FINAL PRIVATE LETTER RULING

REQUEST LETTERS

A - INITIAL REQUEST LETTER

COMPANY
ADDRESS
CITY, STATE ZIP CODE

4.7.11

Fax: 801.297.6357

Tax Commission
Technical Research Unit
210 N 1950 W
CITY BRANCH, Utah 84134

Request for Private Binding Letter Ruling

I understand that the Utah tax commission has been revising and cleaning up some of the language in their definitions to bring them in line with Streamline Sales Tax. I was told the changes taking effect 7.1.11 could affect taxability of our type of transactions. I was directed to request a private letter ruling so that we can get a binding response if and how the changes on 7.1.11 will or will not affect the taxability for our business. Please provide clarification of taxability of the following for both before and after 7.1.11. Please also provide sections of code or regulations as backup.

We are a scaffolding company. We sell and rent scaffolding equipment. As optional services, we will deliver and/or put together, setup, the scaffolding so it is ready to be used by our customer. I have been told that Utah defines this optional setup/teardown service that we perform as assembly, not installation.

During this process miscellaneous supplies may be needed and are purchased by our setup men. Because our men use these supplies in the setup of the scaffolding, we pay tax at the time of purchase. We consider our men the consumers of these supplies and thus owe the taxes.

On our billing to our customer, there are separate line items for:
"Freight", delivery charge,
"Labor", our charges for assembly or disassembly of the scaffolding
"Consumables", which includes the charges for the miscellaneous supplies that were needed and purchased by our men. Some of the items billed in "Consumables" are actually used by our men and <u>not left</u> with the rented scaffolding (masks, forklift rental charges, per diem/travel costs), others stay with the scaffolding (shrink wrap, plywood). We tax the consumable charge billed to our customer because we consider this a "separate transaction". We consider our men's initial

purchase and the billing of the cost of these items to our customer as two separate transactions, both of which are taxable.

We charge tax on all items (except separately stated delivery charges) on the customer's invoice; rental or sale, labor and consumables based on:

R865. Tax Commission, Auditing.
R865-19S. Sales and Use Tax

R865-19S-32. Leases and Rentals Pursuant to Utah Code Ann. Section 59-12-103.

(1) The lessor shall compute sales or use tax on all amounts received or charged in connection with a lease or rental of tangible personal property.

Definitions (Utah Code §59-12-102)
Delivery Charges
Charges for preparation and delivery to a location chosen by a buyer of tangible personal property, products transferred electronically or services. Delivery charges include (but are not limited to): transportation, shipping, postage, handling, crating and packing. Purchase price and sales price of tangible personal property do not include delivery charges if stated separately.

We currently have a customer that insists the labor and consumables should not be taxed. He is a large customer and is withholding payment on his account because of this issue.

Please contact me at PHONE NUMBER if you have further questions.

Sincerely,

NAME
TITLE

B. SUPPLEMENTAL REQUEST LETTER

COMPANY 1
COMPANY'S 1 TITLE
ADDRESS 1
CITY STATE ZIP CODE 1

April 27, 2011

VIA ELECTRONIC MAIL

Commissioner Marc Johnson
Utah State Tax Commission
210 N. 1950 W.
SLC, UT 84134-2100

Re: Sales Tax on Scaffolding Rentals and Related Charges

Dear Commissioner M. Johnson:

We represent a client who often rents scaffolding from COMPANY ("COMPANY"). We received from COMPANY the attached private letter ruling request dated April 7, 2011 which COMPANY submitted to the Tax Commission relating to the sales taxability of the scaffolding rental and related charges. See Exhibit A. In the ruling request, COMPANY referenced a large client who disagreed with their analysis that certain charges were taxable. We represent that client, and their position is based on our advice.

We are submitting this letter with the permission of COMPANY, as a supplement to their April 7 ruling request, to provide our perspective on various charges relating to sales taxability of scaffolding rentals. We are hopeful this analysis will be helpful to the Commission as it prepares its private letter ruling for COMPANY.

COMPANY 's request relates to the following separately stated charges, both before and after July 1, 2011 (the effective date of HB 35 (2011)), which addressed the sales taxability of installation charges): (1) rental of scaffolding, (2) delivery charges, (3) labor charges (including assembly and disassembly charges), and (4) consumables (including charges for shrink wrap, plywood, per diem, travel, masks, and forklift rentals passed through to our client in conjunction with the assembly of the scaffolding).

We will address each of these transactions under the new law in effect July 1, 2011, and will also address the transactions under the law in effect prior to July 1, 2011 where there is a potential difference.

1. Rental of Scaffolding

The scaffolding rented by COMPANY to our clients is not converted to real property. As such, the separately stated rental charge for the scaffolding is a rental of tangible personal property ("TPP") which is subject to Utah sales tax. The taxable rental charge includes any "charge by the seller (COMPANY) necessary to complete the" rental (Utah Code Ann. § 59-12-102(85)(b)(iii)[1]), whether or not such charge is separately stated, unless such a charge is expressly excluded from the tax base by statute. Whereas it is re-leasing the scaffolding, COMPANY should purchase the materials for the scaffolding sales tax free as a sale for re-lease. All of this is true both before and after July 1, 2011.

