

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)	
)	DOCKET NO. 16648
[Redacted])	
Petitioner.)	DECISION
)	
)	

On April 23, 2002, the Construction Audit Group of the [Redacted] State Tax Commission (Commission) issued a Notice of Deficiency Determination to [Redacted] (taxpayer). The Notice proposed additional use tax, penalty, and interest in the total amount of \$39,533 for the periods January 1, 2000 through December 31, 2001. The taxpayer filed a timely appeal and petition for redetermination on June 24, 2002. On July 10, 2002, the Tax Policy Section of the Commission sent a letter to the taxpayer advising the company of its hearing rights. The taxpayer did not respond, and the Commission hereby issues its decision based on information in the audit file.

DISCUSSION OF FACTS AND CONCLUSIONS

FACTS

The taxpayer is a real property contractor based in [Redacted] who contracted with the federal government to, “provide all labor, material, equipment and transportation necessary for the complete construction and equipping for (sic) ‘[Redacted]’ (quoted from the auditor’s protest summary, in reference to the taxpayer’s [Redacted]) The auditor held as taxable all purchases of materials brought to the construction site on which no sales or use tax had been paid. The taxpayer timely protested the audit results and has made no payment on the deficiency.

In its protest letter of June 24, 2002 the taxpayer states:

All materials and services purchased by [Redacted] in Idaho were for ...a federal contract. [Redacted] is a tax-exempt entity. As stated in the FAR (*Federal Acquisition Regulation*) clause 52.229 (incorporated in contract [Redacted]), for an exempt entity, the contract price will exclude all state and local taxes on services or

supplies furnished under the contract. Therefore, [Redacted] is protesting the taxes, penalties and interest assessed per your letter. (Parenthetical information added).

RESPONSE AND CONCLUSION

The basis for the audit finding is Idaho Code § 63-3609. **Retail sale -- Sale at retail**, quoted below in pertinent part:

“(a) All persons engaged in constructing, altering, repairing or improving real estate, are consumers of the material used by them; all sales to or use by such persons of tangible personal property are taxable whether or not such persons intend resale of the improved property.”

Further basis is found in the Sales Tax Administrative Rule 35.01.02.012.10.c, **Contractors Improving Real Property**, quoted below in pertinent part:

“A contractor who buys tangible goods cannot avoid tax just because the goods will be built in to a structure which will belong to, or be used by an exempt entity. ... the contractor or subcontractor is the user or consumer of the material and its use, while it is in his possession and subject to his labor, is taxable.”

There is no evidence to suggest that the taxpayer is aware of the Idaho Code and Rules that apply to real property contractors’ obligations for sales and use tax. The taxpayer relies on the language of its contract with the federal government and the status of the construction site, [Redacted], as a tax-exempt entity.

The taxpayer faithfully quotes FAR 52.229-1, State and Local Taxes, which begins,

“...the contract price excludes all State and local taxes levied on or measured by the contract or sales price of the services or completed supplies furnished under this contract.”

However, the taxpayer’s protest omits the very next sentence in the contract regulation clause. Again, quoting FAR 52.229-1, State and Local Taxes,

“The Contractor shall state separately on its invoices taxes excluded

from the contract price, and the Government agrees either to pay the amount of the taxes to the Contractor or provide evidence necessary to sustain an exemption.”

At this point the taxpayer should have been encouraged to research the FAR, contact the Commission, or communicate with the federal agency in charge of the contract to determine if an exemption could be sustained. Researching the FAR, the taxpayer would have found the following from FAR 29.303 **Application of State and Local Taxes to Government Contractors and Subcontractors** which reads,

“ (a) Prime contractors and subcontractors shall not normally be designated as agents of the Government for the purpose of claiming immunity from State or local sales or use taxes.....

(b) When purchases are not made by the Government itself, but by a prime contractor or by a subcontractor under a prime contract, the right to an exemption of the transaction from a sales or use tax may not rest on the Government’s immunity from direct taxation by States and localities. It may rest instead on provisions of the particular State or local law involved, or, in some cases, **the transaction may not in fact be expressly exempt from the tax.**” (Emphasis added).

Therefore, the Commission finds the assertion of tax by the auditor to be appropriate. The Commission also finds the addition of interest and penalty to the taxpayer’s liability appropriate per Idaho Code §§ 63-3045 and 63-3046.

WHEREFORE, the Notice of Deficiency Determination dated April 23, 2002, directed to [Redacted] is hereby MODIFIED, and as so modified is APPROVED, AFFIRMED AND MADE FINAL.

THEREFORE, IT IS HEREBY ORDERED and THIS DOES ORDER that taxpayer pay the following tax, penalty and interest, calculated to December 31, 2002, at a daily rate of \$6.62.

<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
\$34,503	\$3,450	\$2,808	\$40,761

An explanation of the taxpayer's right to appeal this decision is enclosed with this decision.

DATED this ____ day of _____, 2002.

IDAHO STATE TAX COMMISSION

COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____, 2002, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

[Redacted]