

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

In the Matter of the Protest of	)	
	)	DOCKET NO. 20941
[REDACTED],	)	
	)	DECISION
Petitioner.	)	
_____	)	

On December 11, 2007, the Tax Discovery Bureau (Bureau) of the Idaho State Tax Commission issued a Notice of Deficiency Determination to [Redacted] (taxpayer). The Notice proposed additional tobacco tax, and related interest in the total amount of \$9,118 for the periods April 1, 2004, through June 30, 2007. The taxpayer timely protested and requested a redetermination on February 8, 2008. An informal conference was requested and held on June 25, 2008. After the informal conference, the taxpayer did provide additional information regarding its position. The Bureau reviewed this information and made several adjustments. The Idaho State Tax Commission (Commission) has reviewed the file, is advised of its contents, and hereby issues its decision based thereon.

The taxpayer is a [Redacted] located in the state of [Redacted]. With respect to the state of Idaho, the taxpayer sells [Redacted] into the state to distributors who then sell the products to [Redacted]. The issues involved in this protest relate to the [Redacted] imposed pursuant to Idaho Code § 63-2552. In 2004, the taxpayer applied for, but never received, a [REDACTED] permit. However, despite not having a permit, the taxpayer sold tobacco products into the state of Idaho. In 2007, the taxpayer discovered that it had made sales into Idaho and at that time determined it should have remitted TPT. Accordingly, it calculated its tax liability based on sales from April 2004 through June 2007, prepared a schedule of “Purchases of [REDACTED] sold into Idaho” that showed its liability and sent the schedule to the Commission along with a

\$90,000 remittance. The schedule was reviewed by the Bureau's auditor, who requested additional information. The taxpayer objected to providing all of the information as it was too burdensome. The taxpayer did provide some of the information, and the auditor was able to use this information to verify the taxpayer's calculations and determine that the taxpayer had understated its [REDACTED] liability. The auditor issued a Notice of Deficiency (NOD) to the taxpayer for \$9,118 for unpaid [Redacted]. The auditor gave the taxpayer credit for its \$90,000 payment but determined an additional liability was owing.

After receiving the NOD, the taxpayer protested contending the NOD was invalid. In fact, the taxpayer asserted the payment it made was overstated and requested a refund. The taxpayer raised three specific reasons in support of its contentions that the NOD was invalid and it was entitled to a refund. First, the taxpayer contends that the Bureau overstated the amount of sales in the NOD. The Commission requested the taxpayer provide additional information on this point. The taxpayer provided the requested information, and after review, the Commission agreed to the adjustments suggested by the taxpayer. This reduced the claimed sales by \$19,185. Accordingly, this decision will modify the NOD to reflect the amended sales figures.

The next argument raised by the taxpayer relates to certain disallowances of the sales price made by the audit staff. The invoices provided by the taxpayer showed an average price reduction of 2.88 percent. The auditor disallowed the reduction and determined the [REDACTED] should be calculated on the price shown on the invoice before the deduction. The auditor contended that the price reduction was a price discount and, therefore, the discount could not be used to reduce the price on which the [REDACTED] is calculated.

Idaho Code §§ 63-2552 and 63-2552A imposes the [REDACTED] on the sale, use, consumption, handling or distribution of all [Redacted] in the state at the rate of forty percent of

the wholesale sales price of the [Redacted]. Additionally, the [Redacted] price is defined in Idaho Code § 63-2551(7) to mean the “established price for which a manufacturer sells a [Redacted] to a distributor, exclusive of any discount or other reduction.” The auditor contends that the 2.88 percent reduction is a discount or other reduction of the price and, therefore, the tax must be computed on the price before the discount.

The taxpayer characterizes the reduction differently and it contends that the discount is not a discount or reduction in price as contemplated by the statute. The taxpayer contends the actual price it must pay is the discounted price. In essence, the discount shown on the invoice is illusory because it has no choice but to pay the discounted price. In most cases, the taxpayer contends that a discount is given for prompt payment. The payor may pay the discounted price if it pays within a certain period of time, whereas if it chooses to pay after the time period for the discounted price expires, it must pay the full price shown on the invoice. In this case, the sellers of the [Redacted] require the taxpayer to pay by electronic funds transfer on the day of the expected delivery. Thus, the reduced price is the mandated price the taxpayer must pay, and it must pay it on a certain date, whether or not the [Redacted] are delivered on that date. Simply put, the taxpayer argues the price it pays is the mandated price and there are no discounts.

The auditor relies on the plain language of the invoices. The invoices show a price, a discount, and a net price, which is the price the taxpayer pays for the [Redacted]. As noted above, the measure of the [REDACTED] is the wholesale price, which is defined as the established price for which a manufacturer sells a [Redacted] to a distributor exclusive of any discount or other reduction. There is no evidence provided by the taxpayer as to what is the “established price.” It appears that the “established price” is the gross price shown on the invoices, and even though the taxpayer must pay a reduced price, the price it pays is a discounted

price from the established price. Therefore, the Commission agrees with the Bureau that the taxpayer must pay tax on the price shown on the invoice before the discount.

