

**BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO**

In the Matter of the Protest of	)	
	)	DOCKET NO. 17847
[REDACTED],	)	
	)	DECISION
Petitioner.	)	
_____	)	

On May 19, 2003, the Managed Audit Section of the Sales Tax Audit Bureau of the Idaho State Tax Commission (Tax Commission) issued a Notice of Deficiency Determination to [Redacted] (taxpayer), proposing additional sales tax, penalty, and interest for the period of July 1, 2000, through June 30, 2003, in the total amount of \$40,727. The taxpayer filed a timely protest and petition for redetermination and requested an informal hearing before the Tax Commission. The hearing was held on June 7, 2004. The Tax Commission, having reviewed the file and the arguments presented by the taxpayer, hereby issues its decision.

The taxpayer owns coin operated video games and other amusement devices that it places in retail stores such as [Redacted]. The taxpayer has consistently owned and operated machines in Idaho that do not have amusement device permit stickers affixed, as required by Idaho Code § 63-3623B:

- 63-3623B. AMUSEMENT DEVICES.** -- (a) For purposes of this section the term "amusement device" shall mean all coin, currency, or token operated machines and devices which are used for amusement including, but not limited to, game machines, pool tables, juke boxes, electronic games and similar devices.
- (b) In lieu of the imposition of sales tax upon the use of the amusement device, the owner or lessee or person having the right to impose a charge for use of the amusement device must pay an annual permit fee of thirty-five dollars (\$35.00) for each such device.

(c) Upon payment of the permit fees, the state tax commission shall issue the permit(s) to the owner or lessee or person having the right to impose a charge for use of the amusement device. Such permit fee may be increased in a proportionate amount by the commission if the state sales tax rate increases.

(d) All applications for a permit renewal must be made to the state tax commission on or before July 1 of each year. Such application shall contain the same information required on an application to secure a seller's permit under this chapter and shall be accompanied by the annual permit fee due for each device.

(e) *The state tax commission shall adopt a uniform system of providing, affixing and displaying official decals, labels or other official indicia evidencing that the owner, lessee, or person having the right to impose a charge for the use of the amusement device has paid the annual permit fee for such amusement device. No person subject to a permit fee under this chapter may impose a charge or collect any consideration for use of such amusement device unless such official decal, label, or other official indicia, as required herein, is affixed to such amusement device.*

(f) In addition to the penalties set forth above and in section 63-3634, Idaho Code, the state tax commission may assess the following penalties:

(1) If any owner, lessee, or person having the right to impose a charge for the use of any coin, currency or token operated amusement device in this state *shall violate any provision of this section or any rule promulgated under this section, the commission may assess penalties, of fifty dollars (\$50.00) for each device for failure to pay timely permit sticker fees.*

(2) A person who knowingly secures or attempts to secure an amusement device permit sticker under this section by fraud, misrepresentation, or subterfuge or uses any permit issued under this section in a fraudulent manner shall be subject to a penalty of up to twenty-five thousand dollars (\$25,000).

(g) The state tax commission shall impose the penalties provided in this section by a notice of deficiency determination in the manner provided in section 63-3629, Idaho Code, which shall be subject to review as provided in section 63-3631, Idaho Code.

(h) The commission may revoke all permits of any person who operates any amusement device without complying with the provisions of this section. Notice of revocation shall be given in the manner provided for deficiencies in taxes in section 63-3629, Idaho Code, which shall be subject to review as provided in section 63-3631, Idaho Code.

(i) Permits issued under this section are transferable to another person only after written notice of the transfer is given to the state tax commission. (Emphasis added.)

Idaho sales tax rule 109.02.b (IDAPA 35.01.02.109.02.b) states that a separate amusement device permit is required for every device in operation. When the owner of the machine purchases a permit, he is given a sticker that must be affixed near the currency slot of the machine in such a manner that it is easily visible. (At all times during the audit period, the amusement device permit fee was \$35 per machine. As of July 1, 2004, rule 109 was amended to provide that the permit fee would go up or down by an amount proportional to any change in the sales tax rate. The current permit fee is therefore \$42.)

The taxpayer objected to the imposition of the penalty and the use of an estimate for the first year of the audit period.

It should be noted that the audit staff imposed both a license fee and a penalty for each device the taxpayer operated in Idaho with no stickers. In some cases, the taxpayer purchased stickers but did not affix them. The Commission will adjust the amount of deficiency to reflect that the \$35 permit fee will be imposed only on the number of machines in operation that exceeded the amount of permit stickers purchased.

The taxpayer does not dispute that it has not purchased permit stickers for all of its machines and that it has operated machines in Idaho with no permit stickers. This has been an ongoing problem with this taxpayer and the Tax Commission continues to receive calls concerning the taxpayer's machines. In fact the taxpayer continues to operate machines in Idaho with no permit stickers to this day. The legislature has reviewed the penalty provision of this statute twice: first, when the bill creating the permit system was introduced and again in 1997. The \$50 penalty has remained in place since that time and the legislative intent has always been

for the penalty to be higher than the permit fee. For these reasons, the penalty in this case is appropriate. Since the \$50 penalty is imposed for violating any of the provisions of the statute or rules, it will be imposed for each machine the taxpayer has operated in Idaho without a permit sticker attached.

Finally, the taxpayer has objected to the use of an estimate to calculate the deficiency for the fiscal year ending June 30, 2001. The taxpayer was unable to provide any records for its operations in Idaho for this year. The taxpayer did send a spreadsheet showing the locations of 90 machines in Idaho in 2001. This document is not supported by the accounting records. Idaho Code § 63-3624(c) states that every seller must maintain such records, receipts, invoices and other pertinent papers as the State Tax Commission may require. Idaho sales tax administrative rule 111 (IDAPA 35.01.02.111) requires every retailer doing business in Idaho to keep complete and adequate records as may be necessary for the Tax Commission to determine the amount of sales tax for which that person is liable under Title 63, Chapter 36, Idaho Code. In this case, the taxpayer has failed to keep adequate records. A Notice of Deficiency Determination issued by the Idaho State Tax Commission is presumed to be accurate. Parsons v. Idaho State Tax Com'n, 110 Idaho 572 (Ct. App. 1986). The burden of proof is on the taxpayer to show that the Notice of Deficiency Determination is incorrect. Albertson's, Inc. v. State, Dept. of Revenue, 106 Idaho 810 (1984). The taxpayer has failed to meet that burden. Nonetheless, the Tax Commission agrees that a "percentage of error" method should be used to estimate the deficiency rather than the method used by the audit staff, which was based on the average annual growth rate of the company. The "percentage of error" method applies the error rate of the second year of the audit period to the number of permits purchased in the first year. The third year is not representative

of the audit period because the taxpayer purchased more amusement device permit stickers after the start of the audit. The deficiency will be modified accordingly.

WHEREFORE, the Notice of Deficiency Determination dated May 19, 2003, is MODIFIED, and, as so modified, is APPROVED, AFFIRMED, and MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the taxpayer pay the following tax, penalty, and interest (calculated through August 20, 2004):

<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$3,710	\$22,950	\$896	<u>\$27,556</u>

DEMAND for immediate payment of the foregoing amount is hereby made and given.

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

DATED this \_\_\_\_ day of \_\_\_\_\_, 2004.

IDAHO STATE TAX COMMISSION

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COMMISSIONER

**CERTIFICATE OF SERVICE BY MAIL**

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]

[Redacted]