1993

Broadcast International, Inc. v. Utah State Tax Commission : Brief of Respondent

Utah Court of Appeals

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:T NO. 930527

IN THE UTAH COURT OF APPEALS

BROADCAST INTERNATIONAL, INC.,	)	
	)	
Petitioner/Appellant,	)	
	)	Docket No. 93-0527-CA
vs.	)	
	)	
UTAH STATE TAX COMMISSION,	)	Priority No. 15
	)	
Respondent/Appellee.	)	

BRIEF OF RESPONDENT UTAH STATE TAX COMMISSION

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APPEAL FROM DECISION OF THE UTAH STATE TAX COMMISSION ISSUED JUNE 10, 1993

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JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(k) (Supp. 1992). The appeal was timely filed before the Utah Supreme Court pursuant to Utah Code Ann. § 63-46b-14 (1989) and was properly transferred to the Utah Court of Appeals.

ISSUES PRESENTED FOR REVIEW

ISSUE 1: Whether the Tax Commission's determination that Broadcast International is not entitled to a "purchased for resale" sales tax exemption pursuant to Utah Code Ann. § 59-12-104(28) (1990) is supported by substantial evidence?

ISSUE 2: Whether the Tax Commission's determination that Broadcast was not entitled to a credit for use taxes voluntarily paid to other jurisdictions was correct?

ISSUE 3: Whether the Tax Commission's assessment of sales tax upon Broadcast's purchase of equipment from Utah vendors violates the Commerce Clause?

ISSUE 4: Whether the Tax Commission's assessment of a 10% negligence penalty is supported by substantial evidence?

ISSUE 5: Whether the Tax Commission's finding that Broadcast sold taxable tangible personal property to Merril Osmond Enterprises was supported by substantial evidence?

STANDARD OF REVIEW

The Utah Legislature has recently modified the standard of review to be applied on appeals from the Utah State Tax Commission. The proper standard of review for the Tax Commission's conclusions of law is a correction of error, absent a grant of discretion to interpret the statute. See Utah Code Ann. § 59-1-610(1)(b) (Supp. 1993). Where the Legislature has granted discretion to the Commission to interpret a statute, the Commission's interpretation will be reviewed for reasonableness. See Utah Code Ann. § 59-1-610(1)(b) (Supp. 1993). The Tax Commission's findings of Fact are to be granted deference and upheld if supported by substantial evidence. Id.

The legislature, in enacting the new standards of review, did not specify the proper standard to be applied when an issue involves both factual findings and legal conclusions. However, under earlier law, the Utah Supreme Court had applied an intermediate standard for such issues. This intermediate standard essentially required the reviewing court to assure that the agency's findings fell within the bounds of reasonableness.[1] Utah Dep't of Admin. Serv. v. Pub. Serv. Comm'n, 658 P.2d 601, 610 (Utah 1983). Since the Utah Legislature has failed to provide a specific standard of review for mixed findings of fact

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[1] The Utah Supreme Court has summarized the development of the intermediate standard of review in Morton Int'l, Inc. v. Auditing Div. of the Utah State Tax Comm'n, 814 P.2d 581, 585 -to 586 (Utah 1991).

and law, this Court should apply the prior intermediate standard as developed by the Utah Supreme Court and uphold the Commission's findings on mixed questions of fact and law if they are within the "bounds of reasonableness."

The critical factor involved in Issue I is whether Broadcast intended, at the time it purchased the equipment, to "resale" the equipment to its subscribers. This is a factual question and the standard is whether the Commission's finding is supported by substantial evidence. See Nucor Corp. v. Utah State Tax Comm'n, 832 P.2d 1294 (Utah 1992) (applying the old standard of review contained in Utah Code Ann. § 63-46b-16(4)(h)(i) (1989).

Issues II and III are issues of law. As such, the proper standard is correction of error.

Issue IV involves the question of whether Broadcast was negligent in its nonpayment of taxes. The Tax Commission's finding that Broadcast is a factual issue and should be affirmed if substantial evidence exists supporting the Commission's finding. See Tummurru Trades, Inc. v. Utah State Tax Comm'n, 802 P.2d 715, 720 (Utah 1990).

Issue V involves questions of fact. At question is whether the Commission correctly determined that Broadcast sold taxable tangible personal property to Merril Osmond Enterprises. The question of what constitutes tangible personal property is a question of fact. See BJ-Titan Services v. State Tax Comm'n, 842 P.2d 822, 828 (Utah 1992). Therefore, the Commission's findings

on Issue V should be affirmed if there is substantial evidence supporting the findings.

DETERMINATIVE STATUTES AND RULES

The following statutes and rules are reprinted in full in Appendix A.

STATUTES:

Utah Code Ann. § 59-1-401(3) (1989).

Utah Code Ann. § 59-12-102(10) (1989).

Utah Code Ann. § 59-12-102(14)(b) (1989).

Utah Code Ann. § 59-12-102(12) (1989).

Utah Code Ann. § 59-12-103(1) (1989).

Utah Code Ann. § 59-1-610(1), (2) (Supp. 1993).

Utah Code Ann. § 59-1-801, Article I and V (1989).

Utah Code Ann. § 59-12-102(8)(a) (1989).

Utah Code Ann. § 59-12-104(27), (28) (1989).

ADMINISTRATIVE RULES:

Utah Admin. R. 865-19-92S.

Utah Admin. R. 865-19-23S(E).

STATEMENT OF THE CASE

The Auditing Division of the Utah State Tax Commission issued a Statutory Notice of Sales Tax Deficiency against Broadcast on August 1, 1991. The deficiency consisted of $241,809.04 in past due sales tax, $47,465.09 in interest through

August 31, 1991, and $24,180.92 as a negligence penalty. The audit period giving rise to the deficiency was from January 1, 1987 to September 30, 1990.

Broadcast contested the statutory notice at a formal hearing on September 9 and 10, 1992. The Tax Commission affirmed the statutory notice and issued its Findings of Fact, Conclusions of Law, and Final Decision dated June 10, 1993. On July 8, 1993, Broadcast appealed the Final Decision of the Tax Commission to the Utah Supreme Court. The appeal was subsequently transferred to the Utah Court of Appeals.

STATEMENT OF FACTS

1. Broadcast is in the business of providing private satellite network services to large retail businesses ("subscribers" hereafter) such as American Stores, Fleming Foods and Safeway. Broadcast's services include background music, in-store advertising, electronic mail, and video conferences. (The Tax Commission's Findings of Fact, Conclusions of Law and Final Decision, hereinafter "Final decision", R. 31), a copy of the decision is contained in Appendix B; (Hearing Tr. 31).

2. Broadcast's services are provided pursuant to "service agreements" negotiated between Broadcast and each subscriber. These agreements specify the types of service each subscriber will receive from Broadcast and the price of such services. (Final Decision, R. 31), Appendix B.

3. Broadcast furnishes a satellite dish and mount, low noise amplifier, connecting cable, printer and receiver at each location. The service agreements state that Broadcast shall furnish and maintain all equipment necessary for receipt of the service. (Final Decision, R. 32), Appendix B.

4. The assessment is primarily for satellite receivers purchased by Broadcast from a vendor in Orem, Utah. (Final Decision, R. 34), Appendix B.

5. The receivers were designed to prevent the subscriber from using them for any purpose other than to receive Broadcast's services. (Hearing Tr. 64.) To change the type of music sent to the subscriber, Broadcast typically has to make the change from its headquarters. The subscriber has no ability to make the desired change. (Hearing Tr. 64.)

6. The receiver is a "passive device which receives signals and passes them on." (Hearing Tr. 57.) Once the receiver is installed by Broadcast it cannot be moved or altered by the customer. (Hearing Tr. 60.)

7. The equipment is labeled as Broadcast's and is also marked with a Broadcast inventory number. (Final Decision, R. 32, Appendix B, Hearing Tr. 313.)

8. Upon purchasing the equipment, Broadcast recorded the equipment as an asset, not as inventory. (Final Decision, R. 35), Appendix B. Broadcast has also recorded depreciation deductions on the equipment. (Webb Deposition at 17, lines 5-8.)

9. The service agreements do not contain itemized charges for the equipment installed. See Service Agreement, Appendix C, ¶ 7(a); (Hearing Tr. 52).

10. With respect to equipment used in Utah installations, Broadcast accrued use tax on such equipment as though it was the ultimate consumer. (Final Decision, R. 35, Appendix B; Hearing Tr. 337; Appendix G.)

11. Broadcast calculated its Utah use tax liability using its cost of the equipment as its basis. To be consistent with its "resale" theory, Broadcast should have collected sales tax on the entire subscription fee since Broadcast did not itemize the cost of the equipment in the service agreements. (Hearing Tr. 338, lines 1-15; Appendix G.)

12. In 1988, Broadcast applied for a Utah Sales and Use tax license listing as its reason "goods consumed." Broadcast did not check the box on the application indicating "goods purchased for resale." Broadcast also crossed out the term "sale" and replaced it with the term "use" throughout the application. (Petitioner's Hearing Exhibit 23; Appendix F.)

13. Broadcast has told over 800 other taxing jurisdictions that it did not sale or lease the equipment to its subscribers, but at all times the equipment remained the property of Broadcast. In these letters, Broadcast agreed to pay any use tax due on its equipment. (Hearing Tr. 146, Petitioner's Hearing

Exhibit 29, Appendix E.)

14. Broadcast's officers repeatedly testified that they did not intend, at the time of transactions, to sale or lease the equipment to the subscribers. (Hearing Tr. 126, lines 9-10; 150, lines 6-23; 170, lines 4-22; 178, 179; 204, line 24; 245, 246; 253, Appendix D, Hearing Excerpts.)

15. Pursuant to the service agreements, the equipment used by Broadcast was to remain personal property of Broadcast and did not constitute store fixtures. See Appendix C, ¶ 12.

16. Throughout the service agreements, the equipment was referred to as the "Company's" equipment. The term Company was defined by the agreement as Broadcast. See Appendix C; (Final Decision, R. 32, Appendix B.)

17. The service agreements specified that the equipment was to be exclusively used only for the services provided by Broadcast. See Appendix C, ¶ 18; (Final Decision, R. 32).

18. The check authorization service was not available to the subscribers until the last month of the audit period. (Hearing Tr. 102, 103.) The Digitar 1000 receiver at issue in the audit did not have the uplink capacity necessary to provide check verification. (Hearing Tr. 70.)

19. The service agreements required that maintenance of the equipment "shall be the sole responsibility of Company [Broadcast] . . . ." Appendix C, ¶ 12; (Hearing Tr. 41).

20. Broadcast had the right to remove, replace or move the

equipment at anytime during the contract provided that the subscribers sill received their services. (Final Decision, R. 41.)

21. Broadcast did not have any corporate policy to account for sales and use tax until well into 1988. (Final Decision R. 34) Appendix B; (Hearing Tr. 121, 191).

22. In an unrelated transaction, Broadcast sold master tapes to Merril Osmond Enterprises. (Final Decision R. 35), Appendix B.

23. Broadcast did not obtain a valid "resale" exemption certificate from Merril Osmond Enterprises. (Final Decision R. 35), Appendix B.

SUMMARY OF ARGUMENT

Issue I involves the fact specific question of whether Broadcast purchased equipment for "resale." The Utah Supreme Court has held a "purchased for resale" exemption from sales tax should only be permitted when the primary purpose for the purchase is not for the purchasers own use, but to resale that item. See Nucor Corp. V. Utah State Tax Comm'n, 832 P.2d 1294 (Utah 1992). The evidence clearly establishes that Broadcast purchased the equipment in question for its own use in providing services, not for resale.

Moreover, the record also shows that Broadcast did not in fact resale the equipment to the subscribers. Broadcast consumed

the equipment in the process of providing services to its subscribers. Since Broadcast is the ultimate consumer of the equipment, it is liable for sales tax upon the purchases of the equipment.

Issues II and III relate to the question of whether Broadcast should be entitled to a credit for use taxes paid by Broadcast to other jurisdictions. The Utah Supreme Court and the Utah Court of Appeals have already answered this question in two recent cases. See Chicago Bridge & Iron Co. v. Utah State Tax Comm'n, 839 P.2d 303 (Utah 1992); Niederhauser Ornamental & Metal Works Co. v. Tax Comm'n, 858 P.2d 1034 (Utah Ct. App. 1993). In these decisions, the courts have expressly held that Utah law requires the payment of sales tax on Utah sales, even where the products are subsequently shipped out-of-state and may be subject to use tax in that jurisdiction. The Court affirmed that precedence in liability shall prevail over precedence in payment. Broadcast's sales tax liability unquestionably arose in Utah prior to any possible use of that equipment by Broadcast in another jurisdiction. As such, the tax was due first here and the State of Utah should not afford Broadcast a credit for lower taxes it voluntarily paid to other jurisdictions.

Issue IV concerns the assessment of a 10% negligent penalty by the Tax Commission. This is a factual question and the record is replete with evidence and testimony clearly indicating that Broadcast had no good faith basis for failing to pay sales tax at

the time the liability arose. In fact, for a large part of the audit period Broadcast had no policy to account for its sales and use tax liability. Furthermore, the Commission properly found Broadcast's actions were not consistent with its statements.

Issue V involves Broadcast's sale of master tapes to Merril Osmond Enterprises. The record supports the Commission's conclusion that a "master tape" is tangible personal property and that Broadcast sold master tapes to Merril Osmond Enterprises. The record also supports the Commission's finding that Merril Osmond Enterprises did not present Broadcast with a valid "resale" exemption certificate.

ARGUMENT

I. BROADCAST IS NOT ENTITLED TO A "PURCHASED FOR RESALE" EXEMPTION FOR ITS PURCHASES AND STORAGE OF TANGIBLE PERSONAL PROPERTY IN UTAH.

Utah Code Ann. § 59-12-103(1) (1989) levies a tax upon the purchaser for retail sales of tangible personal property within the state. See Utah Code Ann. §§ 59-12-103(1)(a) (1989).[2] It is undisputed that Broadcast has purchased tangible personal property from Utah vendors. (Final Decision, R. 34), Appendix B.) Therefore, Broadcast is obligated to pay sales tax

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[2] Utah Code Ann. § 59-12-103(1)(l) (1989) also imposes tax on "storage" of tangible personal property within the state. The Commission found Broadcast would also be liable for tax based on this section. (Final Decision R. 45), Appendix B. It is not disputed that Broadcast stored tangible personal property in Utah. (Hearing Tr. 279.)

on its purchases of tangible personal property unless Broadcast can prove to the satisfaction of the Commission that an exemption applies. See Parsons Asphalt Products v. Utah State Tax Comm'n, 617 P.2d 397, 398 (Utah 1980) ("Statutes which provide for exemptions should be strictly construed, and one who so claims has the burden of showing his entitlement to the exemption.").

Broadcast's argument is based on Utah Code Ann. § 59-12-104(28) (1990).[3] Section 59-12-104(28) (1990) specifically exempts from sales tax "property purchased for resale . . . either in its original form or as an ingredient or component part of a manufactured or component product [.]" Utah Code Ann. § 59-12-104(28) (1989).

The term "purchased for resale" is not defined by the Utah Sales and Use Tax Act. However, the specific statutory phrase "purchased for resale" has been interpreted by the Utah Supreme Court in Nucor Steel v. Utah State Tax Comm'n, 832 P.2d 1294 (Utah 1992). In Nucor, the principal question was whether the taxpayer should be entitled to a "purchased for resale" exemption for certain items it purchased and used in its manufacturing process. Id. The Supreme Court noted that "traditional statutory construction" did not aid in the construction of this issue. However, the Court concluded that the phrase "'purchased for resale' implies that a company's purpose in buying an item

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[3] Utah Code Ann. § 59-12-104(28) (1990) has been since been renumbered as (27), effective July 1, 1991.

must be to resell that item." Id. at 1296 n.5.

