

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

In the Matter of the Protest of )  
 )  
[Redacted], ) DOCKET NO. 21409  
 )  
 ) DECISION  
Petitioner. )  
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\_\_\_\_\_ )

On September 10, 2008, the Sales and Use Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination to [Redacted] dba [Redacted] (taxpayer) asserting an amusement device permit penalty totaling \$550 for the period July 1, 2008, through June 30, 2009.

**BACKGROUND**

The taxpayer operates a restaurant that contains amusement devices which are required to have current decals purchased through, and provided by, the Commission. On May 10, 2008, the Commission sent a routine reminder letter to the taxpayer with information that the deadline was approaching for ordering decals for the coming registration year. The taxpayer did not order the decals by the deadline date, and this failure resulted in a penalty asserted by the Bureau as a Notice of Deficiency Determination.

In a letter received September 15, 2008, the taxpayer protested the penalty. The Commission sent a hearing rights letter on September 24, 2008, but the taxpayer did not respond. On February 26, 2009, the Commission issued a decision upholding the audit findings. Following receipt of the decision, the taxpayer contacted the Bureau by telephone stating that it never received a hearing rights letter and was, therefore, unaware that it had missed an opportunity to protest the findings to the Commission.

The Commission agreed to withdraw the decision pending additional information to be supplied by the taxpayer and did so on March 5, 2009. The withdrawal held open the taxpayer's appeal of the Notice of Deficiency Determination. At the taxpayer's request, the Commission held a hearing via telephone on March 9, 2009.

Having reviewed the audit file, the protest letter, applicable Idaho statutes, and information obtained during the hearing, the Commission hereby upholds the Notice of Deficiency Determination based on the following.

#### APPLICABLE TAX LAW

Idaho Code § 63-3623B imposes upon owners or operators of certain amusement devices an annual permit fee in lieu of sales tax remitted from each device's revenue stream. Additionally, the statute imposes a \$50 penalty per device for the owner or operator's failure either to apply for the permits on or before July 1 of each year or to display the decals that are evidence the required fees have been paid. The code section is noted below, in pertinent part:

**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...

(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...**

(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... (Emphasis added).

The taxpayer acknowledges a late application for the required 11 decals but stresses that the decals were affixed as soon as they were received. The taxpayer questions why the \$50/decals penalty is greater than the decal fee itself (currently, \$42 per IDAPA 35.01.02.109.02.a.). Finally, the taxpayer questions why a Commission letter states that an employee visited the business premises, when there was no such visit, and the address noted is a home address, not a business address.

#### ANALYSIS

The \$50 penalty imposed on each decal applied for past the application date is a matter of statute, as noted above. Enacting statutes is the duty of the legislature, and the Tax Commission is charged with tax statute enforcement and administration.

The taxpayer is correct that no Commission employee visited either the home or the business location to determine compliance with Idaho Code § 63-3623B. Rather, the Notice of Deficiency Determination was issued based on Commission records showing that the taxpayer applied for the decals in the last week of July 2008, almost four weeks after the deadline. Thus, while there was an error in communication, the Commission acted within its rights to issue a

Notice of Deficiency Determination, and the taxpayer suffered no additional harm by the mistake.

The taxpayer has operated the business since 1992 and has been in charge of compliance with the amusement device tax since its inception in 1995 (House Bill 318, Idaho State Legislature). The Commission looked to the recent history of the taxpayer's compliance to determine the appropriateness of the penalty.

For the registration years ending June 30, 2008, and 2007, the taxpayer ordered the decals timely. The taxpayer did not make decal purchases for the years ending June 30, 2003, through 2006, and made late purchases for 2001 and 2002. Thus, in nine years, the taxpayer was compliant for only two. In consideration of this history, the Commission declines to abate the penalty.

The taxpayer has not provided the Commission with information to establish that the amount asserted in the Notice of Deficiency Determination is incorrect. As a result, the Commission will uphold the deficiency notice for the period July 1, 2008, through June 30, 2009.

A determination of the State Tax Commission is presumed to be correct (*Albertson's, Inc. v. State, Dept. of Revenue*, 106 Idaho 810, 814, 683 P.2d 846, 850 1984), and the burden is on the taxpayer to show that the deficiency is erroneous (*Parsons v. Idaho State Tax Commission*, 110 Idaho 572, 574-575 n.2 Ct. App. 1986).

WHEREFORE, the Notice of Deficiency Determination dated September 10, 2008, is hereby APPROVED, AFFIRMED, and MADE FINAL.

IT IS ORDERED and THIS DOES HEREBY ORDER that the taxpayer pay the following:  
Penalty of \$550.

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.