BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of	)	
	)	DOCKET NO. 21065
[Redacted],	)	
	)	DECISION
Petitioner.	)	
	)	

On October 31, 2007, 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 additional use tax and interest totaling $90,317 for the period June 1, 2003, through August 31, 2007. In a letter dated March 31, 2008, the taxpayer filed a timely appeal and petition for redetermination. The petition stated disagreements of fact and law that the taxpayer wished to discuss at a hearing. The Commission held a hearing at the taxpayer's request on June 17, 2008.

For reasons explained below, the Commission hereby issues this decision for an amended amount.

Issue

The taxpayer is a general contractor located in southwest Idaho. The sole issue of this audit is a dispute over transactions between the taxpayer and [Redacted] (herein, the Seller). In a routine sales and use tax audit of the taxpayer, a Bureau auditor noted approximately 200 transactions between the taxpayer and the Seller.

The auditor concluded that, based on available documentation that is later discussed in this decision, the taxpayer bought [Redacted] and did not pay sales tax to the Seller, who is also located in Idaho. The auditor therefore asserted a use tax against the taxpayer on each transaction amount. The taxpayer subsequently protested this assertion.

Applicable Tax Law

In Idaho, a retail sale is defined as an exchange of tangible personal property for consideration (e.g. money) and is taxable unless an exemption applies (Idaho Code §§ 63-3609 and 63-3612). Idaho retailers are required to collect sales tax from buyers (Idaho Code § 63-3619) in the absence of an exemption. However, a buyer's liability for the tax remains if the seller cannot, or fails to, collect the tax. In these instances, the buyer owes a use tax directly to the state. The use tax rate is identical to the sales tax rate (Idaho Code § 63-3621). Every state with a sales tax has a complementary use tax to discourage buyers from sidestepping sales tax by ordering goods by mail or on-line from other states, or buying goods in states with either no tax or a lower tax rate.

Customarily, a taxed sale is documented by an invoice from the seller to the buyer showing a statement of tax separate from the price of the item sold. In fact, the Idaho tax code and an administrative rule are specific in that regard.

> The tax commission may by rule provide that the amount collected by the retailer from the customer in reimbursement of the tax be displayed separately from the list price, the price advertised on the premises, the marked price, or other price on the sales slip or other proof of sale (Idaho Code § 63-3619(e)).
>
> Tax to be Separately Displayed. The amount of tax collected by the retailer must be displayed separately from the list price, marked price, the price advertised in the premises or other price on the sales slip or other proof of sale (IDAPA 35.01.02.068 06).

The auditor concluded that there was no evidence that the taxpayer paid sales tax to the Seller or that it paid use tax to the Tax Commission. Further, there was no exemption from the tax because the taxpayer is a contractor improving real property, and all materials bought or used by it in that pursuit are subject to a sales tax on purchase or a use tax thereafter (Idaho Code § 63-3609(a)).

Findings of Fact

The taxpayer does not dispute that the purchases from the Seller are subject to tax. It believes, however, that the Seller collected the required tax, and that documents exist to prove that contention.

The taxpayer argues in his protest letter dated March 31, 2008, that the seller has paid the tax: "All payments by [the taxpayer] to [the Seller] were made against affidavits from [the Seller] averring that all taxes had been paid." The taxpayer refers to documents entitled, Application for Payment. Within those documents is a section titled, Affidavit of Outstanding Accounts, which states, "We certify that all outstanding claims for labor, insurance….taxes….and any and all other obligations….have been paid in full…"

In the same protest letter, the taxpayer cites Idaho Code § 63-3621(a) in his defense:

> "….liability is not extinguished until the tax has been paid to this state except that a receipt from a retailer maintaining a place of business in this state or engaged in business in this state given to the purchaser is sufficient to relieve the purchaser from further liability for the tax to which the receipt refers."

The taxpayer continues, "The affidavit from [the Seller] as a retailer certainly constitutes a receipt."

The auditor was aware of the Application for Payment documents. He also noted documents entitled "Invoice" in large, block letters and bearing the name of the Seller. No dispute is raised that the latter are not documents provided by the Seller. Information added to these pre-printed forms include invoice numbers, the "Bill To" name of the taxpayer, a "Ship To" building project location, an Item (e.g., subcontract sales), Description (e.g., Progress Billing), Unit Price, Amount, and Invoice Amount (i.e., total amount). The invoices do not mention installation.

