts? This issue poses a question of law, to which a non-deferential correction of error standard applies. Utah Code Ann. § 59-1-610(1)(b) (1994).

4. Did the Tax Commission err by concluding that Vermax of Florida's sales to and subsequent installation of products for out-of-state customers were not exempt from Utah tax as being in "interstate commerce?" This issue poses a question of law, to which a non-deferential correction of error standard applies. Utah Code Ann. § 59-1-610(1)(b) (1994).

5. Did the Tax Commission err by impliedly finding that Vermax of Florida made sales to itself, in state, which products it then shipped out of state and installed? This issue poses a question of fact, to which a reviewing court shall grant deference if there is substantial evidence in support of the finding. Utah Code Ann. § 59-1-610(1)(a)(1994).

6. Did the Tax Commission incorrectly characterize the contractual relationship between Vermax of Florida and its out-of-state customers as "furnish and install" contracts when title passed at the site of delivery to the out-of-state buyers before installation? This issue poses a question of law, to which a non-deferential correction of error standard applies. Utah Code Ann. § 59-1-610(1)(b) (1994).

7. Did the Tax Commission err by denying Petitioner's request for an abatement of the 10% negligence penalty? This issue poses a question of fact, to which a reviewing court shall grant deference if there is substantial evidence in support of the finding. Utah Code Ann. § 59-1-610(1)(a)(1994).

#### **DETERMINATIVE RULES AND STATUTES**

The following statutes are determinative of the outcome of this review:

Utah Code Ann. § 59-12-103(1)(a), 1953, as amended (Addendum at 1 (hereinafter "A.1"));

Utah Code Ann. § 59-1-401(3), 1953, as amended (A.2); and Utah Code Ann. § 59-12-104(12) and (33), 1953, as amended (A.3).

Utah Admin. Code Rules R865-19-20S, 29S, 44S & 58S (1994) (A.4, A.5, A.6, and A.7, respectively) are also determinative.

## **STATEMENT OF THE CASE**

### **Nature of the Case**

The Audit Division seeks to collect from Vermax of Florida an alleged deficiency in the principal amount of \$63,134.51. The Audit Period ran from January 1988 to December 1990. Vermax of Florida does not contest a small portion of this amount. However, the lion's share of the alleged deficiency arises from wholesale transactions and transactions in interstate commerce, which transactions are exempt from sales tax under the United States Constitution and Utah statute.

### **Course of Proceedings**

Upon receiving a statutory Notice of Deficiency from the Auditing Division of the Utah State Tax Commission dated November 25, 1991, in the amount of \$86,260.24, Vermax of Florida petitioned the Tax Commission for a Redetermination and Agency Action. Vermax of Florida sought abatement of approximately \$60,000 in taxes, \$15,000 in interest, and \$6000 in penalties, leaving approximately \$4000 uncontested. Vermax of Florida filed an Amended Petition on February 5, 1992. A prehearing conference on the matter was held April 16, 1992, before Alan Hennebold, Administrative Law Judge ("ALJ"). On October 30, 1992, the ALJ entered an "Amended Prehearing Order." A formal evidentiary hearing ensued on May 3, 1993, before the same ALJ, with an agreement that additional factual materials would be submitted by stipulation.

Subsequent to the hearing, on June 18, 1993, the parties entered a Stipulation (A.8) concerning certain uncontested factual matters for the purpose of facilitating submission of this dispute. The Tax Commission, however, did not refer to these stipulated facts, nor did it make findings of fact consistent with them. These stipulated facts are as follows:

1. As to each of the contracts identified by the State Tax Commission in Schedules 1 and 2 attached to the November 25, 1991 Statutory Notice, Vermax issue two separate bids to the prospective purchaser, each of which was located out-of-state. One bid was for the sale of product to be incorporated into buildings out-of-state. The second bid was for the installation of such product into buildings out-of-state.

2. For each contract set forth in Schedules 1 and 2, the purchaser accepted both bids of Vermax. Generally, Vermax then had the purchaser execute two separate contracts, one for purchase and the other for installation. When dealing with large general contractors, Vermax was usually required to sign a single, form contract. Whether separate or combined, the contracts required that Vermax deliver the products on-site and then be responsible for installation.

3. For each installation bid included in the contracts set forth in Schedules 1 and 2, Vermax subcontracted the installation obligations to on-site, out-of-state contractors.

4. For each contract set forth in Schedules 1 and 2, unless the purchaser of Vermax products specified otherwise, Vermax invoiced the purchaser for product and installation as two separate items.

#### **Agency Disposition**

On September 1, 1994, the Tax Commission entered its Findings of Fact, Conclusions of Law (A.9). Based on the May 3, 1993 formal hearing and the subsequent submission of additional evidence and argument, the Tax Commission affirmed the Auditing Division's assessment of additional tax, penalty, and interest on September 1, 1994.

On September 29, 1994, Vermax of Florida filed its Petition for a Writ of Review with this Court.

### **FACTUAL BACKGROUND**

The Petitioner, Vermax of Florida, Inc., ("Vermax of Florida") is a Florida corporation that has been in existence since only approximately 1987. (Transcript of Formal Hearing, at Page 16, Lines 9 through 21). Prior to 1987, there was a Utah corporation by the name of Vermax Corporation (Id.). Vermax Corporation was incorporated in Utah and owned by Jerry Hawk, (id.), with whom the Auditing Division had prior communications regarding tax issues. (Id. at Page 40, Lines 11-15).

Vermax of Florida's main business is the manufacture of custom-designed products built from a synthetic marble product Vermax of Florida manufactures and supplies. Vermax of Florida sells these products to customers in and out of the state. (R.202). Vermax of Florida's primary function is manufacturing. (Transcript of Formal Hearing, at Page 17, Lines 12-13). Its main products are countertops and shower and tub enclosures. (R.202). Vermax of Florida is known as a "supplier of bathroom products." (Id. at Page 24, Lines 9-10).

During the audit years 1988, 1989, and 1990, Vermax of Florida's business consisted primarily of manufacturing and selling its products. (R.202). The majority of its sales are to customers located outside of Utah, and the Tax Commission concedes that without more, those sales are exempt from sales tax. The Tax Commission also concedes that without more, sales of raw materials that go into the products sold to out-of-state customers are wholesale sales, and are not taxable.

In some of its sales, Vermax of Florida assists its customers in obtaining suitable installers, located in other states, that can install the purchased products. (R.202). Vermax of Florida does not maintain a division regularly employed to install its sold products. Instead, Vermax of Florida acts as an intermediary between the customer and a local contractor to ensure installation. (R.203). In such situations, a separate installation contract is usually used. (R.203).

In the usual situation, Vermax of Florida sends out a bid on goods. Occasionally, when interest is indicated, Vermax of Florida provides a separate installation proposal which has no bearing on the sale price of Vermax of Florida's product. (Transcript of Formal Hearing, at Page 24, Line 17 through Page 26, Line 14). Even when Vermax of Florida bids on installation, purchasers often do not accept the installation bid. (Id. at Page 26, Lines 6-8). When a purchaser accepts an installation bid, the products are sold and delivered in the same manner as those delivered to a purchaser that ultimately arranges its own installation. (Id. at Page 47, Line 13 through Page 48, Line 4). The separate installation contracts require the customer to pay to the appropriate state any applicable sales or use tax which accrues as a result of this transaction. (R.203). For the particular contracts at issue, as well as all others of this type, Vermax of Florida never performed the physical installation itself. (Id. at Page 27, Lines 13-15). Nor did it take possession of the goods either in or out of state. (Id. at Page 47, Line 13 through Page 48, Line 10). In each case, Vermax of Florida subcontracted the actual installation of the already purchased materials to local installers. (Id. at Page 27, Lines 16-18; Page 44, Lines 15-18).



## SUMMARY OF THE ARGUMENT

Throughout the course of these proceedings, the Auditing Division has not clearly identified what it considers to be the taxable event at issue. At times, its seemed to focus on Vermax of Florida's sales to out-of-state customers that included an incidental installation contract; at other times, however, the Auditing Division appeared to emphasize and try to tax the sale of raw materials from Utah vendors to Vermax of Florida. The Tax Commission, on the other hand, identified "three types of transactions: 1) Use of materials in real property contracts; 2) Sales made on 'exempt' without proper documentation; and 3) Purchases of personal property for use or consumption by Vermax." (A.9 at 2).

On appeal, Vermax of Florida does not address those sales described as the second type. Only the first and third types are contested, and so Vermax of Florida addresses the only two discrete events that might produce tax liability: Vermax of Florida's purchases of raw materials, and its subsequent sales of products manufactured from those raw materials to out-of-state purchasers.<sup>1</sup> Neither of these types of events, however, is taxable, and the Tax Commission erred in concluding otherwise.

The Tax Commission erred by completely failing to mention, and rendering a ruling wholly inconsistent with, the facts to which the parties stipulated. Moreover, the Tax Commission adopted wholesale the incorrect statement that a potentially controlling statute,

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<sup>1</sup>For the purposes of this brief, the transactions listed as first and third by the Tax Commission are treated in reverse order. Conceptually, the transactions listed third in the ruling are those that occurred first in time, in that Vermax first purchased raw materials in order to fulfill its contracts. These sales are hereinafter referred to as "first-category" sales. Vermax's subsequent sales of its manufactured products to out-of-state purchasers are hereinafter referred to as "second-category sales."

Utah Code Ann. § 59-12-104(33) (Supp. 1994), was not effective during the audit period. The Amendment Notes to the statute leave no question but that the statute came into effect during the audit period. For these reasons alone, the ruling should be reversed.

Moreover, the Tax Commission improperly imposed tax on the two categories of transactions, which were both tax-exempt. The first-category transactions, Vermax of Florida's in-state purchases of raw materials, were tax-exempt as wholesale sales, pursuant to Rule R865-19-29S of the Utah Administrative Code, and, by exclusion, Utah Code Ann. § 59-12-103(1)(a) (Supp. 1994). Moreover, these first-category sales were exempt from tax pursuant to section 59-12-104(33) (Supp. 1993). Second-category sales of Vermax of Florida's manufactured products to out-of-state customers were exempt as sales within interstate commerce under Rule R865-19-44S of the Utah Administrative Code, regardless of whether Vermax of Florida ultimately agreed to assist in installation of its sold products.

Because all of the transactions at issue were tax-exempt, Vermax of Florida was not negligent in failing to pay sales tax on the transactions at issue, and the Tax Commission erred in refusing to abate the negligence penalty. Furthermore, even if this Court finds Vermax of Florida liable for the taxes at issue, the negligence penalty is not warranted in light of the fact that Vermax of Florida came into existence less than a year prior to the audit period, consulted tax experts for advice, and was not aware of any tax deficiencies assessed against Vermax Corporation.

## ARGUMENT

### **I. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE UNCLEAR AS TO THE LEGAL BASIS FOR AFFIRMING THE ASSESSMENT AND DO NOT SUPPORT AFFIRMANCE, REGARDLESS OF WHETHER VERMAX OF FLORIDA WAS A REAL PROPERTY CONTRACTOR**

This Court should reverse the Tax Commission's attempt to tax sales in interstate commerce. In relevant part, as described above, Finding Number 3 suggests that sales tax was imposed on two distinct types of transactions: "purchases of personal property for use or consumption by Vermax" and "use of materials in real property contracts." The Tax Commission was thus concerned with two different types of sales, namely (1) certain of Vermax of Florida's purchases of raw materials from other vendors within Utah for use in manufacturing countertops and sinks to fulfill contracts with out-of-state purchasers; and (2) certain of Vermax of Florida's sales of sinks and countertops to out-of-state customers. These two categories track the transactions for which the Auditing Division assessed tax liability. The Conclusions of Law, however, do not explain which statutes or rules the Tax Commission used to affirm the Auditing Division's assessment of tax on the two categories of transactions. Instead, the Tax Commission merely recites the following provisions, Utah Code Ann. § 59-12-103 and Utah Admin. Code R865-19-58S, without explaining how, why, or in what way they apply to the transactions at issue.

The Tax Commission's perfunctory recital of controlling law oversimplifies the framework governing sales and use tax. The Tax Commission is correct that, as a general proposition, retail sales of tangible personal property made within the state are taxable. Utah Code Ann. § 59-12-103(1)(a) (Supp. 1994). That tax liability, however, is limited by the

United States Constitution, and by the exemptions enumerated in section 59-12-104, several of which apply to Vermax of Florida. In addition Utah imposes no tax liability for wholesale sales. See Utah Code Ann. § 59-12-103(1)(a) and Utah Admin. Code R.865-19-29S (1994). Tax liability is further restricted by provisions within the Utah Administrative Code that limit the applicability of Rule R865-19-58S(A), one of which provisions also applies to Vermax of Florida. In discussing these limitations, each of the two categories of sales will be analyzed separately. As demonstrated below, both types of sales are exempt, regardless of whether Vermax of Florida was a real property contractor.

II. **VERMAX OF FLORIDA'S "FIRST-CATEGORY," IN-STATE PURCHASES OF RAW MATERIALS WERE EXEMPT FROM TAXATION BY RULE AND STATUTE**

A. **No Tax Liability Is Imposed On Wholesale Sales of Component Parts Pursuant to Utah Code Ann. § 59-12-103(1)(a) (Supp. 1994) and Rule R865-19-29S of the Utah Administrative Code**

In its Prehearing Memorandum in Support of Amended Petition for Redetermination and Request for Agency Action, Vermax of Florida argued that its first-category sales, i.e., its purchases of tangible personal property used to manufacture the products sold out-of-state, were tax-exempt because they were wholesale sales. (R. 0153). The Tax Commission did not address this argument in its ruling. However, Vermax of Florida maintains that its purchases of components were wholesale sales and thus not taxable. It was error for the Tax Commission to ignore the issue and to treat the sales in question as retail sales, which poses a question of law reviewable for correctness. Utah Code Ann. § 59-1-610(1)(b) (1994).

According to Rule R865-19-29S:

All sales of tangible personal property or services which enter into and become an integral or component part of tangible personal property or product which is further manufactured or compounded for sale, or the container or the shipping case thereof, are wholesale sales.

Utah Admin. Code R865-19-29S(A)(1) (1994). By statute, sales tax is imposed only on retail sales of tangible personal property, Utah Code Ann. § 59-12-103(1)(a) (Supp. 1994), and by necessary implication, wholesales sales are not taxable.

In the case at bar, Vermax of Florida purchased tangible personal property in the form of raw materials. See Utah Code Ann. § 59-12-102(14)(a) (Supp. 1994) (defining tangible personal property). Those raw materials became an integral or component part of synthetic marble that was then fabricated into bathroom products, which were items of tangible personal property. For the sales at issue here, the manufactured products were then sold to out-of-state customers.<sup>2</sup> The first-category sales were thus wholesale sales of components and were exempt from taxation.

The Auditing Division appears to have argued below that because Vermax of Florida incidentally arranged with independent contractors to install some of its products already sold to out-of-state purchasers, Vermax of Florida's purchases of raw materials from suppliers in

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<sup>2</sup>Vermax notes with some concern that its purchases of raw materials required to manufacture products for sales within the state of Utah are exempt from taxation pursuant to Utah Code Ann. § 59-12-104(27) (Supp. 1994) (exempting "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"). To the extent that the Tax Commission's ruling may impose a tax burden on component purchases for interstate sales while exempting those same purchases for intrastate sales, it may run afoul of the Commerce Clause of the United States Constitution, in contravention of Utah statute. See Utah Code Ann. § 59-12-104 (12) (Supp. 1994).

Utah were somehow transformed from wholesale to retail sales, rendering Vermax of Florida the ultimate consumer. This theory is not supported by the facts.

This Court has recognized that a manufacturer does not engage in a retail sales transaction when it purchases raw materials for manufacturing another item of personal property for resale. Chicago Bridge & Iron Co. v. Tax Comm'n, 839 P.2d 303, 306 (Utah 1992). The Auditing Division does not appear to dispute that out-of-state purchasers who bought bathroom supplies from Vermax of Florida were purchasing items of personal property, rendering tax-exempt Vermax of Florida's purchases of raw materials because they were not retail sales. Yet in those few instances when Vermax of Florida arranged for a local contractor to install those products already owned by the out-of-state purchaser, the Auditing Division shifted gears, labelled Vermax of Florida a real property contractor, and deemed the first-category transaction a taxable retail sale. As explained more fully below, the fact that Vermax of Florida executed a separate installation contract for manufactured products it had already sold did not make Vermax of Florida the ultimate consumer of the final product or a real property contractor. Its wholesale component purchases were not taxable in Utah, and the Tax Commission erred in failing to rule accordingly.