2. Optional Charges for the Delivery of Rented Scaffolding

The separately stated optional charges to deliver the scaffolding to our client's location in Utah are not subject to Utah sales tax, and have not been since Utah adopted the Streamlined Sales Tax ("SST") Agreement effective July 1, 2005 and "toggled off" delivery and installation charges.

In 2003, the Utah Legislature passed SB 147, which adopted the SST Agreement in Utah, and which ultimately became effective July 1, 2005. Prior to the passage of SB 147, some delivery and installation charges were taxable in Utah. In adopting SST, Utah was required to declare delivery and installation charges as either all being taxable, or all being non-taxable. See p. 136 of the SST agreement, as amended on December 13, 2010, available at streamlinedsalestax.org. Utah chose to declare all installation and delivery charges to be non-taxable. See SB 147 (2003), as codified at § 59-12-102(85)(c)(ii)(B) & (C).

As such, since July 1, 2005, delivery charges have been expressly excluded from the tax base, or "toggled off" under SST in Utah. The only potential issue for the letter ruling to COMPANY is whether the delivery charges in question constitute (1) "the cost of transportation to the seller," which is taxable under section 59-12-102(85)(b)(ii)(F), even if separately stated, or (2) "a charge . . . by a seller . . . for preparation and delivery . . . to a location designated by the purchaser," which is non-taxable under section 59-12-102(85)(c)(ii)(D) and -102(29)(a).

In this case, the delivery charges are clearly in the latter category as COMPANY is not incurring the charge to have the scaffolding delivered to COMPANY. Rather, the delivery charge is a charge by COMPANY for delivery to a location designated by our client. As such, the delivery charge is clearly an "outgoing" rather than "incoming" delivery charge. Therefore, the delivery charge is not subject to Utah sales tax.

The fact that COMPANY is renting the scaffolding rather than selling it does not alter this analysis. In relation to the rental charge, the delivery charge is not a cost of transportation to have the scaffolding delivered to COMPANY, but rather is a cost to have the scaffolding delivered to our client. In this case, the delivery is optional, but even if it were a mandatory part

[1] Unless otherwise noted, all statutory citations herein are to the 2010 version of the Utah Code.

of the rental, it would still be excluded from the tax base because it is charge to deliver the product to the purchaser. All of this is true both before and after July 1, 2011.

3. Labor

a. Optional Charge for the Assembly of Rented Scaffolding

The separately stated optional charges by COMPANY to assemble the scaffolding at our client's location following the rental are not subject to Utah tax after July 1, 2011 because they are "installation charges" expressly excluded from the tax base. HB 35 (2011) clarified that repairs, renovations and replacements of TPP include installations of TPP to other TPP only where a repair, renovation or replacement is involved. *See* H.B. 35, lines 1016-27. Where there in an installation of TPP to other TPP which does not involve a repair, renovation or replacement (a "Non-Repair Installation to TPP"), there is no sales tax due.

Going back to 2003 again, prior to the passage of SB 147 (effective July 1, 2005), some installation charges were taxable and some were not taxable. See Utah Code § 59-12-103(g)(ii) (2002). In adopting SST, Utah chose to declare all installation charges to be non-taxable. See SB 147, codified at Utah Code § 59-12-102(85)(c)(ii)(C).

However, under the statutory definition of "repair" as adopted in SB 147, it was unclear how charges were to be treated for a Non-Repair Installation to TPP. The Utah Code stated that "installation charges" were not taxable, and also stated that "repair" included "attaching TPP to other TPP." Under a strained reading of the statute, it could be argued that a Non-Repair Installation to TPP was a taxable "repair," but the more logical reading was that an installation was taxable only a repair involved.

Because of this confusing language, during the 2011 legislative session, the Utah Legislature passed HB 35 (effective July 1, 2011), which clarifies that the installation of TPP to other TPP is not considered taxable, unless the installation is part of a "repair", "renovation" or "replacement" of personal property. *See* H.B. 35, lines 1016-27. As such, Non-Repair Installations to TPP are clearly not subject to Utah sales tax after July 1, 2011.

A remaining question for purposes of the private letter ruling is whether the "assembly" of the scaffolding constitutes "installation" of TPP to other TPP. It clearly does. Prior to July 1, 2005, when installation of TPP to other TPP was clearly taxable, assembly charges not involving real property were taxable either as (1) installation of TPP to other TPP (if the charges were to the final customer), or (2) fabrication labor (if the charges were costs of assembly paid by the seller – see Tax Commission Rule R865-19S-51).