Additionally, the auditor found taxpayer forms labeled "Purchase Order" addressed to the Seller, describing fabricated [Redacted]items, showing unit and total purchase price, unit tax, and a lump tax. The latter two fields show $0.00. The Purchase Orders contain the words "tax included" in bold.

Finally, audit evidence included "Standard Subcontract Agreements" on the taxpayer's forms that contain the phrase "Said sum includes all applicable state and local sales and use taxes."

Analysis

The Application for Payment relied upon by the taxpayer is not "a receipt from a retailer" as described in Idaho Code § 63-3621(a). It resembles a progress billing rather than an original document (i.e., receipt) which typically describes the items sold and the price charged. Further, the Application for Payment does not separately state a tax.

Importantly, the Commission learned through questions at the hearing that the Application for Payment is not the Seller's document; it is the taxpayer's. The taxpayer pays its suppliers and sub-contractors through these standardized forms as a way of accounting for its business payables. The taxpayer's Standard Subcontractor Agreement requires its subcontractors (in the present case, a vendor of tangible personal property) to use this form to insure accurate and prompt payment. Thus, the taxpayer does not have "a receipt from a retailer" showing the tax.

The invoices from the Seller lack detailed descriptions of the transactions, but they are the only Seller documents and thus serve as evidence that the Seller did not charge tax. The Commission concludes that these invoices are for retail sales because there is no mention of installation of the materials. The auditor carefully restricted the records' review to those

transactions termed “mtl” (material) by the taxpayer in its Vendor History of open and paid invoices. Thus, he captured only retail sales that required tax collection and ignored other activities, such as non-taxable services or improvements to real property.

The contracts noted above are taxpayer initiated and are not retail sales invoices from the Seller. Audit staff routinely reject contracts as evidence that tax obligations are met because they are not receipts from a seller and they specify what is to be done from the buyer’s perspective, rather than what the seller has done (i.e., consummated a retail sale). They are not accounting records.

The Purchase Orders are equally inadequate to satisfy the taxpayer’s position. Like the contracts mentioned above, they are initiated by the taxpayer, not by the Seller, and they specify what is to happen, not what has transpired. They are unreliable audit evidence for tax purposes.

The auditor reviewed the Seller’s recorded transactions with the taxpayer and confirmed that the Seller did not collect tax from the taxpayer, nor did it remit any tax on the questioned transactions.

Adjustment of the Liability

In the auditor’s review of the Seller’s records for corroborating evidence, he concluded that the Seller paid a sales or use tax on materials it later sold to the taxpayer. Since the Seller paid tax in error on what it eventually resold (the reseller’s exemption was available per Idaho Code § 63-3609), the Commission will use its discretion and seek only the residual amount due, as explained below.

The Seller is a [Redacted]. It takes [Redacted]. The sale of fabricated goods is taxable (Idaho Code § 63-3612(2)(d)), and the amount taxable is the fully fabricated charge (Idaho Code § 63-3613(a)2). Since the Seller’s cost of the goods has been taxed and paid, the residual is the

difference between tax on the goods' cost and tax on the amount charged by the Seller. The auditor was able to determine an average percentage of aggregate sales prices in excess of the materials' costs for each audit year. Using these facts, the Commission reduced the liability asserted by the auditor to remove liability already satisfied by the Seller's payment of tax on the purchase of materials.

Absent additional information to the contrary, the Commission finds the deficiency prepared and later adjusted to be an accurate representation of the taxpayer's use tax liability for June 1, 2003, through August 31, 2007.

The Bureau added interest to the use tax deficiency. The Commission reviewed this addition and found it to be appropriate per section 63-3045, Idaho Code. Interest is calculated to December 31, 2008, and continues to accrue until the liability is paid.

WHEREFORE, the Notice of Deficiency Determination dated October 31, 2007, as MODIFIED, is APPROVED, AFFIRMED, and MADE FINAL.

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

TAX	INTEREST	TOTAL
$41,118	$3,751	$44,869

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

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

DATED this _____ day of _____, 2008.

IDAHO STATE TAX COMMISSION

_____

COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 2008, 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] Receipt No.

_____