**B. Vermax of Florida's Purchases of Raw Materials Were Exempt From Taxation Pursuant to Utah Code Ann. § 59-12-104(33) (Supp. 1994)**

The first-category sales, purchases of raw materials from other vendors, were also tax-exempt pursuant to Utah Code Ann. § 59-12-104(33) (Supp. 1994), and the Tax Commission erred in ruling otherwise. This erroneous ruling poses a question of law, to

which a non-deferential correction of error standard applies. Utah Code Ann. § 59-1-610(1)(b) (1994).

**1. Section 59-12-104(33) Renders Tax-Exempt Vermax of Florida's Purchases of Raw Materials Used For The Products Purchased By Out-of-State Customers**

By its terms, section 59-12-104(33) exempts from tax Vermax of Florida's first-category purchases of raw materials. Specifically, it makes exempt:

sales of tangible personal property to persons within this state that is subsequently shipped outside the state and incorporated pursuant to contract into and becomes a part of real property located outside of this state, except to the extent that the other state or political entity imposes a sales, use, gross receipts, or other similar transaction excise tax on it against which the other state or political entity allows a credit for taxes imposed by this chapter.

Utah Code Ann. § 59-12-104(33) (Supp. 1994).

Vermax of Florida's sales satisfy each of the statutory requirements within section 59-12-104(33). First, Vermax of Florida purchased tangible personal property, in the form of raw materials, from vendors within the state of Utah. See Utah Code Ann. § 59-12-102(14)(a) (Supp. 1994). Second, pursuant to contracts with out-of-state purchasers, Vermax of Florida used those materials to make synthetic marble sinks and countertops, which were shipped to purchasers in other states. Third, once the products were delivered out of state, the purchasers incorporated them into their hotels or other buildings in the other states. Finally, after installation by an independent third-party, whether arranged by Vermax of Florida or the purchaser, the Vermax of Florida products became a part of real property.

Case law bolsters this statutory analysis of the sales and installation arrangements. The analysis of this Court in Chicago Bridge & Iron Co. v. Tax Comm'n, 839 P.2d 303 (Utah 1992) shows that Vermax of Florida does not engage in a taxable retail sales transaction when it purchases raw materials to fulfill its contracts. Id. at 306. The taxable event occurs when the manufactured product is sold, id., unless some other exemption applies to that sale. As demonstrated above, the interstate commerce exemption applies to Vermax of Florida's sales of its finished product to its out-of-state purchasers. The fact that Vermax of Florida sometimes subcontracts for installation does not alter this analysis.

For these reasons, the first category of transactions was tax exempt, and the Tax Commission erred in affirming the assessment of additional tax.

**2. The Tax Commission Erroneously Concluded That Section 59-12-104(33) Did Not Become Effective Until After the Audit Period**

In its Conclusions of Law, the Tax Commission concluded that section 59-12-104(33) did not become effective until after December, 1990, and thus did not apply to Vermax of Florida's alleged "furnish and install" contracts. (A.9, at 4). This issue poses a question of law, to which a non-deferential correction of error standard applies. Utah Code Ann. § 59-1-610(1)(b) (1994).

The erroneous conclusion apparently stems from the Tax Commission's wholesale adoption of an error in the Prehearing Memorandum submitted by the Auditing Division. The Prehearing Memorandum asserts: "What the petitioner [Vermax of Florida] fails to realize in this instance is that that particular section of the Utah Code became effective on



July 1, 1991 after the applicable audit period." (R.0069) (emphasis original). No authority for that effective date is given.

The legislative history of subsection (33) is difficult to trace. It appears that the language contained within the current subsection (33) was originally enacted as subsection (34), see Utah Code Ann. § 59-12-104 (1989), pursuant to the 1989 amendment. See Amendment Notes to Utah Code Ann. § 59-12-104 (1992); see also, Tummurru Trades v. Utah State Tax Comm'n, 802 P.2d 715, 718 n.10 (Utah 1990) (quoting same language and labelling it subsection (34) under the 1989 amendment). The 1989 amendment became effective on July 1, 1989. Id. Those same Amendment Notes, however, are misleading in that they state, "[t]he 1988 amendment by ch.69, effective April 1, 1988, . . . added Subsection (33); and made minor stylistic changes." Amendment Notes to Utah Code Ann. § 59-12-104 (1992), at 400 (emphasis added). It is not readily apparent whether the Amendment Notes were changed to reflect a change in the subsection numbers.

Regardless of whether the effective date is April 1, 1988, or July 1, 1989, the Tax Commission erred in concluding that the statute did not become effective until after the audit period. The audit period in question is January 1, 1988 through December 31, 1990. Section 59-12-104(33) therefore applied for a significant portion of the audit period, perhaps for all but three months. As a result, the reference in the Prehearing Memorandum to Tummurru is misplaced because, in Tummurru, the relevant statute was not enacted until 1989, well after the October 1, 1984 through September 30, 1987 audit period. Here, in contrast, the statute became effective during the audit period. As such, section 59-12-

104(33) applies, at least in part, and the Tax Commission erred in reaching the opposite conclusion.

III. **VERMAX OF FLORIDA'S "SECOND-CATEGORY" SALES TO AND ARRANGEMENT OF INSTALLATION FOR OUT-OF-STATE CUSTOMERS WERE EXEMPT FROM SALES TAX**

The second category of transactions for which taxes were assessed, sales to out-of-state purchasers, was exempt from taxation because those sales were within interstate commerce. The Tax Commission erred in ruling to the contrary, and this Court owes no deference to that legal determination. Utah Code Ann. § 59-1-610(1)(b) (1994).

According to Utah Code Ann. § 59-12-104(12) (Supp. 1994), the state may not impose sales or use tax on "sales or use of property which the state is prohibited from taxing under the Constitution or laws of the United States or under the laws of this state[.]" This statute reveals the legislature's recognition that the Commerce Clause of the United States Constitution prohibits state taxation of interstate commerce. See, e.g., Union Stockyards v. Tax Comm'n, 93 Utah 174, 71 P.2d 542 (1937). Similarly, Utah law expressly prohibits taxation of interstate commerce, pursuant to Rule R865-19-44S of the Utah Administrative Code. As set forth below, Vermax of Florida's transactions come within the purview of Rule R865-19-44S, and this Court should reverse the assessment of tax liability.

A. **Vermax of Florida's Sales Satisfy Rule R865-19-44S's Three-Step Test For Determining When A Sale Is Made In Interstate Commerce**

Rule R865-19-44S was promulgated to delineate the scope of section 59-12-104(12). Tummurru Trades v. Utah State Tax Comm'n, 802 P.2d 715, 719 (Utah 1990). The Rule sets forth the following test for determining when a sale is made in interstate commerce:

1. the transaction must involve actual and physical movement of the property sold across the state line;
2. such movement must be an essential and not an incidental part of the sale;
3. the seller must be obligated by the express or unavoidable implied terms of the sale, or contract to sell, to make physical delivery of the property across a state boundary line to the buyer.

Utah Admin. Code R.865-19-44S(B). The undisputed facts here meet this test.

The Tax Commission does not dispute that Vermax of Florida's sales to out-of-state customers which were not accompanied by separate installation contracts were within interstate commerce. And the fact of installation does not change the essential character of the sales transactions. The sales in question satisfy each of the three steps under Rule R865-19-44S. It is undisputed that the sales to out-of-state customers involved actual, physical movement of the sinks and countertops across the state line to other states. (A.8, ¶ 1; Finding of Fact Number 6). The interstate movement is essential by definition: the only way Vermax of Florida can sell its products to purchasers physically located outside of Utah is to transport the products across state lines. The purchasers, usually hotels, do not come to Utah to pick up the products. (Transcript of Formal Hearing, Page 47, Line 13 through Page 48, Line 10; A.8, ¶ 2). Finally, the agreements demonstrate that Vermax of Florida is contractually bound to deliver the sinks and countertops across the state boundary. (A.8, ¶ 2; see, e.g. R. 0025 ("ship to Dedham, MA"), R. 0030-0034 (specifying delivery to job site in Peabody, MA within six weeks), R. 0091-0094 (requiring Vermax of Florida to ship to Springfield, VA within four weeks)). Thus, Rule R865-19-44S is satisfied, the sales were

within interstate commerce, and this Court should reverse to the extent the Tax Commission is trying to tax Vermax of Florida's second-category sales.

B. **The Tummurru Decision Does Not Support The Tax Commission's Conclusion That Vermax of Florida's Sales Were Not Within Interstate Commerce**

The Tax Commission relied on this Court's decision in Tummurru Trades v. Utah State Tax Comm'n, 802 P.2d 715 (Utah 1990), in concluding that Vermax of Florida's sales were not in interstate commerce. That reliance was factually and legally misplaced because, contrary to the Tax Commission's conclusion, Tummurru did not advance the same argument as Vermax of Florida and differed in its company structure and sales practices.

Tummurru involved a company with two distinct arms, a construction entity and an inventory-maintaining entity. Id. at 718. The sales in question there occurred when the construction entity purchased and acquired items from the company's inventory. Id. The construction entity then installed the goods, with title to the goods passing to the out-of-state buyer only after the goods were installed. As such, the "purchaser" of the personal property was deemed to be Tummurru's in-state construction entity. Id. at 719. The company argued that it was not liable for sales tax on items its construction entity purchased from its inventory. Id. at 718. This Court disagreed, concluding that one arm of the company acted as the seller because it sold items from its inventory, and that the arm of the company that installed the items in its projects was the buyer. Id. Consequently, the entire Tummurru sale of personal property took place within the state of Utah between two Utah entities.

Implicit in the Tax Commission's Findings of Fact and in its application of Tummurru is the incorrect belief that Vermax of Florida, like Tummurru, made intrastate sales to itself

of products which it then shipped out-of-state and installed. This finding seems to stem from the Auditing Division's shift, in its argument to the Tax Commission, to the contention that Vermax of Florida sold its products to itself within Utah and then shipped and installed those products across the state boundary. That fact situation, however, is not evident or supported by the record here, and makes the Tummurru holding inapposite.

All of Vermax of Florida's contracts show that the purchaser was always a distinct, out-of-state entity, typically a hotel. Regardless of whether the purchaser executed a separate installation contract, the fact remained that the purchaser ordered the items in question, which items were shipped out-of-state and delivered to the purchaser. Title to the goods passed to the buyer out-of-state, prior to installation. Vermax of Florida does not have, and therefore did not transfer the items from, an inventory arm, as in Tummurru. Rather, Vermax of Florida manufactured the products and sold them to out-of-state purchasers per the sales contracts. In short, the only difference between Vermax of Florida's out-of-state sales, which the Tax Commission concedes are exempt, and those sales at issue here is that here, Vermax of Florida arranged to have the purchaser's goods installed locally after title had passed to the buyer. Because Vermax of Florida is not organized like Tummurru, no in-state sale between Vermax of Florida divisions ever occurred.

At the time of installation, unlike the Tummurru installers, neither Vermax of Florida nor, for that matter, the subcontractor, had title to the personal property; the out-of-state buyer owned the goods. Moreover, unlike Tummurru, Vermax of Florida is contractually bound by the express terms of the agreements to make delivery outside of Utah; no such contract terms were described in Tummurru. Thus, Tummurru is entirely distinguishable

and does not compel the result the Tax Commission reached. For this reason, this Court should reverse the Tax Commission's ruling.

C. **Regardless of Whether Vermax of Florida Was A Real Property Contractor, Its Second-Category Sales To Out-of-State Purchasers Were Tax-Exempt**

Vermax of Florida disputes the Tax Commission's characterization of Vermax of Florida as a real property contractor. Nonetheless, even if this Court affirms the Tax Commission's finding on that issue, the sales in question were exempt from taxation pursuant to Rules R865-19-58S(C) and R865-19-44S of the Utah Administrative Code. This issue poses a question of law, to which a non-deferential correction of error standard applies. Utah Code Ann. § 59-1-610(1)(b) (1994).

Assuming, arguendo, that Vermax of Florida was a real property contractor, Rule R865-19-58S determines its tax liability. In relevant part, the Rule provides:

C. Sales of materials and supplies to contractors for use in out-of-state jobs are taxable unless sold in interstate commerce in accordance with Rule R865-19-44S.

Utah Admin. Code R865-19-58S. As previously described, Rule R865-19-44S prescribes a three-part test for sales within interstate commerce, which test Vermax of Florida's sales satisfied. Also, the record shows there were no "sales" from an inventory arm to a contracting arm of Vermax of Florida. Thus, the specific exemption to tax liability expressed in Rule R865-19-44S is met here, and this Court should reverse the assessment.

This Court's decision in Thorup Brothers Constr. v. Auditing Div., 860 P.2d 324 (Utah 1993), compels the same conclusion. In Thorup, this Court held that a real property contractor was not liable for sales tax on its installation of items purchased and owned by a

Catholic school, which was a tax-exempt entity under state law. Id. at 329. Central to the Court's reasoning was the fact that Thorup merely installed goods which it did not own. Id. Likewise, even if Vermax of Florida is considered to have been a real property contractor when it subcontracted installation of its sold products, it arranged installation of items it did not own. The out-of-state purchaser/owner, who purchased and took title to the goods at the moment of delivery out of state, is tax-exempt because of the interstate nature of the sale, just as the Catholic school in Thorup was tax-exempt under state law. This Court concluded in Thorup that the Tax Commission cannot impose sales tax under such circumstances. Id.

Consequently, it is ultimately irrelevant whether Vermax of Florida was a real property contractor because even if it was, the transactions in question were exempt from sales tax by virtue of its non-ownership of the goods, and the Tax Commission erred in concluding otherwise. Thus, this Court should reverse the assessment.

**D. The Record Lacks Sufficient Evidence To Support The Tax Commission's Findings of Fact Underlying Its Erroneous Conclusion That The Sales Were Non-Exempt**

**1. The Record Demonstrates That The Contracts In Question Were Not Real Property Contracts**

The Tax Commission's error stems in part from the finding that the contracts at issue were "real property contracts." (Findings of Fact, Conclusions of Law, at 2, ¶ 3(1)). This label misconstrues the nature of the contracts in question and is not supported by the evidence. Although denominated a "finding" by the Tax Commission, this issue poses a question of law, to which a non-deferential correction of error standard applies. Utah Code Ann. § 59-1-610(1)(b)(1994).

As the evidence demonstrated, and more importantly, as the parties stipulated, Vermax of Florida always issued separate bids when a customer requested an installation bid as well as a sales bid. (A.8, ¶ 1). Some purchasers accepted only the sale bid, while others accepted both bids. Some entities rejected both bids. When both bids were accepted, Vermax of Florida typically used two separate contracts, unless the purchaser required otherwise. (A.8, ¶ 2). Vermax of Florida then manufactured the products specified, delivered its sold products out-of-state and transferred title at that time and place. For the contracts at issue, Vermax of Florida also arranged for an out-of-state subcontractor to perform the out-of-state installation. (A.8, ¶ 3). The purchase and the installation arrangements were billed separately. (A.8, ¶ 4).

These stipulated facts demonstrate that Vermax of Florida merely transformed wholesale raw materials into sinks and countertops, which sinks and countertops remained tangible personal property when the out-of-state buyer took title upon delivery out-of-state. The Tax Commission does not dispute that products sold to purchasers who accepted only the sale bid, and not the installation bid, were tax-exempt sales of tangible personal property within interstate commerce. But the Tax Commission incorrectly implies that the separate installation arrangement changed the character of the sales agreements, and ignores the fact that title to Vermax of Florida's products passed to the out-of-state purchasers at the time of sale, regardless of whether Vermax of Florida arranged the subsequent installation.