After July 1, 2011, where a Non-Repair Installation to TPP is no longer taxable, assembly charges are taxable only if they constitute fabrication labor "that is part of the process of creating a finished product of tangible personal property." Tax Commission Rule R865-19S-51. In the instant case, the assembly/installation charges in question are clearly not fabrication labor because they are optional charges. Our client is renting scaffolding, and is free to pick up and assemble the scaffolding itself. But our client chooses to pay COMPANY a separate charge to

assemble the scaffolding, or in other words, to install the scaffolding to other pieces of scaffolding. Fabrication labor is used to create the metal pieces that are later assembled into scaffolding. The optional labor paid for by our client is not fabrication labor, and as such is a non-taxable installation charge for periods after July 1, 2011.[2]

The next question then becomes, what about the period between July 1, 2005 through July 1, 2011? During that period, were Non-Repair Installations to TPP subject to Utah sales tax or not? For four independent reasons, we believe Non-Repair Installations to TPP were not subject to sales tax from July 1, 2005 through July 1, 2011.

First, the legislative intent behind HB 35 (2011) suggests as much because the bill was presented as a technical clarification, with no fiscal note. In other words, the bill was simply clarifying Tax Commission and taxpayer practice from July 1, 2005 through July 1, 2011. HB 35 (2011) clearly specifies that a Non-Repair Installation to TPP is not taxable. See HB 35, lines 1016-1027. In presenting this bill to the Legislature at the November 17, 2010 legislative interim committee meeting, Commissioner NAME 3 testified as follows:

> The streamlined sales tax project is a project that tries to coordinate the sales tax laws of many states to make it easier for multistate businesses to comply with those requirements, and accordingly much of what we do in the streamlined sales tax project is to coordinate our state's statutes with other state's statutes, and that gives rise to various technical amendments that have to be made from time to time when the business community raises questions and says "you're treatment is not exactly in compliance with the agreement.
>
> * * *
>
> This bill makes five changes which are largely technical.
>
> * * *
>
> The second correction is found on pages 18 and 33. We have not taxed installation of tangible personal property. We do tax repairs. So it's been a continuing concern – how do you determine when a repair is a repair instead of

[2] If the assembly charge by COMPANY was not optional, it may be more debatable whether the assembly charge constituted "fabrication labor" as it could be argued that our client was not renting the scaffolding until after it was assembled. Like a mandatory delivery charge, this would still likely be non-taxable because it is a charge to the final customer rather than to the seller. But in any event, that is not the factual situation with COMPANY. The COMPANY assembly charges are clearly optional, and thus are not taxable fabrication labor, but rather are non-taxable installation charges. It could also potentially be argued that, after July 1, 2011, assembly/installation charges are non-taxable only if TPP is being installed to TPP already owned or leased by the purchaser (like installing an after-market DVD player in a previously purchased vehicle), and that assembly/installation charges are taxable as fabrication labor where one item of TPP is being assembled/installed to another item of TPP purchased in the same transaction (like the scaffolding in the instant case). However, this distinction has no basis in the law, and is illogical. Whether a taxpayer purchases or rents pieces of assembled scaffolding 6 months apart or at the same time should have no impact on whether a charge constitutes fabrication labor or an installation charge.

> the installation of repair parts? And so what we've tried to do here is to clarify that installations do not include installations in connections with repairs or installations in the manufacturing process. And we've clarified that repair does include installations if they are pursuant to another repair. I know that sounds confusing and I'd be happy to answer questions on it, but the bottom line is if you buy brand new seat covers for a brand new car, nobody in the state thinks that's a repair, and we don't think it should be taxed as a repair, so that's going to be an exempt installation. If you go in and get new car parts pursuant to some body work on your car - those new parts are installed -- that is pursuant to repair. That is taxable. That's what we've been doing in the past, but the legislation has been unclear – the statute's been unclear – and it has been subject to the interpretation that even the new car seats might be subject to tax.
>
> * * *
>
> Again, these [five changes] don't change the way we're treating taxpayers, but they are necessary for our technical compliance.

See Revenue & Taxation Interim Committee, Audio Recording at minutes 16:40-24:40, *available at* http://le.utah.gov/asp/interim/ Commit.asp?Year=2010&Com=INTREV, agenda item no. 5 (emphasis added).

Given the confusion between July 1, 2005 and July 1, 2011 as to whether the installation of TPP to other TPP was really a "repair," and whether treating an installation as a repair was compliant with SST, the Commission testimony was clear that the taxpayers and the Tax Commission were not treating such installations as being taxable, and thus presented HB 35 as a technical clarification. In adopting HB 35, the 2011 Legislature acquiesced that the law prior to and after HB 35 was consistent by passing the bill with no fiscal note. See HB 35 Fiscal Note, 2011 Legislative Session, *available at* http://le.utah.gov/lfa/fnotes/2011/hb0035s03.fn.htm. (Attached hereto as Exhibit B). This legislative intent strongly suggests that the law from July 1, 2005 through July 1, 2011 was consistent with the law after July 1, 2011. As such, Non-Repair Installations to TPP should be non-taxable for the period July 1, 2005 through July 1, 2011.

