

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)	
)	DOCKET NO. 23994
[Redacted],,)	
)	
Petitioner.)	DECISION
_____)	

On April 21, 2011, the staff of the Sales and Use Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination (Notice) to [Redacted] (taxpayer) asserting sales tax, use tax, and interest for the period January 1, 2008, through December 31, 2010, in the total amount of \$13,189. In a letter predating the anticipated Notice of Deficiency Determination and received April 12, 2011, the taxpayer filed a timely appeal and petition for redetermination stating its disagreement with one audit finding and its intent to protest that finding. At the taxpayer’s request, the Commission held an informal hearing on June 20, 2011. The Commission, having reviewed the file and considered the discussion at the hearing, hereby upholds the audit findings for reasons explained below.

Background

The taxpayer sells [Redacted] to the general public from one retail location in Idaho. The taxpayer has an advertising business segment which prints and distributes a newspaper six times per year. The advertising business segment is not a separate entity for income tax purposes but is accounted for with segregated record keeping.

Throughout the audit period, the taxpayer’s advertising business segment bought newspapers printed to its specifications; tangible personal property that is subject to Idaho sales or use tax in the absence of an exemption. For reasons discussed below, the auditor found no applicable exemption for these purchases and held them subject to use tax.

Issue and Applicable Tax Code

Idaho imposes a sales tax on the purchase of tangible personal property, among other transactions (Idaho Code § 63-3612(2)(h)). Use tax is a complementary tax to sales tax and is applicable only if sales tax has not been paid to a retailer and no exemption from tax applies. Payment of use tax extinguishes the sales tax obligation (Idaho Code § 63-3621).

In its defense against the audit findings that purchases of the [Redacted] were taxable, the taxpayer claimed the exemption entitled “Equipment to [Redacted]” (Idaho Code § 63-3622T) cited in its entirety below:

There are exempted from the taxes imposed by this chapter:

- (a) Receipts from the sale, storage, use or other consumption in this state of tangible personal property directly used and consumed in the production of publications in a newspaper format which are distributed to the public at large and which rely on advertising revenue as their primary source of income; provided, that the purchase, storage, use or other consumption is by a business or segment of a business which is primarily devoted to such production of said publications; provided, further, that the use or consumption of such tangible personal property is necessary or essential to the performance of such publication business. This exemption does not include machinery, equipment, materials and supplies used in a manner that is incidental to the production of said publications, such as maintenance and janitorial equipment and supplies and hand tools with a unit price not in excess of one hundred dollars (\$100); nor does it include tangible personal property used in any activities other than the actual production of the publication and shall not include property such as office equipment and supplies, equipment and supplies used in selling and distributing activities, in research or in transportation activities; nor shall this exemption include motor vehicles or aircraft without regard to the use to which such motor vehicles or aircraft are put.
- (b) Provided, further, that this exemption shall apply when the publication referred to herein is distributed to the public free of charge.
- (c) Provided, further, that in order for the exemption to be applicable, at least ten percent (10%) of the total publication, computed on an average annual column inch basis, must be devoted to the publication of nonincome producing informative material.

A sales and use tax administrative rule entitled “Free Distribution Newspapers” (IDAPA 35.01.02.127) and cited in its entirety below is also relevant to the exemption:

01. Newspaper Format. The term “newspaper format” shall mean a publication bearing a title, issued regularly at stated intervals of at least twelve (12) times a year, and formed of printed paper sheets without binding. Catalogs, advertising fliers, travel brochures, employee newsletters, theater programs, telephone directories, restaurant guides, posters, and similar publications are not publications in newspaper format.

02. Purchase or Use of Tangible Personal Property. The purchase or use of tangible personal property used to produce newspapers distributed to the public free of charge is exempt from sales or use taxes if the requirements of Section 63-3622T, Idaho Code are met.

03. Qualifying for Exemption. To qualify for the exemption at least ten percent (10%) of the total newspaper, computed on an average annual column inch basis, must be devoted to the publication of nonincome producing informative material. Advertisements promoting the free distribution newspaper itself do not qualify as nonincome producing informative material. Neither do logos, column headings, mastheads, borders, etc.

Taxpayer’s Protest

The taxpayer’s protest letter cites the statute stating that the publication meets the qualifications of a free distribution newspaper by having at least 10 percent of its content devoted to non-income producing informational material. It concludes by asserting that the auditor based her liability on the taxpayer’s lack of adherence to an administrative rule rather than to the statute. That rule, shown above, includes the requirement that the newspaper be issued regularly at stated intervals of at least 12 times a year in order to qualify for the exemption, a benchmark not attained by the taxpayer. The taxpayer believes that lack of adherence to this non-statutory requirement should not disqualify it from the exemption.

Analysis and Conclusion

The taxpayer’s contention that it meets all of the statutory qualifications with respect to the free distribution newspaper and deviates only with respect to one aspect of the administrative rule is not entirely accurate.

The Commission agrees with the taxpayer that the newspaper meets many of the requirements of the exemption statute. However, the auditor provides evidence that newspaper

advertising accounted for 41 percent of the costs of the newspaper and, is therefore, not the primary source of the publication's expenses, as required by statute. The taxpayer absorbs the remainder of the costs. The auditor asserts, therefore, that the newspaper principally serves as an advertisement for the taxpayer itself rather than as a free distribution newspaper defined in the statute. The Commission agrees that under the conditions the auditor found, the exemption would not apply.

While the Commission believes that it is unnecessary to examine the protest further, since an unambiguous statutory requirement for the exemption has not been met, this Decision discusses the previously stated administrative rule requirement requiring that the publication must be issued regularly at stated intervals of at least 12 times a year in order to qualify for the exemption. As noted in the protest, the taxpayer objects to this disqualifier. According to the auditor, and undisputed by the taxpayer, the publication comes out every other month, or six times per year.

The taxpayer asks the Commission to accept "6" in substitution for "at least 12" issues per year. The question is whether the Commission is overstepping the statute by making such a requirement. The Commission replies that if the threshold can be changed from "at least 12" to "6," other requirements could be forgone as well: binding and stapling would be allowed, as would assembly from non-newspaper type sheets, for example. The Commission sees no persuasive reason for waiving the questioned requirement. Were this Decision to be based solely on the administrative rule definition of newspaper format, its decision would be unchanged.

An Idaho district court case supports the Commission's definition of "newspaper format." (Michael D. Justice, dba Commercial Newspaper Service, dba Express Printing & Copy Center vs. Idaho State Tax Commission, Fourth Judicial District, January 23, 1995.) This case pertained

to posters, but the court said that since “newspaper format” was not defined in the statute it would rely on the doctrine of statutory construction and give the words their plain meaning. The court then noted that many jurisdictions determined that newspapers have common characteristics, one of which is “published at short regular intervals, usually not exceeding a week” (Michael D. Justice, pg. 6).

This Decision reflects full receipt of payment against the liability referred to in the Notice.

THEREFORE, the Notice dated April 21, 2011, is AFFIRMED and is MADE FINAL.

<u>PERIOD</u>	<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
1/1/08 through 12/31/10	\$12,113	\$1,076	\$13,189
		LESS PAYMENT	<u>(13,189)</u>
		TOTAL DUE	<u>\$ 0</u>

An explanation of the taxpayer’s right to appeal this decision is enclosed.

DATED this _____ day of _____ 2011.

IDAHO STATE TAX COMMISSION

COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____ 2011, 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.
