

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)
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[Redacted]) DOCKET NO. 21631
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Petitioner.) DECISION
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On June 20, 2008, the staff of the Sales Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination (Notice) to [Redacted] [Redacted], (taxpayer) proposing sales tax, use tax, and interest for the period of October 1, 2002, through September 30, 2006, in the total amount of \$33,261. Also, on June 20, 2008, the Bureau issued a Notice to the taxpayer proposing travel and convention tax and interest for the period of October 1, 2002, through September 30, 2006, in the total amount of \$1,321. In a letter received on August 22, 2008, the taxpayer filed a timely appeal and petition for redetermination of both Notices. The Commission held an informal hearing with the taxpayer on March 2, 2009.

Subsequent to the mailing of each Notice, and before the Bureau forwarded the audit files to the Legal and Policy Section of the Commission for the administrative appeals process initiated by the taxpayer, the auditor reduced the sales and use tax liability based on documentation sent by the taxpayer to the auditor for the latter's review. Following the hearing, the Commission lowered the sales tax, use tax and travel and convention tax liabilities further for reasons that follow. The Commission upholds the remainder of the audit findings and explains its decision herein.

BACKGROUND AND APPLICABLE TAX LAW

The taxpayer operates a hotel in Idaho. It is a franchise of an international chain. The Bureau conducted a routine audit of the taxpayer for compliance with sales tax and travel and convention tax. In Idaho, the sale of lodging is subject to the statewide sales tax (Idaho Code § 63-3612(2)(g)) and the statewide Idaho Hotel/Motel Room and Campground Sales Tax (Idaho Code § 67-4711 *et. seq.*), commonly known as the Travel and Convention tax.

In the course of the audit period, the taxpayer purchased tangible personal property for business use. In Idaho, the sale of tangible personal property is subject to sales tax in the absence of any applicable exemption that exists in the statutes (Idaho Code § 63-3601 *et. seq.*) Idaho retailers are required to collect sales tax from buyers (Idaho Code § 63-3619), but if they fail to do so, the buyer owes a use tax directly to the state (Idaho Code § 63-3621(a)).

Further, there are retailers who have no physical presence in this state who sell and deliver goods to customers in the state via common carrier. As these sellers are not defined as retailers engaged in business in this state (Idaho Code § 63-3611), they cannot be compelled to collect the Idaho sales tax. Purchases from these sellers by Idaho residents and businesses are subject to use tax. All states with a sales tax have a complementary use tax.

PROTEST ISSUES AND ANALYSIS

In its protest letter and additional correspondence regarding the disputed amounts, the taxpayer did not disagree that purchases of tangible personal property were subject to sales or use tax and that lodging was subject to both sales tax as well as travel and convention tax.

The taxpayer's disagreements concern factual matters, such as, what certain sales invoices purport to be selling, and whether a particular sale of lodging qualified for an exemption. Each issue is discussed individually, followed by an analysis and conclusion.

Issue #1: The audits revealed untaxed guest lodging charges for personnel from one Idaho state agency. Lodging charges incurred by state government personnel on official business are not subject to tax as long as the state agency pays the bill directly, or the employees use a credit card that is directly billed to it (rather than through a reimbursement from the agency to the employee who then pays the credit card bill). If a state employee pays by credit card, the “direct billing” feature of the card used must be documented on a Tax Commission Form ST-104HM filled out by the lodger seeking the exemption. The taxpayer did not acquire this form. “Billed directly to” and “paid directly by,” the required elements for an exemption, are defined in IDAPA 35.01.06.16.02.d. and e.

The hotel’s ledger lists the disputed lodging payment as “cash,” which the taxpayer believes is an entry error. The taxpayer stated that the hotel serves many guests from this particular state agency and billings are always made directly to, and paid by, the agency. The auditor denied the exemption for lack of appropriate documentation.

Analysis: The taxpayer provided a booking contract with its protest. This contract for the transactions in question has a MasterCard number. There is no evidence that a state employee presented the credit card to the hotel desk clerk, and only if this occurs would an ST-104HM be required for an exemption. It is reasonable to conclude that the arrangement to pay was made by the state agency through the booking contract, and that payment did not involve the individual employees at all. The Commission concludes that there is sufficient proof that an exemption is established. An adjustment of liability in the taxpayer’s favor is, therefore, made for sales tax as well as travel and convention tax.

Issue #2: One vendor was described by the taxpayer as an arm of the hotel franchisor, providing services and goods to its franchisee properties. This Idaho registered vendor collected

tax on some of the sales of tangible personal property to the taxpayer. The taxpayer contends that the auditor held some non-taxable services as taxable.