The final argument raised by the taxpayer relates to the meaning of Idaho Code § 63-2551(7). As previously discussed, the statute imposes the measure of the tax on the established price for which the manufacturer sells to a distributor. The taxpayer argues that, in many cases, it does not buy directly from the manufacturer, but instead, buys from an intermediary. In most cases, this is the manufacturer's selling representative, but nevertheless, the taxpayer is not buying directly from the manufacturer. In fact, the taxpayer argues that it does not know the manufacturer's sales price because it is not privy to that transaction, it only knows the sales price it pays to the intermediary. Therefore, the taxpayer contends that the statute is unconstitutional because it cannot comply with the statutory requirements. To impose a tax measured by a price to which the taxpayer has no knowledge violates the taxpayer's due process rights.

The taxpayer contends that it only knows what it paid for the [Redacted] and has no knowledge of the price paid by the intermediary to the manufacturer, and thus, it cannot comply with the plain language of the statute. The taxpayer cites a case from the state of [Redacted] for the proposition that Idaho Code § 63-2551(7) imposes a tax on the sales price from the manufacturer to the first receiver. However, *United States Tobacco Sales and Marketing Company Inc. v. State of Washington, Dept. of Revenue*, 982 P.2d 652 (Wash. App. 1999), [Redacted] is not directly on point, and the facts are distinguishable from the facts here. In [Redacted] the manufacturer, United States [Redacted] sold to [Redacted] Both the manufacturer and the distributor were wholly owned subsidiaries of the [Redacted] and in fact, the manufacturer sold its entire domestic output to one customer, [Redacted]. [Redacted] then

sold the [Redacted] to wholesalers. Despite language identical to Idaho Code § 63-2551(7), [Redacted] Sales in [Redacted] reported the tax based on the price it sold the products to [Redacted] wholesalers. Tobacco Sales later determined that it should have paid tax on the price it paid the manufacturer and requested a refund. The [Redacted] Department of Revenue denied the refund claim, and [Redacted] appealed to [Redacted] courts. The Court of Appeals agreed with [Redacted] and held that it was entitled to a refund.

The Tax Commission agrees with the holding of the *US [Redacted]* case, but the facts are distinguishable. In [Redacted] was the distributor and purchased the products from the manufacturer and then sold to wholesalers in [Redacted]. Thus, there was a sale from the manufacturer to the distributor in Washington. However, here the manufacturer representatives [Redacted] sell the [Redacted] to the taxpayer in [Redacted] who then causes the products to be brought into Idaho. The [REDACTED] is imposed upon the distributor of the [Redacted]. See Idaho Code § 63-2552. The distributor is defined in Idaho Code § 63-2551(3) to mean “(a) any person engaged in the business of selling [Redacted] in this state who brings, or causes to be brought, into this state from without the state any [Redacted] for sale, (b) any person who makes, manufactures, or fabricates [Redacted] in this state for sale in this state, (c) any person engaged in the business of selling [Redacted] without this state who ships or transports [Redacted] to retailers in this state, to be sold by those retailers.” The taxpayer meets the definition of a distributor. When the taxpayer purchases [Redacted] manufactured by the [Redacted], it buys them from [Redacted]. However, [Redacted] is selling the products to the taxpayer in the s[Redacted] and not in Idaho. In this case, [Redacted] does not cause the [Redacted] to be brought into the state, and it does not ship or transport [Redacted] to retailers in

this state. The first party in the chain of sales who causes the [Redacted] to be brought into Idaho is the taxpayer.

The taxpayer, during the period in question, purchased approximately 40 percent of the total tobacco products it acquired and resold to its customers from [Redacted]. The taxpayer purchased approximately 15 percent of its tobacco products from [Redacted] and 5 percent of all tobacco products from [Redacted]. Both [Redacted] are entities related to manufacturers. Thus, between [Redacted] the taxpayer purchased about 60 percent of its [Redacted] that it sold into Idaho from non-manufacturers. However, in all of these cases, the taxpayer is the distributor within the meaning of Idaho Code § 63-2552(3) because it is the entity that brought the tobacco products to Idaho.

If the manufacturers' selling agents made sales to the taxpayer in Idaho, then the taxpayer's arguments might have merit. The distributor would be the selling agent and since it buys from the manufacturer, the measure of the tax would be its purchase price. But here, the manufacturer sells to its agent who then sells to the taxpayer outside of Idaho. Since the taxpayer is the distributor, the question is whether the taxpayer owes tax when it brings the [Redacted] into Idaho.

As noted, the measure of the tax is the established price for which a manufacturer sells the [Redacted] to a distributor. Thus, when the taxpayer purchases the products from the selling agent, it should pay tax based on the established price for which the manufacturer sells to a distributor. The taxpayer argues that it does not know the established price and has no way of knowing. Presumably the taxpayer could ask the manufacturer for a list price for its products. The measure of the tax is the established price, not necessarily the price for which the manufacturer sold the particular [Redacted] at issue. Thus, even though the taxpayer may not

know what its seller paid for the products, as long as it obtains from the manufacturer the established price for the particular products, the taxpayer can compute its tax liability.