The Utah Supreme Court in Nucor affirmed the Tax Commission's decision which "determined that Nucor purchased the items at issue primarily for their use as equipment and only incidently for their use as ingredients in the manufacturing process." Id. at 1297 (emphasis added). This definition of "purchased for resale" is wholly applicable to Broadcast's situation since the Court also noted in Nucor that "[t]he determination of a purchaser's status as a consumer subject to tax or as a wholesaler [reseller] or manufacturer exempt from taxation depended upon the purchaser's use of the item and the reason for its purchase." Id. (emphasis added); See also Union Portland Cement Co. v. Utah State Tax Comm'n, 170 P.2d 164 (Utah 1946).[4] In this case, Broadcast is attempting to be classified as a wholesaler, or one who resales its equipment rather than purchasing for its own use and ultimate consumption. Such a claim by Broadcast is not supported by the record and is inconsistent with Broadcast's actions and representations during the audit period.

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[4] Concerning the Union Portland case, the Supreme Court in Nucor stated, "[w]e inherently recognized in our decision that Union Portland's primary intent in purchasing the items was to use them as manufacturing equipment, not as raw ingredients for cement." Nucor at 1297. Thus, the court in Union Portland and Nucor recognized that the important factor in applying the "purchased for resale" exemption was the primary purpose of the purchase, not who eventually ended up with possession of the materials. Id. n.14.

In applying the Nucor decision to the facts of this case, it is clear that the Tax Commission was correct in finding that Broadcast purchased the equipment for its own use and not for "resale" to its subscribers. The Tax Commission's Findings of Fact are fully supported by the record. The record shows that Broadcast wrote a letter to over 800 taxing jurisdictions stating in bold type that "[a]ll equipment installed by Broadcast International remains our property and is not sold, leased or rented to the retail stores to which we provide our services." (Hearing Tr. 146, Respondent's Hearing Exhibit A); Appendix E. Broadcast's own officers repeatedly testified that at the time of the transactions they did not intend to sale or lease the equipment to the subscribers.[5]

Reese Davis stated the letters were sent to other jurisdictions saying Broadcast did not sale or lease the equipment since "I did not want them to believe in any way, shape, or form that we had sold the equipment in a commercial sense, i.e., conveyed title. In addition, I did not want them to understand that we had in a commercial sense again leased the equipment to a client." (Hearing Tr. 149, lines 15-22.) Similarly, Steven Webb, Broadcast's Assistant Controller, testified that at the time of the transactions he never

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[5] See also (Hearing Tr. 126, lines 9-10; 150, lines 6-23; 170, lines 4-22; 178, 179; 204, line 24; 232, lines 19-21; 245; 246; 253); (Webb Deposition at 45, lines 2, 3).

considered the equipment to be sold on leased. (Webb Deposition at 45.) Reed Bensen, General Counsel of Broadcast, also testified regarding the service agreement he drafted. "If we were going to sell equipment we would have a sales price on here, but we have never sold equipment." (Hearing Tr. R. 245.)

The record further supports the factual findings of the Tax Commission that it was never the intent of Broadcast to resell the equipment. Rather, it was the intent of Broadcast to provide services to its subscribers and the equipment was used merely as tool incidental to providing those services.[6] Reese Davis, Broadcast's Corporate Treasurer, testified that the reason why Broadcast issued a resale exemption certificate to its vendors was because "we [Broadcast] would be consuming, using and operating the equipment to the extent provided by our contracts of that equipment outside of the State of Utah." (Hearing Tr. 131, line 18-23.)

The agreements themselves clearly indicate that Broadcast never said the equipment. The Tax Commission found that the service agreements between Broadcast and its subscribers consistently labeled the equipment as Broadcast's. (Final Decision, R. 31), Appendix B; (Hearing Tr. 313). The Commission

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[6] The testimony of the officers of Broadcast supports the Tax Commission's finding that Broadcast's intent was not to sell the equipment, but rather was to use the equipment in providing services. For example, Dwight Egan, CEO of Broadcast, testified that "the company [Broadcast] provides services through the utilization of satellite equipment . . . ." (Hearing Tr. 31).

also noted that the service agreements stated in unambiguous language that the equipment was to remain personal property of Broadcast and could only be used for Broadcast's services. (Final Decision, R. 34), Appendix B. Moreover, the agreements prohibited the subscribers from using the equipment for any purpose other than receiving the services of Broadcast. Appendix C, ¶ 18. The subscribers were prohibited from moving or altering the equipment, or from adding any additional equipment. (Final Decision, R. 8), Appendix B. It was also the practice of Broadcast to attach its inventory sticker on the equipment. (Hearing Tr. 313.)

Broadcast's internal record keeping and Utah sales tax returns filed during the audit period also reveal that Broadcast never intended to "resale" the equipment. Broadcast recorded its purchases of the equipment as an asset on its accounting records and took depreciation deductions. (Final Decision, R. 35), Appendix B; (Davis Deposition at 35). Had Broadcast actually intended to resell the equipment to its subscribers, it would have carried the equipment on its accounting records as inventory. Similarly, when Broadcast filed its Utah sales and use tax returns during the audit period, it reported and paid a use tax upon the equipment as if it was the ultimate consumer of the equipment it used in providing services to Utah customers. (Final Decision, R. 35), Appendix D; (Hearing Tr. 336, 337); Appendix E). Had Broadcast actually "resold" the equipment to

its Utah customers, it should have paid sales tax on the total service agreement price, not use tax on its consumption of the equipment. See Utah Admin. R. 865-19-27S; (Hearing Tr. 338, lines 1-4); (Hearing Tr. 170).

These facts, as contained in the record support the findings of the Tax Commission, and establish that Broadcast purchased equipment primarily for its own use in providing services and not "for resale" as that term was defined by the Utah Supreme Court in Nucor.

A. THE "PURCHASED FOR RESALE" EXEMPTION DOES NOT EQUATE TO THE DEFINITION OF "SALE" IN UTAH CODE ANN. § 59-12-102(10).

Broadcast equates the term "purchased for resale" with the broad definition of the term "sale" as contained in Utah Code Ann. § 59-12-102(10) (1987). This ignores the opinions of this Court discussed above which define the term "purchased for resale" and results in a tortured reading of the exemption that flies in the face of the facts found by the Commission.[7] Broadcast is attempting to use the definition of "sale" in Section 59-12-102(10) in isolation as a substantive statute.

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[7] The Tax Commission concluded that Broadcast's transactions with its subscribers did not constitute a "taxable sale" of tangible personal property. The Tax Commission reached this conclusion by applying Section 59-12-103(1). Certainly, if Broadcast's service transactions do not constitute a "taxable sale" of tangible personal property, Broadcast would be considered the ultimate consumer and would not be entitled to the "purchased for resale" exemption regardless of their primary intent when they purchased the equipment.

Section 59-12-102(10) is merely a definition and has no operative effect when applied in isolation. In other words, satisfying the "sale" definition is not the end of the inquiry. What makes a transaction taxable is the operative statute contained in Section 59-1-103(1)(a) which assesses sales tax upon "retail sales." Likewise, what makes a transaction exempt is the operative statute contained in Section 59-12-104(28) (1989) which exempts "property purchased for resale in this state." Therefore, to determine "taxable sale" one must consider the meaning of Section 59-1-103(1)(a) as it has been interpreted by Utah case law as well as Section 59-1-104(28) (1989) and cases decided under that section.

The definitions contained in Section 59-12-102 apply only as they define specific terms in the operative sections. Utah law requires that "statutes should not be construed in a piecemeal fashion, but as a comprehensive whole." Belnorth Petroleum v. State Tax Comm'n, 845 P.2d 266, 269 n. 6 (Utah Ct. App. 1993): see also Osuala v. Aetna Life & Casualty Co., 608 P.2d 242, 243 (Utah 1980) ("if there is doubt or uncertainty as to the meaning or application of the provisions of an act, it is appropriate to analyze the act in its entirety, in light of its objective, and to harmonize its provisions in accordance with the legislative intent and purpose.").

In determining whether a "taxable sale" occurs under Section 59-12-103(1) two tests are typically applied. One test is used

to ascertain whether a "transfer of tangible personal property" has occurred. The second test determines whether the transaction was to an "ultimate consumer." See BJ-Titan Services v. State Tax Comm'n, 842 P.2d 822, 825 (Utah 1992).

To determine if the transaction is for tangible personal property, the Utah Supreme Court has developed the "essence of the transaction test." Id. at 825. This test focuses on the nature of the transaction as a whole to see if "the essence of the transaction is one for services or for tangible personal property." Id. According to the Supreme Court this "analysis typically requires a determination either that the services provided are merely incidental to an essentially personal property transaction or that the property provided is merely incidental to an essentially service transaction." Id.

To determine whether a transfer occurs to an "ultimate consumer", the Supreme Court applies the "ultimate user or consumer theory." Id. at 825. In the words of the Utah Supreme Court:

> The second theory, known as the ultimate user or consumer theory focuses on whether a retail sale is made to a user or consumer and not for resale.

Id. (emphasis added). The Court in BJ-Titan acknowledged that this test recognizes that "tangible personal property is often used in the process of making other property and in rendering services." Id. at 825 (emphasis added). This theory is the same

theory applied by the Utah Supreme Court in Nucor Corp. v. Utah State Tax Comm'n, 832 P.2d 1294 (Utah 1992) and Union Portland Cement Co. v. Utah State Tax Comm'n, 170 P.2d 164 (Utah 1946). (See supra page 12 to 14 of this memorandum for a discussion of the Nucor decision.)

1. The "essence of the transaction" is that Broadcast was selling services, not tangible personal property. The Utah Supreme Court has listed five factors which should be considered when determining whether a transaction is essentially for services or a transfer of tangible personal property. BJ-Titan Services v. State Tax Comm'n, 842 P.2d 822, 826 (Utah 1992).

> (1) the value of the tangible property to the customer in relation to that of the services; (2) the cost of the property to the seller; (3) the customer's rights to possession or ownership of the property; (4) the ability to separately itemize charges for the property and services; (5) the extent to which the services increase the value of the property or to which the property increases the value of the services; and (6) the extent that such services are rendered in similar transactions.

An analysis of Broadcast's transactions with its subscribers based on these factors clearly shows that the essence of the transaction was for services.

1. The value of the tangible personal property to the customer in relation to that of the services.

Broadcast has admitted that the subscribers "only purpose in having the equipment is to receive the services of Broadcast."

(Hearing Tr. 36.) Broadcast has deliberately designed the equipment so that the subscribers cannot use the equipment for any other purpose. (Hearing Tr. 64.) The service agreement prohibits any other use of the equipment. (Appendix C.) If Broadcast were to stop its services of furnishing music and advertising, the satellite receiving equipment would not be useable by the customer and would have no independent value.

2. The cost of the property to the seller.

Broadcast has admitted that its cost of equipment runs between $2,000 and $2,500 for each location. (Davis Deposition at 21.) The typical service agreement charges a base fee of $265 per month per site. (Supplemental Answers to Interrogatories at 7, No. 9; R. 491.) Accordingly, the base fee agreement generates $3,180 per year. Each agreement is for a period of five years for a total base fee of $15,900. In addition to the base fee Broadcast receives $400 per half hour of video teleconferencing, fifteen percent of advertising revenues received by the subscriber and $1.50 per kilo character for data transmission. Broadcast has testified that nearly all of the subscribers had renewed their five year contracts at approximately the same rate. Assuming no further extension is granted of the lease, the lease generates revenue of at least $31,800 compared to Broadcast's equipment cost of $2,500. This is a ration of nearly 13 to 1. It is important to note that the base fee does not go down for subsequent contracts where no equipment cost is involved.

(Hearing Tr. 158.)

3. Customers right to possession or ownership of the property.

The contracts clearly state that the equipment remains the property of Broadcast and does not become store fixtures. (Appendix B, ¶ 12.) Broadcast labels all equipment with tags clearly identifying the equipment as "property of Broadcast International" with a specific inventory number. (Hearing Tr. 313.) The customer is not given an option to purchase the equipment. (Appendix C.) The customer is prohibited from using the equipment for its own purposes. (Hearing Tr. 64); Appendix C, ¶ 18. The customer is prohibited from moving or altering the equipment. (Final Decision R. 41.) The satellite receivers are basically passive devices that run themselves once installed. (Hearing Tr. 56, line 37, lines 1-2.) Broadcast is responsible for obtaining all permits necessary to install and operate the equipment. (Appendix C, ¶ 9.) Broadcast is responsible for all taxes on the equipment. (Appendix C, ¶ 9.)

4. The ability to separately itemize charges for the property and services.

Broadcast has admitted it purposely does not itemize the cost of equipment in the service agreement so that its subscribers do not know where the real profit margin is. (Hearing Tr. 52.)

5. The extent to which the services increased the value of

the property or to which the property increased the value of the services.

The value of the service is increased by having individual satellite receivers on site since it allows Broadcast to customize its services to individual stores. (Hearing Tr. 36, lines 21-22.) This gives each store the flexibility to choose the specific type of music and advertising services it wants to receive. (Final Decision R. 33.)

6. The extent said services are rendered in similar transactions.

Dwight Egan, Broadcast's Chief Executive Officer, described Broadcast's transactions as being similar to a cable television subscription. (Hearing Tr. 35.) A cable television subscriber is typically provided with a converter box. Similarly, Broadcast's subscribers are provided with a satellite receiver to receive Broadcast's services. Mr. Egan testified:

> The FCC puts our type of delivery service alongside of something like CNN. So for instance, if you're a subscriber from TCI Cable in Utah, . . . , the subscriber has a box in his home.
>
> * * *
>
> [T]he person in the home, the ultimate end user, the subscriber, is the one who's watching the TV who is receiving the benefits of the services and occasionally has to call in for service from Broadcast International, or in the case of a cable company, they have to call in someone like TCI.

Hearing Transcript p. 36 line 25, p. 37 line 1-16.

Jurisdictions which have addressed the cable tv subscription scenario described by Mr. Egan have held that the subscribers do not have possession or use of the converter box. For example, in White v. Storer Cable Communications, 507 So.2d 964 (Ala.Civ.App. 1987), an Alabama court held that cable television subscription charges did not constitute rent for a converter box supplied to the subscribers in order to permit them access to the cable television services. The relevant Alabama statute taxed rental payments on "[a] transaction whereunder the person who owns or controls the possession of tangible personal property permits another person to have the possession or use thereof. . . ." See Ala. Code § 40-12-220(5) (1975) (emphasis added).

The court in White adopted the taxpayers argument that the "essence of the transaction" was for services, not for the rental of tangible personal property. Id. at 967. The Alabama court noted that:

> If the article sold has no value to the purchaser except as a result of services rendered by the vendor, and the transfer of the article to the purchaser is an actual and necessary part of the services rendered, then the vendor is engaged in the business of rendering services , and not in the business of selling at retail. If the article sold is the substance of the transaction and the service rendered is merely incidental to and inseparable part of the transfer to the purchaser of the article sold, then vendor is engaged in the business of selling at retail . . . ."

Id. at 968, citations omitted.

Broadcast's situation is very similar to the transaction at issue in White. Broadcast's agreement with its subscribers is primarily for services. Broadcast's subscribers cannot use the receivers for any other purpose. Applying the "essence of the transaction" test as set forth in BJ-Titan Services v. State Tax Comm'n, 842 P.2d 822, 825 (Utah 1992) leads to the inescapable conclusion that Broadcast's transaction with its subscribers is not a taxable "sale" under Utah law because the "essence of the transaction" is for services, not for tangible personal property.

2. Broadcast is the "ultimate consumer" of its equipment.

The Utah Supreme Court has noted the critical facts to be considered when applying the ultimate consumer test.