Vermax of Florida did not perform the physical installation of its sold products, and its sales were complete at the time it delivered the products to its out-of-state customers, prior to any attachment, affixation, or installation. The products never became attached to



real property while Vermax of Florida had title to them, and thus they retained their character as personal property at all times relevant to Vermax of Florida's potential tax liability, in accordance with Utah law. See Valgardson Housing Systems v. Tax Comm'n, 849 P.2d 618, 621-622 (Utah App.), cert. denied, 859 P.2d 585 (Utah 1993) (manufactured items are not converted from personal property to real property until attached or affixed to real estate). Thus, there is no evidence to support the legal finding that the contracts in question were "real property contracts," and the Tax Commission erred in characterizing them as such.

**2. The Finding That The Contracts in Question Were "Furnish And Install" Contracts Is Not Supported By Substantial, Or Any Evidence, and Completely Ignores the Parties' Stipulation To The Contrary**

There is also no record support for the proposition that the contracts in question were "furnish and install" contracts. (Findings of Fact, Conclusions of Law, at 2, ¶¶ 6-7). The "furnish and install" label is nothing more than another name for a real property contract. It implies that title to the good does not pass until the good is installed. Such a situation existed in Tummurru, supra. The stipulated facts here demonstrate that the contracts in question were not furnish and install contracts because (1) two independent contracts were bid and executed; (2) purchasers were not required to accept both bids, i.e., purchasers could arrange installation themselves; and (3) Vermax of Florida did not install the products, but rather arranged installation as a convenience to some of its out-of-state customers who desired that extra service. Prior decisions of this Court recognize that installation of goods does not change the essential character of a sales agreement. See Nickerson Pump &

Machinery Co. v. State Tax Comm'n, 12 Utah 2d 30, 361 P.2d 520, 522 (1961) ("The primary purpose of the agreements were [sic] for the sale and purchase of [products] assembled to particular specifications. The emplacement was incidental to such purpose and was a mere convenience for the purchaser . . . .").

In addition to the stipulated facts, the Formal Hearing Transcript is replete with testimony demonstrating that the contracts were not "furnish and install" contracts. According to the testimony of the only witness on this issue, Vermax of Florida's "primary function" is manufacturing. (Transcript of Formal Hearing, at Page 17, Lines 12-13). Vermax of Florida is known as a "supplier of bathroom products." (Id. at Page 24, Lines 9-10). Vermax of Florida sends out a bid on goods and, when interest is indicated, sends out a separate installation proposal which has no bearing on the sale price of Vermax of Florida's product. (Id. at Page 24, Line 17 through Page 26, Line 14). Even when Vermax of Florida bids on installation, purchasers need not and usually do not accept the installation bid. (Id. at Page 26, Lines 6-8). And when a purchaser accepts an installation bid, the products are delivered in the same manner as those delivered to a purchaser that ultimately arranges its own installation. (Id. at Page 47, Line 13 through Page 48, Line 4).

In marshalling evidence in favor of the Tax Commission ruling, Vermax of Florida submits that the only testimony conceivably supporting the Tax Commission's finding is that Vermax of Florida sometimes makes a profit from arranging the installations. (Id. at Page 45, Lines 5-7). But the fact that Vermax of Florida aims to profit from arranging installations demonstrates only that Vermax of Florida strives to be a profit-making entity, just like other businesses, and not that it is entering into furnish and install contracts. Such

profits are also taxed as income by the State. The record is devoid of any other evidence supporting the Tax Commission's finding. Because the record lacks substantial evidence in support of the finding, this Court need not defer to the finding. Utah Code Ann. § 59-1-610(1)(a)(1994).

**E. The Tax Commission's Factual Errors Led It To Treat Vermax of Florida As A Real Property Contractor And As The Ultimate Consumer**

Because the Tax Commission treated the contracts as "furnish and install" contracts, it incorrectly concluded that Vermax of Florida was a real property contractor. This factual error led the Tax Commission to apply Rule R865-19-58S(A) of the Utah Administrative Code, which does not apply to the stipulated facts here. Applicability of this Rule poses a question of law, to which a non-deferential correction of error standard applies. Utah Code Ann. § 59-1-610(1)(b) (1994).

Rule R865-19-58S provides in relevant part:

A. Sale of tangible personal property to real property contractors and repairmen of real property is generally subject to tax.

1. The person who converts the personal property into real property is the consumer of the personal property since he is the last one to own it as personal property.

2. The contractor or repairman is the consumer of tangible personal property used to improve, alter or repair real property, regardless of the type of contract entered into -- whether it is a lump sum, time and material, or cost-plus contract.

Application of this Rule requires the presence of two facts that do not exist here. First, there is no "sale" to Vermax of Florida, regardless of whether this Court concludes that Vermax of

Florida is a real property contractor. Second, Vermax of Florida is not a real property contractor. The Rule applies to the person who converts personal property into real property, and assumes that the personal property is not already owned by the customer. See, Thorup, 860 P.2d at 329. Finally, Vermax of Florida does not convert anything into real property, but merely arranges for local installers to do it.

Vermax of Florida's products do not become real property until they are attached or affixed into a building during the installation process. See, e.g., Valgardson Housing Systems v. Tax Comm'n, 849 P.2d 618, 621-622 (Utah App.), cert. denied, 859 P.2d 585 (Utah 1993). Even when Vermax of Florida executes two contracts with an out-of-state purchaser, installation is always performed by an independent third-party after Vermax of Florida delivers the product and accomplishes the sale. At the moment the sale is completed, the products are in the form of tangible personal property and remain so until someone else incorporates them into the real property. In addition, at the moment of sale, title passes to the out-of-state purchaser. When installation occurs, title to goods is in the buyer, not Vermax of Florida.

Because Vermax of Florida does not hold title to the items for which it subcontracts installation, it is neither a real property contractor nor the ultimate consumer under Utah law. As this Court explained in Thorup Brothers Construction v. Auditing Division, 860 P.2d 324 (Utah 1993), an entity is not liable for taxes on property it installs but does not own. Id. at 327. The out-of-state purchasers of Vermax of Florida's product are no different from any other tax-exempt entity, and mere installation of another's property does not give rise to tax

liability. The rationale of Thorup necessarily implies that Vermax of Florida was not liable for sales tax under Rule R865-19-58S.

Additional decisions of this Court support excluding Vermax of Florida from application of the real property contractor rule. For example, in BJ-Titan Services v. State Tax Comm'n, 842 P.2d 822 (Utah 1992), this Court commented extensively on the treatment given real property contractors. BJ-Titan provided oil and gas well stimulation and stabilization accomplished by cementing, hydraulic fracturing, and acidizing. Id. at 823. The company delivered its products to well sites, at which point the well operators decided formulas and methods of placement in the well. Id. In considering whether BJ-Titan was a real property contractor, the Court observed:

The different treatment applied to real property contractors is based on the proposition that building materials lose their identity as such when they become part of a building or facility. In other words, they are converted from tangible personal property into real property. The issue is not, as BJ-Titan urges, which party to the transaction converted the cement into real property, but rather, who is the ultimate user or consumer of the cement. Because the essence of the transaction between BJ-Titan and a well operator is tangible personal property, BJ-Titan purchased the raw materials used in producing its cement not for consumption, but for resale . . . . The ultimate consumer is the well operator . . . .

Moreover, a well operator is in the business of making a well produce . . . . It does not seek to purchase real property, nor does the cement become inseparably meshed into a greater facility which itself is the object of the transaction. From the standpoint of the well operator, who may or may not own the well, the cement has not lost its identity as tangible personal property.

Id. at 829. By the same reasoning, Vermax of Florida purchased the raw materials to make sinks and countertops not for consumption, but for resale. And from the perspective of the purchaser, the sinks and countertops did not lose their identity as tangible personal property until after the purchaser owned them. Indeed, nothing prevented the purchasers from reselling the products, moving them elsewhere, storing them in a warehouse, or otherwise disposing of them upon receipt from Vermax of Florida, and the arrangement of installation neither changed the character of the transaction or the products, nor converted Vermax of Florida into a real property contractor.

Consequently, Vermax of Florida was neither a real property contractor nor the ultimate consumer of its sold products, and the contracts in question were neither real property contracts nor "furnish and install" contracts. These incorrect characterizations led the Tax Commission to apply the wrong statutes and erroneously affirm the Auditing Division's assessment. This Court should now reverse that assessment.

IV. **THE TAX COMMISSION IMPROPERLY DENIED VERMAX OF FLORIDA'S REQUEST FOR ABATEMENT OF THE TEN PERCENT NEGLIGENCE PENALTY**

The Tax Commission erroneously denied Vermax of Florida's request for an abatement of the 10% negligence penalty. This issue poses a question of fact, to which a reviewing court shall grant deference if there is substantial evidence in support of the finding. Utah Code Ann. § 59-1-610(1)(a)(1994).

Negligence penalties are authorized by Utah Code Ann. § 59-1-401(3)(a).<sup>3</sup> Under this section, a negligence penalty:

is appropriate when the taxpayer has failed to pay taxes and a reasonable investigation into the applicable rules and statutes would have revealed that the taxes were due . . . . [T]he taxpayer can escape the penalty if he or she can show that he or she based the nonpayment of taxes on a legitimate, good faith interpretation of an arguable point of law.

Hales Sand & Gravel v. Audit Div., 842 P.2d 887, 895 (Utah 1992). If Vermax of Florida prevails upon this writ of review, the penalty should be rejected because Vermax of Florida was not liable for taxes and therefore could not have been negligent in failing to pay taxes it did not owe. But even if Vermax of Florida does not prevail, the penalty should be abated because Vermax of Florida was not negligent and because Vermax of Florida based its nonpayment on a good faith construction of the sales tax law. This Court has observed that "[w]hether a taxpayer is a real property contractor for sales tax purposes usually is fact sensitive." Chicago Bridge & Iron Co. v. Tax Comm'n, 839 P.2d 303, 309 (Utah 1992). If Vermax of Florida is a real property contractor, and its interpretation of the relevant rules and statutes is proven incorrect on appeal, the fact of its error does not require imposition of a penalty. Id. (construing penalty imposed for intentional disregard of rule<sup>4</sup> and noting that taxpayer's arguments as to liability demonstrated good faith dispute, although position was

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<sup>3</sup>Pursuant to the 1994 Amendments, Subsection 3 has been redesignated as Subsection 5. See Utah Code Ann. § 59-1-401(5)(a)(i) (Supp. 1994), and Amendment Notes thereto.

<sup>4</sup>A penalty assessed due to intentional underpayment implicates the same standard as a negligence penalty. See Hales Sand & Gravel v. Audit Div., 842 P.2d 887, 895 (Utah 1992).

ultimately deemed wrong); accord Hales, 842 P.2d at 895 (reversing negligence penalty because of good faith argument based on understandable confusion, despite ultimately rejecting petitioner's arguments and affirming Tax Commission on the merits).

The Tax Commission affirmed the penalty because it "note[d] that several years ago, Vermax of Florida was assessed a sales tax deficiency for the same type of deficiency as is involved here." The Tax Commission claims that it notified Vermax of Florida of the previous deficiency. Vermax of Florida denies that it received any such notice, and the record is devoid of evidence that Vermax of Florida was ever notified. Most importantly, Vermax of Florida did not exist "several years ago" in relation to the audit period. A separate entity by the name of Vermax Corporation existed, with which Vermax of Florida has no unity of ownership. Moreover, Vermax of Florida actively sought and adhered to advice from its auditors and certified public accountants, (R. 0142, 0151, 0183-0184), which behavior has been deemed reasonable by the United States Supreme Court. United States v. Boyle, 469 U.S. 241, 105 S. Ct. 687 (1985). Because Vermax of Florida's behavior was reasonable, it could not have acted negligently, as section 59-1-401(3)(a) requires for a penalty to be properly assessed. In addition, as this lengthy brief amply demonstrates, Vermax of Florida has set forth several colorable arguments supported by controlling decisions of this Court. The existence of a bona fide, good faith dispute negates the imposition of a negligence penalty. Hales, 842 P.2d at 895.

In marshalling the evidence, Vermax of Florida maintains that the only record evidence that could support the Tax Commission's ruling is a Tax Commission Decision entered on July 11, 1986 against Vermax Corporation. (R.0130). Vermax Corporation, a



Utah corporation, is a different entity from Petitioner here, a Florida corporation. (Formal Hearing Transcript, at Page 16, Lines 13 through 21). Vermax of Florida, is a distinct corporate entity, and Vermax Corporation's prior negligence should not be attributed to Vermax of Florida.

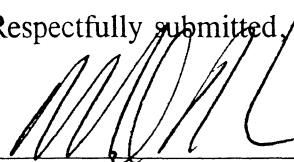
It would be unfair to penalize Vermax of Florida for the negligence of another, and it would go against the substantial evidence in the record demonstrating Vermax of Florida's lack of negligence. Furthermore, the Tax Commission's ruling completely ignores Vermax of Florida's good faith interpretation of several points of law, which, under this Court's prior decisions, negates a finding of negligence. See Hales, 842 P.2d at 895. For these reasons, the penalty should be reversed in any event.

#### CONCLUSION

For the foregoing reasons, Vermax of Florida respectfully requests that this Court reverse the Commission's assessment of additional sales tax and negligence penalty.

DATED this 9<sup>th</sup> day of February, 1995.

Respectfully submitted,



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Amy E. Weissman, Esq.

SNELL & WILMER L.L.P.

Attorneys for Vermax of Florida, Inc.

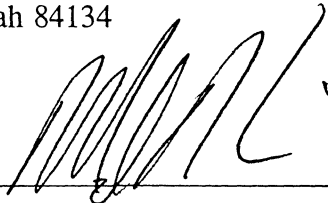
CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, four true and accurate copies of the foregoing BRIEF OF PETITIONER VERMAX OF FLORIDA, INC. on this the 9<sup>th</sup> day of February, 1995, to each of the following:

Kim Thorne, Director  
Auditing Division  
210 North 1950 West  
Salt Lake City, Utah 84134

Gale Francis, Esq.  
Assistant Attorney General  
50 South Main Street, Suite 900  
Salt Lake City, Utah 84144

Craig Sandberg  
Deputy Director, Auditing  
210 North 1950 West  
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## ADDENDUM

A.1

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

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

- (a) retail sales of tangible personal property made within the state;
- (b) amount paid to common carriers or to telephone or telegraph corporations, whether the corporations are municipally or privately owned, for:
  - (i) all transportation;
  - (ii) intrastate telephone service; or
  - (iii) telegraph service;
- (c) gas, electricity, heat, coal, fuel oil, or other fuels sold or furnished for commercial consumption;
- (d) gas, electricity, heat, coal, fuel oil, or other fuels sold or furnished for residential use;
- (e) meals sold;
- (f) (i) admission or user fees for theaters, movies, operas, museums, planetariums, shows of any type or nature, exhibitions, concerts, carnivals, amusement parks, amusement rides, circuses, menageries, fairs, races, contests, sporting events, dances, boxing and wrestling matches, closed circuit television broadcasts, billiard or pool parlors, bowling lanes, golf and miniature golf, golf driving ranges, batting cages, skating rinks, ski lifts, ski runs, ski trails, snowmobile trails, tennis courts, swimming pools, water slides, river runs, jeep tours, boat tours, scenic cruises, horseback rides, sports activities, or any other amusement, entertainment, recreation, exhibition, cultural, or athletic activity;
  - (ii) the tax imposed on admission or user fees in Subsection (i) does not affect an entity's sales tax exempt status under Section 59-12-104.1;
- (g) (i) use of amusement devices, including music machines, pinball machines, and mechanical or electronic games, provided that the owner or lessee of these devices is required to remit only 75% of the sales tax liability imposed under this chapter;
  - (ii) by October 1, 1995, and every five years thereafter, the Tax Review Commission and the Revenue and Taxation Interim Committee shall review the 25% exclusion from remittance and determine whether the exclusion from remittance should be continued, modified, or repealed;
- (h) (i) use of coin-operated car washes, provided that the owner or lessee of these devices is required to remit only 75% of the sales tax liability imposed under this chapter;
  - (ii) by October 1, 1995, and every five years thereafter, the Tax Review Commission and the Revenue and Taxation Interim Committee shall review the 25% exclusion from remittance and determine whether the exclusion from remittance should be continued, modified, or repealed;
- (i) services for repairs or renovations of tangible personal property or services to install tangible personal property in connection with other tangible personal property;
- (j) (i) cleaning or washing of tangible personal property, except that the owner or lessee of coin-operated laundry machines or coin-operated

dry cleaning machines is required to remit only 75% of the sales tax liability imposed under this chapter;

(ii) by October 1, 1995, and every five years thereafter, the Tax Review Commission and the Revenue and Taxation Interim Committee shall review the 25% exclusion from remittance and determine whether the exclusion from remittance should be continued, modified, or repealed;

(k) tourist home, hotel, motel, or trailer court accommodations and services for less than 30 consecutive days;

(l) laundry and dry cleaning services;

(m) 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

(n) tangible personal property stored, used, or consumed in this state.