Second, applying this legislative intent in finding Non-Repair Installations to TPP to be non-taxable from July 1, 2005 through July 1, 2011 is also consistent with the common law principle that statutes should not be read to produce "an unreasonable or inoperable result." *State v. Jeffries*, 2009 UT 57, ¶ 7. The reasonable reading of the statutory definition of "repairs and renovations" from July 1, 2005 to July 1, 2011 is that it includes attaching TPP to other TPP only when a repair or renovation is involved. This reading is not only reasonable and rationale, it is consistent with the legislative intent, as evidenced by the passage of HB 35 as a clarifying bill with no fiscal note. When a statute has a reading that is unreasonable, courts and the Commission are to look past such a reading to the legislative intent:

> Our duty to give effect to the plain meaning of a statute . . . should give way if doing so would work a result so absurd that the legislature could not have intended it. Where a statute's plain language creates an absurd, unreasonable, or

> inoperable result, we assume the legislature did not intend that result. To avoid an absurd result, we endeavor to discover the underlying legislative intent and interpret the statute accordingly.

State v. Jeffries, 2009 UT 57, ¶ 8 (citations omitted) (emphasis added).

In this case, the legislative intent is clear from the passage of HB 35 (2011) as a clarifying bill with no fiscal note – the legislative intent all along, beginning when SB 147 was passed effective July 1, 2005, was that attaching TPP to TPP is a repair, renovation or replacement only when TPP is being repaired, renovated or replaced. When there is no such repair, renovation or replacement, attaching TPP to other TPP is a non-taxable installation charge, consistent with Utah Code section 59-12-102(85)(c)(2)(C) (which excludes an "installation charge" from the definition of "purchase price"). As such, the statute must be read rationally, consistent with this legislative intent, which is to apply the clear meaning of the statute after July 1, 2011 to the period from July 1, 2005 to July 1, 2011.

Third, reading the Utah Code to tax a Non-Repair Installations to TPP from July 1, 2005 through July 1, 2011 is a violation of the SST Agreement which Utah joined as an associate member on October 1, 2005. Page 136 of the SST agreement, as amended on December 13, 2010, includes within the universal definition of "sales price," which conforming states must adopt, the term "installation charge," then provides that "states may exclude from 'sales price' the amounts received for charges included in paragraphs (C) through (F) above" (installation charges are under paragraph E). See http://www.streamlinedsalestax.org/index.php?page=modules. (Relevant page attached as Exhibit C). Under this provision, Utah must tax either all installation charges, or no installation charges, and cannot tax only Non-Repair Installations to TPP , as was clarified with HB 35.

Reading the Utah Code to tax a Non-Repair Installation to TPP for the period July 1, 2005 through July 1, 2011 must thus be avoided so Utah is not found to be out of compliance with the agreement. Utah's certification to all taxpayers, governmental entities, etc. in its taxability matrix published on the SST web-site for several years has been that all installations are excluded from the tax base in Utah. See http://www.streamlinedsalestax.org/ index.php?page=state-taxability-matricies. (Relevant page attached as Exhibit D.) Consistent with this certification, and to keep Utah in compliance with the SST Agreement, the statute must be read consistent with the legislative intent evidenced by HB 35 – that a Non-Repair Installation to TPP is not subject to Utah Sales Tax from July 1, 2005 through July 1, 2011.

Fourth, reading the Utah Code to avoid taxing a Non-Repair Installation to TPP from July 1, 2005 through July 1, 2011 is consistent with principles of statutory construction because the relevant provision is a taxing statute and, "[i]t is an established rule in the construction of tax statutes that if any doubt exists as to the meaning of the statute, our practice is to construe taxation statutes liberally in favor of the taxpayer**,** leaving it to the legislature to clarify an intent to be more restrictive if such intent exists." *County Bd. of Equalization v. Utah State Tax Comm'n*, 944 P.2d 370 (Utah 1997). The relevant statutory provisions at issue for the period July 1, 2005 through July 1, 2011 are (1) the definition of "sales price," and (2) the definition of "repairs or renovations of tangible personal property." *See* § 59-12-102(91) & (100). Both of

these provisions define what the tax base is, as opposed to carving out an exemption, or defining an exemption. As such, the provisions are both taxing provisions. Therefore, any doubt as to their meaning must be construed in favor of the taxpayer, and such construction means the definition of "repairs" did not include Non-Repair Installations to TTP from July 1, 2005 through July 1, 2011.

For all four of these reasons, independently and cumulatively, from July 1, 2005 through July 1, 2011, Non-Repair Installations to TPP are not subject to Utah sales tax. As such, COMPANY's separately stated optional charges to assemble its rented scaffolding are not subject to Utah sales tax for any period from July 1, 2005 forward.[3]

b. Optional Charge to Disassemble Rented Scaffolding

If charges to disassemble the scaffolding after the conclusion of the rental transaction are not separately stated, but are included within the charge for assembly, then their taxability is controlled by the taxability of the assembly charges in the preceding section.

If the disassembly charges are separately stated, the charges should be non-taxable because disassembly is not a charge that is included in the Utah sales tax base. Disassembly is not taxable as fabrication labor, because fabrication is the act building, not tearing apart. Disassembly is not taxable as a repair, renovation or replacement as nothing is being repaired, renovated or replaced. Optional disassembly is also not a service necessary to complete the sale. If a taxpayer rents scaffolding, and could deliver, assemble, and disassemble the scaffolding itself, then chooses to pay someone a separate amount to disassemble the scaffolding, that disassembly charge is not a service necessary to complete the sale. Whereas disassembly does not fit within any element of the Utah tax base, separately stated disassembly charges are not subject to sales tax in Utah. See *Union Pacific Railroad v. Tax Comm'n*, 842 P.2d 876 (Utah 1992) (holding that charges to punch holes in railroad ties were not subject to Utah sales tax because punching holes was not repairing, and did not otherwise fall within the Utah tax base).