> The facts critical and of controlling importance are that petitioners themselves so state and assert themselves that they are not engaged in selling any of such materials; that they are not itemized or sold separately, but the patient [customer] is billed a total sum for the services rendered, and that no sales tax is charged or collected by them.

Hardy v. Utah State Tax Comm'n, 561 P.2d 1064, 1065 (Utah 1977) (emphasis added). These facts are undisputed in Broadcast's case. First, Broadcast has repeatedly admitted that it never sold its equipment to the subscribers. (Hearing Tr. 111, lines 2-8; 126, lines 9-10; 150, lines 6-23; Hearing Tr. 170, lines 4-22; 178, 179; 204, line 24; 245, 246; 253.) The service agreements Broadcast drafted, state that they are not to be construed as a sale or lease of the equipment "in any manner."

(R. 256, ¶ 7.) Broadcast sent letters to 800 taxing jurisdictions across the country stating that it did not sale or lease the equipment. Appendix E. Second, Broadcast does not itemize the cost of the equipment in the service agreements. (Hearing Tr. 52.) Finally, Broadcast has not attempted to collect sales tax on the supposed resale of the equipment to Utah subscribers. (Hearing Tr. 338.) In fact, the agreements specifically provide that Broadcast will be liable for any sales or use tax assessed upon the equipment. Appendix C, ¶ 9; (Hearing Tr. 162.) Moreover, Broadcast lists the property as an asset on its books. (Davis Deposition at 35.) Broadcast takes depreciation deductions on the equipment. (Id.) When the lease expires Broadcast retrieves the equipment it has installed and reinstalls it someplace else. (Id. at 35-36.) The subscriber has no say in the ultimate disposition of the equipment (Id.) These facts clearly show that Broadcast purchases the equipment, uses it in providing services to its customers, takes the tax benefits of ownership of the equipment and makes the determination as to the ultimate disposition of the property. Therefore, under any test Broadcast is the "ultimate consumer of the equipment."

The Court of Appeals should note that under the "essence of the transaction" theory and the "ultimate consumer" theory, it does not matter who actually has physical possession of the

property.[8] The important factors are whether the transaction is primarily for tangible personal property, and who is the ultimate consumer of that property. See eg., Young Electric Sign Co. v. Utah State Tax Comm'n, 291 P.2d 900 (Utah 1955) (The essence of the transaction to repair electric signs was for services despite the fact that tangible personal property was transferred to the consumer.); See Sine v. Utah State Tax Comm'n, 390 P.2d 130 (Utah 1964) (The tangible personal property provided to hotel guests such as towels and soap is not taxable even though the customer is granted the right to use and possess the towels). In Nucor Corp. v. Utah State Tax Comm'n, 832 P.2d 1294 (Utah 1992) and Union Portland Cement Co. v. Utah State Tax Comm'n, 170 P.2d 164 (Utah 1946), the stirring lances and bricks were not purchased for resale even though possession was transferred to the customer.

Broadcast has avoided this well developed case law interpreting the terms of the operative statutes. Rather, Broadcast isolates the definition of the term "sale" contained in Section 59-12-102(10) and attempts to apply it as an operative statute. This approach ignores the prior decisions of this Court interpreting the operative statutes, Section 59-12-103(1) and

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[8] In Thorup Brothers v. Utah State Tax Comm'n, 221 Utah Adv. Rep. 39 (Utah 1993), the Utah Supreme Court held that Thorup Brothers was not the "ultimate consumer," even though they had physical possession and use of the building materials, since they were not the "purchaser" of the materials.

Section 59-12-104(28) (1990). The Tax Commission correctly applied these sections as interpreted by the Courts and found that the essence of Broadcast's transaction was to provide services and not to transfer "use and possession" of tangible personal property. (Final Decision, R. 40.) As such Broadcast is the "ultimate consumer" of the equipment and its purchase and storage in Utah was taxable as found by the Commission.

B. THE TAX COMMISSION CORRECTLY HELD THAT THE SUBSCRIBERS DID NOT HAVE THE RIGHT TO "POSSESSION, OPERATION OR USE" OF THE EQUIPMENT.

Even under Broadcast's strained application of the sale definition, the Tax Commission was correct in finding that the subscribers had no <u>right</u> to possess, operate or use the equipment. The term "sale" is defined in Utah Code Ann. § 59-12-103(10) (1992) as:

> any transfer of title, exchange or barter, conditional or otherwise, in any manner of tangible personal property . . . . It includes:
>
> (e) any transaction under which <u>right to</u> possession, operation, or use of any article of tangible personal property is granted under a lease or contract <u>and the transfer of possession would be taxable if an outright sale were made</u>. (Emphasis added.)[9]

The Tax Commission found that the service agreements only provided the subscribers with the right to receive the services of Broadcast, not the right to operate, use, or possess the

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[9] Petitioner ignores this clause of the definition which necessitates the analysis applied in the previous sections of the brief.

equipment. (Final Decision R. 41.) This conclusion is amply supported by the explicit terms of the agreement.

> [1] To receive Company's [Broadcast's] Service, except for view transmissions, Company shall furnish, install and keep in good operating condition, at no capital cost to subscriber, all equipment necessary to receive the satellite transmissions throughout the term of this Agreement. See Appendix A, ¶ 3 (emphasis added).
>
> [2] All such equipment is and shall remain personal property of Company and shall not be considered to be store fixtures. Id. ¶ 12 (emphasis added).
>
> [3] Company shall have sole responsibility for obtaining all building or governmental permits necessary to install, maintain and operate Company's equipment and system in each participating store and to provide the services contemplated by this Agreement.
>
> * * *
>
> Company shall be solely responsible for all taxes, levies and assessments on its equipment, system, services and business. Id. ¶ 9.
>
> [4] Maintenance of Company's equipment shall be the sole responsibility of Company . . . . Id. ¶ 12.
>
> [5] [Subscriber] shall not change the location of the equipment connected to Company's equipment or make any additions to or alterations in it. Id. ¶ 15.
>
> [6] Company may, at its discretion, refuse to install its system at that location[.] Id. ¶ 15.
>
> [7] Company shall defend, indemnify and hold Subscriber harmless against any and all costs, expenses or claims which arise out of (a) the installation, operation or maintenance of Company's equipment in participating stores by Company or its agents or employees . . . . Id. ¶ 16.
>
> [8] The Service is intended for the private use of Subscriber exclusively for the services described herein. Id. ¶ 18.

The quoted language from the agreement, drafted by Broadcast, does not provide the subscribers with any right to use, operate

or possess any particular equipment. The only right granted was to receive the services. As such, the Tax Commission's findings were correct and should be affirmed.

Broadcast has attempted to argue in its Brief, that the term possession should be interpreted in the broadest possible way. However, "right to possess" necessarily requires more than just actual physical custody. The Utah Supreme Court in Thorup Brothers Constr., Inc, v. Auditing Division of the Utah State Tax Commission, 221 Utah Adv. Rep. 39 (1993), has recognized the principal that mere physical custody of tangible personal property did not make Thorup the ultimate consumer. In Thorup, the Court was faced with determining whether a contractor was the ultimate consumer of construction materials it used in construction of a real property improvement. The materials were purchased by a tax exempt entity and the materials were shipped to the contractor. Despite the fact that the contractor in Thorup had physical possession and use of the materials pursuant to a contract, the Court held that the contractor was not the ultimate consumer because it did not purchase the materials.

Similarly, in Broadcast's situation, the subscribers are not granted the "right to possession" to any particular piece of equipment. They cannot change the location of the equipment nor can they make any alterations to it. As the Tax Commission correctly found, "Broadcast can move, remove, replace or substitute the equipment so long as the customer (subscriber)

receives its services." (Final Decision, R. 42); Appendix B. The Commission also found that the equipment could only be used to receive the services of Broadcast and not for any other purpose.

Broadcast has attempted to argue that Young Electric Sign Co. v. Utah State Tax Comm'n, 291 P.2d 900 (1955) is directly controlling in this case. Young involved basically two issues. The first issue was whether tangible personal property used in the repair services of electric signs constituted a "resale" of tangible personal property. The second issue was whether the rental of electric signs to customers constituted a taxable "sale" of tangible personal property.

In regards to the first issue, which has been ignored by Broadcast, the Utah Supreme Court reiterated the rules of law applicable in determining whether there has been a "resale" of tangible personal property. The Court noted that the determination of "resale" was based upon whether the repair parts were merely incidental to the repair services and in effect consumed by the service provider. Id. at 901. In Young, the Court concluded that the materials were incidental to providing services even though the customer ended up with actual possession of the materials. In the words of the Utah Supreme Court, "[w]hat the customers were obtaining from the companies were principally services and not goods." Id. at 902. As to this portion of the Young decision, the Tax Commission agrees with

Broadcast that Young is relevant and controlling.

The second part of the Young decision, the part relied upon by Broadcast, involved the question of whether the rental of an electric sign to a customer constituted a "taxable sale" under the Utah Sales and Use Tax Act. The Supreme Court's decision in this part is consistent with the Tax Commission's findings.[10] The Court in Young found that the rental agreements transferred continued possession to the Customer. Moreover, the customer in Young had exclusive right to that sign during the rental agreement and at the end of the agreement the customer had the option to purchase the sign or enter into new lease for the service of the sign. Id. at 902, 903. This is obviously not the case in Broadcast's situation in which the subscriber has no contractual right to ever acquire ownership of the equipment, nor does it have the exclusive right to use and possess any particular piece of equipment.

The factual foundation in the Young decision concerning the rental of the electric sign is also not the same as in Broadcast's case. In Young the principal transaction was the rental of the electric sign, tangible personal property. The principal transaction in Broadcast's situation is the providing of services, not equipment. This distinction is imperative in

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[10] As has been repeatedly argued in this case, the issue is whether an item is "purchased for resale", not what constitutes a "sale." Therefore, this portion of the Young decision is technically not relevant to this case.

determining whether a taxable sale of tangible personal property has occurred. The transaction in Young involved a contract to build and maintain custom signs upon the customers property. The maintenance services were incidental to the transfer of tangible personal property. In Broadcast's case, the service agreements called for Broadcast to provide services and there is no contractual language granting use, operation and possession of any particular piece of equipment to the subscribers. In fact, the agreements were specific in reserving all the rights to the equipment in favor of Broadcast, not the subscribers.

II. BROADCAST IS NOT ENTITLED TO A CREDIT FOR USE TAXES IT PAID TO JURISDICTIONS OTHER THAN UTAH.

The State of Utah is not required to give Broadcast a credit for use tax paid to other jurisdictions. Utah Code Ann. § 59-1-801 (1989) contains the Multistate Tax Compact Act. Article V of the Multistate Tax Compact provides:

> Each purchaser liable for a use tax on tangle personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another state and any other subdivision thereof . . . .

The Multistate Tax Commission pursuant to authority granted in the Act have issued a resolution interpreting Article V.

The Resolution states:

> WHEREAS, Article V of the Multistate Tax Compact provides that a credit shall be allowed against the use tax liability for a sales or use tax paid in another state with

> respect to the same transaction; and
>
> WHEREAS, the question has arisen as to whether precedence and liability or in payment shall prevail as the determinant as to which state is required to allow the credit; and
>
> NOW, THEREFORE, BE IT RESOLVED, that the Multistate Tax Commission has always interpreted said provision to mean that precedence in liability shall prevail over precedence in payment; and that the Multistate Tax Commission continues to do so and to recommend that all states abide by this interpretation.

Resolution of Multistate Tax Commission, Annual Meeting (1980). This resolution plainly states that the precedence in liability was always intended by Article V of the Multistate Tax Compact. When the Legislature adopted the Multistate Tax Compact, it agreed to apply its sales tax consistent with Article V of the Multistate Compact.

The Utah Supreme Court recognized this interpretation in its decision in Chicago Bridge & Iron. Id.; accord Niederhauser Ornamental & Metal Works Co., Inc. v. Tax Comm'n, 858 P.2d 1034 (Utah Ct. App. 1993) (following the Chicago Bridge & Iron decision). Chicago Bridge & Iron involved the question of whether Utah could impose sales tax on items purchased within the state, but installed at locations outside of Utah. Use taxes were paid to a jurisdiction outside of Utah on these items. One of Chicago Bridge and Iron Co.'s ("CBI") main arguments on appeal was that an assessment of sales tax by Utah would result in

double taxation and would violate the Commerce Clause of the Constitution unless Utah provided a credit for the use tax paid to other jurisdictions. Specifically, CBI argued that "imposing Utah sales tax on CBI's purchases of steel materials in Utah subjects CBI to taxation by two states on the same transaction, that is, taxation by Utah and taxation by the state where the tanks are installed." Id. at 308.

The Court responded to CBI's argument by citing Article V of the Multistate Tax Compact. The Court noted that "[u]nder this article, California, in imposing use tax, must give credit for any Utah sales tax levied, since "precedence in liability shall prevail over precedence in payment." Id. As such, the Utah Supreme Court expressly held in Chicago Bridge and Iron that tax is due where the first taxable event occurs. In this case the first taxable event is Broadcast's purchase of satellite receivers from a Utah company. Any use of these receivers by Petitioner in any other state is subsequent to the purchase.

Broadcast's attempt to distinguish Chicago Bridge & Iron from its own factual situation is futile. The relevant issue common to both cases is whether sales tax is due on a purchase of tangible personal property in Utah when the property is used, and becomes subject to use tax in another state. The fact that Broadcast may have paid use tax to jurisdictions who are not members of the Multistate Tax Compact does not render Chicago Bridge & Iron in applicable. The Utah Court of Appeals found in

Niederhauser that the principal of precedence in liability, as set forth in Article V of the Multistate Tax Compact and recognized in Chicago Bridge & Iron, applies regardless of whether the other states are members of the Multistate Tax Compact. Niederhauser Ornamental & Metal Works, Co. v. Utah State Tax Comm'n, 858 P.2d 1034 (Utah Ct. App. 1993). Niederhauser involved the purchase of building materials by a contractor who assembled the parts in Utah and then installed the finished product in sites located outside of Utah. The Tax Commission assessed Sales Tax on the contractor's purchase of the materials in Utah. The contractor also paid use tax to Nevada on the same materials it used to improve real property in Nevada. Id. at 1036. The contractor's argument in Niederhauser was that it should be entitled to a credit in Utah since it previously paid use tax to Nevada. According to the contractor, the sales tax assessed by Utah "unlawfully discriminates against interstate commerce unless [the contractor] is given a credit against its Utah tax bill for the taxes paid to Nevada."[11] Id. at 1040.

The contractor's argument was rejected by the Court of Appeals. The court based is decision on the statute contained in Utah Code Ann. § 59-12-104(28) (1992) which compliments Article V

[11] Nevada is not a member of the Multistate tax compact.

of the Multistate Tax Compact.[12] Section 59-12-104(28) applies to all taxpayers and should apply regardless of whether tax payments were paid to jurisdictions who are not members of the Multistate Tax Compact. The Court of Appeals reasoned that the Utah Supreme Court's decision in Chicago Bridge & Iron should apply equally to Section 59-12-104(28) and Art. V since both statutes contain similar language. The court noted the "conclusion that taxes which come due first take priority over taxes paid first is a simple, logical, and easily applied rule." Id. at 12.

Broadcast has asked this court to reject the Utah Supreme Court's holding in Chicago Bridge and Iron and the Court of Appeals' similar decision in Niederhauser, and instead, follow a Wyoming Supreme Court decision in State v. Sinclair Pipeline Co., 605 P.2d 377 (Wyo. 1980). Broadcast's reliance upon Sinclair is unjustified for three reasons.

First, Sinclair was decided in January of 1980. The Multistate Tax Commission did not issue its resolution interpreting Article V until after Sinclair was decided. Therefore, the Wyoming Supreme Court did not have the benefit of the Multistate Tax Commission Resolution when the court made its

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[12] Utah Code Ann. § 59-12-104(28) (1992) states:

> 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 . . . .

decision.

