

APPEAL # 25-1388
TAX TYPE: SALES AND USE TAX
TAX YEAR: 2020 - 2023
DATE SIGNED: 7/31/2026
COMMISSIONERS: J.VALENTINE, R.ROCKWELL, J.FRESQUES, AND J.DEEDS

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER,	INITIAL HEARING ORDER
Petitioner,	Appeal No. 25-1388
v.	Account No: #####
BUSINESS TAXES AND DISCOVERY	Tax Type: Audit - Sales & Use Tax
DIVISION OF THE UTAH STATE TAX	Audit Period: DATE - DATE
COMMISSION,	
Respondent.	Judge: Marshall

Presiding:

Jan Marshall, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER'S REP-1, TAXPAYER
PETITIONER'S REP-2, TAXPAYER

For Respondent: RESPONDENT'S REP-1, Assistant Attorney General
RESPONDENT'S REP-2, Assistant Attorney General
RESPONDENT'S REP-3, Tax Examiner Manager, Business Taxes and

Discovery Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on April 7, 2026, for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. The Petitioner (“Taxpayer”) timely appealed the Respondent’s (“Division”) denial of a refund request for sales and use tax for the period of DATE through DATE. The Taxpayer had requested a refund in the amount of \$\$\$\$\$, which the Division denied in its entirety.

APPLICABLE LAW¹

Utah Code Ann. §59-12-103 imposes a tax on certain transactions, as follows:

- (1) A tax is imposed on the purchaser as provided in this part on the purchase price or sales price for amounts paid or charged for the following transactions:
 - (a) retail sales of tangible personal property made within the state;
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 - (l) amounts paid or charged for tangible personal property if within this state the tangible personal property is: (i) stored; (ii) used; or (iii) consumed."

Utah Code Ann. §59-12-102 provides the following definitions, relevant in this matter:

- (129) "Storage" means any keeping or retention of tangible personal property or any other taxable transaction under Subsection 59-12-103(1), in this state for any purpose except sale in the regular course of business.
- (141) "Use" means the exercise of any right or power over tangible personal property, a property transferred electronically, or a service under Subsection 59-12-103(1), incident to the ownership or leasing of that tangible personal property, product transferred electronically, or service.

Utah Code Subsection 59-12-104(58) provides for an exemption to the taxes imposed under Title 59, Chapter 12, Sales and Use Tax Act, as follows:

- (a) subject to Subsection (58)(b) or (c), sales of tangible personal property or a product transferred electronically to a person within this state if that tangible personal property or product transferred electronically is subsequently shipped outside the state and incorporated pursuant to contract into and becomes a part of real property located outside of this state;
- (b) the exemption under Subsection (58)(a) is not allowed to the extent that the other state or political entity to which the tangible personal property is shipped imposes a sales, use, gross receipts, or other similar transaction excise tax on the transaction against which the other state or political entity allows a credit for sales and use taxes imposed by this chapter....

¹ The Commission cites to, and applies, the 2021 version of the Utah Code. Although amendments were made to the 2021 version of the Utah Code during the audit period, none of these amendments affect the outcome of this Initial Hearing Order.

Utah Administrative Rule R865-19S-58 provides additional guidance on the sale of construction materials, and other items of tangible personal property, to contractors and repairmen of real property, as follows:

- (1) Sales of construction materials and other items of tangible personal property to real property contractors and repairmen of real property are generally subject to tax if the contractor or repairman converts the materials or items to real property.
 - (a) "Construction materials" include items of tangible personal property such as lumber, bricks, nails and cement that are used to construct buildings, structures or improvements on the land and typically lose their separate identity as personal property once incorporated into the real property.
 - (b) Fixtures or other items of tangible personal property such as furnaces, built-in air conditioning systems, or other items that are appurtenant to or incorporated into real property and that become an integral part of a real property improvement are treated as construction materials for purposes of this rule.
- (2) The sale of real property is not subject to sales tax, nor is the labor performed on real property. For example, the sale of a completed home or building is not subject to the tax, but sales of materials and supplies to contractors for use in building the home or building are taxable transactions as sales to final consumers.
 - (a) The contractor or repairman who converts the personal property to real property is the consumer of tangible personal property regardless of the type of contract entered into--whether it is a lump sum, time and material, or a cost-plus contract.
 - (b) Except as otherwise provided in Subsection (2)(d), the contractor or repairman who converts the construction materials, fixtures or other items to real property is the consumer of the personal property whether the contract is performed for an individual, a religious or charitable institution, or a government entity.
 - (c) Sales of construction materials or fixtures made to religious or charitable institutions are exempt only if the items are sold as tangible personal property.
 - (d) Sales of materials are considered made to religious or charitable institutions and, therefore, exempt from sales tax, if:
 - (i) the religious or charitable institution makes payment for the materials directly to the vendor; or
 - (ii)
 - (A) the materials are purchased on behalf of the religious or charitable institution.
 - (B) Materials are purchased on behalf of the religious or charitable institution if the materials are clearly identified and segregated and installed or converted to real property owned by the religious or charitable institution.
 - (e) Purchases not made pursuant to Subsection (2)(d) are assumed to have been made by the contractor and are subject to sales tax.
- (3) 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.