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

(a) 5% through June 30, 1994; and

(b) 4.875% from and after July 1, 1994.

(3) The rates of the tax levied under Subsection (1)(d) shall be 2% from and after January 1, 1990.

(4) (a) From January 1, 1990, through December 31, 1999, there shall be deposited in an Olympics special revenue fund or funds as determined by the Division of Finance under Section 51-5-4, for the use of the Utah Sports Authority created under Title 9, Chapter 1, Part 3, Utah Sports Authority Act:

(i) the amount of sales and use tax generated by a  $\frac{1}{64}$ % tax rate on the taxable items and services under Subsection (1);

(ii) the amount of revenue generated by a  $\frac{1}{64}$ % tax rate under Section 59-12-204 on the taxable items and services under Subsection (1); and

(iii) interest earned on the amounts under Subsections (i) and (ii).

(b) These funds shall be used by the Utah Sports Authority as follows:

(i) to the extent funds are available, to transfer directly to a debt service fund or to otherwise reimburse to the state of Utah any amount expended on debt service or any other cost of any bonds issued by the state to construct any public sports facility as defined in Section 9-1-303; and

(ii) to pay for the actual and necessary operating, administrative, legal, and other expenses of the Utah Sports Authority, but not including protocol expenses for seeking and obtaining the right to host the Winter Olympic Games.

(5) From July 1, 1996, through June 30, 2003, the annual amount of sales and use tax generated by a  $\frac{1}{8}$ % tax rate on the taxable items and services under Subsection (1) shall be used for water projects as provided in this subsection.

(a) Fifty percent of the amount generated by the  $\frac{1}{8}$ % tax rate shall be transferred to the Water Resource Conservation and Development Fund created in Section 73-10-24 for use by the Division of Water Resources. In addition to the uses allowed of the fund under Section 73-10-24, the fund may also be used to:

(i) develop the water of the Bear River;

- (ii) provide a portion of the local cost share, not to exceed 50% of the funds made available to the Division of Water Resources under this section, of potential project features of the Central Utah Project;
  - (iii) fund state required dam safety and improvements; and
  - (iv) protect the state's interest in the interstate water compact allocations, including the hiring of technical and legal staff.
- (b) Twenty-five percent of the amount generated by the  $\frac{1}{8}\%$  tax rate shall be transferred to the Water Quality Security Subaccount created in Section 73-10c-5 for use by the Water Quality Board to fund wastewater projects as defined in Section 73-10b-2.
- (c) Twenty-five percent of the amount generated by the  $\frac{1}{8}\%$  tax rate shall be transferred to the Drinking Water Security Subaccount created in Section 73-10c-5 for use by the Division of Drinking Water to:
- (i) provide for the installation and repair of collection, treatment, storage, and distribution facilities for any public water system, as defined in Section 19-4-102;
  - (ii) develop underground sources of water, including springs and wells; and
  - (iii) develop surface water sources.
- (d) Notwithstanding Subsections (a), (b), and (c), \$100,000 of the amount generated by the  $\frac{1}{8}\%$  tax rate each year shall be transferred as dedicated credits to the Division of Water Rights to cover the costs incurred in hiring legal and other technical staff for the adjudication of water rights. Any remaining balance at the end of each fiscal year shall lapse back to the contributing funds on a prorated basis.
- (6) If the Legislature does not enact any increase in the rate of the motor fuel tax as provided in Title 59, Chapter 13:
- (a) If in fiscal year 1995-96, General Fund revenues are at least \$200 million in excess of the General Fund revenues in fiscal year 1994-95, beginning on July 1, 1996 through June 30, 2003, the annual amount of sales and use tax generated by a  $\frac{1}{8}\%$  tax rate on the taxable items and services under Subsection (1) shall be transferred to the Transportation Fund and shall be used for transportation projects.
  - (b) If the General Fund revenues in fiscal year 1995-96 do not require the  $\frac{1}{8}\%$  transfer under Subsection (a), then in fiscal year 1997-98, 1999-2000, and 2001-2002, the  $\frac{1}{8}\%$  transfer otherwise provided for in Subsection (5) shall be made to the Transportation Fund.

**History:** L. 1933, ch. 63, § 2; 1933 (2nd S.S.), ch. 20, § 1; 1935, ch. 91, § 1; 1937, ch. 110, § 1; 1939, ch. 103, § 1; C. 1943, 80-15-2; L. 1943, ch. 92, § 1; 1949, ch. 83, § 1; 1957, ch. 125, § 1; 1963, ch. 140, § 1; 1969, ch. 187, § 1; 1969 (1st S.S.), ch. 14, § 1; 1971, ch. 152, § 1; 1973, ch. 151, § 1; 1981, ch. 239, § 1; 1986, ch. 55, § 2; C. 1953, 59-15-2; renumbered by L. 1987, ch. 5, § 21; 1989, ch. 41, § 6; 1989 (2nd S.S.), ch. 5, § 5; 1990, ch. 22, § 1; 1990, ch. 171, § 1; 1991, ch. 152, § 1; 1992, ch. 241, § 370; 1994, ch. 210, § 2; 1994, ch. 217, § 1; 1994, ch. 290, § 1; 1994, ch. 318, § 1.

**Amendment Notes.** — The 1994 amendment by ch. 210, effective July 1, 1994, rewrote Subsection (1)(f), which read "admission to any

place of amusement, entertainment, or recreation, including seats and tables reserved or otherwise, and other similar accommodations."

The 1994 amendment by ch. 217, effective July 1, 1994, added Subsections (1)(g), (1)(h), and (1)(j)(ii); added the language beginning "except that the owner" at the end of Subsection (1)(j)(i); deleted former Subsection (2)(a), which read "5  $\frac{3}{32}\%$  through December 31, 1989"; deleted former Subsection (3)(a), which read "2  $\frac{3}{32}\%$  through December 31, 1989"; and made related stylistic changes.

The 1994 amendment by ch. 290, effective July 1, 1994, rewrote Subsection (2)(a), which read "5  $\frac{3}{32}\%$  through December 31, 1989"; rewrote Subsection (2)(b), which read "5% from and after January 1, 1990"; deleted former

Subsection (3)(a), which read "2  $\frac{3}{32}$ % through December 31, 1989" and redesignated former Subsection (3)(b) as Subsection (3).

The 1994 amendment by ch. 318, effective

July 1, 1994, added Subsections (5) and (6).

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

## NOTES TO DECISIONS

### ANALYSIS

Constitutionality.  
Cementing.  
Direct sale vs. lease.  
Exemption from tax.  
Installation.  
—Responsibility.  
Oil and gas well stimulation services.  
Purchaser.  
Repairs and renovations.  
Sale of goods to subsidiary.  
Transfer of vehicles.  
Transportation costs as part of sales price.  
—"Small-batch" charges.  
Water softeners.  
Cited.

#### Constitutionality.

Although the state may include the price of services performed in connection with tangible property in calculating the basis for a use tax, it cannot impose a tax that discriminates against interstate commerce. In order for the state to include out-of-state services in the basis for calculating the use tax, the Constitution requires that those services be taxable if performed within the state. *Union Pac. R.R. v. Auditing Div.*, 842 P.2d 876 (Utah 1992).

The imposition of a use tax under this section on tangible personal property purchased out of state but stored or used in Utah did not create a discriminatory burden on interstate commerce contrary to the commerce clause of the U.S. Constitution, given that the state would have taxed the transaction at a similar rate under the sales tax provision if it had occurred within the state. *Union Pac. R.R. v. Auditing Div.*, 842 P.2d 876 (Utah 1992).

#### Cementing.

A company selling cementing services involving the mixing, delivery, and injection of concrete slurry into well holes is not a real property contractor; because the essence of the transaction between the company and its well operator customers is tangible personal property, the company purchased materials for resale to the well operator as the ultimate consumer. *B.J.-Titan Servs. v. State Tax Comm'n*, 842 P.2d 822 (Utah 1992).

#### Direct sale vs. lease.

The tax commission's decision to tax post-lease sales of water softeners as tangible personal property while exempting direct sales of

the same product as an improvement to real property was unreasonable. The nature of the product as an improvement to real estate did not change simply because it was sold after initial installation under a lease. *Superior Soft Water Co. v. Utah State Tax Comm'n*, 843 P.2d 525 (Utah Ct. App. 1992).

#### Exemption from tax.

Amusement arcade's fees collected for use of its batting cages, roller skating rink, and laser tag game were not subject to a sales tax under this section since the fees were not obtained as admissions for the "right to enter a place," but were merely monies charged to do particular things. *49th St. Galleria v. Tax Comm'n*, 223 Utah Adv. Rep. 36 (Ct. App. 1993).

Contractor was not liable for sales tax for materials purchased by and used on behalf of a school district because the purchaser within the meaning of Subsection (1)(n) was the school district. Since the school district was exempt from sales taxes as a subdivision or institution of the state, the fact that the school district had a nonexempt party incorporate the purchased property into its realty did not change the character of the transaction. *Brown Plumbing & Heating Co. v. State Tax Comm'n*, 224 Utah Adv. Rep. 12 (1993).

When one of the express exemptions in § 59-12-104 applies, the sales tax is inapplicable, and there is no policy reason for assessing the use tax. *Knowledge Data Sys. v. Utah State Tax Comm'n*, 229 Utah Adv. Rep. 29 (Utah Ct. App. 1993).

#### Installation.

##### —Responsibility.

Even though a joint venture agreement may have allocated responsibility for installation to petitioner's co-venturer, petitioner who had ultimate responsibility to ensure installation was a real property contractor and therefore liable for the taxes assessed. *Niederhauser Ornamental & Metal Works Co. v. Tax Comm'n*, 219 Utah Adv. Rep. 43 (Ct. App. 1993).

#### Oil and gas well stimulation services.

Cementing services involving the mixing, delivery, and injection of concrete slurry into well holes were subject to sales and use taxes; however, hydraulic fracturing and acidizing services which involved the injection of chemicals into the well to stimulate well flow did not produce a finished tangible product subject to



taxes. *B.J.-Titan Servs. v. State Tax Comm'n*, 842 P.2d 822 (Utah 1992).

#### **Purchaser.**

The focus of Subsection (1)(a) is on the purchaser, rather than the item purchased. *Thorup Bros. Constr. v. Auditing Div. of Utah State Tax Comm'n*, 221 Utah Adv. Rep. 39 (1993).

A contractor is not liable for sales taxes on property that it did not purchase or own. *Thorup Bros. Constr. v. Auditing Div. of Utah State Tax Comm'n*, 221 Utah Adv. Rep. 39 (1993).

Electrical contractor could not be assessed a use tax on materials purchased by owners that were tax-exempt entities. *Arco Elec. v. Utah State Tax Comm'n*, 222 Utah Adv. Rep. 11 (1993), following *Thorup Brothers Constr., Inc. v. Auditing Division of the Utah State Tax Comm'n*, 221 Utah Adv. Rep. 39 (1993).

#### **Repairs and renovations.**

The tax commission erred when it included the cost of milling and drilling raw logs incurred by a railroad in assessing a use tax on railroad ties brought instate for use. The basis for calculating the use tax in such a case is the amount paid for the raw logs when purchased plus the amount paid for services that fall into one of the specified categories of taxable services set forth in this section. The commission erroneously concluded that the milling and drilling procedures were "repairs or renovations" within the meaning of Subsection (1)(g). *Union Pac. R.R. v. Auditing Div.*, 842 P.2d 876 (Utah 1992).

#### **Sale of goods to subsidiary.**

A seller was liable under Subsection (1)(a) for sales of goods to another corporation despite the fact that the Department of Transportation found the two corporations to be a single entity for the purposes of the Davis Bacon Act. One

agency's determination is not necessarily binding on the deliberations of another agency, and federal labor law criteria are irrelevant to determination of state taxability. *Hales Sand & Gravel, Inc. v. Auditing Div.*, 842 P.2d 887 (Utah 1992).

#### **Transfer of vehicles.**

Transfer of vehicles subject to sales tax. See *B.J.-Titan Servs. v. State Tax Comm'n*, 842 P.2d 822 (Utah 1992).

#### **Transportation costs as part of sales price**

Transportation charges are taxable under Subsection (1)(a) as part of the sales price of personal property if they are incurred before the transfer of title. When a sales contract requires delivery at destination, title passes at destination and the transportation costs are therefore subject to taxation unless the parties explicitly agree otherwise. *Hales Sand & Gravel, Inc. v. Auditing Div.*, 842 P.2d 887 (Utah 1992).

#### **— "Small-batch" charges.**

"Small-batch" charges added by a concrete seller to concrete batches that were too small to absorb the costs of delivery were taxable under Subsection (1)(a) as a transportation charge added to the sales price. *Hales Sand & Gravel, Inc. v. Auditing Div.*, 842 P.2d 887 (Utah 1992).

#### **Water softeners.**

The sale of water softeners, sold pursuant to sales and installation contracts, are sales of improvements to real estate, and not sales of tangible personal property subject to sales tax. *Superior Soft Water Co. v. Utah State Tax Comm'n*, 843 P.2d 525 (Utah Ct. App. 1992).

*Cited in* *Matrix Funding Corp. v. Auditing Div.*, 231 Utah Adv. Rep. 23 (Utah Ct. App. 1994).

## **59-12-104. Exemptions.**

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

(1) sales of aviation fuel, motor fuel, and special fuel subject to a Utah state excise tax under Title 59, Chapter 13, Motor and Special Fuel Tax Act;

(2) sales to the state, its institutions, and its political subdivisions, except sales of construction materials however, construction materials purchased by the state, its institutions, or its political subdivisions which are installed or converted to real property by employees of the state, its institutions, or its political subdivisions are exempt;

(3) sales of food, beverage, and dairy products from vending machines in which the proceeds of each sale do not exceed \$1 if the vendor or operator of the vending machine reports an amount equal to 150% of the cost of items as goods consumed;

A.2

- (ii) recklessly disregarded obvious or known risks, which resulted in the failure to collect, account for, or pay over the tax; or
- (iii) failed to investigate or to correct mismanagement, having notice that the tax was not or is not being collected, accounted for, or paid over as provided by law.

(c) The commission or court need not find a bad motive or specific intent to defraud the government or deprive it of revenue to establish willfulness under this section.

(d) If the commission determines that a person is liable for the penalty under Subsection (2), the commission shall assess the penalty and give notice and demand for payment. The notice and demand for payment shall be mailed by registered mail, postage prepaid, to the person's last-known address.

**History:** C. 1953, 59-1-302, enacted by L. 1988, ch. 3, § 89; 1992, ch. 249, § 1; 1993, ch. 2, § 1; 1994, ch. 107, § 1.

**Amendment Notes.** — The 1993 amendment, effective May 3, 1993, inserted "and use" in Subsection (1)(a), inserted "clean fuel" and "Parts 2, 3, and 4" in Subsection (1)(f), deleted former Subsection (1)(h), which read "corporate franchise tax under Chapter 7, Part 1," substi-

tuted "Subsections (4) and (5)" for "Subsection (4)" in Subsection (7), and made stylistic changes.

The 1994 amendment, effective May 2, 1994, deleted former Subsections (2) and (3), relating to the creation of a lien for unpaid taxes; added Subsection (7)(d); and made related stylistic changes.

### **59-1-302.1. Lien for taxes.**

(1) If any person liable to pay any tax provided in Title 59, except a tax imposed under Chapter 2, 3, or 4, neglects or refuses to pay that tax after demand, the amount, including any interest, additional amount, additional tax, or assessable penalty, together with any costs that may accrue, is a lien in favor of the state upon all property and rights to property, whether real or personal, belonging to that person.