Second, Sinclair has no precedential value. The dissent in Sinclair correctly stated that the majority opinion should be afforded little weight by other jurisdictions. The dissent pointed out that "the repeal of [Article V] in Wyoming makes this case of little precedential value in our state . . .", and as such, should be carefully considered by other states before relying upon it. Id. at 380. It appears that other jurisdictions have followed the dissent's warning since no court has cited Sinclair for its interpretation of Article V of the Multistate Tax Compact.

The third reason why Sinclair should be afforded little deference by this court is that the decision goes directly against the purposes of the Multistate Tax Compact. The Multistate Tax Compact sets forth the purposes of the act as follows:

1. Facilitate proper determination of state and local tax liability . . . .
2. Promote uniformity . . . .
3. Facilitate taxpayer convenience and compliance . . . .
4. Avoid duplicate taxation.

Utah Code Ann. § 59-1-801 Art. I. As pointed out by Justice Thomas in his dissent in Sinclair, the Wyoming decision flies in the face of these stated purposes. It ignores the Court's responsibility in determining tax liability. Under the

majorities reading, liability would be determined by the taxpayer in choosing to whom, and when it issued a check. A system where liability is determined by the timing of payment would lead to different results for each taxpayer and could differ with the same taxpayer from transaction to transaction. Such a system cannot promote uniformity. It is a system based entirely on uncertainty where the taxing authority has absolutely no control. Paying when the first taxable event occurs allows convenience for the taxpayers and certainty of knowing that credit will follow the item down the line. This certainly increases compliance. The theory proposed by Sinclair would encourage a taxpayer to withhold payment until the first state came and asked for it. Allowing a taxpayer to thus withhold payment, builds an incentive for noncompliance and would create a gold rush mentality among tax jurisdictions. This is the antithesis of the purpose of the Multistate Tax Compact.

The Utah Supreme Court has interpreted its sales tax statutes consistent with the purposes of the Multistate Tax Compact. This court has followed and further clarified that decision in Niederhauser. As such, under Utah law, Broadcast is not entitled to a credit for taxes paid in other jurisdictions since tax liability unquestionably arose first in Utah.

III. UTAH'S IMPOSITION OF SALES TAX DOES NOT VIOLATE THE COMMERCE CLAUSE.

Broadcast's argument has already been rejected by the Utah

Supreme Court in Chicago Bridge & Iron. See Chicago Bridge & Iron v. Utah State Tax Comm'n, 839 P.2d 303 (Utah 1992); accord Niederhauser Ornamental & Metal Works Co., Inc. v. Tax Comm'n, 858 P.2d 1034 (Utah Ct. App. 1993).

CBI contended in Chicago Bridge & Iron that the Tax Commission's assessment of sales tax on CBI's purchases of materials in Utah violated the Commerce Clause. According to CBI, the assessment violated the Commerce Clause because it resulted in double taxation by Utah and California. The Utah Supreme Court rejected this argument. The Court noted the four part test used to determine when a tax should be sustained under the Commerce Clause. It was the Court's conclusion that the tax assessed by the Commission did not violate this test as outlined in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) and Goldberg v. Sweet, 488 U.S. 252 (1989) because Utah was not taxing "an out of state transaction or even a transaction in interstate commerce." Chicago Bridge & Iron, 839 P.2d at 308, citing McLeod v. J.E. Dilworth Co., 322 U.S. 327 (1944).

The Court reiterated the fact that:

> "[t]he transactions Utah taxed were CBI's purchase of steel materials from Utah Vendors. The transactions occurred solely within this state, and the goods that were subject to the transactions were all used within the state by the taxpayer. Utah did not tax the use of a particular product manufactured outside the state but used within the state, See e.g., D.H. Holmes Co. v. McNamara, 486 U.S. 24 (1988), nor did it tax a sale in another state. The

> installation of the finished tanks in other states does not affect the local nature of the sales transactions, nor does it make CBI's purchase of materials in Utah subject to apportionment, even though CBI paid a use tax to the state where the tanks were assembled and installed.

The Utah Supreme Court was clear in stating that Utah's taxation of purchases of personal property from Utah vendors did not violate the Commerce Clause despite payment of use tax in another state.

Broadcast's situation almost parallels that of CBI. The Commission is not attempting to tax Broadcast's use of its equipment in other states. The Commission has only assessed sales tax on Broadcast's purchase and storage of equipment which occurred in Utah. The fact that Broadcast may be liable for use tax in other jurisdictions does not invalidate Utah's assessment of sales tax on the transactions in question.

IV. THE NEGLIGENCE PENALTY ASSESSED BY THE COMMISSION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Tax Commission has assessed a 10% penalty upon Broadcast's negligent behavior in not paying, accruing or timely remitting the proper amount of sales tax due to the State of Utah. See Utah Code Ann. § 59-1-401(3)(a) (1992). The Utah Supreme Court has stated:

> It is within the discretion of the Tax Commission whether to assess penalties for failure to pay taxes. The findings of the Tax Commission will not be overturned on appeal unless the party challenging the findings can show that they are contrary to

law or otherwise erroneous.

Tummurru Trades, Inc. v. Utah State Tax Comm'n, 802 P.2d 715 (Utah 1990) (emphasis added). The Utah Supreme Court has further stated that a "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 and Gravel, Inc. v. Utah State Tax Comm'n, 842 P.2d 887 (Utah 1992) (emphasis added).

The factual record of this case shows that Broadcast, at the time it failed to pay sales taxes, did not have a good faith basis to do so. The determination of whether a penalty should be affirmed lies not upon the reasonableness of the taxpayer's argument before this court, but rather whether the taxpayer actually relied upon the arguments when it withheld the payment of taxes. In this case, the record is replete with evidence showing that Broadcast did not rely upon its current arguments when it failed to pay tax on its purchases in the state of Utah.

Broadcast has argued before this court, in attempt to avoid tax liability, that it "sold" the equipment to its subscribers. However, the record contains substantial evidence which indicates Broadcast never considered its transactions during the audit period to be sales. In fact, the record contains evidence showing extensive steps taken by Broadcast to make the transactions with its subscribers to appear as anything other than a sale. The following is a short list of the evidence

supporting the tax finding that Broadcast did not have a good faith basis for its nonpayment of sales tax.

1. Broadcast paid use tax on equipment it used in jurisdictions outside of Utah. If Broadcast had actually believed it had sold the equipment to the subscribers as it now claims, it should not have paid use tax on the equipment since the tax liability would be upon the subscribers. (Hearing Tr. 124-127.)

2. Broadcast told 800 taxing jurisdictions that it in no way sold or leased the equipment to its subscribers. Had Broadcast sincerely believed its transactions with the subscribers constituted a sale of tangible personal property, it could not, in good faith, told 800 taxing jurisdictions otherwise. (Hearing Tr. 146-148, 171.)

3. Broadcast paid use tax to the State of Utah on its transactions with Utah subscribers on a consumption basis. In other words, Broadcast paid tax on these in-state transactions as if it did not sell the equipment to the subscribers. Therefore, if Broadcast had a good faith belief that it sold the equipment to the Utah subscribers, it should have treated the transaction as such on its sales tax returns filed in Utah. (Hearing Tr. 335-337.)

4. Broadcast did not record its purchases of the equipment in a manner consistent with its theory that it resold the equipment to the subscribers. Broadcast did not recorded its

purchases in an inventory account, but rather recorded the purchases in a general asset account. (Webb Deposition at 5.)

5. Steven Webb, Broadcast's controller during the audit period, stated the decision was made not on whether the transaction was a "sale" but rather based on "just where the equipment was being used." (Webb Deposition at 44-45.)

6. Broadcast's agreements between its subscribers expressly reserved all rights of ownership in Broadcast. Such express language contradicts any assertion by Broadcast that it had a good faith basis in believing that it sold tangible personal property to its subscribers. Appendix C.

7. For much of the audit period Broadcast did not have a corporate policy for ascertaining its sales and use tax liability on the transactions with subscribers. (Hearing Tr. 139, 191.)

The above facts provide a substantial basis for the Tax Commission's conclusion that Broadcast was negligent by not paying tax on its purchases in the State of Utah.

The report issued by Vertex does not support Broadcast's argument that it acted in good faith. The Vertex report makes the following conclusion about Broadcast's transactions with its subscribers.

> BI is currently registered to collect sales tax in most states and is routinely filing returns with the state and locally administered jurisdictions. However, the returns reflect only the use tax imposed when BI owned equipment is installed at any of its retail customers locations. On the use tax

> issue, BI is in total compliance and has stood the test of any state audit that has been conducted.

Petitioner's Hearing Exhibit 22. The Vertex report points out that only use tax returns were currently filed by Broadcast. Also, there is no mention in the Vertex report that its exemption certificates issued in Utah were valid. Finally, the Vertex report was issued in July of 1990. Broadcast had been doing business since 1985 without any procedure to account for its sales and use tax liability.

Broadcast had no policy and made no attempt to even comply with Utah law, or the laws of many other jurisdictions for the majority of the audit period. The failure to file proper returns in a timely fashion without more justifies the negligence penalty. Broadcast actions have demonstrated an intentional disregard for Utah's taxing statutes; the argument it offers here is not credible given its conduct, its treatment of the property, its contract language and representations made to other states. The Penalty should be affirmed.

V. THERE IS NO ERROR IN THE TAX COMMISSION'S FINDING THAT BROADCAST SOLD MASTER TAPES TO MERRIL OSMOND ENTERPRISES.

The Commission found in its Final Decision that Broadcast sold Tangible Personal Property in the form of a "master tape" to Merril Osmond Enterprises ("Osmond"). (Final Decision, R. 22), Appendix B. The Commission based its decision upon the entire record. (Final Decision, R. 46), Appendix B.

Broadcast asserts that the Commission's finding in this regard is "a blatant disregard for the testimony presented at the hearing." Petitioner's Brief at 43. Broadcast further claims that the transaction constituting Broadcast's sale of the master tape to Osmond "is a complete fabrication on the part of the auditors and sustained by the Tax Commission." Petitioner's Brief at 43.

Such allegations by Broadcast are slanderous and ignore the facts. The Tax Commission's finding is supported by testimony presented at the hearing and by the record as a whole.[13] The following is a dialogue from the hearing transcript between Reese Davis, Treasurer of Broadcast, and Randy Grimshaw, Attorney for Broadcast. Reese Davis made the following statement when questioned about the circumstances of the Osmond transaction.

> Broadcast International specifically performed a tape service, delivering tapes to Merril Osmond Enterprises under a program known as audio voice which was a weekly broadcast on various radio stations.

(Hearing Tr. 137) (emphasis added). Randy Grimshaw asked a follow up question to Reese Davis' previous statement.

> So I take it then that you were providing certain material to them [Osmond], and it was

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[13] Petitioner has failed to marshall the evidence in the record supporting the Commission finding, its challenge to the finding is therefore defective and should not be considered. See Intermountain Health Care v. Board of Review, 839 P.2d 841 (Utah Ct. App. 1992); citing Grace Drilling Co. v. Board of Review, 776 P.2d 63, 67-68 (Utah Ct. App. 1990). Accord Lake Philgas Service v. Valley Bank and Trust, 845 P.2d 951 (Utah Ct. App. 1993).

> their view that they were buying that for resale; is that what's marked on the certificate?

(Hearing Tr. 137) (emphasis added). Reese Davis responded to this question in the affirmative by stating "As the certificate states, yes." (Hearing Tr. 138.) This testimony by Reese Davis coupled with the testimony provided by the auditors in their depositions supports the Commission's findings that Broadcast sold tangible personal property to Merril Osmond Enterprises.[14] It should also be noted that the mere fact that Osmond offered a "resale exemption certificate" indicates that the transaction was one for tangible personal property not for services only.

VI. BROADCAST HAS FAILED TO ESTABLISH THAT ITS SALE OF TANGIBLE PERSONAL PROPERTY TO OSMOND WAS EXEMPT FROM SALES TAX.

Broadcast's argument, that the tapes were computer software, is inapplicable and irrelevant for purposes of this case. It is inapplicable for the reason that the term "audio tapes" cannot be equated to the same meaning as the term "computer software." The argument is also irrelevant for the reason that the Administrative Rule providing an exception for "canned software", Utah Admin. R. 865-19-92S, was enacted after the audit period. As such, the Commission properly determined that the master audio tapes fall under the general definition of "tangible personal

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[14] See Andersen Deposition, at 27, line 17. (Ms. Andersen testified "Broadcast International sold a tape to Merril Osmond"); see also Mitchell Deposition at 16, line 13.

property" as contained in Utah Code Ann. § 59-12-102(16) (1992), and therefore, are subject to sales tax.

Broadcast's second argument is also flawed. Broadcast argues that its sale of master tapes to Osmond is exempt upon the premise that Osmond purchased the tapes for resale. The Commission did not agree with Broadcast's characterization of the transaction and ruled that Osmond consumed the master tapes. The testimony provided at the Hearing supports the Commission's finding. Reed Benson, General Counsel for Broadcast, testified at the hearing:

> [Osmond] came and produced those, what's called a master tape, and then he took the master tape and had it duplicated someplace else, I don't know where, and then he, through another distributor, were selling cassette tapes of these recordings in convenience stores.

(Hearing Tr. 220) (emphasis added).[15] This testimony supports the position that Osmond did not resell the master tape, rather, Osmond used the master tapes to produce cassette tapes of the recordings which were then resold. Therefore, the Commission was correct in concluding that Broadcast was not entitled to a sales tax exemption.

Furthermore, Osmond did not provide proper exemption

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[15] Broadcast misquoted this same statement of Mr. Benson in its Brief before this court. See Petitioner's Brief at 44 and 45. Broadcast cited the last portion of Mr. Benson's statement as "selling master tapes of these recordings to convenience stores." The actual statement was "selling cassette tapes of these recordings in convenience stores."

certificates to the Commission. Utah Code Ann. § 59-12-106(2) (1992) creates a presumption that the sale of tangible personal property is subject to tax unless the seller presents to the Tax Commission a valid exemption certificate issued to the seller by the customer. Utah Code Ann. § 59-12-106(2) states that "[t]he exemption certificates shall contain information prescribed by the commission." The certificate presented to the Commission by Broadcast does not contain Osmond's sales tax license or exemption number. Furthermore, the exemption certificate lacks a phone number for Osmond, was not dated and was admittedly submitted after the fact. (Final Decision, R. 47), Appendix B.

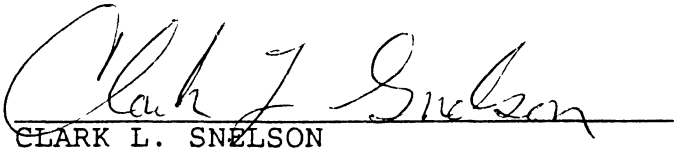
There exists substantial evidence to support the Commission's finding that Broadcast sold tangible personal property to Osmond. Moreover, the Commission's denial of a sales tax emption is supported by the law and the facts revealed at the hearing. As such, this court should affirm the Commission's assessment.

CONCLUSION

This case does not present any new or novel questions to be decided by the Court, but rather calls for the application of well establish precedent. Petitioner purchased tangible personal property from Utah vendors. Absent the application of some exemption those purchases are taxable transactions. The Commission applied tests set forth by the Utah Supreme Court in

determining that Petitioner did not purchase the tangible personal property "for resale." The essence of Petitioner's transactions with its subscribers was a "service agreement." It was labeled as such and treated and characterized as such by the parties. The Petitioner's are the "ultimate consumers" of the equipment taxed. One need look no further than the Petitioner's own statements made at the time to over 800 taxing jurisdictions to determine that Petitioner did not sell or lease the equipment in any manner. Petitioner's arguments regarding credit for taxes paid have previously been considered and rejected by both the Utah Supreme Court and the Court of Appeals. The Tax Commission's findings are well supported by the record; its actions where proper applications of existing law and should be affirmed in all respects.