Even assuming the manufacturer does not provide an established price for its products, the taxpayer can still compute its tax liability. Arguably, the statute is ambiguous for a taxpayer who does not purchase [Redacted] directly from the manufacturer. It may be difficult for the purchaser to readily identify the manufacturer's established price to compute the tax. In these cases, the Commission has adopted a rule to identify the term "wholesale sales price." IDAPA 36.01.10.019.03 allows distributors to determine the wholesale sales price when purchasing from someone other than the manufacturer. The rule provides in part:

**03. (Determining Wholesale Sales Price.)** Any time a distributor makes a purchase of tobacco products upon which the tax has not been paid, and the documents pertaining to that purchase do not clearly indicate the wholesale sales price as defined by Section 63-2551(7), Idaho Code, wholesale sales price will be determined to be the purchase price of that product, or the wholesale sales price of that same or a like product in the course of normal commerce whichever is greater. It is the responsibility of the distributor to provide the accuracy of the wholesale sales price of any product it may be held liable for. (7-1-93)

The rule establishes that the taxpayer can calculate its tax liability by relying on its purchase price. Since it cannot establish the manufacturer's established price, it can rely on the rule and use its purchase price to calculate the tax. The taxpayer argues the rule is contrary to the statute and is unenforceable. The taxpayer argues that since it did not buy from a manufacturer and cannot readily determine the wholesale sales price, it does not owe any tax. Apparently, the taxpayer argues that the legislature only intended to tax [Redacted] when the distributor buys directly from the manufacturer and if it buys from any other entity, then the legislature did not see fit to require tax to be paid. However, such a reading is not consistent with the clear legislative intent as codified in Idaho Code § 63-2553. This statute provides that:

Legislative intent.—It is the intent, and purpose of this chapter to levy a tax on all tobacco products sold, used, consumed, handled, or distributed within this state and to collect the tax from the distributor as defined in section 63-2551 [Idaho Code]. It is the further intent and purpose of this chapter to impose the tax only once but nothing in this chapter shall be construed to exempt any person taxable under any other law or under any other tax imposed by the state of Idaho.

The Idaho Supreme Court has used a two-step approach to legislative interpretation. It interprets statutes according to the plain, express meaning of a provision in question, and will resort to judicial construction only if the provision is ambiguous, incomplete, absurd, or arguably in conflict with other laws. *Peasley Transfer & Storage Co. v. Smith*, 132 Idaho 732, 742, 979 P.2d 605, 615 (1999). Here, the argument that wholesale sales price is undefined is, at best, incomplete, and the Commission rule provides a more thorough definition of the term “wholesale sales price.” A court will accord judicial deference to an agency’s interpretation of a statute when certain conditions are met. *J.R. Simplot Company, Inc. v. Idaho State Tax Comm’n*, 120 Idaho 849, 820 P.2d 1206 (1991). Courts apply a four-part test when determining whether considerable weight must be given to an agency’s interpretation of a statute. *Preston v. Idaho State Tax Comm’n*, 131 Idaho 502, 960 P.2d 185 (1998). A court must determine whether: (1) the agency has been entrusted with the responsibility to administer the statute in question; (2) the agency’s interpretation is reasonable; (3) the statutory language contains an ambiguity; and (4) any of the rationales underlying the rule of deference are present.

Here, the Commission is the agency entrusted with the responsibility to administer the [REDACTED]. The Commission’s interpretation of the term “wholesale sales price” is reasonable. As noted, the statute imposes, as the measure of the tax, the established price for which a manufacturer sells a [Redacted] to a distributor. When the distributor does not have access to the

established price, the Commission's interpretation of the term provides that it means the price the distributor paid for the products.

The Commission's interpretation is also supported by the rationales underlying the rule of deference. The Idaho Court noted five rationales underlying the rule of deference: (1) rationale requiring that a practical interpretation of the statute exists; (2) rationale requiring the presumption of legislative acquiescence; (3) rationale requiring agency expertise; (4) rationale of repose; and (5) the rationale requiring contemporaneous agency interpretation. *Preston v. Idaho State Tax Comm'n*, 131 Idaho 502, 960 P.2d 185 (1998). The Commission adopted IDAPA 36.01.10.019.03 in 1993. The legislature has never amended Idaho Code § 63-2551(7) since it enacted it in 1972, until it made an amendment in 2008, which is after the relevant time period here. Thus, at least some of the rationales underlying the rule of deference does exist. Accordingly, it is the Commission's opinion that its interpretation of the statute would be upheld by the courts.

THEREFORE, the Notice of Deficiency Determination dated December 11, 2007, is hereby MODIFIED, and as MODIFIED, is APPROVED, AFFIRMED, AND MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the taxpayer pay the following tobacco products tax and interest for the periods April 1, 2004, through June 30, 2007:

<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$3,291	\$360	\$3,651

Interest is computed and will accrue at \$ .45 per day until paid in full.

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 \_\_\_\_\_, 2009.

IDAHO STATE TAX COMMISSION

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COMMISSIONER

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_\_ day of \_\_\_\_\_, 2009, 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.