The taxpayer provided an invoice as proof of its claim. While the auditor excluded from tax items that appear to be management fees and installation charges, she held taxable what appear to be charges for computer hardware and software.

At the hearing, the taxpayer contended that the questioned items were actually installation charges for the hardware and software, rather than charges for the goods themselves. The sale of computer hardware is the sale of tangible personal property. Canned computer software is defined as tangible personal property (Idaho Code § 63-3616(b)) and the license for its conditional use is therefore subject to sales or use tax.

Analysis: The invoice includes non-taxed charges for items labeled "S/W FEE" and "S/W LICENSE." The Commission asked to see contracts and separate billings for the software licenses which, for its purposes, would have proven that the charges in question were for installation rather than for the purchase itself. At the time of this writing, the taxpayer has not provided anything additional for the Commission to consider, and the Commission believes the audit conclusion is reasonable.

Issue #3: Another invoice from an Idaho-registered vendor shows taxable and non-taxable charges. The taxpayer believes that the auditor held "time and freight" charges taxable in error.

Analysis: The invoice states the following for the non-taxed charge that the taxpayer contests: "Accessories for Christmas Decorations and time: this includes the second tree and shipping costs too - I did not charge extra for fixing previously decorated items but for the second tree items." The Commission agrees with the auditor that these are taxable charges for

the sale of tree items rather than non-taxable installation charges. Regarding the shipping costs, it is not clear if these are shipping charges to the retailer prior to the final sale (freight-in) or charges to the ultimate customer (freight-out). Only the former are subject to tax (Idaho Code § 63-3613(a)3 and (b)7).

Non-taxable charges must be separately stated from taxable amounts in order not to be taxed (Idaho Code § 63-3613(b)4 and (b)7). The lack of clarity with respect to this invoice requires the undifferentiated amount to be held taxable.

Issue #4: The auditor held a video surveillance system purchase taxable because there was no invoice to prove tax had been paid. The taxpayer provided a letter from the company attesting that the taxpayer paid the full system price and applicable tax.

Analysis: The Commission concluded from other information available that there was a high likelihood that the vendor made an accurate statement despite its inability to provide an invoice of the transaction. The Commission has adjusted the use tax liability for this transaction.

Issue #5 and Analysis: Miscellaneous items were held taxable that the taxpayer believes should be eliminated.

a. Software maintenance charges were held taxable for lack of an invoice proving that tax was either paid or was not required. Software maintenance agreements can include upgrades or license privileges, which are taxable, in addition to support functions that are not. However, software vendors, often those not registered with Idaho to collect sales tax, fail to separately state the charges on invoices. The Commission chooses to hold 50 percent of the undifferentiated invoice charges as a taxable estimate, adhering to a recently enacted administrative rule. (IDAPA 35.01.02.027.05.b.ii.)

b. The auditor held as taxable an invoice for telephone system maintenance charges. The taxpayer could not provide a contract with the vendor that would prove the former's contention that the invoice referred only to non-taxable services and not to tangible personal property. As it is reasonable to presume that the charges are for the licensed use of telephone systems software and upgrades in the absence of information proving otherwise, the Commission chooses to hold 50 percent of the invoice charges as a taxable estimate, based on the recently enacted administrative rule referred to in the previous paragraph.

c. No invoices were available to prove the taxpayer's contention that charges to company credit cards by its marketing personnel for travel expenses and associated activities were either not taxable or were taxed when transactions were made. While a reasonable audit standard holds that expenses must be supported by invoices, the Commission, in this case, accepts the taxpayer's description as to how the expenses were incurred and removes the associated liability from the audit work papers.

d. A purchase of guest amenities was held taxable for lack of an invoice that may have shown tax. Since the auditor found seven other invoices from the same company that show tax, the Commission will remove this liability from the work papers.

Some of the liability adjustments described above involved transactions from sample groups. The errors in the sample groups were extrapolated to determine a liability for the entire audit period. Where adjustments have been made in the taxpayer's favor, the projections of error have been revised to reflect a lower liability overall.

WHEREFORE, the Notices of Deficiency Determination dated June 20, 2008, are MODIFIED, and as MODIFIED, are AFFIRMED, and MADE FINAL.

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

TRAVEL AND CONVENTION

<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$907	\$252	\$1,159

SALES AND USE

<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$15,900	\$5,092	\$20,992

Interest is calculated through October 31, 2009, for both Notices of Deficiency Determination 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.

[Redacted]