DATED this 10th day of November, 1993.



CLARK L. SNELSON
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November, 1993, I caused 2 copies of the foregoing BRIEF OF RESPONDENT/APPELLEE to be hand-delivered to:

Randy Grimshaw
Maxwell A. Miller
PARSONS BEHLE & LATIMER
201 South Main #1800
P.O. Box 11898
Salt Lake City, UT 84147

APPENDIX A

RELEVANT STATUTES

DETERMINATIVE STATUTES AND RULES

STATUTES:

Utah Code Ann. § 59-1-401 (1989).

(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.

Utah Code Ann. § 59-12-102(10) (1989).

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

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

Utah Code Ann. § 59-12-102(14)(b) (1989).

(b) "Use" does not include the sale, display, demonstration, or trial of that property in the regular course of business and held for resale.

Utah Code Ann. § 59-12-102(12) (1989).

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

Utah Code Ann. § 59-12-104 (1989).

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

* * *

(28) 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; [Renumbered as Utah Code Ann. § 59-12-104(27) in 1991].

Utah Code Ann. § 59-12-104 (1989).

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

* * *

(26) property stored in the state for resale; [Renumbered as Utah Code Ann. § 59-12-104(25) in 1991].

Utah Code Ann. § 59-12-103 (1989).

(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;

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

Utah Code Ann. § 59-12-102 (1989).

(8) (a) "Retail sale" means any sale within the state of tangible personal property or any other taxable item or service under Subsection 59-12-103(1), other than resale of such property, item, or service by a retailer or wholesaler to a user or consumer.

Utah Code Ann. § 59-1-610 (Supp. 1993).

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

(a) grant the commission deference concerning its written findings of fact, applying a substantial evidence standard on review; and

(b) grant the commission no deference concerning its conclusions of law, applying a correction of error standard, unless there is an explicit grant of discretion contained in a statute at issue before the appellate court.

(2) This section supercedes Section 63-46b-16 pertaining to judicial review of formal adjudicative proceedings.

Utah Code Ann. § 59-1-801 (1989).

ARTICLE I. PURPOSE OF COMPACT

1. Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

2. Promote uniformity or compatibility in significant components of tax systems.

3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.

4. Avoid duplicative taxation.

ARTICLE V. ELEMENTS OF SALES AND USE TAX LAWS

1. Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another state and any subdivision thereof. The credit shall be applied first against the amount of any use tax due the state, and any unused portion of the credit shall then be applied against the amount of any use tax due a subdivision.

Utah Code Ann. § 59-12-104 (1989).

(29) 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; **[Renumbered as Utah Code Ann. § 59-12-104(28) in 1991].**

ADMINISTRATIVE RULES:

Utah Admin. R. 865-19-23S.

E. The burden of proving that a sale is for resale or otherwise exempt is upon the person who makes the sale. If any agent of the Tax Commission requests the vendor to produce a valid exemption certificate or other

similar acceptable evidence to support the vendor's claim that a sale is for resale or otherwise exempt, and the vendor is unable to comply, the sale will be considered taxable and the tax shall be payable by the vendor.

Utah Admin. R. 865-19-92S. [Enacted in 1991].

A. Definitions:

1. "Canned computer software" or "prewritten computer software" means a program or set of programs that can be purchased and used without modification and has not been prepared at the special request of the purchaser to meet their particular needs.

2. "Custom computer software" means a program or set of programs designed and written specifically for a particular user. The program must be customer ordered and can incorporate preexisting routines, utilities or similar program components. The addition of a customer name or account titles or codes will not constitute a custom program.

3. "Computer-generated output" means the microfiche, microfilm, paper, discs, tapes, molds, or other tangible personal property generated by a computer.

4. "License agreement" means the same as a lease or rental of computer software.

B. The sale, rental or lease of canned or prewritten computer software constitutes a sale of tangible personal property and is subject to the sales or use tax. Payments under a license agreement are taxable as a lease or rental of the software package. Charges for program maintenance, consultation in connection with a sale or lease, enhancements, or upgrading of canned or prewritten software are taxable.

C. The sale, rental or lease of custom computer software is exempt from the sales or use tax, regardless of the form in which the program is transferred. Charges for services such as program maintenance, consultation in connection with a sale or lease, enhancements, or upgrading of custom software are not taxable.

D. Charges for services to modify or adapt canned computer software or prewritten computer software to a purchaser's

needs or equipment are not taxable if the charges are separately stated and identified.

E. The sale of computer generated output is subject to the sales or use tax if the primary object of the sale is the output and not the services rendered in producing the output.

F. This rule cites the most common types of transactions involving computer software and it should not be construed to be all inclusive but merely illustrative in nature.

APPENDIX B

FINAL DECISION

BEFORE THE UTAH STATE TAX COMMISSION

BROADCAST INTERNATIONAL, INC., Petitioner,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION
v.	)	
AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	)	Appeal No. 91-1402 Account No. D52955

STATEMENT OF CASE

This matter came before the Utah State Tax Commission for a formal hearing on September 9 and 10, 1992. Commissioners Joe Pacheco and S. Blaine Willes of the Commission and Alan Hennebold, Administrative Law Judge, heard the matter on behalf of the Commission. Maxwell A. Miller and Randy M. Grimshaw, of Parsons Behle & Latimer, represented Petitioner. Clark L. Snelson, Assistant Utah Attorney General, represented Respondent.

Based upon the evidence presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax in question is sales and use tax.

2. The period in question is January 1987 through September 1990.

3. On August 1, 1991, the Audit Division assessed Broadcast with additional sales and use tax in the amount of $241,809.04, a 10% negligence penalty in the amount of

$24,180.92 and interest accrued at the statutory rate through August 31, 1991 in the amount of $47,456.09. Broadcast filed a timely appeal of the foregoing assessment with the Commission.

4. Broadcast is a Utah corporation with its principal place of business in Midvale, Utah. It began doing business in 1985.

5. Broadcast provides the services of a private satellite network to large retail businesses ("subscribers" hereafter) such as American Stores, Fleming Foods and Safeway. Broadcast's services can include background music, in-store advertising, electronic mail, video conferencing, stock and commodity quotes, check verification, and credit card services.

6. Each subscriber determines the services it will receive from Broadcast. It also determines the contents of such services. For example, each subscriber selects the type of background music it will receive, makes arrangements for its own in-store advertising directly with advertisers, and establishes the time and content of video conferences. The services selected by subscribers are delivered over Broadcast's satellite network, according to the subscriber's instructions.

7. Broadcast's services are provided pursuant to "service agreements" negotiated between Broadcast and each subscriber. These contracts specify the types of service each subscriber will buy from Broadcast and the price of such services. Each contract requires Broadcast to supply all the equipment necessary to provide the agreed-upon services.

8. Broadcast has over 4,000 installations at subscriber locations throughout the United States.

9. Broadcast provides its services to subscribers by means of a satellite dish and mount, low noise amplifier, connecting cable, printer and receiver at each location. Demodulators and "uplink" equipment are also sometimes used. Uplink equipment allows the subscriber to send, as well as receive, information over Broadcast's satellite network. If a particular subscriber already has some of the equipment necessary to receive Petitioner's services, such equipment is incorporated into Broadcast's system.

10. Broadcast is bound by its service agreements to provide its services throughout the subscriber's hours of operation. Broadcast is also bound to furnish, install and maintain all equipment necessary for delivery of its services. Subscribers are contractually prohibited from moving the equipment, adding equipment, or altering the equipment. The service agreements specifically provide that equipment furnished by Broadcast remains Broadcast's property. Such equipment is labeled as Broadcast's property and also marked with Broadcast's inventory number.

11. Broadcast's employees or contractors install the necessary equipment at each subscriber's location. The satellite dish is typically mounted on the building's roof and attached to the building's framework. Cables connect the external equipment to the other components, which are usually located in a secure office.

12. Broadcast usually obtains any permits necessary for the installation of its equipment at the subscriber's location.

13. After Broadcast has installed its equipment, the subscriber determines how the system's volume should be set. Broadcast's employees make any necessary final adjustments to the equipment.

14. Satellite dishes are passive devices. Once aimed, they do not require further operation. Printers and receivers must be plugged in and turned on and printers must be loaded with paper. Receivers have volume controls and "status" buttons which can generate print-outs for trouble-shooting purposes.

15. Once Broadcast has installed the equipment, the subscriber communicates any desired changes in services to Broadcast, which then implements those changes from its location in Midvale. The subscribers cannot implement such changes in service themselves.

16. After installation is complete, Broadcast's service staff visits each installation as required to maintain the system in good working order, averaging 1.1 visits per year to each site.

17. Broadcast maintains a telephone based "trouble-shooting" unit to deal with system malfunctions. However, some subscribers instruct their employees to first contact the subscriber's own in-house "help desk" when problems arise. If the subscriber's help desk cannot resolve a problem through simple procedures, the subscriber calls Broadcast to correct the problem.

18. Subscribers are contractually bound to indemnify Broadcast for damage, destruction or loss to Broadcast's equipment while it is at the subscriber's location.

19. It is possible for Broadcast to physically move its equipment from one location to another. Such relocation has rarely been necessary due to the fact that subscribers have usually renewed their contracts with Broadcast.

20. Most of Broadcast's equipment was purchased from out of state vendors and shipped directly from the vendors to the installation site. In most cases, such sites were also out of state. Respondent has not assessed Utah sales or use tax on these out of state transactions.

21. Respondent has assessed sales and use tax on Broadcast's purchases of equipment from Utah vendors, primarily "Digistar" receivers purchased from CDI in Orem, Utah. CDI delivered the receivers to Broadcast's Midvale office. They were stored in Utah, then shipped to installation sites usually outside Utah.

22. At first, CDI charged sales tax on sales of receivers to Broadcast. Later, after Broadcast provided an exemption certificate stating that the receivers were being purchased for resale, CDI stopped charging sales tax.

23. From the time it began doing business in 1985 until 1988, Broadcast had no system for reporting and paying sales or use tax on acquisitions of equipment. Broadcast developed its system during 1988 and attempted to apply it retroactively to all prior equipment purchases. Under its system, Broadcast treats sales/use tax as due to the

jurisdiction in which the equipment is installed. Tax is calculated on the amount paid by Broadcast for the equipment.

24. The equipment in question is carried as an asset on Broadcast's financial records.

25. With respect to equipment used in Utah installations, Broadcast accrues use tax on such equipment as though it is the consumer. In other words, Broadcast pays tax to Utah based on its purchase price for the equipment, rather than on the payments it receives from subscribers.

26. In a transaction unrelated to Broadcast's purchase of equipment, Broadcast provided a blank master tape to Merrill Osmond Enterprises ("Osmond" hereafter) and allowed Osmond to use Broadcast's facilities to record the master tape. Osmond then duplicated the master tape at another location, producing tapes for retail distribution. Broadcast did not charge sales tax on the transaction, nor did it request an exemption certificate from Osmond.

27. After the Audit Division began its investigation of Broadcast's sales and use tax liability, Broadcast requested and obtained an exemption certificate from Osmond. However, the exemption certificate was not completed with an exemption number or a sales tax license number.

28. The Audit Division imposed a 10% negligence penalty in this matter on the grounds that Broadcast failed to organize and conduct its business with reasonable prudence so as to provide for proper payment of taxes and had improperly issuing a resale exemption certificate to CDI.

CONCLUSIONS OF LAW

Utah Code Ann. §59-12-103(1) levies 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; and
> . . .
> (l) tangible personal property stored, used, or consumed in this state.

Utah Code Ann. §59-12-104 exempts the following sales and uses from sales and use taxes:

> . . .
> (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;
> . . .
> (25) property stored in the state for resale;
> . . .
> (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; and
> (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.

"Retail sale" is defined by Utah Code Ann. §59-12-102(8)(a) as:

> . . . any sale within the state of tangible personal property or any other taxable item or service under Subsection 59-12-103(1), other than resale of such property, item, or service by a retailer or wholesaler to a user or consumer.

"Storage" is defined by Utah Code Ann. §59-12-102(12) as:

> any keeping or retention of tangible personal property or any other taxable item or service . . . in this state for any purpose except sale in the regular course of business.

"Sale", as material to this appeal, is defined by Utah Code Ann. §59-12-102(10)(e) as:

> any transaction under which right to possession, operation, or use of any article of tangible personal property is granted under a lease or contract and the transfer of possession would be taxable if an outright sale were made.

"Possession" is defined by Blacks Law Dictionary, Revised Fourth Edition, as:

> The detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. Act or state of possessing. That condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all others.

"Use" is defined by Utah Code Ann. §59-12-102(14) as:

> (a) the exercise of any right or power over tangible personal property . . . incident to the ownership or the leasing of that property, item, or service.
> (b) Use does not include the sale, display, demonstration, or trial of that property in the regular course of business and held for resale.

"Operate" is defined by Webster's New Collegiate Dictionary as "to perform a function".

Part V of the Multistate Tax Compact, as adopted by Utah Code Ann. §59-1-801, provides as follows:

> Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use tax paid by him with respect to the same property to another state and any subdivision thereof. . . .

The State of Utah has entered into similar reciprocal agreements with other jurisdictions not parties to the Multistate Compact.

Utah Administrative Rule R865-19-235(E) provides as follows:

> The burden of proving that a sale is for resale or otherwise exempt is upon the person who makes the sale. If any agent of the Tax Commission requests the vendor to produce a valid exemption certificate or other similar acceptable evidence to support the vendor's claim that a sale is for resale or otherwise exempt, and the vendor is unable to comply, the sale will be considered taxable and the tax shall be payable by the vendor.

Utah Code Ann. §59-12-110(5) provides as follows:

> If any part of the (sales tax) deficiency is due to negligence . . . there shall be added a penalty as provided in section 59-1-401 . . . to the amount of the deficiency . . . .

Utah Code Ann. §59-1-401(3) provides in material part:

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

DECISION AND ORDER

Two separate fact situations underlie the assessment of sales and use tax in this matter. The first is Broadcast's purchase of equipment, primarily receivers, from Utah vendors. The second is Broadcast's sale of a "master recording tape" to Osmond. Broadcast's sales and use tax liability will be considered with respect to each of the foregoing fact situations. Thereafter, the Commission will consider the issue of penalties.

I. Equipment Purchased and Stored in Utah.

As noted in the preceeding findings of fact, Broadcast purchased some of its equipment from Utah vendors, primarily Digistar receivers from CDI in Orem. The equipment was then stored in Utah for a short time until it was transferred to out of state installation sites and connected to other equipment. The completed system enabled subscribers to receive Broadcast's services.

Any inquiry regarding assessment of sales and use tax begins with the question of whether the tax-imposing sections of Utah's Sales and Use Tax Act (Utah Code Ann. §59-12-101 et seq., "the Act" hereafter) reach the transactions at issue. The tax-imposing provisions of the Act must be liberally construed in favor of the taxpayer. Parsons Asphalt Products v. Utah State Tax Commission, 617 P.2d 397, 398 (Utah 1980).

Respondent raises §59-12-103(1)(a) of the Act as a basis for imposing sales and use tax on Broadcast's purchases of equipment from Utah vendors. Section 59-12-103(1)(a) provides as follows:

> 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.

Broadcast concedes it purchased the equipment in question from Utah vendors, but argues such purchases were not "retail sales" and therefore not subject to tax under §59-12-103(1)(a).

Section 59-12-102(8)(a) of the Act defines "retail sale" as follows:

> "Retail sale" means any sale within the state of tangible personal property or any other taxable item or service under Subsection 59-12-103(1), other than resale of such property, item, or service by a retailer or wholesaler to a user or consumer. (Emphasis added.)