4. Consumable pass-through charges to our client of the shrink wrap, plywood, masks, per diem, travel, and forklift rental charges incurred by COMPANY in assembling/installing the scaffolding.

Separately stated pass-through charges for shrink wrap, plywood, masks, per diem, travel and forklift rental charges incurred by COMPANY in assembling/installing the scaffolding should not be taxable because they are all functionally part of the non-taxable service charge to assemble/install the scaffolding (similar to a charge for copies or travel costs separately itemized on a legal bill). The Tax Commission has specified that, while per diem and travel expenses incurred by the seller in relation to the rental of a taxable product or other taxable services are taxable, per diem and travel expenses incurred in conjunction with non-taxable services, such as

[3] While we are not aware of any Commission rulings between 2005 and 2011 that suggest Non-Repair Installations to TPP are taxable, if any such rulings exist, the instant private letter ruling should clarify them in light of HB 35 and the four arguments above.

installation services, are not taxable. See Private Letter Ruling 09-023, p. 7 (2009); See also Tax Commission Decision Appeal No. NUMBER, p. 14 (2009).

In this case, except for the shrink wrap and plywood, the various consumable charges are not tied in any way to the taxable rental of the scaffolding (that rental transaction is completely separate and apart from any employees traveling to our client's location). Rather, the consumable charges are incurred by employees going to assemble/install the scaffolding. Because the assembly/installation charges are non-taxable, the attendant consumable charges should be non-taxable also.

As for the shrink wrap and plywood, if they are becoming a part of the scaffold structure and COMPANY is renting those items to our client, then the items would be separately stated from the consumables and subject to sales tax as a rental of tangible personal property.

Finally, when COMPANY purchases the consumables (the masks, food, fuel, forklift rental, etc.), COMPANY should pay sales tax on these items, and the vendor should remit such sales tax to the Tax Commission. COMPANY is not reselling these products or incorporating them into a tangible personal product being resold. Rather, these products are consumed as COMPANY provides assembly services, and sales tax is properly paid on COMPANY's purchase. When COMPANY collects money from our client to recoup COMPANY's costs for these items, COMPANY could include any sales tax it paid in one lump-sum passed-through cost of the masks. If COMPANY separately lists the pass-through sales tax, COMPANY will likely be responsible to remit such sales tax to the Commission, even though the underlying transaction was not subject to sales tax (under the Tax Commission policy that any amount collected as sales tax must be treated and remitted as sales tax). [4]

Conclusion

For all the reasons stated, the Commission should issue a private letter ruling specifying that (1) rental of scaffolding is subject to Utah sales tax, (2) separately stated optional delivery charges are not subject to Utah sales tax, (3) separately stated optional assembly/installation charges or disassembly charges are not subject to Utah sales tax, either before or after July 1, 2011, and (4) separately stated charges for items consumed in assembling/installing the scaffolding are not subject to Utah sales tax (other than possibly the shrink wrap and plywood if these items are being rented to our client).

[4] If the Commission were to determine that assembly/installation charges incurred prior to July 1, 2011 were subject to sales tax, then the consumable charges associated with such taxable assembly/installation charges would be subject to sales tax to our client also (and COMPANY would also pay sales or gas tax when paying for the masks, food, fuel, etc. because these items are not re-sold or re-leased to COMPANY). However, for the reasons stated above, the assembly charges should not be taxable between July 1, 2005 and July 1, 2011. As such, the corresponding consumable pass-through charges should be non-taxable also during that period.

Sincerely,

NAME 4

cc: NAME 5, NAME 6

SPY:GWQ

RESPONSE LETTER

December 21, 2011

NAME
E-MAIL
COMPANY
ADDRESS
CITY, STATE ZIP CODE

NAME 4
E-MAIL 1
COMPANY 1
COMPANY'S 1 TITLE
ADDRESS 1
CITY STATE ZIP CODE 1

Sent via e-mail
Original to follow in U.S. Mail

RE: Private Letter Ruling Request–Sales Tax Treatment of Charges Relating to Sales and Rentals of Scaffolding

Dear NAME and NAME 4:

NAME and NAME 4, you have requested a ruling on behalf of your respective clients, COMPANY and a customer of COMPANY, on the Utah sales and use tax treatment of COMPANY 's charges relating to its sales and rentals of scaffolding.

According to your letters, COMPANY sells and rents scaffolding, charging its customers sales tax on these transactions. COMPANY also provides the optional services of delivery, assembly, and disassembly for the sales and rentals. For the optional services, COMPANY uses the following separate line items:

1. **Freight**. Freight includes charges for delivery of scaffolding to and from the customer. Through later communications, NAME explained that delivery included two separate charges. When scaffolding is delivered to a customer's work site, the initial delivery is invoiced on the first invoice, named the D Invoice, with D standing for delivery. When scaffolding is disassembled and returned to COMPANY, the return delivery is invoiced on an R Invoice, with R standing for repeat rental. COMPANY does not charges sales tax to its customers for Freight.

