

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)	
)	DOCKET NO. 20984
[Redacted],)	
)	DECISION
Petitioner.)	
_____)	

On September 14, 2007, the Sales and Use Tax Audit Bureau of the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination to [Redacted]. (taxpayer) asserting additional sales and use tax, penalty, and interest totaling \$167,043 for the period of August 1, 2002, through July 31, 2005. The taxpayer protested the Notice of Deficiency Determination on November 14, 2007. The taxpayer requested an informal hearing, which was held on July 8, 2008.

The Commission has reviewed the file, is advised of its contents, and hereby issues its decision. The liability is reduced, in part, based on a review of documentation that the taxpayer provided since September 2007. The remaining liability is affirmed as described in this decision.

BACKGROUND

The taxpayer operates a [Redacted] services. It is a buyer and retailer of [Redacted]. It has a separate, but wholly-owned, related entity that is a retailer [Redacted]. This related business was the subject of another audit. Transactions between the two entities and those on behalf of one another gave rise to some of the liability for both audits. The auditor took care to assert liability against only one of the related entities if both entities were a party to a particular transaction. Thus, there is no duplication of taxable transactions in either of the audit findings or the decisions.

The issues of this case involve the sale, purchase, and use of tangible personal property. In Idaho, sales and purchases of tangible personal property are subject to sales tax unless an exemption exists under law (Idaho Code § 63-3601 *et. seq.*).

Idaho Code § 63-3621 imposes a tax on the storage, use, or other consumption of tangible personal property in Idaho. The use tax is a complementary tax to the sales tax. The use tax rate is the same as the sales tax and is imposed on the value of the property. When property is stored, used, or consumed in Idaho, the user owes use tax unless he has paid sales tax on the purchase of the property or an exemption applies.

During the year following the hearing held with the Commission, the taxpayer provided additional documentation for the auditor's review. On October 15, 2008, the taxpayer signed a waiver of Idaho Code § 63-3045B's time limitation for issuing an Idaho State Tax Commission decision. The taxpayer recently indicated that its internal search and review of records was complete, giving rise to this decision. The Commission mailed final, revised workpapers to the taxpayer.

AUDIT FINDINGS

There are several areas that the taxpayer contests. For some, arriving at an audit conclusion was hampered by incomplete records, and the auditor did his best to understand the issues while having less than complete evidence.

Every retailer doing business in this state and every purchaser storing, using, or otherwise consuming in this state tangible personal property shall keep complete and adequate records as may be necessary for the State Tax Commission to determine the amount of sales and use tax for which that person is liable under Title 63, Chapter 36, Idaho Code (IDAPA 35.01.02.111.01).

These records must include the normal books of account ordinarily maintained by the average prudent businessman engaged in such business, together with all bills, receipts, invoices, cash register

tapes, or other documents of original entry supporting the entries in the books of account, together with all schedules or working papers used in connection with the preparation of tax returns (IDAPA 35.01.02.111.01.b.).

The auditor identified non-taxed sales but could not locate valid exemption certificates filled out by the buyers for some of those sales, as required by Idaho Code § 63-3621(e). In some instances, the auditor could not locate the invoices to determine the nature of the sale or if an exemption could apply. Undocumented sales are presumed taxable.

Late in the year in which it provided additional information for the Commission's consideration, the taxpayer asked the Commission to examine records from a computer that would break down the cost of retail sales invoices to show the sales price [Redacted]. Additionally, the taxpayer said that the computer would show separately stated delivery fees. The auditor declined to view or to accept these computer-generated invoices as sufficient or competent evidence.

The auditor's earlier experience from examining the taxpayer's records suggests that the invoices in question provided to customers did not have the price [Redacted] stated from the materials' sales price. Delivery fees to the customer by the seller are exempt from tax only if they are separately stated from the sales price of tangible personal property, and the separate statement cannot be used as a means of avoiding imposition of the tax upon the actual sales price of the tangible personal property (Idaho Code § 63-3613(b)(7)).

The auditor identified numerous non-taxed purchases. Many were repair parts for [Redacted] operated by the taxpayer. For each non-taxed purchase, the auditor considered if an exemption for the taxpayer's purchase existed under the sales tax code. When he could not find a justifiable exemption, he held these purchases taxable.