Under the foregoing definition of "retail sale", Broadcast's purchases of equipment from Utah vendors are retail sales, and therefore subject to tax, unless the equipment was purchased for resale.

"Resale" is not defined by the Act. However, §59-12-102(10) defines "sale" as follows:

> "Sale" . . . includes:
> . . .
> (e) any transaction under which right to possession, operation, or use of any article of tangible personal property is granted under a lease or contract and such transfer of possession would be taxable if an outright sale were made.

Given the foregoing chain of statutory definitions, Broadcast's purchase of equipment from Utah vendors is not subject to sales and use tax under §59-12-103(1)(a) if purchased for resale. In the context of this case, Broadcast can only establish such a resale by showing that it granted its subscribers the right to possession, the right to operate, or the right to use such equipment.

With respect to the right of possession, Broadcast grants no such right to its subscribers. To the contrary, Broadcast grants only the right to receive various services. Equipment is installed by Broadcast only to allow receipt of Broadcast's service. The equipment remains completely under

Broadcast's authority. Broadcast can move, remove, or substitute equipment so long as the subscriber receives its services.

As to "right to operate", the term "operate" is not defined by the Act, and must therefore be applied according to its common meaning. "Operate" is defined by Webster's New Collegiate Dictionary as: "to perform a function". In the context of the contractual relationship between Broadcast and its subscribers, the subscribers are prohibited from tuning the receivers. They are also prohibited from connecting the equipment to any other equipment other than as installed by Broadcast. The equipment is completely dedicated to functioning as Broadcast's service delivery system. Under such circumstances, the subscriber's ability to turn the receiver on or off, push a button to obtain a status report, or increase the volume does not constitute the "right to operate" the equipment.

Finally, with respect to the subscriber's "right to use" the equipment, the Act defines "use" as the exercise of any right or power over tangible personal property. Once again, based upon Broadcast's service agreements with its subscribers as well as Broadcast's actual practice, the subscriber only has the "right" to receive services from Broadcast, but no right or power over the tangible property which delivers the services.

Based on the foregoing, the Commission finds that Broadcast does not convey to its subscribers the right to possess, operate or use the equipment in question. The

Commission therefore holds that Broadcast does not resell such equipment. Consequently, Broadcast's purchase of the equipment was not for "resale" so as to escape imposition of sales and use tax under §59-12-103(1)(a).

A second and independent basis for taxation with respect to the equipment is §59-12-103(1)(l), which imposes tax on the purchaser for the amount paid for tangible personal property "stored, used or consumed" in Utah. Clearly, Broadcast did not "use" or "consume" the equipment within this state and is subject to tax under §59-12-103(1)(l) only if it "stored" the equipment here.

The Act defines "storage" as "any keeping or retention of tangible personal property . . . in this state for any purpose except sale in the regular course of business." Under the undisputed facts of this case, Broadcast kept and retained the equipment in Utah, albeit a short period of time. Broadcast is therefore subject to tax under §59-12-103(1)(l) unless it falls within the exclusion contained therein for property stored in Utah for "sale in the regular course of business."

The application of the "resale" limitation has previously been discussed with respect to §59-12-103(1)(a). That discussion applies equally here. The Commission therefore concludes that Broadcast did not store the equipment in Utah for resale and that such equipment is subject to tax under §59-12-103(1)(l).

The Commission has concluded that Broadcast's equipment purchases in Utah are subject to tax under

§59-12-103(1)(a) and, alternatively, that the storage of such equipment in Utah is subject to tax under §59-12-103(1)(l). The Commission will next consider whether any of the Act's exemption provisions relieve Broadcast of such tax liability. Such exemption provisions are strictly construed against Broadcast. (Parsons Asphalt Products v. State Tax Commission, supra; Nucor Corp. v. State Tax Commission, 187 Ut. Adv. Rep. 17 (Utah 1992).)

Broadcast argues it is exempt from taxation under §59-12-104(12) because the transactions in question are in interstate commerce. However, Broadcast is a Utah corporation that purchased the equipment in Utah, took delivery in Utah, then stored the equipment in Utah. Such intrastate transactions are not within the exemption provided by §59-12-104(12).

Broadcast also argues it is exempt from taxation under §59-12-104(25), pertaining to property purchased in Utah for resale, or §59-12-104(27), pertaining to property stored in Utah for resale. The Commission has already dealt with the "resale" issue, concluding that the equipment in question was not purchased or stored in Utah for resale. For that reason, Broadcast's purchase and storage of the equipment does not qualify for exemption from sales and use tax under either §59-12-104(25) or §59-12-104(27).

Finally, Broadcast argues that under §59-12-104(28) of the Act, it is entitled to a credit for sales and use tax paid

on the equipment to other jurisdictions. Section 59-12-104(28) provides:

> The following sales and uses are exempt from the tax imposed by this chapter:
> . . .
> (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 adjustment is allowed if the tax paid was greater than the tax imposed by this part and Part 2;

Similarly, the Multistate Tax Compact, Article V, found in Utah Code Ann. §59-1-801 et seq, provides:

> Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another state and any subdivision thereof. . . .

Broadcast contends that the foregoing statutes grant a credit to Broadcast, to be applied against its Utah sales and use tax liability, for sales and use taxes which were later paid to other jurisdictions. Broadcast also argues that failure to allow such credit would violate the Commerce Clause of the United States Constitution.

The Commission has previously concluded that Broadcast's purchases of CDI receivers from a Utah vendor were intrastate transactions. Therefore, Broadcast's Commerce Clause arguments are not well founded.

As to Broadcast's claim for credit for taxes paid to other jurisdictions, the Utah Supreme Court has addressed at least a portion of that issue in Chicago Bridge & Iron, 196 Utah Advance Reporter 18 (1992), holding that because the first

taxable event occurred in Utah, sales and use tax was payable to Utah. Chicago Bridge & Iron was decided by reference to the Multistate Compact. That logic is equally applicable with respect to other jurisdictions which are not members of the multistate compact, but which have entered into reciprocal agreements of the same nature with the State of Utah. The same result is also reached under §59-12-104(28) itself. Section 59-12-104(28) pertains only to sales or uses in Utah which involve property already taxed in other jurisdictions. If the the tax is first due in Utah, §59-12-104(28) does not apply. Otherwise, Utah's ability to collect sales and use tax would be subject to a taxpayer's decision to first pay tax elsewhere.

In the case now before the Commission, Broadcast purchased the equipment in Utah before shipping the equipment to other jurisdictions. The first taxable event therefore occurred in Utah and the tax on the transaction is payable to Utah. The Commission concludes that Broadcast may not claim a credit against its Utah tax liability for taxes paid to other jurisdictions.

In summary, then, the Commission concludes that Broadcast is liable under Utah's Sales and Use Tax Act for tax upon the amount paid by it for equipment either purchased from Utah vendors or stored in Utah. Broadcast is not entitled to credit against its Utah tax liability for sales or use taxes paid to other jurisdictions.

II. The Osmond Transaction

The second issue before the Commission relates to the imposition of tax on Broadcast's sale to Osmond of a master recording tape.

The Audit Division bases its assessment of tax on its conclusion that Broadcast produced and sold a master recording tape to Osmond, and that such a sale constitutes a retail sale of tangible personal property. For its part, Broadcast maintains that it merely leased its facilities to Osmond, and that Osmond then both produced the recording and provided the blank master tape itself. According to Broadcast, such a fact situation does not give rise to a sales or use tax.

The Commission has reviewed the record in this matter. Although the testimony at the hearing is inconclusive on the question of whether Broadcast provided the blank master tape, the pleadings serve to clarify such testimony. Based upon the entire record, the Commission has determined that Broadcast provided the blank tape and recording facilities from which the master tape was produced. The subsequent sale of the master tape to Osmond was, therefore, a sale of tangible personal property subject to sales and use tax under Utah Code Ann. §59-12-103(1).

Broadcast argues that it has obtained an exemption certificate from Osmond indicating that the master tape was purchased for resale, and that by virtue of the exemption certificate Broadcast had no obligation to collect the tax from Osmond. It is clear from the record that the exemption certificate's statement that the master tape was purchased for

resale is incorrect. The master tape was in fact consumed by Osmond, and not acquired for resale. Furthermore, Broadcast acknowledges that it did not obtain the exemption certificate at the time of transaction, but only after the Audit Division had commenced its audit. Furthermore, when the exemption certificate was finally received, it was improperly completed. Under such circumstances, Broadcast cannot claim to have relied on the exemption certificate. The Commission therefore concludes that Broadcast cannot rely upon an inaccurate, incomplete, after-the-fact exemption certificate to escape tax liability on the Osmond transaction.

III. PENALTY

The final issue is whether a negligence penalty is appropriate with respect to Broadcast's tax liability.

When Broadcast began doing business, it admittedly did so without any attention to Utah's Sales and Use Tax Act. Broadcast's inattention continued well into the audit period. Furthermore, Broadcast has taken inconsistent positions with respect to its in-state and out-of-state tax liabilities. In Utah, Broadcast has considered itself to be the consumer of the equipment in question, and has therefore paid sales tax on the purchase price of the equipment. If Broadcast had considered itself to be the seller of the Utah equipment, as it claims to be in other states, it would have been obligated to pay sales and use tax on the entire amount of its service fees received from Utah customers.

With respect to the Osmond transaction, Broadcast's sale of a master recording tape was clearly a sale of tangible personal property, subject to sales and use tax.

In view of Broadcast's inattention to its sales and use tax liability during the initial portion of the audit period, its adoption of inconsistent positions with respect to its Utah and out-of-state installations, and its neglect of sales and use liability on the Osmond transaction, the Commission concludes that the 10% negligence penalty imposed pursuant to Utah Code Ann. §§59-12-110(5) and 59-1-401 is appropriate.

IV. ORDER

In summary, the Commission concludes that Broadcast is liable for sales and use tax with respect to the amount paid by it for equipment purchased from Utah vendors or stored in Utah. Broadcast is not entitled to credit against its Utah sales and use tax liability for sales and use taxes paid to other jurisdictions. Broadcast is also liable for sales and use tax with respect to the Osmond transaction. Finally, the

10% negligence penalty imposed by the Audit Division is affirmed. It is so ordered.

DATED this 10th day of June, 1993.

BY ORDER OF THE UTAH STATE TAX COMMISSION.

R.H. Hansen
Chairman

Roger O. Tew
Commissioner

Joe B. Pacheco
Commissioner

S. Blaine Willes
Commissioner

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

AH/sj/3773w

STATE TAX COMMISSION SEAL STATE OF UTAH

APPENDIX C

SERVICE AGREEMENT

SERVICE AGREEMENT
BETWEEN
BROADCAST INTERNATIONAL, INC.
AND
SAVE MART SUPERMARKETS

THIS AGREEMENT is entered into this 2nd day of May, 1988 between Broadcast International, Inc., a Utah corporation, with its principal place of business at 7050 Union Park Center, Suite 650, Midvale, Utah, 84047, (hereafter "Company") and Save Mart Supermarkets, (hereafter "Subscriber").

Company desires to furnish daily background music, commercial audio advertisements, and other video and audio transmissions to certain retail stores owned by Subscriber and Subscriber desires Company to provide the Service under the terms and conditions contained in this Agreement.

Therefore, based on the foregoing premises and the mutual promises set forth in the remainder of this Agreement, which the parties agree are adequate consideration to support the Agreement, they hereby agree as follows:

1. Definitions. As used herein, the following terms and phrases shall have the meanings set forth below:

a. "Service" shall mean and refer to the daily background music, audio advertisements, and other video and audio transmissions provided by the Company to Subscriber.

b. "Network" shall mean and refer to the retail stores owned by Subscriber and to which the Company furnishes the Service.

c. "Billing Period" shall mean and refer to four week period which shall correspond to Subscriber's four week accounting periods.

d. "Spot Rotation" shall mean and refer to one commercial audio advertisement broadcast over the Subscriber's Network a minimum of once every 40 minutes for a consecutive seven day period.

2. Background Music Program. Company hereby agrees to make available (via satellite) to Subscriber daily background music, throughout all hours of operation of each of Subscriber's stores participating on Subscriber's Network. Participating stores are identified on Exhibit "A" to this Agreement and shall include such additional locations as may be added in writing by Subscriber hereafter from time to time.

3. Transmission Responsibility. To receive Company's Service, except for video transmissions, Company shall furnish, install and keep in good operating condition, at no capital cost to Subscriber, all equipment necessary to receive the satellite transmissions throughout the term of this Agreement.

4. Point to Multi-Point Data Service. Company shall furnish and install a dot matrix printer and a data demodulator at each participating store to enable Subscriber to transmit data and messages via the Network. It shall be Subscriber's responsibility to transmit data and messages via telephone modem to Company's Salt Lake City uplink and all costs of such delivery shall be borne by Subscriber except for telephone charges for a wats line number the costs for which shall be borne by Company. All other costs of transmission are included in the data transmission charges described hereafter.

5. Teleconferencing. Company will provide to Subscriber one-half hour of video teleconferencing and one half hour of audio teleconferencing each Billing Period at no charge to Subscriber ("Free Teleconferencing Time"). Company will also provide additional video and teleconferencing services to Subscriber on an as-requested basis. Requests for all video teleconferencing service shall be made in writing by Subscriber at least seven days in advance of each anticipated air date. Run of station broadcasts (i.e. when no time for the broadcast is specified) shall be made upon 24 hour written notice to Company and Company shall use its best efforts to broadcast such information within a shorter time. Any additional equipment needed to receive such teleconferencing services (e.g., television monitor, VCR, etc.) must be supplied by Subscriber, although Subscriber may request Company to assist it in acquiring and installing such additional equipment and if the installation thereof is at a time other than the initial installation of the satellite equipment, Subscriber shall pay a mutually agreed installation fee.

6. Instore Commercials. Subscriber desires to make available to its vendors and manufacturers point of purchase advertising opportunities in the form of instore audio announcements to be aired in stores participating on the Subscriber's Network. Company shall produce up to twelve, (including the two advertisements described in Paragraph 6(d) below) 30 second audio advertisements each week for Subscriber for purposes of instore advertising and promotion. Company will broadcast such advertisements as an integral part of the background music transmission described in Paragraph 1 above. To further assist Subscriber in operating and maintaining the Subscriber's instore advertising program, Company will provide the following additional services:

a. As requested by Subscriber, Company will offer marketing consultation to assist Subscriber in promoting advertising opportunities to Subscriber's vendors and manufacturers.

b. Company agrees to interact with Subscriber's vendors and

other groups desiring to advertise products via Subscriber's Network as often as may be requested by Subscriber for the purpose of obtaining creative or other pertinent information to assist Company in writing and producing the audio advertisements.

c. Company will provide Subscriber's vendors or other designated parties Proof of Performance Certificates which verify the broadcast of the audio advertisements to Subscriber's participating stores via the Network.

d. Subscriber shall be entitled to two (2) free thirty second audio advertisements each week to be aired as Spot Rotations for the purpose of promoting goods and services via satellite for which Subscriber has not received payment.

The foregoing notwithstanding, in the event Subscriber sells the two free ads to third parties, Subscriber shall pay Company $3.00 per Spot Rotation per Store per week or fifteen per cent of the actual sales price of the free spots, whichever is lesser unless the Subscriber shall have sold and broadcast at least 10 Spot Rotations in the Billing Period when such free audio advertisements are broadcast.

In the event Subscriber requests Company to produce audio advertisements in excess of the twelve (12) weekly Spot Rotations referenced hereinabove, Company may agree to produce and air such additional audio advertisements for a production fee of $3.00 per each additional Spot Rotation per store per week.

e. Company shall have the right to sell up to two advertisements to national manufacturers for airing on all satellite networks serviced by Company, subject to Subscriber's rates for advertising and Company's volume discounts for national advertising. Provided, however, any such products advertised must be products carried by Subscriber and not be in conflict with any other ads broadcast by Subscriber. Revenues from such sales, shall be treated as revenues from any other sales of advertising.

f. Company shall assist Subscriber in the preparation of master advertising schedules to be used by Subscriber in promoting, selling, producing and broadcasting the audio advertisements.