2. **Labor**. Labor includes charges for assembly and disassembly of the scaffolding. Similar to the Freight charge, NAME explained through later communications that there are multiple, separate charges for Labor. When the scaffolding is initially assembled, the Labor is invoiced on the D Invoice. When the scaffolding is disassembled, the labor is invoiced on a later R invoice. If a customer needs the scaffolding disassembled, moved, and reassembled at a different location at the same worksite, then Labor is also invoice on an R invoice. COMPANY charges sales tax to its customers for Labor.

3. **Shrink Wrap.** In a subsequent communication, NAME explained that COMPANY 's CITY BRANCH bills shrink wrap separate from Consumables. COMPANY sells shrink wrap (part # SHRINKWRAP) to any customer who wants to purchase it, either for the customer to install or to have COMPANY install. Shrink wrap goes around the outside of the scaffolding to create an artificial wall. The shrink wrap is attached with glue or ties and then shrunk with heat. It shelters the customer's employees and project from the elements, such as wind, and protects the outside environment from materials being used on the project. The shrink wrap is not used to protect COMPANY's employees during assembly or disassembly of the scaffolding. The shrink wrap is garbage when it comes down.

4. **Plywood.** In a subsequent communication, NAME explained that, similar to shrink wrap, COMPANY's CITY BRANCH bills plywood separate from Consumables. However unlike shrink wrap, COMPANY, not its customers, determines if plywood is needed to complete the scaffolding. Plywood is used 99% of the time as a rental item to complete a scaffold to make it OSHA compliant and safe for the customers' use. Plywood charges are addressed in COMPANY's rental agreement, under part numbers VPW4X8X3/4, VPW2X8X3/4, VPW2X2X3/4 and so on for the different sizes. Plywood that is sold rather than rented is done so at the request of the customers, if they have lost the plywood or choose to keep it.

5. **Consumables**. Consumables include charges for miscellaneous items purchased by individuals assembling and disassembling the scaffolding. Miscellaneous items may include the following:

    - Masks, forklift rental charges, and per diem/travel costs. These items do not stay with the scaffolding.
    - Specialty anchors or other odd items that are left at the job site. Specialty items are more expensive and are not normal stock items.

Similar to the Freight and Labor charges, consumables for assembly would be billed on the D Invoice and consumables used for disassembly or disassembly/reassembly would be billed on later R Invoices. Additionally, COMPANY pays Utah sales and use tax when it acquires the items that are later billed as Consumables and also charges sales tax to its customers for the Consumables.

For charges other than Freight, COMPANY charges sales tax based on Utah Admin. Code R865-19S-32(1), as "amounts received or charged in connection with a lease or rental of tangible personal property." For Freight, COMPANY does not charge sales tax.

COMPANY's customer has withheld its payment to COMPANY because the customer believes COMPANY is incorrectly charging sales tax on the Labor and Consumables. The customer asserts that the Labor and Consumables are nontaxable, separately-stated installation charges. For Freight, the customer agrees with COMPANY that the charge is nontaxable as a separately stated delivery charge.

After the Applicable Law section below, we provide our ruling on the sales tax treatment of the sales, rentals, and related charges.

I. Applicable Law

Utah Code § 59-12-103(1) (2010-2011) states in part:

A tax is imposed on the purchaser . . . for amounts paid or charged for the following transactions:
(a) retail sales of tangible personal property made within the state;
. . . .
(k) amounts paid or charged for leases or rentals of tangible personal property if within this state the tangible personal property is:
(i) stored;
(ii) used; or
(iii) otherwise consumed . . .

Utah Code § 59-12-102(87) (2011)[1] defines purchase price, stating in part:

(a) "Purchase price" and "sales price" mean the total amount of consideration:
(i) valued in money; and
(ii) for which tangible personal property, a product transferred electronically, or services are:
(A) sold;
(B) leased; or
(C) rented.

[1] Prior version at § 59-12-102 (85) (2010).

(b) "Purchase price" and "sales price" include:
  (i) the seller's cost of the tangible personal property, a product transferred electronically, or services sold;
  (ii) **expenses of the seller**, including:
    (A) the cost of materials used;
    (B) a labor cost;
    (C) a service cost;
    (D) interest;
    (E) a loss;
    (F) the cost of transportation to the seller; or
    (G) a tax imposed on the seller;
  (iii) a charge by the seller for any service necessary to complete the sale; or
  . . . .
(c) "Purchase price" and "sales price" do not include:
  . . . .
  (ii) the following if **separately stated** on an invoice, bill of sale, or similar document provided to the purchaser:
  . . . .
    (B) a delivery charge;
    (C) an installation charge . . .
    . . . .

(Emphasis added.)