(2) Unless another date is specifically fixed by law, the lien imposed by this section for unpaid taxes arises at the time the assessment is made and continues until the liability for the assessed amount, or a judgment against the taxpayer arising from that liability, is satisfied or becomes unenforceable because of lapse of time.

**History:** C. 1953, 59-1-302.1, enacted by L. 1994, ch. 107, § 2.

**Effective Dates.** — Laws 1994, ch. 107

became effective on May 2, 1994, pursuant to Utah Const., Art. VI, Sec. 25.

## **PART 4**

### **PENALTIES, INTEREST AND CONFIDENTIALITY OF INFORMATION**

#### **59-1-401. Penalties.**

(1) (a) The penalty for failure to file a tax return within the time prescribed by law including extensions is the greater of \$20 or 10% of the unpaid tax due on the return.

(b) Subsection (1) does not apply to amended returns.

(2) The penalty for failure to pay tax due shall be the greater of \$20 or 10% of the unpaid tax for:

(a) failure to pay any tax, as reported on a timely filed return;

(b) failure to pay any tax within 90 days of the due date of the return, if there was a late filed return subject to the penalty provided under Subsection (1)(a);

(c) failure to pay any tax within 30 days of the date of mailing any notice of deficiency of tax unless a petition for redetermination or a request for agency action is filed within 30 days of the date of mailing the notice of deficiency;

(d) failure to pay any tax within 30 days after the date the commission's order constituting final agency action resulting from a timely filed petition for redetermination or request for agency action is issued or is considered to have been issued under Subsection 63-46b-13(3)(b), unless a petition for judicial review is timely filed; and

(e) failure to pay any tax within 30 days after the date of a final judicial decision resulting from a timely filed petition for judicial review.

(3) (a) Beginning January 1, 1995, in the case of any underpayment of estimated tax or quarterly installments required by Section 59-5-107, 59-5-207, and 59-7-504, there shall be added a penalty in an amount determined by applying the interest rate provided under Section 59-1-402 plus four percentage points to the amount of the underpayment for the period of the underpayment.

(b) (i) For purposes of Subsection (3)(a), the amount of the underpayment shall be the excess of the required installment over the amount, if any, of the installment paid on or before the due date for the installment.

(ii) The period of the underpayment shall run from the due date for the installment to whichever of the following dates is the earlier:

(A) the original due date of the tax return, without extensions, for the taxable year; or

(B) with respect to any portion of the underpayment, the date on which that portion is paid.

(iii) For purposes of this Subsection (3), a payment of estimated tax shall be credited against unpaid required installments in the order in which the installments are required to be paid.

(4) (a) In case of an extension of time to file an individual income tax or corporate franchise tax return, if the lesser of 90% of the total tax reported on the tax return or 100% of the prior year's tax is not paid by the due date of the return, not including extensions, a 2% per month penalty shall apply on the unpaid tax during the period of extension.

(b) If a return is not filed within the extension time period as provided in Section 59-7-505 or 59-10-516, penalties as provided in Subsection (1) and Subsection (2)(b) shall be added in lieu of the penalty assessed under this subsection as if no extension of time for filing a return had been granted.

(5) (a) Additional penalties for underpayments of tax are as follows:

(i) If any underpayment of tax is due to negligence, the penalty is 10% of the underpayment.

(ii) If any underpayment of tax is due to intentional disregard of law or rule, the penalty is 15% of the underpayment.

(iii) For intent to evade the tax, the penalty is the greater of \$500 per period or 50% of the tax due.

(iv) If the underpayment is due to fraud with intent to evade the tax, the penalty is the greater of \$500 per period or 100% of the underpayment.

(b) If the commission determines that a person is liable for a penalty imposed under Subsection (ii), (iii), or (iv), the commission shall notify the taxpayer of the proposed penalty.

(i) The notice of proposed penalty shall:

(A) set forth the basis of the assessment; and

(B) be mailed by registered mail, postage prepaid, to the person's last-known address.

(ii) Upon receipt of the notice of proposed penalty, the person against whom the penalty is proposed may:

(A) pay the amount of the proposed penalty at the place and time stated in the notice; or

(B) proceed in accordance with the review procedures of Subsection (iii).

(iii) Any person against whom a penalty has been proposed in accordance with this subsection may contest the proposed penalty by filing a petition for an adjudicative proceeding with the commission.

(iv) If the commission determines that a person is liable for a penalty under this subsection, the commission shall assess the penalty and give notice and demand for payment. The notice and demand for payment shall be mailed by registered mail, postage prepaid, to the person's last-known address.

(6) The penalty for failure to file an information return or a complete supporting schedule is \$50 for each return or schedule up to a maximum of \$1,000.

(7) If any taxpayer, in furtherance of a frivolous position, has a prima facie intent to delay or impede administration of the tax law and files a purported return that fails to contain information from which the correctness of reported tax liability can be determined or that clearly indicates that the tax liability shown must be substantially incorrect, the penalty is \$500.

(8) For monthly payment of sales and use taxes under Section 59-12-108, in addition to any other penalties for late payment, a vendor may not retain a percentage of sales and use taxes collected as otherwise allowable under Section 59-12-108.

(9) As provided in Section 76-8-1101, the following are criminal penalties:

(a) Any person who is required by this title or any laws the commission administers or regulates to register with or obtain a license or permit from the commission, or who operates without having registered or secured a license or permit, or who operates when the registration, license, or permit is expired or not current, is guilty of a class B misdemeanor, except that, notwithstanding Section 76-3-301, the fine is not less than \$500 nor more than \$1,000.

(b) Any person who, with intent to evade any tax or requirement of this title or any lawful requirement of the commission, fails to make, render, sign, or verify any return or to supply any information within the time required under this title, or who makes, renders, signs, or verifies any false or fraudulent return or statement, or who supplies any false or

fraudulent information, is guilty of a third degree felony, except that, notwithstanding Section 76-3-301, the fine is not less than \$1,000 nor more than \$5,000.

(c) Any person who willfully attempts to evade or defeat any tax or the payment thereof is, in addition to other penalties provided by law, guilty of a second degree felony, except that, notwithstanding Section 76-3-301, the fine is not less than \$1,500 nor more than \$25,000.

(d) The statute of limitations for prosecution for a violation of this section is six years from the date the tax should have been remitted.

(10) Upon making a record of its actions, and upon reasonable cause shown, the commission may waive, reduce, or compromise any of the penalties or interest imposed under this part.

**History:** C. 1953, 59-1-401, enacted by L. 1987, ch. 3, § 6; 1987, ch. 148, § 1; 1988, ch. 193, § 1; 1988, ch. 213, § 3; 1989, ch. 22, § 37; 1991, ch. 37, § 1; 1992, ch. 298, § 1; 1994, ch. 93, § 2; 1994, ch. 107, § 3.

**Amendment Notes.** — The 1994 amendment by ch. 107, effective May 2, 1994, in Subsection (3) (which is Subsection (5) in the reconciled version), designated the existing provision as Subsection (a), added Subsection (b), and made related stylistic changes.

The 1994 amendment by ch. 93, effective July 1, 1994, rewrote Subsections (1) and (2), adding Subsections (2)(b), (2)(d), and (2)(e) and rewriting the provisions of former Subsection (2)(b) as

Subsection (4)(a); added Subsections (3) and (4)(b); renumbered former Subsections (3) to (8) as Subsections (5) to (10); rewrote the introductory language of Subsection (5); and substituted “a vendor may not retain a percentage of sales and use taxes collected as otherwise allowable under” for “there is a penalty of 10% of the amount of any tax not paid and the loss of any reimbursement for sales tax collection costs provided for in” in Subsection (8).

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

**Cross-References.** — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

## NOTES TO DECISIONS

### ANALYSIS

Intentional disregard.

—Not found.

Negligent underpayment.

—Good faith.

**Intentional disregard.**

—Not found.

Although an Illinois corporation did not comply with the State Tax Commission's written demand for sales taxes, that disregard did not constitute an “intentional disregard of law or rule” since when the commission's letter was

sent, the corporation's status as a real property contractor, subjecting it to the tax, was arguable. *Chicago Bridge & Iron Co. v. State Tax Comm'n*, 839 P.2d 303 (1992).

**Negligent underpayment.**

—Good faith.

A seller of concrete found liable for a sales tax deficiency was not subject to the negligence penalty under this section, since it based its nonpayment of taxes on a legitimate, good faith interpretation of an arguable point of law. *Hales Sand & Gravel, Inc. v. Auditing Div.*, 842 P.2d 887 (Utah 1992).

## 59-1-402. Interest.

(1) Notwithstanding Subsections (2) and (3), the rate of interest applicable to certain installment sales for the purposes of the corporate franchise tax shall be determined pursuant to Section 453A, Internal Revenue Code, as provided in Section 59-7-112.

(2) Except as otherwise provided for by law, the interest rate for a calendar year for all taxes and fees administered by the commission shall be calculated based on the federal short-term rate determined by the Secretary of the Treasury under Section 6621, Internal Revenue Code, and in effect for the preceding fourth calendar quarter.



taxes. *B.J.-Titan Servs. v. State Tax Comm'n*, 842 P.2d 822 (Utah 1992).

#### **Purchaser.**

The focus of Subsection (1)(a) is on the purchaser, rather than the item purchased. *Thorup Bros. Constr. v. Auditing Div. of Utah State Tax Comm'n*, 221 Utah Adv. Rep. 39 (1993).

A contractor is not liable for sales taxes on property that it did not purchase or own. *Thorup Bros. Constr. v. Auditing Div. of Utah State Tax Comm'n*, 221 Utah Adv. Rep. 39 (1993).

Electrical contractor could not be assessed a use tax on materials purchased by owners that were tax-exempt entities. *Arco Elec. v. Utah State Tax Comm'n*, 222 Utah Adv. Rep. 11 (1993), following *Thorup Brothers Constr., Inc. v. Auditing Division of the Utah State Tax Comm'n*, 221 Utah Adv. Rep. 39 (1993).

#### **Repairs and renovations.**

The tax commission erred when it included the cost of milling and drilling raw logs incurred by a railroad in assessing a use tax on railroad ties brought instate for use. The basis for calculating the use tax in such a case is the amount paid for the raw logs when purchased plus the amount paid for services that fall into one of the specified categories of taxable services set forth in this section. The commission erroneously concluded that the milling and drilling procedures were "repairs or renovations" within the meaning of Subsection (1)(g). *Union Pac. R.R. v. Auditing Div.*, 842 P.2d 876 (Utah 1992).

#### **Sale of goods to subsidiary.**

A seller was liable under Subsection (1)(a) for sales of goods to another corporation despite the fact that the Department of Transportation found the two corporations to be a single entity for the purposes of the Davis Bacon Act. One

agency's determination is not necessarily binding on the deliberations of another agency, and federal labor law criteria are irrelevant to a determination of state taxability. *Hales Sand & Gravel, Inc. v. Auditing Div.*, 842 P.2d 887 (Utah 1992).

#### **Transfer of vehicles.**

Transfer of vehicles subject to sales tax. See *B.J.-Titan Servs. v. State Tax Comm'n*, 842 P.2d 822 (Utah 1992).

#### **Transportation costs as part of sales price.**

Transportation charges are taxable under Subsection (1)(a) as part of the sales price of personal property if they are incurred before the transfer of title. When a sales contract requires delivery at destination, title passes at destination and the transportation costs are therefore subject to taxation unless the parties explicitly agree otherwise. *Hales Sand & Gravel, Inc. v. Auditing Div.*, 842 P.2d 887 (Utah 1992).

#### **—"Small-batch" charges.**

"Small-batch" charges added by a concrete seller to concrete batches that were too small to absorb the costs of delivery were taxable under Subsection (1)(a) as a transportation charge added to the sales price. *Hales Sand & Gravel, Inc. v. Auditing Div.*, 842 P.2d 887 (Utah 1992).

#### **Water softeners.**

The sale of water softeners, sold pursuant to sales and installation contracts, are sales of improvements to real estate, and not sales of tangible personal property subject to sales tax. *Superior Soft Water Co. v. Utah State Tax Comm'n*, 843 P.2d 525 (Utah Ct. App. 1992).

Cited in *Matrix Funding Corp. v. Auditing Div.*, 231 Utah Adv. Rep. 23 (Utah Ct. App. 1994).

## **59-12-104. Exemptions.**

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

(1) sales of aviation fuel, motor fuel, and special fuel subject to a Utah state excise tax under Title 59, Chapter 13, Motor and Special Fuel Tax Act;

(2) sales to the state, its institutions, and its political subdivisions, except sales of construction materials however, construction materials purchased by the state, its institutions, or its political subdivisions which are installed or converted to real property by employees of the state, its institutions, or its political subdivisions are exempt;

(3) sales of food, beverage, and dairy products from vending machines in which the proceeds of each sale do not exceed \$1 if the vendor or operator of the vending machine reports an amount equal to 150% of the cost of items as goods consumed;



- (4) sales of food, beverage, dairy products, similar confections, and related services to commercial airline carriers for in-flight consumption;
- (5) sales of parts and equipment installed in aircraft operated by common carriers in interstate or foreign commerce;
- (6) sales of commercials, motion picture films, prerecorded audio program tapes or records, and prerecorded video tapes by a producer, distributor, or studio to a motion picture exhibitor, distributor, or commercial television or radio broadcaster;
- (7) sales made through coin-operated laundry machines that are:
  - (a) located in multiple dwelling units;
  - (b) used exclusively for the benefit of tenants; and
  - (c) not available for use by the general public;
- (8) sales made to or by religious or charitable institutions in the conduct of their regular religious or charitable functions and activities, if the requirements of Section 59-12-104.1 are fulfilled;
- (9) sales of vehicles of a type required to be registered under the motor vehicle laws of this state which are made to bona fide nonresidents of this state and are not afterwards registered or used in this state except as necessary to transport them to the borders of this state;
- (10) sales of medicine;
- (11) sales or use of property, materials, or services used in the construction of or incorporated in pollution control facilities allowed by Sections 19-2-123 through 19-2-127;
- (12) sales or use of property which the state is prohibited from taxing under the Constitution or laws of the United States or under the laws of this state;
- (13) sales of meals served by:
  - (a) public elementary and secondary schools;
  - (b) churches, charitable institutions, and institutions of higher education, if the meals are not available to the general public; and
  - (c) inpatient meals provided at medical or nursing facilities;
- (14) isolated or occasional sales by persons not regularly engaged in business, except the sale of vehicles or vessels required to be titled or registered under the laws of this state;
- (15) sales or leases of machinery and equipment purchased or leased by a manufacturer for use in new or expanding operations (excluding normal operating replacements, which includes replacement machinery and equipment even though they may increase plant production or capacity, as determined by the commission) in any manufacturing facility in Utah;
  - (a) manufacturing facility means an establishment described in SIC Codes 2000 to 3999 of the 1987 Standard Industrial Classification Manual, of the federal Executive Office of the President, Office of Management and Budget;
  - (b) for purposes of this subsection, the commission shall by rule define "new or expanding operations" and "establishment";
  - (c) by October 1, 1991, and every five years thereafter, the commission shall review this exemption and make recommendations to the Revenue and Taxation Interim Committee concerning whether the exemption should be continued, modified, or repealed. In its report to the Revenue and Taxation Interim Committee, the tax commission review shall include at least:

- (i) the cost of the exemption;
  - (ii) the purpose and effectiveness of the exemption; and
  - (iii) the benefits of the exemption to the state;
- (16) sales of tooling, special tooling, support equipment, and special test equipment used or consumed exclusively in the performance of any aerospace or electronics industry contract with the United States government or any subcontract under that contract, but only if, under the terms of that contract or subcontract, title to the tooling and equipment is vested in the United States government as evidenced by a government identification tag placed on the tooling and equipment or by listing on a government-approved property record if a tag is impractical;
- (17) intrastate movements of freight by common carriers;
- (18) sales of newspapers or newspaper subscriptions;
- (19) tangible personal property, other than money, traded in as full or part payment of the purchase price, except that for purposes of calculating sales or use tax upon vehicles not sold by a vehicle dealer, trade-ins are limited to other vehicles only, and the tax is based upon the then existing fair market value of the vehicle being sold and the vehicle being traded in, as determined by the commission;
- (20) sprays and insecticides used to control insects, diseases, and weeds for commercial production of fruits, vegetables, feeds, seeds, and animal products;
- (21) sales of tangible personal property used or consumed primarily and directly in farming operations, including sales of irrigation equipment and supplies used for agricultural production purposes, whether or not they become part of real estate and whether or not installed by farmer, contractor, or subcontractor, but not sales of:
- (a) machinery, equipment, materials, and supplies used in a manner that is incidental to farming, such as hand tools with a unit purchase price not in excess of \$100, and maintenance and janitorial equipment and supplies;
  - (b) tangible personal property used in any activities other than farming, such as office equipment and supplies, equipment and supplies used in sales or distribution of farm products, in research, or in transportation; or
  - (c) any vehicle required to be registered by the laws of this state, without regard to the use to which the vehicle is put;
- (22) seasonal sales of crops, seedling plants, or garden, farm, or other agricultural produce if sold by the producer;
- (23) purchases of food made with food stamps;
- (24) sales of nonreturnable containers, nonreturnable labels, nonreturnable bags, nonreturnable shipping cases, and nonreturnable casings to a manufacturer, processor, wholesaler, or retailer for use in packaging tangible personal property to be sold by that manufacturer, processor, wholesaler, or retailer;
- (25) property stored in the state for resale;
- (26) property brought into the state by a nonresident for his or her own personal use or enjoyment while within the state, except property purchased for use in Utah by a nonresident living and working in Utah at the time of purchase;

(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;

(28) property upon which a sales or use tax was paid to some other state, or one of its subdivisions, except that the state shall be paid any difference between the tax paid and the tax imposed by this part and Part 2, and no adjustment is allowed if the tax paid was greater than the tax imposed by this part and Part 2;

(29) any sale of a service described in Subsections 59-12-103(1)(b), (c), and (d) to a person for use in compounding a service taxable under the subsections;

(30) purchases of food made under the WIC program of the United States Department of Agriculture;

(31) sales or leases made before June 30, 1996, of rolls, rollers, refractory brick, electric motors, and other replacement parts used in the furnaces, mills, and ovens of a steel mill described in SIC Code 3312 of the 1987 Standard Industrial Classification Manual, of the federal Executive Office of the President, Office of Management and Budget;

(32) sales of boats of a type required to be registered under Title 73, Chapter 18, State Boating Act, boat trailers, and outboard motors which are made to bona fide nonresidents of this state and are not thereafter registered or used in this state except as necessary to transport them to the borders of this state;

(33) sales of tangible personal property to persons within this state that is subsequently shipped outside the state and incorporated pursuant to contract into and becomes a part of real property located outside of this state, except to the extent that the other state or political entity imposes a sales, use, gross receipts, or other similar transaction excise tax on it against which the other state or political entity allows a credit for taxes imposed by this chapter;

(34) sales of aircraft manufactured in Utah if sold for delivery and use outside Utah where a sales or use tax is not imposed, even if the title is passed in Utah;

(35) until July 1, 1999, amounts paid for purchase of telephone service for purposes of providing telephone service; and

(36) fares charged to persons transported directly by a public transit district created under the authority of Title 17A, Chapter 2, Part 10.

**History:** L. 1933, ch. 63, § 6; 1933 (2nd S.S.), ch. 20, § 1; 1939, ch. 103, § 1; C. 1943, 80-15-6; 1945, ch. 110, § 1; 1957, ch. 126, § 1; 1957, ch. 127, § 1; 1965, ch. 128, § 1; 1967, ch. 162, § 1; 1969, ch. 187, § 3; 1969 (1st S.S.), ch. 14, § 3; 1973, ch. 42, § 9; 1973, ch. 154, § 1; 1975, ch. 179, § 2; 1976, ch. 28, § 1; 1979, ch. 195, § 1; 1981, ch. 238, § 1; 1981, ch. 239, § 2; 1982, ch. 70, § 1; 1983, ch. 264, § 1; 1983, ch. 281, § 1; 1983 (1st S.S.), ch. 6, § 2; 1984, ch. 59, § 1; 1984, ch. 60, § 1; 1985, ch. 80, § 3; 1986, ch. 9, § 1; 1986, ch. 55, § 6; 1986, ch. 99, § 1; 1986, ch. 134, § 1; 1986, ch. 168, § 1; C. 1953, 59-15-6; renumbered by L. 1987, ch. 5, § 26; 1987, ch. 51, § 1; 1987 (1st S.S.), ch. 10, §§ 1, 2; 1988, ch. 58, § 1; 1988, ch. 66, § 2; 1988, ch. 69, § 1; 1989, ch. 89, § 1;

1989, ch. 169, § 1; 1989, ch. 247, § 1; 1990, ch. 22, § 2; 1990, ch. 36, § 1; 1991, ch. 5, § 57; 1991, ch. 111, § 1; 1991, ch. 112, § 216; 1992, ch. 66, § 3; 1992, ch. 298, § 2; 1993, ch. 166, § 1; 1993, ch. 296, § 1; 1994, ch. 49, § 1; 1994, ch. 155, § 1; 1994, ch. 213, § 1; 1994, ch. 217, § 2; 1994, ch. 226, § 2; 1994, ch. 248, § 1.

**Amendment Notes.** — The 1993 amendment by ch. 166, effective May 3, 1993, substituted "sales of aviation fuel, motor fuel, and special fuel" for "sales of motor fuels and special fuels" in Subsection (1).

The 1993 amendment by ch. 296, effective May 3, 1993, substituted "1996" for "1994" in Subsection (31).

The 1994 amendment by ch. 49, effective May 2, 1994, rewrote Subsection (24), which for-

merly read: "any container, label, shipping case, or, in the case of meat or meat products, any casing."

The 1994 amendment by ch. 248, effective May 2, 1994, in Subsection (31), deleted "after July 1, 1987, and" after "leases made" and "but only if the steel mill was a nonproducing Utah facility purchased and reopened for the production of steel" at the end.

The 1994 amendment by ch. 155, effective July 1, 1994, substituted "150%" for "120%" in Subsection (3).

The 1994 amendment by ch. 213, effective July 1, 1994, redesignated the subsections under Subsection (15); substituted "by common carriers" for "and express or street railway fares" in Subsection (17); and added Subsection

(36), making a related stylistic change.

The 1994 amendment by ch. 217, effective July 1, 1994, deleted "coin-operated dry cleaning machines, or coin-operated car washes" in the introductory language of Subsection (7); added Subsections (7)(a) through (7)(c); subdivided Subsection (15); and made related stylistic changes.

The 1994 amendment by ch. 226, effective July 1, 1994, inserted the language following the first occurrence of "political subdivisions" in Subsection (2) and deleted "and, after July 1, 1993" after "activities" in Subsection (8).

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

## NOTES TO DECISIONS

### ANALYSIS

Charitable institution.

—Activities.

—Purchase by subcontractor.

"Consumption."

Intrastate movement of freight.

Isolated or occasional sale.

"Manufacturer."

Medicine.

New or expanding operations.

Real property.

Registered vehicle.

—Sale to nonresident.

Sale in sister state.

Sale to state.

Sprays to control disease.

Cited.

**Charitable institution.**

—Activities.

Church industry auxiliary, chartered as a non-profit corporation, which ran, among other things, a transient shelter, a vocational education program, a retirement center, and a day care center, charging nominal fees to defray costs, lost its sales-tax-exempt status by severing from its religious institution, since the auxiliary's remaining common membership and weekly spiritual practices did not convert the auxiliary from a business organization into a religious institution. *SEMECO Indus., Inc. v. Auditing Div. of Utah State Tax Comm'n*, 849 P.2d 1167 (Utah 1993).

—Purchase by subcontractor.

The fact that the amount of the tax might be passed along to the general contractor and then on to the church owning the buildings in which the general contractor was installing products did not bring a subcontractor's purchase of materials used in making the products under

Subsection (8). *Niederhauser Ornamental & Metal Works Co. v. Tax Comm'n*, 219 Utah Adv. Rep. 43 (Ct. App. 1993).

**"Consumption."**

Steel manufacturers who lance pipes, stirring lances, and mill rolls primarily for their use as equipment and only incidentally for their use as ingredients in the manufacturing process are liable for sales and use taxes on the items. *Nucor Corp. v. Utah State Tax Comm'n*, 832 P.2d 1294 (Utah 1992).

**Intrastate movement of freight.**

Subsection (17), providing for a sales tax exemption for intrastate movements of freight, is limited to common carriers and does not provide an exemption for intrastate delivery made by the seller in its own trucks. *Hales Sand & Gravel, Inc. v. Auditing Div.*, 842 P.2d 887 (Utah 1992).

**Isolated or occasional sale.**

The "isolated or occasional sales" exemption applied to the trade-in of used computer equipment by a customer to a retailer of computer systems and thus the retailer's own use of the equipment was exempt from the use tax. *Knowledge Data Sys. v. Utah State Tax Comm'n*, 229 Utah Adv. Rep. 29 (Utah Ct. App. 1993).

**"Manufacturer."**

Subsection (15) does not authorize the State Tax Commission to define the term "manufacturer" to restrict the manufacturing sales tax exemption set forth therein; a rule of the Commission limiting the availability of the exemption was invalid. *Sanders Brine Shrimp v. Audit Div. of the Utah State Tax Comm'n*, 846 P.2d 1304 (Utah 1993).

**Medicine.**

Sales tax on sales of oxygen concentrators to

medically dependent individuals was erroneous because oxygen concentrators fall under "any oxygen ... prescribed by a physician" in § 59-12-102(4)(a)(iii). *Miller Welding Supply, Inc. v. Utah State Tax Comm'n*, 221 Utah Adv. Rep. 8 (Ct. App. 1993).

#### **New or expanding operations.**

The commission erroneously interpreted SIC Code 3652, incorporated by reference in Subsection (15), when it determined that activities of video tape producer in expanding its manufacturing capacities did not fall within the scope of the federal definition. *Bonneville Int'l Corp. v. Utah State Tax Comm'n*, 219 Utah Adv. Rep. 52 (Ct. App. 1993).

#### **Real property.**

Where, under its sales contracts, an Illinois corporation fabricated, erected, and installed on its customers' real property large tanks that were not readily removable, and it was not intended that they be moveable or removed, then the installed tanks, once attached, were real property and the corporation was a real property contractor, not a manufacturer, and was not eligible for the exemption for materials used in manufacturing. *Chicago Bridge & Iron Co. v. State Tax Comm'n*, 839 P.2d 303 (1992).

Where an Illinois corporation's customers intended to purchase fully assembled tanks permanently installed on real estate, whether that real estate was located in Utah or another state was not relevant as to the corporation's status as a real property contractor. *Chicago Bridge & Iron Co. v. State Tax Comm'n*, 839 P.2d 303 (1992).

#### **Registered vehicle.**

##### **—Sale to nonresident.**

While taxpayer's legal residence created a legitimate source of dispute, because he maintained a registered vehicle with Utah designated as home state and allowed a vehicle to be kept or used by a Utah resident, the State Tax Commission reasonably found that the taxpayer had resident status for sales tax purposes

and thus was disqualified from claiming the nonresident exemption. *Putvin v. Utah State Tax Comm'n*, 837 P.2d 589 (Utah Ct. App. 1992).

#### **Sale in sister state.**

Taxes that come due first take priority over taxes paid first. Therefore, petitioner was liable for the Utah tax first because the sales to petitioner in Utah of materials used in making the finished products occurred long before petitioner sold finished products in Nevada. *Niederhauser Ornamental & Metal Works Co. v. Tax Comm'n*, 219 Utah Adv. Rep. 43 (Ct. App. 1993).

#### **Sale to state.**

Payment for goods by a state warrant does not alone make it a sale to the state or its institutions or political subdivisions to exempt it from sales tax. *Rocky Mt. Energy v. Utah Tax Comm'n*, 852 P.2d 284 (Utah 1993).

Contractor was not liable for sales tax for materials purchased by and used on behalf of a school district because the purchaser within the meaning of § 59-12-103(1)(l) was the school district. Since the school district was exempt from sales taxes as a subdivision or institution of the state, the fact that the school district had a nonexempt party incorporate the purchased property into its realty did not change the character of the transaction. *Brown Plumbing & Heating Co. v. State Tax Comm'n*, 224 Utah Adv. Rep. 12 (1993).

#### **Sprays to control disease.**

Spraying liquid nitrogen on meat patties to prevent microorganisms that cause disease fits within the plain meaning of Subsection (20), and reference to other rules of statutory construction to determine the proper meaning of this subsection is unnecessary. *OSI Indus., Inc. v. Utah State Tax Comm'n*, 221 Utah Adv. Rep. 34 (Ct. App. 1993).

Cited in *Thorup Bros. Constr. v. Auditing Div. of Utah State Tax Comm'n*, 221 Utah Adv. Rep. 39 (1993).

## **59-12-104.1. Exemptions for religious or charitable institutions.**

(1) Sales made by religious or charitable institutions or organizations are exempt from the sales and use tax imposed by this chapter if the sale is made in the conduct of the institution's or organization's regular religious or charitable functions or activities.

(2) (a) Sales made to a religious or charitable institution or organization are exempt from the sales and use tax imposed by this chapter if the sale is made in the conduct of the institution's or organization's regular religious or charitable functions and activities.



a deficiency assessment shall be made and written notification shall be given to the taxpayer.

**R865-19-20S. Basis for Reporting Tax Pursuant to Utah Code Ann. Section 59-12-107.**

A. Amounts shown on returns must include the total sales made during the period of such returns, and the tax must be reported and paid upon such basis. Total sales means the total amount of all cash, credit, installment, and conditional sales made during the period covered by the return.

B. Justified adjustments may be made and credit allowed for cash discounts, returned goods, bad debts, and repossessions which result from sales upon which the tax has been reported and paid in full by the retailers to the Tax Commission.

1. Such adjustments and credits will be allowed only if the retailer has not reimbursed himself in the full amount of the tax except as noted in B.6.a. and can establish such facts by records, receipts or other means.

2. In no case shall the credit be greater than the sales tax on that portion of the purchase price remaining unpaid at the time the goods are returned, the account is charged off, or the repossession occurs.

3. Any refund or credit given to the purchaser must include the related sales tax.

4. Sales tax credits for bad debts are allowable only on accounts determined to be worthless and actually charged off for income tax purposes. Recoveries made on bad debts and repossessions for which credit has been claimed must be reported and the tax paid.

5. Sales tax credit for repossessions is allowable on the basis of the original amount subject to tax, less down payment. This amount is multiplied by the ratio of the number of monthly payments not made, divided by the total number of monthly payments required by the contract.

a. For example: the credit allowed on a taxable \$30,000 car sale with a \$5,000 down payment financed on a 60-month contract and repossessed after 20 full payments were made would be \$16,667 as computed and shown below. The number of unpaid full payments is determined by dividing the total received on the contract by the monthly payment amount.

TABLE

Example:	
(1) Original amount subject to tax	\$30,000
(2) Down payment or trade in	(5,000)
(3) Balance of taxable base financed	25,000
(4) Number of full payments unpaid at the time of repossession	40
(5) Total contract period (no. of months)	60

Line 4 divided by line 5 times taxable base financed equals repossession credit

$$40/60 \times \$25,000 = \$16,667$$

b. In cases where a contract assignment creates a partial (part of the loan amount) recourse obligation to the seller, any repossession credit must be calculated in the same manner as shown above.

c. The credit for repossession shall be reported on the dealer's or vendor's sales tax return with an attached schedule showing computations and appropriate adjustments for any tax rate changes between the date of sale and the date of repossession.

6. Credit for tax on repossessions is allowed only to the selling dealer or vendor.

a. This does not preclude arrangements being made between the dealer or vendor and third party financial institutions wherein sales tax credits for repos-

sessions by financial institutions may be taken by the dealer or vendor who will in turn reimburse the financial institution.

b. In the event the applicable vehicle dealer is no longer in business, and there are no outstanding delinquent taxes, the third party financial institution may apply directly to the Tax Commission for a refund of the tax in the amount that would have been credited to the dealer.

C. Adjustments in sales price, such as allowable discounts or rebates cannot be anticipated. The tax must be based upon the original price unless such adjustments were made prior to the close of the reporting period in which the tax upon the sale is due. If the price upon which the tax is computed and paid is subsequently adjusted, credit may be taken against the tax due on a subsequent return.