7. Service Fees. In consideration of the services to be performed by Company and described in Paragraphs 1-6 hereof, Subscriber agrees to pay the following fees:

a. License Fee. Subscriber shall pay, in advance, the amount of $200 per participating store as a "License Fee" for the Service for each Billing Period, which Billing Period shall

coincide with Subscriber's four-week accounting periods. The License Fee shall be paid commencing upon the installation and activation of 50 locations and shall be due thereafter on the first day of each subsequent Billing Period. The License Fee for each renewal term shall be adjusted at the beginning of each renewal term to reflect any increased costs of delivery and production.

b. Advertising Revenues. Subscriber shall pay Company fifteen percent of the "gross revenues" Subscriber derives during any Billing Period from the sale of instore audio advertising. The "gross revenues" received by Subscriber, for purposes of that calculation, shall not exceed $20 per Spot Rotation per store per week and shall not include proceeds from the sale of the two free audio advertisements except required by Paragraph 6(d) above. Any revenues which may be earned by Subscriber in excess of $20 per Spot Rotation shall not be utilized in calculation of amounts due to Company. The intent of the limitation on maximum gross revenue utilized in this calculation is to limit the Company's share of gross advertising revenues to $3.00 per Spot Rotation per store per Billing Period.

Subscriber shall furnish Company with copies of the Authorization for In-store Commercials prepared for Vendors during each four week Billing Period from which the amount due to Company shall be calculated. Subscriber shall then pay the amount due to Company within fifteen days after the later of the close of each Billing Period or transmission of Company's billing to Subscriber.

Upon reasonable notice to Subscriber, Company shall have access, for the purpose of audit, during the term of this Agreement to Subscriber's invoices regarding advertising revenues which are the subject of this provision. Company shall not perform more than one such audit per calendar year and the period of audit shall be limited to no more than the two immediately preceding fiscal years. All information disclosed to Company or its agents during such audits shall be confidential and shall not be disclosed to third parties without Subscriber's consent.

c. Data Transmission Charges. Subscriber shall pay in advance $65 per location per Billing Period for the data service plus transmission charges, paid in arrears, based on the following schedule of usage:

Kilocharacter Usage per Billing Period	Charge per Kilocharacter per Billing Period
0-1000 Kilocharacter	$ .50 per Kilocharacter
1000-2000 "	.25 " "

above 2000 " .10 " "

The foregoing notwithstanding, there shall be no transmission charges for the first three complete Billing Periods of operation after the data system is operational.

d. Teleconferencing Services. After Company has provided the Free Teleconferencing Time, Subscriber shall pay $400 per each additional one half hour segment or portion thereof, of video teleconferencing broadcast by Company and $100 per each additional one half hour segment or portion thereof, of audio teleconferencing broadcast by the Company in any Billing Period.

8. Option to Reduce Services. At the conclusion of the third year of the initial term hereof, Subscriber shall have the option of electing to reduce the Services furnished by Company. Subscriber shall give Company 90 days written notice of election to reduce services which notice must be given on or before 90 days before the end of the third year of the term hereof. In the event, Subscriber elects to reduce services Subscriber shall receive music only, be entitled to no free audio advertisements, cease actively selling advertising, and the License Fee described in Paragraph 7(a) shall be reduced to $100.00 per participating retail store per Billing Period. Company shall then have the right to sell advertising to vendors subject to the reasonable approval of Subscriber as to content of the advertising and air such advertising over the Subscriber's Network. The initial $100.00 of revenues, in excess of sales commissions, derived from the sale of such advertising shall be retained by Company. All revenues in excess of the initial $100.00 shall be split equally between the Company and Subscriber.

9. Permits, Licenses and Compliance with Applicable Law. Company shall have sole responsibility for obtaining all building or governmental permits necessary to install, maintain and operate Company's equipment and system in each participating store and to provide the services contemplated by this Agreement. Company hereby warrants and represents to Subscriber that it does now comply and shall continue to comply with all federal, state and local laws, regulations and ordinances which govern its provision of property and services to Subscriber pursuant to this Agreement. Company shall be solely responsible for all taxes, levies and assessments on its equipment, system, services and business.

10. Covenant of Uninterrupted Service. Company hereby represents and warrants to Subscriber that it shall use its best efforts to ensure continuous Service to all participating stores during their hours of operation.

11. Music Royalties and Fees. Company shall have sole responsibility for payment of all royalties, talent and/or performance fees and similar fees which may be due in connection with the Service

Subscriber harmless from any and all claims alleging copyright infringement or failure to pay any such royalties, talent or performance fees. Company's obligations under this Paragraph 11 shall survive the termination or expiration of this Agreement.

12. Equipment. Company shall supply, at its sole cost, all necessary satellite dishes, card cabinets, cable and related equipment necessary to enable it to supply the Service (except TV's and VCR's) required by this Agreement. All such equipment shall be of a quality acceptable to Subscriber. All standard installation costs shall be borne by Company. (See Paragraph 14 regarding non-standard installations.) All such equipment is and shall remain personal property of Company and shall not be considered to be store fixtures. Unless Subscriber requests Company to install additional sound system equipment, all sound system equipment in each store shall be and remain the property of Subscriber. Maintenance of Company's equipment shall be the sole responsibility of Company, unless damage is caused to that equipment by the negligence or willful misconduct of Subscriber's employees or agents. Maintenance of Subscriber's sound system equipment referred to herein shall be the sole responsibility of Subscriber unless damage to that equipment is caused by the negligence or willful misconduct of Company's employee or agents.

13. Installation Schedule. Company shall install its equipment in all locations designated on Exhibit "A" and all such standard locations shall be operational on or before July 25, 1988. Subscriber shall provide the list of stores and clearances to install by May 6, 1988. If Company fails to complete all installations by such date specified herein, for each day after July 25, 1988 required to make all standard locations operational, Subscriber shall be allowed to use the entire system, including data, for no charge for one day. If Company fails to complete the standard installations within 150 days after clearances have been given, Subscriber may, at its sole election, terminate this Agreement as to one or more participating locations with no further liability to Company or Subscriber. Installation schedules for stores hereafter made subject to this Agreement shall be specified in writing by both parties and those installation commitments shall then be incorporated herein by reference.

14. Non-standard Installation. Should any participating store require installation materials or procedures different from Company's standard installation protocol due to abnormal terrestrial interference not solved by screens or filters, building structural deficiencies, extra-ordinary governmental requirements, or other conditions required by participating stores, Company shall not be required to install its equipment at the affected location and this Agreement shall not become effective as to that location, unless Subscriber agrees to bear any additional costs necessary to make such location operational.

15. Installation and Equipment Locations. Subscriber shall provide a power outlet within six feet of each store's amplifier

location, and shall not change the location of the equipment connected to Company's equipment or make any additions to or alterations in it. If any alteration or improvement must be made to any store to accommodate installation of Company's equipment, those alterations or improvements shall at all times remain a part of the premises where that equipment is installed. Subscriber shall provide access and shall cooperate with Company to obtain landlord approval and building or governmental permits where necessary. Subscriber grants its permission to Company to install required equipment on or about the premises of each participating store. Company shall exert its best efforts to utilize existing instore public address systems and/or speaker/amplifier systems in each store. Company may request Subscriber to replace any sound reproduction equipment which is deemed unsatisfactory by Company. Should Subscriber choose not to replace unsatisfactory equipment, Company may, at its discretion, refuse to install its system at that location, and this Agreement shall thereupon automatically terminate as to that location. Subscriber shall remain responsible for any existing contracts or agreements which it has with any provider of background music or of service and maintenance on existing public address systems.

16. Indemnification. Company shall defend, indemnify and hold Subscriber harmless against any and all costs, expenses or claims which arise out of (a) the installation, operation or maintenance of Company's equipment in participating stores, by Company or its agents or employees; or (b) the provision of any services by Company or its agents or employees to Subscriber. This obligation by Company shall survive termination or expiration of this Agreement. Company shall maintain general liability insurance against claims for bodily injury to and/or death of and/or damage to property of any person or persons and a media perils policy. The limit of liability of such insurance shall be not less than One Million Dollars ($1,000,000) for bodily injury and property damage claims (combined) arising out of any one occurrence or in the aggregate during any one policy year.

Company shall furnish written certificates from its insurance carriers to Subscriber establishing that said insurance has been procured and is being properly maintained and that the premiums therefore are paid, and specifying the names of the insurers and the respective policy numbers and expiration dates. Subscriber shall be an additional named insured on each such policy. Neither the nature nor the amount of Company's liability to Subscriber is limited in any way by the existence or amount of such insurance.

17. Term and Renewal. The term of this Agreement for COMPANY to provide the Service shall be for a period of five (5) years commencing upon July 25, 1988. During the initial two years of the term hereof, all additional participating stores shall be subject to the same terms and conditions, including fees, as the initial 50 locations. The expiration of this Agreement as to such additional participating stores shall coincide with the termination of this Agreement.

The term may be extended at any time by Subscriber upon written notice to Company within 90 days before the expiration of the initial term or any renewal term hereof for additional renewal terms ("Renewal Term") of at least one year, but not more than five (5) years. The License Fees set forth in Paragraphs 7(a) and 7(c) shall total $199.89 per participating store per Billing Period during the Renewal Term. The Company's share of advertising revenues and usage charges for data service and teleconferencing services shall remain the same as during the initial term. The foregoing service fees shall be effective for the Renewal Term only if:

a. the Company continues to use substantially the same equipment as installed for the initial terms (Subscriber shall have the right to require usage of the same equipment); and,

b. the Subscriber maintains a minimum of 50 stores on the Service; and,

c. the Company's satellite delivery costs (transponder and up link services) incurred during the fifth year of this Service Agreement do not increase more than 10% for the first year of the Renewal Term.

In the event Subscriber requests Company to install satellite equipment at retail locations in addition to those designated on Exhibit "A" and there would be less than 36 months remaining in the term of the Agreement, all such locations shall be subject to the following provisions upon termination of the Service Agreement:

a. If Company is able to relocate such equipment to another Company client, Subscriber shall pay Company $600.00 to cover such costs of relocation and Subscriber shall be under no further obligation regarding such equipment.

b. If Company is not able to relocate such equipment, Subscriber shall continue to pay Company $100.00 per Billing Period per each such store until such store shall have been installed a minimum period of 36 months.

18. Service Use Restrictions. The Service is intended for the private use of Subscriber exclusively for the services described herein. Subscriber hereby stipulates that it shall not use the Service to displace a live orchestra, live entertainers, nor shall Subscriber transmit any program nor use the Service outside or inside the participating premises without Company's written consent. Subscriber will select up to three different formats of background music to be designated for each site to be broadcast over the store systems. Formats may include either foreground or background music. Formats and song selections must be among those available to Company pursuant to its agreements with ASCAP and BMI through their authorized

representatives or licensees.

19. Maintenance. Subscriber agrees to promptly notify Company by collect call and/or 800 call to Company's main office if Company's system fails to work properly. Company will provide maintenance of the system within forty-eight hours after notification. The parties agree that only repairmen who have been authorized by Company shall be allowed to perform maintenance on Company's equipment. Subscriber shall grant free access to Company or persons designated by it for the purpose of testing, inspecting, maintaining or replacing Company's equipment. Company shall not be responsible for consequential damages to Subscriber incurred as a result of the interruption or failure of Company's equipment or Service.

20. Interruption of Service. In the event Service is not furnished by Company to Subscriber because of any reason beyond the reasonable control of Company, including but not limited to strike, mechanical failure, the elements, acts of God, governmental rulings or regulations, emergency or other causes in the public interest, such interruption of Service shall not constitute a breach of this Agreement. However, Company agrees that if Service is not furnished by it to Subscriber for forty-eight or more consecutive hours after Subscriber has given Company notice of the interruption in the manner described in Paragraph 19, not including Sundays or legal holidays, at any participating store, Company will credit Subscriber's account with an amount equal to one twenty-eighth of the Billing Period License Fee for each store at which service has been interrupted for each consecutive twenty-four hour period during which the interruption continues. That credit shall not be given if interruption results solely from negligence or other fault of Subscriber or from material breach by Subscriber of this Agreement.

In addition, if any store system has a Service interruption of [illegible] consecutive days for any reason whatsoever (so long as such interruptions of Service do not result solely from the negligence or other fault of Subscriber or from material breach by Subscriber of this Agreement), and if Company has received notice of each such service interruption in the manner described in Paragraph 19, then Subscriber may, at its sole election, terminate this Agreement as to each such location sixty days following written notice to the Company of its intent to terminate.

21. Advertising Schedule Submission and Content Approval. Subscriber shall submit on a weekly basis copies or summaries of all advertising contracts. Subscriber shall also submit a weekly advertising schedule to Company indicating each product or service and product information it intends to advertise and it shall submit that schedule to Company at least fourteen days prior to "Air Date". "Air Date" shall mean the date and time the audio announcement or jingle is first aired. Based on the information received, Company shall upon Subscribers request produce the required audio commercial advertisements pursuant to its production protocol. If requested to do

so by Subscriber, Company shall allow Subscriber to pre-approve copy content of audio announcements prior to their scheduled broadcast. Either Subscriber or Company may refuse to produce or air any advertisements which are obscene, offensive, deceptive, in violation of any state of federal law or regulation, contrary to public morality or otherwise incompatible with their respective business interests. If Company fails to produce and broadcast any of the audio advertisements which are timely submitted to it by Subscriber, Company shall pay Subscriber an amount equal to any actual payments made by Subscriber to its advertisers as a result of the failure to air the audio advertisements.

22. Sale, Transfer or Closure of Stores.

a. Should Subscriber sell or transfer all or substantially all of its business (at least 20 stores) to a third party, this Agreement shall be binding upon and inure to the benefit of that purchaser or transferee.

b. If Subscriber should sell or close a participating store for seven or more consecutive days, it may offer to transfer Company's equipment from that store to another of its stores. If Company accepts the relocation offer, it shall transfer its equipment to the new location within thirty days after the date of its written acceptance of that offer.

If Subscriber and Company agree to move equipment to a new site, Subscriber shall pay Company the sum of $500 to cover moving costs and labor and installation costs if the equipment is moved to another store within the same division. If the equipment is relocated to a store in a different Subscriber division, Subscriber shall pay Company the sum of $600 to cover those costs.

If Subscriber makes a relocation offer, any and all obligations of Subscriber to Company hereunder shall terminate on the thirtieth day after that offer is made unless Company has by then notified Subscriber in writing of its election to accept that relocation offer.

If Subscriber does not offer to allow Company to relocate its equipment to another Subscriber store, Subscriber shall remain liable to pay a reduced License Fee of $100.00 per Billing Period to Company (rather than the $200 specified in Paragraph 7) for the closed or sold store for the remaining initial term or applicable renewal term of this Agreement.

c. Company shall use its best efforts to attempt the sale to or use by a third party of the equipment in any participating store which is sold or closed. When and

if Company does sell or transfer that equipment to a third party, Subscriber shall have no further obligation to make any payments to Company on and after the date that equipment is sold or transferred, and this Agreement shall terminate on that date as to the affected store.

23. Relationship of Parties. Company's relationship to Subscriber shall be that of an independent contractor and shall not be that of partner, joint venturer, agent or any other relationship. Company is and shall remain solely responsible for any salaries and benefits due to its employees or agents and shall comply throughout the initial and any renewal terms of this Agreement with all applicable federal, state and local laws governing the employment of its own employees, including but not limited to applicable workers' compensation and unemployment compensation laws.