Utah Code § 59-12-102(29) (2010-2011) defines delivery charge, stating:

(a) "Delivery charge" means a charge:
  (i) by a seller of:
    (A) tangible personal property;
    (B) a product transferred electronically; or
    (C) services; and
  (ii) for preparation and delivery of the tangible personal property, product transferred electronically, or services described in Subsection (29)(a)(i) **to a location designated by the purchaser**.
(b) "Delivery charge" includes a charge for the following:
  (i) transportation;
  (ii) shipping;
  (iii) postage;
  (iv) handling;
  (v) crating; or
  (vi) packing.

(Emphasis added.)

Utah Code § 59-12-102(49) (2011) defines installation charge, stating:

> (a) Except as provided in Subsection (49)(b), "installation charge" means a charge for **installing**:
> (i) tangible personal property; or
> (ii) a product transferred electronically.
> (b) "Installation charge" does not include a charge for:
> (i) repairs or renovations of:
> (A) tangible personal property; or
> (B) a product transferred electronically; or
> (ii) attaching tangible personal property or a product transferred electronically:
> (A) to other tangible personal property; and
> (B) as part of a manufacturing or fabrication process.
>
> (Emphasis added.)

Subsection (b)(ii) was recently added during the 2011 General Session of the Utah Legislature and is effective July 1, 2011.

Utah Code § 59-12-102(93) (2011)[2] defines repairs or renovations of tangible personal property, stating:

> (a) Except as provided in Subsection (93)(b), "repairs or renovations of tangible personal property" means:
> (i) a repair or renovation of tangible personal property that is not permanently attached to real property; or
> (ii) attaching tangible personal property or a product transferred electronically to other tangible personal property if:
> (A) the other tangible personal property to which the tangible personal property or product transferred electronically is attached is not permanently attached to real property; and
> (B) the attachment of tangible personal property or a product transferred electronically to other tangible personal property is made in conjunction with a repair or replacement of tangible personal property or a product transferred electronically.
> . . . .

Subsection (a)(ii)(B) was recently added during the 2011 General Session of the Utah Legislature and is effective July 1, 2011.

[2] Prior version at § 59-12-102 (91) (2010).

Utah Code § 59-12-104(25) (2010-2011) provides the resale exemption, stating the following:

> The following sales and uses are exempt from the taxes imposed by this chapter:
> . . . .
> (25) a product 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 . . .

II. Analysis

Sales and rentals of scaffolding are subject to Utah sales tax under § 59-12-103(1)(a) and (k), respectively. If COMPANY purchases scaffolding for resale or rental in Utah, then those purchases would meet the resale exemption found in Utah Code § 59-12-104(25) and COMPANY would not be subject to Utah sales or use tax on those purchases. The subsequent rental of that scaffolding to COMPANY's customers is subject to Utah sales tax, and COMPANY is required to collect tax on those sales.

Freight, Labor, Shrink Wrap, Plywood, and Consumables are separate line items whose taxability depends on whether they are part of the purchase price of taxable sales or rentals. Under § 59-12-102(87), purchase price includes "[(b)](i) the seller's cost of the tangible personal property . . . or services sold; [or (b)](ii) ***expenses of the seller***, including: (A) the cost of materials used; (B) a labor cost; (C) a service cost; . . . (F) the cost of transportation to the seller; or (G) a tax imposed on the seller;" but excludes "[(c)](ii) the following ***if separately stated on an invoice***, bill of sale, or similar document provided to the purchaser: . . . . (B) a delivery charge; [or] (C) an installation charge . . ." (emphasis added). Freight, Labor, Shrink Wrap, Plywood, and Consumables are line items reflecting costs or expenses of the seller; however, if these items are separately-stated delivery or installation charges, then they would not be part of the purchase price and would not be subject to sales tax.

A. Freight Charge

The Freight charge for the initial delivery to a customer is not subject to Utah sales tax because it is a separately-stated delivery charge *if* the charge is limited to transportation, shipping, postage, handling, crating, and packing. *See* § 59-12-102(29)(b). Notably, the initial delivery meets § 59-12-102(29)(a)(ii) because the scaffolding is delivered to a location designed by the purchaser.

The Freight charge for the return delivery to COMPANY is subject to Utah sales tax; it is not a delivery charge, even though the charge is separately stated. A return delivery is not made to a location designated by the purchaser, so it does not meet § 59-12-102(29)(b). It is, however, a cost necessary to complete the transaction because the transaction, as represented to us, specifically contemplates that the scaffolding be returned to COMPANY as part of the transaction. Indeed, the essential difference between renting property and buying property is that at the conclusion of a rental period, the property is returned to the owner. Thus, the Freight charge for the return delivery would be taxable under § 59-12-102(87)(b)(iii) as part of the

purchase price of the rental of scaffolding, as an expense of the seller. Going forward, the tax on the Freight charge for return delivery needs to be collected.

B. Labor Charge

The Labor charge for the initial assembly of the scaffolding is not subject to Utah sales tax because it is a separately-stated installation charge, both before and after July 1, 2011. Under § 59-12-102(49)(a)-(a)(i), an installation charge is a charge for installing tangible personal property. Installation is not defined in § 59-12-102, but install commonly means "[t]o set up or fix in position for use or service." *See* Black's Law Dictionary, 798 (6th ed. 1990). The assembly of scaffolding is not a repair or renovation as defined in § 59-12-102(93); thus § 59-12-102(49)(b)(i), which excludes repairs or renovations from installation, does not apply.

