

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

In the Matter of the Protest of )  
[Redacted], ) DOCKET NO. 21395  
 )  
 ) DECISION  
Petitioner. )  
\_\_\_\_\_ )

On June 13, 2008, the staff of the Sales Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination to [Redacted] (taxpayer) proposing sales and use tax and interest for the period of November 1, 2004, through October 31, 2007, in the total amount of \$59,533.

On August 15, 2008, the taxpayer filed a timely appeal and petition for redetermination. The Commission held an informal hearing with the taxpayer on October 27, 2008.

The taxpayer has objected to only one issue, the imposition of use tax on the purchase of mailing lists.

A company named [Redacted] prepares the mailing lists according to criteria specified by the taxpayer. [Redacted] prepares the mailing lists by extracting names and addresses from its database. [Redacted] then electronically forwards the lists to a second company named [Redacted] verifies the names and addresses and deletes duplicate entries. [Redacted] then electronically sends the lists to printers in different parts of the country. None of the [Redacted] are located in Idaho. [Redacted] also electronically sends one copy of each list to the taxpayer in Idaho. The taxpayer reviews the lists but makes no other use of them.

Idaho Code § 63-3621 imposes a use tax on the storage, use, or other consumption of tangible personal property in Idaho. Payment of sales tax to the seller extinguishes any use tax liability. Thus, use tax is due when the seller fails to collect and remit sales tax.

Idaho Code § 63-3616 defines tangible personal property for the purposes of the Idaho Sales Tax Act. That statute states, in relevant part:

**63-3616. Tangible personal property.** (a) The term "tangible personal property" means personal property which may be seen, weighed, measured, felt or touched, or which is in any other manner perceptible to the senses.

(b) The term "tangible personal property" includes any computer software which is not a custom computer program.

(i) As used in this subsection, the term "computer software" means any computer program, part of a program or any sequence of instructions for automatic data processing equipment or information stored in an electronic medium. Computer software is deemed to be tangible personal property for purposes of this chapter regardless of the method by which the title, possession or right to use the software is transferred to the user.

(ii) As used in this subsection, the term "custom computer program" means any computer software (as defined in this subsection) which is written or prepared exclusively for a customer and includes those services represented by separately stated charges for the modification of existing prewritten programs when the modifications are written or prepared exclusively for a customer. The term does not include a "canned" or prewritten program which is held or existing for general or repeated sale, lease or license, even if the program was initially developed on a custom basis or for in-house use. Modification to an existing prewritten program to meet the customer's needs is custom computer programming only to the extent of the modification, and only to the extent that the actual amount charged for the modification is separately stated on invoices, statements, and other billing documents supplied to the purchaser....

Since the mailing lists consist of information stored in an electronic medium, they are included in the definition of tangible personal property, provided they are not custom software.

Idaho sales tax Rule 027.06 (IDAPA 35.01.02.06) states, in relevant part:

**06. Reports Compiled by a Computer.** The sale of statistical reports, graphs, diagrams, microfilm, microfiche, photorecordings, or any other information produced or compiled by a computer and sold or reproduced for sale in substantially the same form as it is produced is a sale of tangible personal property and is taxable regardless of the means of transfer. If a report is compiled from information furnished by the same person to whom the finished

report is sold, the report will be subject to tax unless the person selling the report performs some sort of service regarding the data or restates the data in substantially different form than that from which it was originally presented. (3-6-00)

...

b. Example: A company sells mailing lists which are stored on a computer disk. The seller compiles all the mailing lists from a single data base. Since the same data base is used for all such mailing lists it is not custom software. Therefore, the sale is subject to tax. (7-1-93)

Under Rule 027, therefore, the mailing lists are tangible personal property and their sale is taxable in Idaho. The taxpayer argues that Rule 027.06.b does not apply because [Redacted] uses more than one database to create the lists. The Commission does not find this argument persuasive, since it would be relatively easy to split any database into two or more smaller databases, just to avoid the imposition of sales tax.

For these reasons, if an Idaho seller had sold the mailing lists to the taxpayer in Idaho, the sale would have been subject to sales tax. In this case, however, the purchase is one that would be subject to use tax because the seller has no nexus with Idaho and did not collect sales tax.

Idaho Code § 63-3615 defines the word "use":

**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.)*

The Idaho legislature could have included sales of [Redacted] in the definition of “sale.” This definition includes sales of restaurant meals [Redacted]. Instead, the legislature chose to define [Redacted] as tangible personal property, even though many times the software has no tangible existence outside of a computer. Thus, the legislature made the sale of [Redacted] taxable, but created a legal fiction at the same time.

Suppose that the [Redacted] in this case, had been sent to the taxpayer in Idaho in the form of [Redacted]. If the taxpayer had then sent them on to the [Redacted], the taxpayer would not be liable for use tax because the lists were brought to Idaho solely for subsequent use outside the state; however, the lists were sent in the form of [Redacted] that lack ubiety (i.e., the property of having a definite location at any given time; state of existing and being localized in space). The same [Redacted] could exist in exactly the same format simultaneously on a computer in Idaho and on an indefinite number of computers outside the state. Because the taxpayer made no actual use of the [Redacted] in Idaho, the Commission finds that the statutory exclusion of “use” under Idaho Code § 63-3615(c) prevents the imposition of use tax on the [Redacted].

The Commission notes that this ruling is limited to the unusual facts presented by this case. The Commission also notes that this ruling applies to use tax only, not to sales tax. Had the [Redacted] been sold in Idaho by an Idaho seller, the sale would have been taxable because the sale occurred in Idaho.

WHEREFORE, the Notice of Deficiency Determination dated June 13, 2008, is MODIFIED, and as MODIFIED, APPROVED, AFFIRMED, and MADE FINAL.

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

<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$22,326	\$4,589	\$26,915

Interest is calculated through May 15, 2009, and will continue to accrue at the rate set forth in Idaho Code § 63-3045(6) until 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

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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]

Receipt No.

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