D. If a sales tax rate change takes place prior to the reporting period when the credit is claimed, the tax credit must be determined and deducted rather than deducting the sales price adjustments.

E. Commissions to agents are not deductible under any conditions for purposes of tax computation.

**R865-19-22S. Sales and Use Tax Records Pursuant to Utah Code Ann. Section 59-12-111.**

A. Every retailer, lessor, lessee, and person doing business in this state or storing, using, or otherwise consuming in this state tangible personal property purchased from a retailer, shall keep and preserve complete and adequate records as may be necessary to determine the amount of sales and use tax for which such person or entity is liable. Unless the Tax Commission authorizes in writing an alternative method of recordkeeping, these records shall:

1. show gross receipts from sales, or rental payments from leases, of tangible personal property or services performed in connection with tangible personal property made in this state, irrespective of whether the retailer regards the receipts to be taxable or nontaxable;

2. show all deductions allowed by law and claimed in filing returns;

3. show bills, invoices or similar evidence of all tangible personal property purchased for sale, consumption, or lease in this state; and

4. include the normal books of account maintained by an ordinarily prudent business person engaged in such business, together with supporting documents of original entry such as: bills, receipts, invoices, and cash register tapes. All schedules or working papers used in connection with the preparation of tax returns must also be maintained.

B. Records may be microfilmed or microfiche. However, microfilm reproductions of general books of account — such as cash books, journals, voucher registers, ledgers, and like documents — are not acceptable as original records. Where microfilm or microfiche reproductions of supporting records are maintained — such as sales invoices, purchase invoices, credit memoranda and like documents — the following conditions must be met:

1. appropriate facilities must be provided for preservation of the films or fiche for the periods required and open to examination,

2. microfilm rolls and microfiche must be systematically filed, indexed, cross referenced, and labeled to show beginning and ending numbers and to show beginning and ending alphabetical listing of documents included.

3. upon request of the Tax Commission, the taxpayer shall provide transcriptions of any information





**R865-19-27S. Retail Sales Defined Pursuant to Utah Code Ann. Sections 59-12-102(8)(a) and 59-12-103(1)(g).**

A. The term retail sale has a broader meaning than the sale of tangible personal property. It includes any transfers, exchanges, or barter whether conditional or for a consideration by a person doing business in such commodity or service, either as a regularly organized principal endeavor or as an adjunct thereto. The price of the service or tangible personal property, the quantity sold, or the extent of the clientele are not factors which determine whether or not it is a retail sale.

B. Retail sale also includes certain leases and rentals of tangible personal property as defined in Rule R865-19-32S, accommodations as defined in Rule R865-19-79S, services performed on tangible personal property as defined in Rules R865-19-51S and R865-19-78S, services that are part of a sale or repair, admissions as defined in Rules R865-19-33S and R865-19-34S, sales of meals as defined in Rules R865-19-61S and R865-19-62S, and sales of certain public utility services.

C. A particular retail sale or portion of the selling price may not be subject to a sales or use tax. The status of the exemption is governed by the circumstances in each case. See other rules for specific and general exemption definitions, Rule R865-19-30S for definition of sales price and Rule R865-19-72S covering trade-ins.

**R865-19-28S. Retailer Defined Pursuant to Utah Code Ann. Section 59-12-102.**

A. "Retailer" means vendors operating within this state directly, or indirectly through agents or representatives, if the vendor:

1. has or utilizes an office, distribution house, sales house, warehouse, service enterprise, or other place of business,
2. maintains a stock of goods in Utah,
3. regularly solicits orders whether or not such orders are accepted in this state, unless the activity in this state consists solely of advertising or solicitation by direct mail,
4. regularly engages in the delivery of property in this state other than by common carrier or United States mail, or
5. regularly engages in any activity in connection with the leasing or servicing of property located within this state.

B. A person may be a retailer within the meaning of the act even though the sale of tangible personal property is incidental to his general business. For example, a contractor may operate a salvage business and be a retailer within the meaning of the act.

**R865-19-29S. Wholesale Sale Defined Pursuant to Utah Code Ann. Section 59-12-102.**

A. "Wholesale sale" means any sale by a wholesaler, retailer, or any other person, of tangible personal property or services to a retailer, jobber, dealer, or another wholesaler for resale.

1. All sales of tangible personal property or services which enter into and become an integral or component part of tangible personal property or product which is further manufactured or compounded for sale, or the container or the shipping case thereof, are wholesale sales.

2. All sales of poultry, dairy, or other livestock feed and the components thereof and all seeds and seedlings are deemed to be wholesale sales where the

eggs, milk, meat, or other livestock products, plants, or plant products are produced for resale.

3. Sprays and insecticides used in the control of insect pests, diseases, and weeds for the commercial production of fruit, vegetables, feeds, seeds, and animal products shall be wholesale sales. Also baling ties and twine for baling hay and straw and fuel sold to farmers and agriculture producers for use in heating orchards and providing power in off-highway type farm machinery shall be wholesale sales.

B. Tangible personal property or services which are purchased by a manufacturer or compounder which do not become and remain an integral part of the article being manufactured or compounded are subject to sales or use tax.

1. For example, sales to a knitting factory of machinery, lubricating oil, pattern paper, office supplies and equipment, laundry service, and repair labor are for consumption and are taxable. These services and tangible personal property do not become component parts of the manufactured products. On the other hand, sales of wool, thread, buttons, linings, and yarns, to such a manufacturer that do become component parts of the products manufactured are not taxable.

C. The price of tangible personal property or services sold or the quantity sold are not factors which determine whether or not the sale is a wholesale sale.

D. All vendors who make wholesale sales are required to obtain an exemption certificate from the purchaser as evidence of the nature of the sale, as required by Rule R865-19-23S.

**R865-19-30S. Purchase Price or Sales Price Defined Pursuant to Utah Code Ann. Sections 59-12-102 and 59-12-104.**

A. "Fair market value" means the average trade-in value as shown in the appropriate published guide.

1. Acceptable guides include:
  - a) NADA Official Used Car Guide;
  - b) NADA Official Older Used Car Guide;
  - c) NADA Recreational Vehicle Guide;
  - d) NADA Motorcycle, Moped, ATV Appraisal Guide;
  - e) ABOS Intertec Publishing Company Marine Publications Division Guide.

2. If a listing for any vehicle is not found in an acceptable guide, a certified value from the local county assessor's office shall be accepted as the fair market value for that vehicle.

B. "Purchase price" and "sales price" may be used interchangeably.

C. With the exception of vehicles purchased from licensed dealers, a person who purchases a vehicle required to be titled or registered and who pays the tax at the time of titling or registration is subject to the following provisions when calculating the sales or use tax due.

1. If the seller of the vehicle has not received a trade-in vehicle the sales and use tax shall be calculated as follows:

a) If the purchaser of the vehicle obtains a signed bill of sale from the seller of the vehicle, the amount of sales and use tax collected shall be based upon the sales price set forth in the bill of sale. The bill of sale must contain the names and addresses of the purchaser and the seller and the sales price of the vehicle.

b) If the purchaser of the vehicle does not obtain a signed bill of sale from the seller of the vehicle, the amount of sales and use tax collected shall be based upon the sales price declared or stated by the pur-



B. If a sale is an integral part of a business whose primary function is not the sale of tangible personal property, then such sale is not isolated or occasional. For example, the sale of repossessed radios, refrigerators, etc., by a finance company is not isolated or occasional.

C. Sales of vehicles required to be titled or registered under the laws of this state are not isolated or occasional sales, except that any transfer of a vehicle in a business reorganization where the ownership of the transferee organization is substantially the same as the ownership of the transferor organization shall be considered an isolated or occasional sale.

D. Isolated or occasional sales made by persons not regularly engaged in business are not subject to the tax. The word "business" refers to an enterprise engaged in selling tangible personal property or taxable services notwithstanding the fact that the sales may be few or infrequent. Any sale of an entire business to a single buyer is an isolated or occasional sale and no tax applies to the sale of any assets made part of such a sale (with the exception of vehicles subject to registration).

E. The sale of used fixtures, machinery, and equipment items is not an exempt occasional sale if the sale is one of a series of sales sufficient in number, amount, and character to indicate the seller deals in the sale of such items.

F. Sales of items at public auctions do not qualify as exempt isolated or occasional sales.

G. Wholesalers, manufacturers, and processors who primarily sell at other than retail are not making isolated or occasional sales when they sell such tangible personal property for use or consumption.

**R865-19-39S. Sales by Farmers and Agricultural Producers Pursuant to Utah Code Ann. Sections 59-12-102 and 59-12-104.**

A. The seasonal sale of crops, seedling plants, garden, farm or other agricultural produce by the producer thereof is not subject to tax. The exemption does not extend to the retail sale of seasonal products by anyone other than the producer thereof, and the burden of proof that any such sale is not subject to the tax is on the vendor.

B. Poultry, eggs, and dairy products are not seasonal products and are not exempt from tax if a producer sells such products and his sales to consumers have an average sales value of \$125 or more per month.

C. If any farmer or other person who is an agricultural producer establishes a place of business — such as a roadside stand, curb stand, market, stall, or other store — for the sale of seasonal crops which he has produced, and in addition sells agricultural products which he has purchased or otherwise acquired from some third party, he then becomes a retailer of the produce purchased or otherwise acquired and is subject to the provisions of the law with respect to collecting and remitting sales taxes upon such retail sales and filing returns.

**R865-19-40S. Exchange of Agricultural Produce For Processed Agricultural Products Pursuant to Utah Code Ann. Section 59-12-102.**

A. When a raiser or grower of agricultural products exchanges his produce for a more finished product capable of being made from the produce exchanged with the processor, the more finished product is not subject to the tax within limitations of the value of the raised produce exchanged.

**R865-19-41S. Sales to The United States Government and Its Instrumentalities Pursuant to Utah Code Ann. Section 59-12-104.**

A. Sales to the United States Government are exempt if federal law or the United States Constitution prohibits the collection of sales or use tax.

B. In cases where the United States Government pays for merchandise or services with funds held in trust for nonexempt individuals or organizations, sales tax must be charged.

C. Sales made directly to the United States Government or any authorized instrumentality thereof are not taxable, provided such sales are ordered upon a prescribed governmental purchase order form and are paid for directly to the seller by warrant on government funds. Vendors making such sales are required to retain purchase orders, voucher stubs, or like evidence of governmental purchase and payment. However, where the sale is \$100 or less, a signed certificate claiming governmental exemption by the buyer is acceptable evidence of exemption.

**R865-19-42S. Sales to the State of Utah and Its Subdivisions Pursuant to Utah Code Ann. Section 59-12-104.**

A. Sales made to the state of Utah, its departments and institutions or to its political subdivisions such as counties, municipalities, school districts, drainage districts, irrigation districts, and metropolitan water districts are exempt from tax if such property is for use in the exercise of an essential governmental function. If the sale is paid for by a warrant drawn upon the state treasurer or the official disbursing agent of any political subdivision, the sale is considered as being made to the state of Utah or its political subdivisions and exempt from tax.

**R865-19-43S. Sales to or by Religious and Charitable Institutions Pursuant to Utah Code Ann. Section 59-12-104.**

A. In order to qualify for an exemption from sales tax as a religious or charitable institution, an organization must be recognized by the Internal Revenue Service as exempt from tax under Section 501(c)(3) of the Internal Revenue Code.

B. Religious and charitable institutions must collect sales tax on any sales income arising from unrelated trades or businesses and report that sales tax to the Tax Commission unless the sales are otherwise exempted by law.

1. The definition of the phrase "unrelated trades or businesses" shall be the definition of that phrase in 26 U.S.C.A. Section 513 (West Supp. 1993), which is adopted and incorporated by reference.

C. Every institution claiming exemption from sales tax under this rule must submit form TC-160, Application for Sales Tax Exemption Number for Religious or Charitable Institutions, along with any other information that form requires, to the Tax Commission for its determination. Vendors making sales to institutions exempt from sales tax are subject to the requirements of Rule R865-19-23S.

**R865-19-44S. Sales In Interstate Commerce Pursuant to Utah Code Ann. Section 59-12-104.**

A. Sales made in interstate commerce are not subject to the sales tax imposed. However, the mere fact that commodities purchased in Utah are transported beyond its boundaries is not enough to constitute the transaction of a sale in interstate commerce. When the commodity is delivered to the buyer in this state, even though the buyer is not a resident of the state

side the state, the sale is not in interstate commerce and is subject to tax.

B. Before a sale qualifies as a sale made in interstate commerce, the following must be complied with:

1. the transaction must involve actual and physical movement of the property sold across the state line;

2. such movement must be an essential and not an incidental part of the sale;

3. the seller must be obligated by the express or unavoidable implied terms of the sale, or contract to sell, to make physical delivery of the property across a state boundary line to the buyer.

C. Where delivery is made by the seller to a common carrier for transportation to the buyer outside the state of Utah, the common carrier is deemed to be the agent of the vendor for the purposes of this section regardless of who is responsible for the payment of the freight charges.

D. If property is ordered for delivery in Utah from a person or corporation doing business in Utah, the sale is taxable even though the merchandise is shipped from outside the state to the seller or directly to the buyer.

**R865-19-45S. Auctioneers, Consignees, Bailees, Etc., Pursuant to Utah Code Ann. Section 59-12-102.**

A. Every auctioneer, consignee, bailee, factor, etc., entrusted with possession of any bill of lading, custom house permits, warehousemen's receipts, or other documents of title for delivery of any tangible personal property, or entrusted with possession of any of such personal property for the purpose of sale, is deemed to be the retailer thereof, and is required to collect sales tax, file a return, and remit the tax. The same rule applies to lien holders such as storage men, pawnbrokers, mechanics, and artisans.

**R865-19-48S. Charge For Coverings and Containers Pursuant to Utah Code Ann. Section 59-12-102.**

A. Sales of containers, labels, bags, shipping cases, and the like are taxable when:

1. sold to the final user or consumer;
2. sold to a manufacturer, processor, wholesaler, or retailer for use as a returnable container which is ordinarily returned to them and reused by them in storing or transporting their product; or
3. sold for internal transportation or accounting control purposes.

B. Sales of nonreusable containers, labels, bags, shipping cases, and the like, when sold to a manufacturer, processor, wholesaler, or retailer for use in packaging tangible personal property which they sell, are not taxable.

1. Nonreusable containers generally exempt from the tax include boxes, cartons, paper bags, labels, wrapping paper, and shipping cases of items being sold.

C. Returnable containers that are ordinarily reused and subject to the tax include water bottles, carboys, drums, beer kegs for draft beer, dairy product containers, and gas cylinders.

1. Labels used for accounting, pricing, or other control purposes are also subject to tax.

D. For the purpose of this rule, soft drink bottles and similar containers which are ultimately destroyed or retained by the final user or consumer are not considered to be returnable containers and are exempt from the tax when purchased by the processor.

E. When a retailer sells tangible personal property in containers, such as soft drinks, and chooses to assess a deposit or other container charge, such charge is subject to the tax. Upon refund of this charge, the retailer may take credit on a sales tax return if the tax is refunded to the customer.

**R865-19-49S. Sales to Farmers and Other Agriculture Producers Pursuant to Utah Code Ann. Section 59-12-104.**

A. Farmers, market gardeners, commercial fruit growers, livestock feeders, poultrymen, nurserymen, beekeepers, dairymen, and similar agricultural producers may purchase tax exempt for resale baling ties, baling twine, seeds, plants, trees, fertilizer, feed, breeding stock, eggs, stock salt, baby chicks, livestock, sprays, insecticides, and medicine and veterinary supplies.

1. These purchases are exempt only if purchased for resale or if the purchase is deemed to become a component part of the raised product, as in the case of fertilizer, feed and medicine.

2. These purchases are subject to tax if the property purchased is used by the farmer or is used to produce goods to be used or consumed by the farmer. For example, seeds and seedlings are exempt if sold to farmers for use in producing a crop for sale, but are taxable if used for lawns, flowers, or crops to be used for personal consumption or any purpose other than sale.

3. Feed is exempt if used to produce livestock, milk, butter, poultry, eggs, etc., for sale or to feed working dogs and working horses in agricultural use, but is taxable if used for pets or other animals not to be marketed.