The following describes tax issues that were of particular interest to the auditor in terms of the amount of tax involved and the overall compliance of the taxpayer with the tax law.

The auditor determined that the taxpayer's related entity, a retailer, bought some [Redacted] for the latter's use. This is a misuse of the privilege of buying goods non-taxed for resale purposes. The use of the goods in question is subject to tax if the goods are no longer held for their intended resale purpose (IDAPA 35.01.02.105.06.b.).

Similarly, there were instances where the taxpayer and the related-party retailer were selling vehicles to one another. While sales of capital assets between related entities can be conducted tax free when certain conditions are met, there is a requirement that the initial transferor must have paid sales or use taxes previously for the exemption to apply (Idaho Code § 63-3622K(b)(4)). According to the auditor, that condition was not met for those transactions he held as taxable.

The taxpayer sold a vehicle to a buyer for \$9,000 according to records examined. The auditor checked the [Redacted] against the [Redacted] records and found that tax was paid, but only on a \$6,000 sales price. The auditor was unable to find an adequate explanation for the misrepresentation of the purchase price by the taxpayer to the [Redacted].

The taxpayer leased a [Redacted] to a company owned by a personal friend of the taxpayer. A lease is considered to be a sale by the lessor to the lessee (Idaho Code § 63-3612(2)(h)). On this lease transaction, the lessee claimed a sales tax exemption for the use of the [Redacted] operation. The auditor concluded that the [Redacted] would not qualify for a [Redacted] and presumed that the lessor (the taxpayer) should know this. An exemption claim is not valid if the tangible personal property purchased is taxable to the purchaser as a matter of law in the particular instance claimed on the resale certificate (Idaho Code § 63-3621(e)).

The taxpayer gave an invoice to the auditor which did not match the original he had previously seen at another location. The original invoice showed the sale of fill dirt and screened top soil to a construction management services company. The invoice provided to the auditor indicates that the charges were for custom hauling. As noted previously, the sale of tangible personal property is taxable unless an exemption applies, but the charges for separately stated freight to the final buyer are not. The auditor was unable to reconcile the invoice disparities with the taxpayer.

The taxpayer loaned money to an acquaintance to help the latter pay off a debt to the Idaho State Tax Commission arising from an audit. The acquaintance's company (herein Company B) had a payment agreement with the Commission regarding the debt. Subsequent to the agreement, the taxpayer operated Company B's business, billing customers through Company B's name and issuing invoices in the name of "Taxpayer dba Company B". The majority of the invoices showed that sales tax was included but, based on the auditor's examination, the taxpayer did not remit the sales tax billed on those invoices to the Commission.

The taxpayer contends that the sales tax in dispute, referred to in the previous paragraph, was forgiven, or accounted for, in the agreement between Company B and the Commission. However, the auditor notes that the agreement covered transactions and sales tax up to May 2003. Yet, the invoices showing the taxpayer doing business as Company B were dated June 2003 and later. Sales tax collected by a retailer is state money and must be paid to the Tax Commission (Idaho Code § 63-3623A).

Furthermore, in regard to holding sales tax in trust for Idaho, the auditor's reconciliation of sales tax collected to the amount remitted for the third quarter of 2003 (July through

September) revealed that the taxpayer only remitted sales tax on September's sales. July and August taxed sales that were booked were not included.

The auditor believed that several of the taxpayer's aforementioned questioned transactions were done with the intent to defraud the state and evade tax that was due. As such, the auditor imposed a 50 percent penalty against the amount of tax due, consistent with Idaho Code §§ 63-3634 and 63 3046:

If any part of any deficiency is due to fraud with intent to evade tax, then fifty percent (50%) of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected and paid (Idaho Code § 63-3046(b)).

WHEREFORE, the Notice of Deficiency Determination dated September 14, 2007, is hereby APPROVED as MODIFIED, and is AFFIRMED and MADE FINAL.

IT IS ORDERED and THIS DOES HEREBY ORDER that the taxpayer pay the following taxes, penalty, and interest:

<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$87,326	\$43,663	\$31,667	\$162,656

Interest on unpaid tax is part of this assessment, per Idaho Code § 63-3045(6) and has been extended to June 30, 2009. Interest on unpaid tax continues to accrue until the tax is paid.

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

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]

Receipt No.

[Redacted]