

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)	
)	DOCKET NO. 21573
[Redacted])	
Petitioner.)	DECISION
)	
_____)	

On September 26, 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, penalty, and interest for the period of April 1, 2001, through March 31, 2008, in the total amount of \$290,335.

On November 17, 2008, the taxpayer filed a timely appeal and petition for redetermination. The Commission held an informal hearing with the taxpayer on April 7, 2009.

The taxpayer is in the business [Redacted]. Two of the [Redacted] that the taxpayer sells are [Redacted]. Since the [Redacted]. The taxpayer distributes [Redacted] can only be used with the taxpayer's products. The taxpayer maintains an inventory of the [Redacted] storage facility, where they are stored in the unopened boxes in which they were delivered. The taxpayer ships them to customers when they agree to purchase the [Redacted] None of the [Redacted] were distributed in [Redacted].

At issue is the imposition of Idaho use tax on the taxpayer's purchases of these [Redacted] Idaho Code § 63-3621 imposes a use 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. Payment of sales tax to the seller extinguishes the use tax liability.

The taxpayer argues that it purchased the [Redacted] for resale. Alternatively, the taxpayer argues that the use of the [Redacted] is exempt under Idaho Code § 63-3622N.

Idaho Code § 63-3609 defines “retail sale,” which states, in relevant part:

63-3609. Retail sale - Sale at retail. The terms "retail sale" or "sale at retail" means a sale for *any purpose other than resale* in the regular course of business or lease or rental of property in the regular course of business where such rental or lease is taxable under section 63 3612(h), Idaho Code.... (Emphasis added.)

Since the tax is imposed only on the ultimate purchaser, the taxpayer’s purchase of the [Redacted] would not be taxable if it resold them. In this case, however, the taxpayer does not charge the purchaser for the [Redacted]. The taxpayer argues that the cost of the [Redacted] is built in to the cost of the [Redacted], and therefore it is leasing the [Redacted]. The auditor stated that there is no written lease for the [Redacted] After two years, the purchaser becomes the owner of the [Redacted] if it has purchased enough of the [Redacted]. Since there is no specified charge for the [Redacted] however, the consideration that the taxpayer receives for the [Redacted] cannot be determined. Idaho Code § 63-3612 states that consideration is necessary for a sale to occur. The taxpayer, therefore, does not sell the [Redacted] but gives them away.

Idaho Code § 63-3622N provides an exemption for sales and purchases of certain [Redacted] There is no question that the [Redacted] the taxpayer sells qualify for this exemption. The [Redacted], however, are not [Redacted] but devices. The taxpayer argues that since the [Redacted] can not be administered without the [Redacted], they are therefore [Redacted] themselves. The Commission disagrees with this argument. Some [Redacted], however, is not a [Redacted]. Also, the [Redacted]are delivered separately from the [Redacted] not as part of a package.

In *Ciba Vision Corporation v. Jackson*, 248 Ga.App. 688, 548 S.E.2d 431, the taxpayer argued that the [Redacted] it distributed without charge were purchased for resale. The Court ruled that they were not sold but used by the taxpayer as part of its marketing strategy. Likewise, the taxpayer in this case is using the [Redacted] as part of its marketing strategy. Nor are the

[Redacted] included within the definition of [Redacted] One of the requirements of [Redacted] is that it must be suitable for use in the home. The [Redacted] can only be used by [Redacted]. Neither are they sold to or on behalf of an individual as the statute requires. For these reasons, the [Redacted] are not exempt under Idaho Code § 63-3622N.

Nevertheless, the Commission holds that some of the [Redacted] are not “used” by the taxpayer. Idaho Code § 63-3615 defines “use” as:

63-3615. 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.)*

All of [Redacted] were stored [Redacted] but delivered to purchasers outside the state. For this reason, they are excluded from the definition of “use,” and use tax can not be imposed on the [Redacted] storage. This definition, however, does not apply to sales tax. Two of the vendors do not have seller’s permits and apparently have no nexus with Idaho. One of the sellers of the [Redacted] and should have collected sales tax when it sold [Redacted] to the taxpayer in Idaho.

Idaho Code § 63-3624(h) states:

(h) When the tax commission determines that a retail sale is not exempt and the purchaser has failed to voluntarily pay sales or use tax in regard to the property or services purchased, the tax commission may collect the sales tax which was due at the time of the sale or the use tax due at the time of storage, use or other consumption of the taxable goods or services by issuing to the purchaser a notice of deficiency determination, asserting tax together with interest, at the rate provided in section 63-3045, Idaho Code, and may assert penalties found elsewhere in this chapter.

This provision was enacted in 1992, after the Idaho Legislature broadened [Redacted]ability to accept exemption and resale certificates. Without this provision, the Commission would be unable to collect the tax when the purchaser gives the seller a resale certificate and then uses property in a taxable manner.

The Commission, therefore, is not asserting tax on purchases of [Redacted]from vendors other than [Redacted]. The Commission has also agreed to waive the negligence penalty.

WHEREFORE, the Notice of Deficiency Determination dated September 26, 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>
\$140,670	\$21,708	\$162,378

Interest is calculated through August 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

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.