B. Fur-bearing animals, which are kept for breeding, for their products, or for other useful purposes, shall be deemed agricultural products. Persons engaged in raising fur-bearing animals, such as foxes or mink, are agricultural producers.

C. Electricity, gas, coal, and other fuels are taxable when sold for general farm use; but fuel sold to agricultural producers for use in heating orchards or operating off-highway type farm equipment is exempt.

D. Farm machinery, equipment, and supplies used primarily and directly in farming operations are exempt from sales tax subject to the following provisions:

1. The exemption applies only to sales of tangible personal property used or consumed primarily and directly in commercial farming operations, as evidenced by the filing of a federal Farm Income and Expenses Statement (Schedule F) or similar evidence that the farm is operated as a commercial venture.

2. The exemption does not apply to materials, machinery, equipment, and supplies, such as maintenance and janitorial equipment and supplies that are incidental to farming, nor to hand tools with a unit price of less than \$100. The exemption also does not apply to office equipment, transportation equipment, vehicles subject to state licensing requirements, equipment and supplies used in research and sales.

E. Vendors making sales to farmers or other agricultural producers are liable for the tax unless such vendor obtains from the purchaser a certificate as set forth in Rule R865-19-23S.

F. Vendors must also comply with the provisions of Rule R865-19-38S, which requires reporting exempt sales on quarterly sales tax returns.



to waitresses and other employees, contest prizes given to salesmen, merchandise bonuses given to clerks, and similar items given away.

**R865-19-57S. Ice Pursuant to Utah Code Ann. Sections 59-12-102 and 59-12-103.**

A. In general, sales of ice to be used by the purchaser for refrigeration or cooling purposes are taxable. Sales to restaurants, taverns, or the like to be placed in drinks consumed by customers at the place of business are sales for resale and are not taxable.

B. Where ice is sold in fulfillment of a contract for icing or reicing property in transit by railroads or other freight lines, the entire amount of the sale is taxable, and no deduction for services is allowed.

**R865-19-58S. Materials and Supplies Sold to Owners, Contractors and Repairmen of Real Property Pursuant to Utah Code Ann. Sections 59-12-102 and 59-12-103.**

A. Sale of tangible personal property to real property contractors and repairmen of real property is generally subject to tax.

1. The person who converts the personal property into real property is the consumer of the personal property since he is the last one to own it as personal property.

2. The contractor or repairman is the consumer of tangible personal property used to improve, alter or repair real property, regardless of the type of contract entered into — whether it is a lump sum, time and material, or a cost-plus contract.

3. The sale of real property is not subject to the tax nor is the labor performed on real property. For example, the sale of a completed home or building is not subject to the tax, but sales of materials and supplies to contractors and subcontractors are taxable transactions as sales to final consumers. This is true whether the contract is performed for an individual, a religious institution, or a governmental instrumentality.

4. Sales of materials to religious or charitable institutions and government agencies are exempt only if sold as tangible personal property and the seller does not install the material as an improvement to realty or use it to repair real property.

B. If the contractor or repairman purchases all materials and supplies from vendors who collect the Utah tax, no sales tax license is required unless the contractor makes direct sales of tangible personal property in addition to the work on real property.

1. If direct sales are made, the contractor shall obtain a sales tax license and collect tax on all sales of tangible personal property to final consumers.

2. The contractor must accrue and report tax on all merchandise bought tax-free and used in performing contracts to improve or repair real property. Books and records must be kept to account for both material sold and material consumed.

C. Sales of materials and supplies to contractors for use in out-of-state jobs are taxable unless sold in interstate commerce in accordance with Rule R865-19-44S.

D. This rule does not apply to contracts whereby the retailer sells and installs personal property which does not become part of the real property. See Rules R865-19-51S, R865-19-59S, and R865-19-78S for information dealing with installation and repair of tangible personal property.

**R865-19-59S. Sales of Materials and Services to Repairmen Pursuant to Utah Code Ann. Section 59-12-103.**

A. Sales of tangible personal property and services to persons engaged in repairing or renovating tangible personal property are for resale, provided the tangible personal property or service becomes a component part of the repair or renovation sold. For example, paint sold to a body and fender shop and used to paint an automobile is exempt from sales tax since it becomes a component part of the repair work.

1. Sandpaper, masking tape, and similar supplies are subject to sales tax when sold to a repairman since these items are consumed by the repairman rather than being sold to his customer as an ingredient part of the repair job. These items shall be taxed at the time of sale if it is known that they are to be consumed. However, if this is not determinable at the time of sale, these items should be purchased tax free, as set forth in Rule R865-19-23S and sales tax reported on the repairman's sales tax return covering the period during which consumption takes place.

**R865-19-60S. Sales of Machinery, Fixtures and Supplies to Manufacturers, Businessmen and Others Pursuant to Utah Code Ann. Section 59-12-103.**

A. Unless specifically exempted by statute, sales of machinery, tools, and other equipment to a manufacturer, producer, or contractor and sales of furniture, fixtures, supplies, stationery, equipment, appliances, tools and instruments to stores, shops, businesses, establishments, offices, and professional people for use in carrying on their business or professional activities are taxable.

B. Such sales are to final buyers or ultimate consumers and are not sales for resale.

**R865-19-61S. Meals Furnished Pursuant to Utah Code Ann. Section 59-12-104.**

A. The tax is imposed upon the amount paid for meals furnished by any restaurant, cafeteria, eating house, hotel, drug store, diner, private club, boarding house, or other place, regardless of whether meals are regularly served to the public.

1. By specific exemption, the following meal sales are exempt from taxation:

a. public elementary and secondary school meals, whether sold to students or the public; and

b. inpatient meals provided at medical or nursing facilities. Tax must be paid on the purchase price of food by nonexempt medical or nursing facilities.

2. Ingredients which become a component part of meals subject to tax are construed to be purchased for resale.

B. Where no separate charge or specific amount is paid for meals furnished but is included in the membership dues or board and room charges; the club, boarding house, fraternity, sorority, or other place is considered to be the consumer of the items used in preparing such meals.

C. Meals served by religious or charitable institutions, and institutions of higher education are exempt from taxation only if the meals are not available to the general public. The term "available to the general public" is interpreted broadly so as to include any restaurant, cafeteria, or other facility where service is not restricted and monitored for a limited class of people. The following are guidelines for various types of meal sales:

1. Exemption status of employee cafeterias is determined in large measure by the availability of access

A.8  
WITHOUT ATTACHMENTS

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111 East Broadway, Suite 900  
Salt Lake City, Utah 84111  
Telephone: (801) 237-1904

Attorneys for Petitioner.

**BEFORE THE UTAH STATE TAX COMMISSION**

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VERMAX OF FLORIDA, INC., a	)	
Florida corporation,	)	
	)	
Petitioner,	)	STIPULATION
	)	
v.	)	
	)	
UTAH STATE TAX COMMISSION,	)	Case No. 92-0318
	)	
Respondent.	)	

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Petitioner Vermax of Florida, Inc. and Respondent Utah State Tax Commission hereby stipulate to certain facts for the purpose of facilitating submission of this matter. The factual record in this matter consists of those stipulations and admissions already made a part of the record herein, and evidence received at the May 3, 1993 evidentiary hearing in this matter. At that hearing, it was stipulated and agreed that Vermax provide further documentation in support of its claim. In lieu of that additional documentary evidence, the parties hereto stipulate and agree as follows:



1. As to each of the contracts identified by the State Tax Commission in Schedules 1 and 2 attached to the November 25, 1991 Statutory Notice, Vermax issued two separate bids to the prospective purchaser, each of which was located out-of-state. One bid was for the sale of product to be incorporated into buildings out-of-state. The second bid was for the installation of such product into the buildings out-of-state.

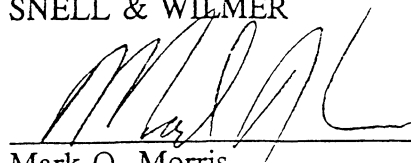
2. For each contract set forth in Schedules 1 and 2, the purchaser accepted both bids of Vermax. Generally, Vermax then had the purchaser execute two separate contracts, one for purchase and the other for installation. When dealing with large general contractors, Vermax was usually required to sign a single, form contract. Whether separate or combined, the contracts required that Vermax deliver the products on-site and then be responsible for installation.

3. For each installation bid included in the contracts set forth in Schedules 1 and 2, Vermax subcontracted the installation obligations to on-site, out-of-state subcontractors.

4. For each contract set forth in Schedules 1 and 2, unless the purchaser of Vermax products specified otherwise, Vermax invoiced the purchaser for product and installation as two separate items.

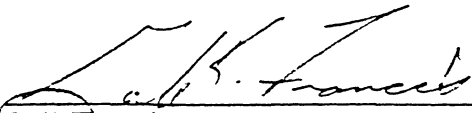
DATED this 18<sup>th</sup> day of June, 1993.

SNELL & WILMER



Mark O. Morris  
Attorneys for Petitioner

UTAH STATE TAX COMMISSION

By:   
Gail Francis  
Assistant Attorney General



BEFORE THE UTAH STATE TAX COMMISSION

---

VERMAX OF FLORIDA, INC.,	)	
	:	
Petitioner,	)	FINDINGS OF FACT,
	:	CONCLUSIONS OF LAW,
v.	)	
	:	
AUDITING DIVISION OF THE	)	Appeal No. 92-0318
UTAH STATE TAX COMMISSION,	:	
	)	Account No. D46403
	:	
Respondent.	)	Tax Type: Sales Tax

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STATEMENT OF CASE

This appeal came before the Utah State Tax Commission for a formal hearing on May 3, 1993. Alan Hennebold, Administrative Law Judge, heard the matter on behalf of the Commission. Mark O. Morris, of Snell & Wilmer, represented Vermax. Gale Francis, Assistant Utah Attorney General, represented the Auditing Division.

After the hearing, the parties were permitted to submit additional evidence and argument. The last such material was received by the Commission on November 1, 1993.

Based on the record in this matter, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax in question is sales tax.
2. The period in question is January 1988 through December 1990.
3. On November 25, 1991, the Audit Division assessed Vermax with additional sales tax in the amount of \$63,134.51,

arising from three types of transactions: 1) Use of materials in real property contracts; 2) Sales made on an "exempt" without proper documentation; and 3) Purchases of personal property for use or consumption by Vermax. In addition to the tax liability, a 10% negligence penalty in the amount of \$6,313.45 and interest were also assessed against Vermax.

4. Vermax has filed a timely appeal of the foregoing assessment.

5. Vermax manufactures, supplies and installs synthetic marble used for counter tops, showers and tubs.

6. In the transactions at issue in this appeal, Vermax furnished and installed counter tops, showers and tubs for various customers outside Utah. Vermax did not collect sales tax on these transactions.

7. During 1986, Vermax was also assessed for additional sales tax for failure to collect tax on "furnish and install" contracts.

#### CONCLUSIONS OF LAW

Utah's Sales and Use Tax Act levies sales tax on the purchaser for the amount paid or charged for retail sales of tangible personal property made within the state. (Utah Code Ann. §59-12-103.)

The Commission's Rule R865-19-58S provides in material part as follows:

A. Sale of tangible personal property to real property contractors and repairmen of real property is generally subject to tax.

1. The person who converts the personal property into real property is the consumer of the personal property since he is the last one to own it as personal property. 2. The contractor or repairman is the consumer of tangible personal property used to improve, alter or repair real property, regardless of the type of contract entered into - whether it is a lump sum, time and material, or a cost-plus contract.

3. The sale of real property is not subject to the tax nor is the labor performed on real property. For example, the sale of a completed home or building is not subject to the tax, but sales of materials and supplies to contractors and subcontractors are taxable transactions as sales to final consumers. This is true whether the contract is performed for an individual, a religious institution, or a governmental instrumentality. . . . .

C. Sales of materials and supplies to contractors for use in out-of-state jobs are taxable unless sold in interstate commerce in accordance with Rule R865-19-44S.

Utah Code Ann. §59-1-401(3) levies the following penalty for failure to pay tax as due:

(3) The penalty for underpayment of tax is as follows: (a) If any underpayment of tax is due to negligence, the penalty is 10% of the underpayment.

#### DECISION AND ORDER

Vermax challenges the Auditing Division's assessment of tax on those transactions where Vermax has provided and installed materials in real property construction.

Vermax argues that the exemption found in Utah Code Ann. §59-12-104(33)<sup>1</sup> should apply to Vermax's out of state "furnish and install" contracts. However, §59-12-104(33) did not become effective until after the audit period and does not apply to the transactions in question.

Vermax additionally argues that its "furnish and install" contracts are exempt from Utah tax as being in "interstate commerce". The Utah Supreme Court considered the same argument in Tummurru Trades v. Utah State Tax Commission, 802 P.2d 715 (Utah 1990). In Tummurru, the taxpayer manufactured modular units in Utah which its construction division then installed in real property outside the state. The taxpayer argued that it was not liable for Utah sales tax on the items taken from inventory for use in out of state construction projects. In response to that argument, the Court commented:

Because Tummurru took possession of the items within the state of Utah and title passed within the state, it became the ultimate consumer for sales tax purposes. The fact that the items would be incorporated into real property located out of the state does not change the nature of Tummurru's consumer use of the items.

The Court then proceeded to uphold the assessment of sales and use tax against the taxpayer.

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<sup>1</sup> Section 59-12-104(33) exempts sales within Utah of personal property to be incorporated into real property in another state, under certain conditions.

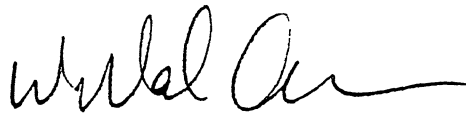
Vermax also contends that even if the transactions in question are subject to Utah's sales and use tax, the amount of tax assessed is incorrect. However, Vermax has failed to provide any documentation or clear explanation on this point.

Finally, Vermax challenges the imposition of a 10% negligence penalty against it. The Commission notes that several years ago, Vermax was assessed a sales tax deficiency for the same type of deficiency as is involved here. Under such circumstances, a 10% negligence penalty is appropriate.

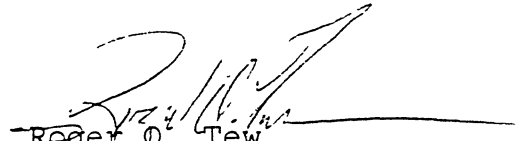
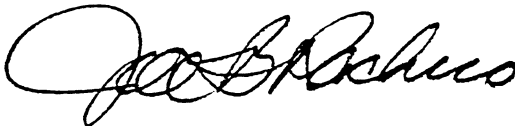
Based on the foregoing, the Commission affirms the Audit Division's assessment of additional tax, penalty and interest.

DATED this 1<sup>st</sup> day of September, 1994.

BY ORDER OF THE UTAH STATE TAX COMMISSION.



W. Val Oveson  
Chairman

  
Roger O. Tew  
Commissioner

Joe B. Pacheco  
Commissioner

  
Alice Shearer  
Commissioner

NOTICE: You have twenty (20) days after the date of a final order to file a Request for Reconsideration with the Commission. If you do not file a Request for Reconsideration with the Commission, you have thirty (30) days after the date of a final order to file a.) a Petition for Judicial Review in the Supreme Court, or b.) beginning July 1, 1994, a Petition for Judicial Review by trial de novo in district court. (Utah Administrative Rule R861-1-5A(P) and Utah Code Ann. §§59-1-601(1), 63-46b-13(1), 63-46-14(3)(a).)

AH/sy/92-0318 for



Appeal No. 92-0318

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing Findings of Fact, Conclusions of Law, and Final Decision to the following:

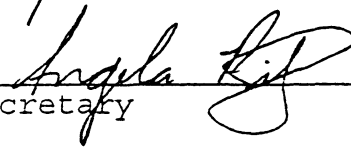
Vermax of Florida  
c/o Mark O. Morris  
Snell & Wilmer  
111 East Broadway, Ste 900  
Salt Lake City UT 84111-1004

Kim Thorne, Director  
Auditing Division  
210 North 1950 West  
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Gale Francis  
Assistant Attorney General  
50 South Main, Ste. 900  
Salt Lake City UT 84144

Craig Sandberg  
Deputy Director, Auditing  
210 North 1950 West  
Salt Lake City UT 84134

DATED this 1<sup>st</sup> day of September, 1994.

  
\_\_\_\_\_  
Secretary