- (a) 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.
- (b) The contractor must accrue and remit tax on all merchandise bought tax-free and converted to real property. Books and records must be kept to account for both material sold and material consumed.
- (4) This rule does not apply to contracts where the retailer sells and installs personal property that does not become part of the real property. Examples of items that remain tangible personal property even when attached to real property are:
 - (a) moveable items that are attached to real property merely for stability or for an obvious temporary purpose;
 - (b) manufacturing equipment and machinery and essential accessories appurtenant to the manufacturing equipment and machinery;
 - (c) items installed for the benefit of the trade or business conducted on the property that are affixed in a manner that facilitates removal without substantial damage to the real property or to the item itself and
 - (d) telephone or communications equipment and associated wire and lines if the equipment, wire, and lines:
 - (i) are provided as part of a single transaction;
 - (ii) that are part of real property are an incidental portion of the transaction;
 - (iii) are primarily used for the operation of a telephone system or a communications system;
 - (iv) are installed for the benefit of the trade or business conducted on the property; and
 - (v) are attached to real property in a manner such that their removal from the real property does not cause substantial damage to the equipment, wire, or lines or to the real property to which they are attached.

The burden of proof is generally on the Taxpayer, as provided in Utah Code Ann. §59-1-1417, below:

- (1) In a proceeding before the commission, the burden of proof is on the petitioner except for determining the following, in which the burden of proof is on the commission:
 - (a) whether the petitioner committed fraud with intent to evade a tax, fee, or charge;
 - (b) whether the petitioner is obligated as the transferee of property of the person that originally owes a liability or a preceding transferee, but not to show that the person that originally owes a liability is obligated for the liability; and
 - (c) whether the petitioner is liable for an increase in a deficiency if the increase is asserted initially after a notice of deficiency is mailed in accordance with Section 59-1-1405 and a petition under Part 5, Petitions for Redetermination of Deficiencies, is filed, unless the increase in the deficiency is the result of a change or correction of federal taxable income:
 - (i) required to be reported; and
 - (ii) of which the commission has no notice at the time the commission mails the notice of deficiency.

- (2) Regardless of whether a taxpayer has paid or remitted a tax, fee, or charge, the commission or a court considering a case involving the tax, fee, or charge shall:
 - (a) construe a statute imposing the tax, fee, or charge strictly in favor of the taxpayer; and
 - (b) construe a statute providing an exemption from or credit against the tax, fee, or charge strictly against the taxpayer.

DISCUSSION

The Taxpayer is an PRODUCT company based in Utah. The Taxpayer expanded operations into other states, including STATE-1. The Taxpayer purchased materials that were received in Utah, and used in real property jobs performed in Utah and other states. The Division had previously conducted a sales and use tax audit on the Taxpayer. During the audit, it was discovered that the Taxpayer had erroneously paid sales and use taxes on those materials taken into the other states to those states. The Taxpayer paid the audit tax to Utah, including the out-of-state transactions, and requested refunds from the other states for the taxes erroneously paid. The State of STATE-1 refused to issue a refund. The Taxpayer submitted a refund request to the Division for the amount of tax paid to the State of STATE-1, which the Division denied.

PETITIONER'S REP-1 stated that they do not dispute that the tax on the out-of-state transactions should have been paid to Utah. He stated that early on in the business operations, they had received bad advice, and had paid use tax to the State of STATE-1 for the materials brought into the State of STATE-1 for real property jobs. PETITIONER'S REP-1 explained that after the audit by the State of Utah, the Taxpayer filed amended returns with the State of STATE-1, and requested a refund, which the State of STATE-1 denied. He stated that he was told that even though the payments were made in error to the State of STATE-1, there was nothing in the STATE-1 law that required a refund of those payments. PETITIONER'S REP-1 stated that they are asking for some consideration from the State of Utah because the Taxpayer has paid the tax twice.

Since the audit, the Taxpayer started paying all sales taxes to Utah, and has received a credit from the State of STATE-1 for the amount of taxes paid to Utah. He noted that the Taxpayer has also received letters from the State of STATE-1 with estimated sales tax because of the change in their reporting.