The Labor charge for disassembly of the scaffolding is subject to Utah sales tax; it is not an installation charge, even though it is separately stated. Disassembly does not meet the common definition of installation; disassembly is not the setting up of the scaffolding for use or service. As noted for return freight, however, disassembly is a cost necessary to complete the transaction because the transaction, as represented to us, specifically contemplates that the scaffolding be returned to COMPANY as part of the transaction. Thus, the Labor charge for disassembly would remain taxable under § 59-12-102(87)(b)(iii) as part of the purchase price of the rental of scaffolding, as a labor or service expense of the seller.

The combined Labor charge for disassembling, moving and reassembling the scaffolding to a new location at the same worksite is for an additional, nontaxable service, separate from the rental of the scaffolding. The combined charge is not part of the purchase price of the rental under § 59-12-102(87)(b)(ii) because the combined disassembling, moving, and reassembling service is not intrinsically related to the rental of the scaffolding. The rental agreement contemplates that the scaffolding will be delivered to a building site, assembled, used for its intended purpose for the time period established in the contract, disassembled and returned to COMPANY. An interim relocation of the scaffolding within the rental period is not a cost necessary to complete the transaction. Furthermore, when considered separately, the combined disassembling, moving, and reassembling service transaction is not one of the service transactions specifically enumerated in § 59-12-103(1) as taxable.

C. Shrink Wrap Charge

The Shrink Wrap charge is subject to Utah sales tax; it is not an installation charge. COMPANY or the customer does not use the shrink wrap to assemble the scaffolding. Instead, the shrink wrap is attached to the assembled scaffolding, creating an artificial wall benefiting COMPANY's customers when they use the scaffolding. The Shrink Wrap charge is subject to Utah sales tax under § 59-12-103(1)(a), as an amount charged for the retail sale of tangible personal property.

D. Plywood Charge

The Plywood charge is subject to Utah sales tax; it is not an installation charge. Instead, the plywood usually is part of the rented scaffolding that is returned to COMPANY and the Plywood charge is taxable under § 59-12-103(1)(k), as part of the purchase price of the rented scaffolding. When plywood is sold rather than rented, the Plywood charge is taxable under § 59-12-103(1)(a) and COMPANY must collect the tax from its customers. COMPANY's own purchases of plywood are for rental or resale in Utah. Accordingly, those purchases would meet the resale exemption found in Utah Code § 59-12-104(25) and COMPANY would not be subject to Utah sales or use tax on those purchases.

E. Consumables Charge

The Consumables charge incurred for the initial assembly of the scaffolding is not subject to Utah sales tax because it is a separately-stated installation charge, both before and after July 1, 2011. These charges are incurred to set up or fix in position the scaffolding for use or service.

The Consumables charge incurred for disassembly of the scaffolding is subject to Utah sales tax; it is not an installation charge, even though it is separately stated. Thus, the Consumables charge for disassembly would remain taxable under § 59-12-102(87) as part of the purchase price of the rental of scaffolding, as a cost or expense of the seller necessary to complete the transaction.

The combined Consumables charge incurred for disassembling, moving and reassembling is not subject to Utah sales tax because it is part of a nontaxable service, separate from the rental of the scaffolding. The sale tax treatment of this Consumables charge is consistent with the treatment of the combined Labor charge for disassembling, moving and reassembling the scaffolding, discussed earlier.

COMPANY must pay Utah sales and use tax on its purchases of consumable items if the items are purchased, used, or stored in the state. The fact that the purchase cost is reimbursed as part of the sales price of various services does not convert those purchases into purchases for resale, because COMPANY is consuming those items in the course of providing those services.

III. Conclusions

As explained above, the following separately-stated line items are subject to Utah sales tax, both before and after July 1, 2011, if the sales or rentals occurred in the state:

- Sales and rentals of scaffolding
- Freight charge for the return delivery
- Labor charge for disassembling,
- Shrink Wrap charge
- Plywood charge
- Consumables charge incurred for disassembly

However, the following separately-stated line items are not subject to Utah sales tax:

- Freight charge for the initial delivery
- Labor charge for the initial assembly
- Combined Labor charge for disassembling, moving and reassembling
- Consumables charge incurred for the initial assembly
- Combined Consumables charge incurred for disassembling, moving and reassembling

Furthermore, the Utah resale exemption found in Utah Code § 59-12-104(25) may apply to COMPANY's purchases of the following for resale or rental in Utah:

- Scaffolding
- Shrink wrap
- Plywood

Lastly, this ruling is based on current law and could be changed by subsequent legislative action or judicial interpretation. Also, our conclusions are based on the facts as described. Should the facts be different, a different conclusion may be warranted. If you feel we have misunderstood the facts as you have presented them, you have additional facts that may be relevant, or you have any other questions, you are welcome to contact the Commission.

For the Commission,

Marc B. Johnson
Commissioner

MBJ/aln
11-002