

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)
[Redacted]) DOCKET NO. 17339
Petitioner.) DECISION
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On March 17, 2003 the staff of the Sales, Use and Miscellaneous Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination to [Redacted] (taxpayer), proposing sales tax, penalty, and interest for the period January 1, 2001 through December 31, 2002 in the total amount of \$26,203.

On May 16, 2003, the taxpayer filed a timely appeal and petition for redetermination. An informal hearing was held on December 5, 2003. The taxpayer’s attorney and officials from [Redacted] represented the taxpayer. The taxpayer is the contractor who oversaw the construction and installation of a large boiler at [Redacted]Idaho. [Redacted]has agreed to reimburse the taxpayer for any sales or use tax it owes from transactions relating to the boiler project. The Commission, having reviewed the file, hereby issues its decision.

During the audit period, [Redacted] purchased a large boiler from an out of state vendor. The vendor had the boiler delivered to [Redacted]Idaho. As stated before, the taxpayer oversaw the construction and installation of the boiler and the necessary structures relating to the boiler project. The boiler provides steam to various buildings on the [Redacted].

Because it is a nonprofit educational institution, sales to and purchases by [Redacted] are exempt from sales and use tax by Idaho Code § 63-3622O(1). The auditor imposed use tax on the taxpayer’s use of the boiler.

As in most states, building contractors in Idaho are defined as the consumers of the materials they install:

63-3609. Retail sale -- Sale at retail. -- The terms "retail sale" or "sale at retail" means a sale for any purpose other than resale in the regular course of business or lease or rental of property in the regular course of business where such rental or lease is taxable under section 63-3612(h), Idaho Code.

(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.

(b) For the purpose of this chapter, the sale or purchase of personal property incidental to the sale of real property or used mobile homes is deemed a sale of real property.

Idaho Code § 63-3615 defines "use" as:

63-3615.Storage -- Use. -- (a) The term "storage" includes any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer.

(b) *The term "use" includes the exercise of any right or power over tangible personal property incident to the ownership or the leasing of that property or the exercise of any right or power over tangible personal property by any person in the performance of a contract, or to fulfill contract or subcontract obligations, whether the title of such property be in the subcontractor, contractor, contractee, subcontractee, or any other person, or whether the titleholder of such property would be subject to the sales or use tax, unless such property would be exempt to the titleholder under section 63-3622D, Idaho Code, except that the term "use" does not include the sale of that property in the regular course of business.*

(c) "Storage" and "use" do not include the keeping, retaining, or exercising of any right or power over tangible personal property for the purpose of subsequently transporting it outside the state for use thereafter solely outside the state, or for the purpose of being processed, fabricated, or manufactured into, attached to, or incorporated into other tangible personal property to be transported outside the state, and thereafter used solely outside the state. (Emphasis added.)

Idaho Code § 63-3621 imposes a use tax on the use of tangible personal property in Idaho. Pursuant to Idaho Code § 63-3615(b), a contractor may use materials that belong to another party, as is the case here.

The taxpayer first argues that the incidence of the tax is actually on [Redacted], and therefore imposing the tax would be contrary to the exemption provided by Idaho Code § 63-3622O(1). That statute exempts sales to and purchases by nonprofit educational institutions; however, subsection (4) of that statute states:

The exemptions granted by subsection (1) of this section do not include the use of tangible personal property by a contractor used to improve real property of an exempt entity when such use is within the definition provided by section 63-3615(b), Idaho Code, whether the use tax liability is included in a contract total or stated separately in a contract. (Emphasis added.)

The legislature, therefore, clearly intended the use of building materials by a contractor to be taxable even if the materials are used to improve the real property of an exempt entity.

The taxpayer also presented an argument that hinges on the definition of “materials.” As noted previously, contractors are defined as the consumers of the “materials” used by them. The boiler was shipped to Idaho in one piece and is a fixture to real estate. The taxpayer states that “materials” are the items such as pipe, wire, and lumber that the contractor must cut to the right size and install. After installation, the value of the improved realty is greater than the value of the materials and so the contractor adds value to the materials. Because the boiler required installation only and did not require assembly by the contractor, the taxpayer reasons that it did not exercise sufficient use or control over the boiler to fall within the definition provided by I.C. § 63-3615(b).

The Idaho Supreme Court has addressed similar arguments on two occasions. In both cases, the taxpayers were companies that caused printed materials to be shipped to Idaho from

out of state. *K Mart Corp. v. Idaho State Tax Commission*, 111 Idaho 719, 727 P.2d 1147 (1986), and *American Express Travel Related Services v. Idaho State Tax Commission*, 128 Idaho 902, 920 P.2d 921 (1996). The taxpayer did not take physical possession of the materials in either case. The court ruled that both taxpayers exercised sufficient control over the materials to constitute use as defined by I.C. § 63-3615(b). The Court also noted in *American Express* that: The legislative history of I.C. § 63-3615(b) indicates that "use" is to be defined "as broadly as possible." House Revenue and Taxation Committee Report in Support of House Bill 222, p. 18. *American Express*, 128 Idaho at 904.

Finally, the taxpayer has argued that, if it must pay use tax on the use of the boiler, it would also owe use tax on its use of refrigerators and washing machines installed in buildings used for student housing. Since these items retain the characteristics of tangible personal property, those transactions are retail sales to the university and are intended to be exempt pursuant to Idaho Code § 63-3622O(1)(a).

As stated previously, Idaho Code § 63-3622O(4) states that the use of tangible personal property by a contractor is taxable, even if the property is used to improve the real property of an exempt entity. The statute does not distinguish between materials and fixtures. The taxpayer does not dispute that the boiler became affixed to real estate. The Commission therefore finds that the taxpayer's use of the boiler is taxable.

Finally, the Commission notes that the Notice of Deficiency Determination provided for a 5% negligence penalty. The Commission feels that the imposition of a penalty is inappropriate in this case. The Notice of Deficiency will therefore be modified to reflect this. Interest is calculated through February 29, 2004.

WHEREFORE, the Notice of Deficiency Determination dated March 17, 2003, is modified in accordance with the provisions of this decision, and as so modified, is APPROVED, AFFIRMED and MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the petitioner pay the following tax and interest:

<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$22,703	\$3,287	\$25,990

DEMAND for immediate payment is hereby made and given.

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

DATED this ____ day of _____, 2004.

IDAHO STATE TAX COMMISSION

COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____, 2004, 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]

[REDACTED]Receipt No.

[REDACTED]

[Redacted]