24. Grounds for Termination by Subscriber. Upon the occurrence of any of the events listed below, Subscriber may, at its sole election, terminate this Agreement as to one or more participating stores sixty days after delivery of written notice of intent to terminate to Company:

a. Failure by Company to perform its obligations hereunder or its breach of any provision of this Agreement and failure to cure such breach within the said sixty day period.

b. The assignment by Company to a third party of any of its rights or obligations hereunder, unless Company has first obtained Subscriber's prior written consent to that assignment which consent may not be unreasonably withheld.

c. The insolvency, bankruptcy or reorganization of Company or the assignment of all or substantially all of its assets for the benefit of its creditors.

d. A judgment or other final determination by a court of competent jurisdiction that Company has violated or failed to comply with any federal, state or local law, regulation or ordinance applicable to the Service supplied by Company hereunder, and such violation has not been cured within 30 days following such final determination.

25. Integration Clause. All representations and promises of every kind are merged into this Agreement, which constitutes the entire and only agreement between Subscriber and Company. No representations or guarantees have been made by any person on behalf of Subscriber or Company which are not herein expressed. No modification or failure to enforce any of the provisions hereof shall be valid or deemed a waiver

26. Governing Law. This Agreement shall be governed by the substantive and procedural laws of the State of California.

27. Notice. Any notices which may be sent or which are required to be sent pursuant to this Agreement shall be deemed effective three (3) days after deposit in the U.S. mail, first class postage, pre-paid. Such notices shall be sent to the parties at the following addresses, or at such other addresses as shall be furnished to the other party in writing during the term or any renewal of this Agreement:

The Company:

Broadcast International
7050 Union Park Center
Suite 650
Midvale, Utah 84047
Attention: Reed L. Benson, Corporate Counsel

Subscriber:

Save Mart Supermarkets
1800 Standiford Avenue
P.O. Box 4278
Modesto, California 95352-4278
Attention: President

28. Authority of Parties. Each of the undersigned represents that he has read the terms and conditions of this Agreement, that he agrees to be bound by them, and that he has actual authority to execute this Agreement.

29. Confidentiality. The parties agree that all information of either party which may be disclosed to the other related to financial, operational, managerial or other facets of the business shall remain confidential and not be disclosed to any other person, firm, or entity.

APPENDIX D

HEARING EXCERPTS

HEARING EXCERPTS

1. Hearing Transcript pg. 111, lines 2 -to 10. Testimony of John Lasater, Manager of Save Mart store systems.

   [Mr. Snelson]. Does Save Mart have any claim to ownership of the equipment?

   [Mr. Lasater]. No.

   [Mr. Snelson]. Do you lease the equipment?

   [Mr. Lasater]. No.

   [Mr. Snelson]. Do you rent the equipment?

   [Mr. Lasater]. I don't know. That's a hard one to answer. It would be depending upon the terminology of the contract. I don't think it's actually stated as a rental. It's services. (Emphasis added).

2. Hearing Transcript pg. 126, lines 8 -to 11. Testimony of Reese Davis, Corporate Treasurer of Broadcast, addressing the issue of why Broadcast paid use tax, not sales tax to jurisdictions outside of Utah.

   [Mr. Grimshaw]. Why did you concluded that a sale did not occur here?

   [Mr. Davis]. In a commercial sense a sale had not occurred because we had not specifically transferred title to our client.

3. Hearing Transcript pg. 150, lines 15 -to 20. Testimony of Reese Davis concerning the letter mailed by Broadcast to 800 taxing jurisdictions.

   [Mr. Grimshaw]. "And is not sold or leased." Why did you say that?

   [Mr. Davis]. Because in the commercial sense we had not sold the property, i.e. conveyed title, nor had we entered into a commercial lease agreement where elements such as residual value, bargain purchase, et cetera, would be an element of our arrangement.

4. Hearing Transcript pg. 169, lines 9 -to 11, pg. 170, lines 4 -to 22. Testimony of Mr. Davis of why Broadcast represented to 800 taxing jurisdictions that it did not sale or lease its equipment to the subscribers.

   [Mr. Snelson]. Now, that interests me. Why is it that you represent to these taxing jurisdictions that you're not selling or leasing or renting this equipment?

[Mr. Davis]. What I wanted to say is there was no outright sale in that particular taxing jurisdiction of our equipment, meaning a conveyance of title, that would subject that particular transaction to a sales tax on bulk. Secondly, we did not want to convey that we were leasing the equipment, wherein if you leased the equipment, to my understanding and experience, you would be required or you would be subjecting your clientele to list on their property tax declaration within that jurisdiction that they, in fact, were leasing equipment when that was not the case, and they would have to list the name of the lessor, the monthly payments and so on that they were making, which was not the case.

We were not leasing the equipment from that standpoint in a commercial sense because there was no residual, no bargain purchase, no particular fee element that was involved in determining a leased rate. We did not -- we applied the same criteria to rental because we were not renting the equipment to them either. We withstood the capital responsibility for the equipment in its installation.

5. Hearing Transcript pg. 178, lines 11 -to 12. Testimony of Reese Davis concerning the letter mailed by Broadcast to 800 taxing jurisdictions.

[Mr. Davis]. That is, in a commercial sense we do not sell the equipment.

6. Hearing Transcript pg. 179, lines 7 -to 9.

[Mr. Snelson]. What about lease?
[Mr. Davis]. There is no lease.
[Mr. Snelson]. And no rental?
[Mr. Davis]. No rental.

7. Hearing Transcript pg. 204, lines 22 -to 25; pg. 205, lines 1 -to 7. Testimony of Steven Webb, Assistant Controller of Broadcast, concerning Broadcast's transactions with the subscribers.

[Mr. Snelson]. What you meant was that it wasn't a sale in regular course of business; is that correct?

[Mr. Webb]. What I meant was we were not selling them the equipment in the normal -- I believe the word commercial has been used, in the commercial sense where title would pass.

[Mr. Snelson]. No sale. Is it in the regular course of your business to sell equipment?

[Mr. Webb]. As far as I understand it, no.

8. Hearing Transcript pg. 232, lines 15 -to 17. Testimony of Steven Webb concerning the language in the service agreements stating that the agreements were not to be treated in any manner a sale or lease of equipment.

[Mr. Webb]. We do not intend that this transfer of property that we do to these subscribers be deemed a sale of property, no.

9. Hearing Transcript pg. 234, lines 12 -to 14.

[Mr. Webb]. In the commercial sense, no it probably not a lease. It's not intended to be a lease. It's not designated as such.

10. Hearing Transcript pg. 245, lines 1 -to 16. Testimony of Steven Webb on why there is no sales price in the service arrangements.

[Mr. Webb]. If we were going to sell equipment we would have a sale prices here, but we have never sold equipment. We have never transferred title, never transferred ownership to any equipment so we don't need a sales prices on any of our equipment.

[Mr. Snelson]. Its not a sale in any manner?

[Mr. Webb]. Its not a sale of equipment to our subscribers, no?

[Mr. Snelson]. What a about a lease? Is this a lease of the equipment to the subscribers.

[Mr. Webb]. Under the definition that Mr. Miller read to me, yes. Is it a commercial lease, is it designated as a lease agreement, no. It's designated as a service agreement under which we transfer possession, use and operation or the equipment to our subscribers.

11. Hearing Transcript pg. 245, line 25, pg. 246, lines 1 -to 8. Testimony of Steven Webb on whether or not the service agreements fees could even be taxed as a lease.

[Mr. Snelson]. So there is no way this could ever be taxed as a lease?

[Mr. Webb]. Not unless we constructed it as a lease, no.

[Mr. Snelson]. And you haven't constructed it as a lease?

[Mr. Webb]. No.

[Mr. Snelson]. Not a sale?

[Mr. Webb]. No.

[Mr. Snelson]. Not a lease?

[Mr. Webb]. No.

APPENDIX E

LETTER

Broadcast International, Inc.
7050 Union Park Center, Suite 650
Midvale, Utah 84047
(801) 562-2252

April 18, 1990

Delaware Division of Taxation
Attn: Mark Udinski
820 French Street
Wilmington, DE 19801

Re: REFUND ON SALES/USE TAX LICENSE FEE

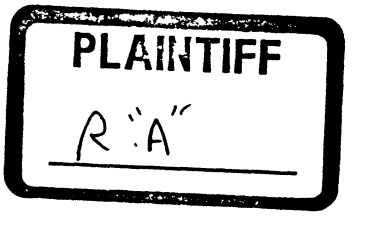
Broadcast International, Inc. is a satellite communications company which broadcasts in-store music and advertising to retail stores nationwide including your state. We purchase satellite receiving equipment and install it on the individual stores. **All equipment installed by Broadcast International remains our property and is not sold, leased or rented to the retail stores** to which we provide our service. We have no employees or an office located in your state. All business is conducted here in Midvale, Utah. We are not considered contractors or sub-contractors, since Broadcast International employs and pays our own people to install the equipment.

We mailed to you check #7008, dated January 15, 1990 for $50.00, your fee for a sales/use tax permit. A few weeks later we discovered that your state requires use tax returns remitted on personal property that is leased or rented. Since we are not leasing our equipment, we are at this time requesting a refund of the $50.00.

If you should have any questions. or need further information, please feel free to call me on our toll free number, 1-800-722-0400.

Sincerely,

Paula Barker
Property Coordinator
Broadcast International, Inc.



APPENDIX F

SALES TAX APPLICATION

COMBINED APPLICATION

WITHHOLDING NUMBER

LIABILITY DATE

Please enter your Federal Employer's Identification Number

8 7 0 4 2 9 9 7 1

CHECK ONE

- [x] Sales Tax License and/or Use Tax Registration
- [ ] Employer's Withholding Tax Identification No
- [ ] Both of the above

SALES & USE TAX NUMBER D52955

DATE ISSUED 8/31/88

LOCAL CODE

INDUSTRIAL CODE

1 NAME OF OWNER OR CORPORATION BROADCAST INTERNATIONAL, INC.

2 TRADE NAME IF ANY (DBA) n/a

3 ADDRESS OF BUSINESS 7050 Union Park Center Suite 650 (STREET NUMBER) 801-562-2252 (BUSINESS PHONE NO)

Midvale (TOWN OR POST OFFICE) Salt Lake (COUNTY) Utah (STATE) 84047 (ZIP CODE)

4 Mailing address if different from above same

5 Describe specifically the primary nature of your business (what are you selling, wholesaling, manufacturing, leasing or servicing?)
Satellite Communications Services

6 Check any of the following that may apply to your business

- [ ] Retail sales delivered from a fixed place of business in Utah
- [ ] Retail sales delivered from an out-of-state location direct to a customer in Utah
- [ ] Retail sales made through vending machines
- [x] Goods or services purchased from out-of state for use storage or other consumption in Utah
- [ ] Other explain

7 Is your business located within the corporate limits of an incorporated city or town in Utah? yes If yes name of city or town Midvale

8 How many places of business do you operate in Utah? One (1) (If more than one, you will be required to file a consolidated return. Show name and address of each additional business location on reverse side hereof.)

9 Date you started or will start collecting sales tax n/a

10 What do you estimate your quarterly taxable sales subject to ~~sales~~ use tax will be? (check one)

- [x] 2000 or less
- [ ] 2000 to 5000
- [ ] 5000 to 10,000
- [ ] 10 000 to 100 000
- [ ] over 100 000

If less than $2000 do you wish to file your ~~sales~~ use tax returns annually? [ ] Yes [x] No

11 Have you been previously issued a sales tax license or withholding tax identification number in Utah? [x] Yes [ ] No If yes give business names locations and dates Broadcast International, Inc. withholding number

withholding number Y45364 sales tax license number

12 What was the name of previous owner, if any? n/a

13 Is your state withholding amount expected to be $100 or more per month? [ ] Yes [ ] No n/a

14 Show date of first Utah wages paid which were subject to Federal withholding

15 TYPE OF OWNERSHIP.

- [ ] Individual proprietorship
- [ ] Partnership
- [x] Corporation
  - State in which incorporated Utah
  - Date of incorporation 7/16/85
  - Utah Secretary of State Authorization Number 115990

---List names social security numbers & addresses of owners, officers or partners on reverse side---

16 A Will this business sell cigarettes or cigarette papers? no

B Will this business sell special fuels? (Diesel, propane etc.) no

C Will you make charges for tourist home, hotel, motel, or trailer court accommodation no (If yes see instruction sheet transient room tax)

I HEREBY CERTIFY THAT THE STATEMENTS HEREIN ARE TRUE AND CORRECT

By [signature] Title Corporate Controller

Date August 30, 1988

IMPORTANT: MUST BE SIGNED BY OWNER, PARTNER OR CORPORATE OFFICER
PLEASE RETURN ALL COPIES OF APPLICATION TO STATE TAX COMMISSION

APPENDIX G

SALES TAX RETURN

[redacted]

Sales and Use Tax Return

For state and local sales and use taxes single place of business

UTAH FORM TC-71

Name and address (please correct any errors)	Tax Commission records indicate that this business made taxable sales from the city or unincorporated county of	Tax Period
BROADCAST INTERNATIONAL INC		JAN-MAR 1989
		Return due on or before
D52955 BROADCAST INTERNATIONAL 7050 UNION PARK CENTE 650 MIDVALE UT 84047	MIDVALE 18093	MAY 01, 1989
		Account Number
		D52955
	Call (801) 530-4848 immediately if this information is incorrect.	▲ Use this number ▲ for all references

Please check here if this is an amended return. ☐ Be sure the tax period shown above is the period amended.

IMPORTANT NOTICE
Please make appropriate corrections to this return when there has been a change in ownership, a business has been discontinued, a new business location has been added, or a current business location has changed.

		Column I - Sales Tax Goods delivered and services performed from one place of business INSIDE UTAH	Column II - Use Tax Goods delivered directly from OUTSIDE UTAH	Column III - Total (add Columns I and II)
1 Total sales (including power and fuel sales)	1	$		
2. Exempt sales included in line 1	2			
3. Taxable sales (line 1 less line 2)	3			
4. Goods purchased tax free and used by you	4		$ 4,146.50	
5 Total taxable amounts (add lines 3 and 4)	5		4,146.50	
6. Adjustments (attach explanation showing figures)	6			
7. Net taxable amounts (line 5 plus or minus line 6)	7		4,146.50	
8. Total state and local tax rate	8	6.25000 %	6.25000 %	
9. Total state and local tax due (line 7 multiplied by line 8)	9	$	$ 259.16	$ 259.16
10. Tax credit on power, gas and fuels sold for residential use included in line 1 (see instructions)		Sales amount $	X .03 =	
11 Net tax due (line 9 less line 10). PAY THIS AMOUNT WITH RETURN BY DUE DATE SHOWN ABOVE				$ 259.16
12. Owners of new or expanding manufacturing facilities - enter the total amount of purchases or leases of machinery and equipment which qualify for exemption (see instruction 12)			$	THIS RETURN MUST BE FILED EVEN THOUGH NO TAX IS DUE
13. Persons who purchased or leased certain items or services for use in a qualifying Utah mineral facility expansion or modernization project - enter the total amounts purchased or leased which qualify for exemption (see instruction 13).			$	
14. Vendors making sales to farmers and agricultural producers - enter total sales of farm machinery, equipment and supplies which qualify for exemption (see instruction 14)			$	

RECD USTC IS
AUG 28 1990

Send return and payment to: Utah State Tax Commission, 160 East Third South Salt Lake City UT 84134-0400	OFFICIAL USE ONLY	ICR				UFA		APP	

Under penalty of perjury, I certify that this return, including any accompanying schedules and identification of the business location, has been examined by me and to the best of my knowledge is a true, correct and complete return. Broadcast International by:

▶ [signature] Your signature — Corporate Controller Title — 8/6/90 Date

Return original, keep duplicate

EXHIBIT
RC