The Division's representative stated that the underlying facts are not in question. He stated the Utah Supreme Court in *Ivory Homes v. Utah State Tax Comm'n*, 266 P.3d 751 (Utah 2011) determined that tax refunds are to be construed narrowly against the taxpayer.

The Division's representative stated that Utah law is clear in this matter, and the sales tax was properly due to the State of Utah. He stated that the Utah Court of Appeals in *Niederhauser*

Ornamental & Metal Works Co. v. Utah State Tax Comm'n, 858 P.2d 1034 (Utah Ct. App. 1993) found that the sales tax due to the State of Utah takes precedence over the use tax due to another state. The Division's representative stated that the Taxpayer has acknowledged that the tax was due to the State of Utah, and argued that STATE-1 had incorrectly applied Utah law in its denial of the Taxpayer's refund request.

The Division's representative argued that it would be inequitable for Utah to issue a refund to the Taxpayer, as the tax was properly due to the State of Utah. He stated that the State of STATE-1 should issue a refund of the tax it incorrectly received. The Division's representative stated that it is unclear whether the Taxpayer has exhausted all of its remedies in STATE-1.

The underlying facts are not in dispute. The Taxpayer purchased materials that were received in Utah, and used in real property jobs performed in Utah and other states. The materials were stored or used by the Taxpayer in order for it to consume the materials when performing its real property jobs. Furthermore, the Utah Supreme Court has clarified that such materials are subject to Utah sales and use tax, even though a taxpayer converts the materials to real property in a state outside of Utah.

In *Tummurru Trades. v. Utah State Tax Comm'n*, 802 P.2d 715 (Utah 1990), one of the issues considered by the Utah Supreme Court concerned the taxation of materials stored in Utah and used by a real property contractor to construct real property outside of Utah. The Court found that the taxpayer, as a real property contractor, was the ultimate consumer of the materials. The Court stated that "[t]he act of taking the items out of inventory for use in a construction contract is a retail sale for the purpose of sales tax because the contractor is the ultimate consumer." The Court determined that the circumstances did not qualify as a sale in interstate commerce. The Court reconfirmed this position in *Chicago Bridges & Iron Co. v. State Tax Comm'n*, 839 P.2d 303 (Utah 1992), stating that "[e]ven if a real property contractor incorporates the materials into real property in another state, the purchase in Utah of those materials is still taxable." These rulings are consistent with the Court's findings in *Niederhauser Ornamental & Metal Works Co. v. Utah State Tax Comm'n*, 858 P.2d 1034 (Utah Ct. App. 1993).

In general, the burden of proof is on the petitioner, under Utah Code Ann. §59-1-1417(1). Further, Subsection (2) provides that the Commission shall construe a statute providing an exemption from or credit against a tax, fee, or charge strictly against the taxpayer.

Utah Code Ann. §59-12-104(58) provides an exemption from taxation in certain cases where a real property contractor consumes tangible personal property when performing a real property contract outside of Utah. Subsection 59-12-104(58)(b) provides that the exemption is not allowed when the state in which the tangible personal property is converted to real property

allows a credit for Utah sales and use tax that is due. It is not disputed that the sales and use tax is due to Utah. Further, the Taxpayer confirmed that STATE-1 allows such a credit, and that it has been receiving that credit from the State of STATE-1 since it changed its practices to report the transactions and pay the tax in Utah. The Commission finds the exemption is not applicable in the instant case. In construing the exemption statute, the Commission finds that there is a difference between a credit being allowed by another state, and that credit being granted. There are a number of reasons for which a credit may not be granted, such as requesting the credit after the applicable statute of limitations, insufficient books and records to support a credit, or providing inadequate proof to the other state to show that taxes were paid to Utah.²

After reviewing the arguments of the parties, the Division's denial of the refund claim should be upheld.

Jan Marshall
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission denies the Taxpayer's refund request. It is so ordered.

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

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

or emailed to:

taxappeals@utah.gov

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

DATED this ____ day of ____, 2026.

² The Commission notes in this case, that were the Commission to grant a refund, there is nothing to prevent the Taxpayer from pursuing an appeal in STATE-1. If STATE-1 were to ultimately grant that credit, the Taxpayer would have escaped the tax due.

John L. Valentine
Commission Chair

Rebecca L. Rockwell
Commissioner

Jennifer N. Fresques
Commissioner

John T. Deeds
Commissioner

Notice of Payment Requirement: Any balance due as a result of this order must be paid within thirty (30) days of the date of this order, or a late payment penalty could be applied.