

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)
[Redacted],) DOCKET NO. 24925
)
)
Petitioner.) DECISION
)
_____)

On October 31, 2011, the staff of the Sales, Use and Miscellaneous Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination (Notice) to [Redacted]. (taxpayer), proposing sales tax, use tax, penalty, and interest for the period August 1, 2010, through April 30, 2011 in the total amount of \$13,490. For the reasons that follow, the Commission upholds the audit findings.

On December 31, 2011, the taxpayer filed a timely appeal and petition for redetermination of the Notice. On June 26, 2012, at the taxpayer’s request, the Commission held a hearing.

Background and Audit Findings

[Redacted], is a [Redacted] operating as the successor to [Redacted] was owned by [Redacted], [Redacted], and [Redacted]. It had one operating location in Idaho. When ownership changed, the business cancelled its retail seller’s permit. [Redacted] left the business and it was reformed as [Redacted] with two remaining owners of the predecessor, [Redacted] and [Redacted].

According to the auditor, the taxpayer did not remit all of the collected sales tax to the state. Most of the liability is due to this omission. The auditor imposed a 50 percent fraud penalty for the failure to remit the collected tax. At the hearing, the taxpayer maintained that liability imposed upon a successor could include tax, but not penalty or interest.

There is no evidence that the successor made an inquiry to the Commission regarding any existing sales tax liability, nor did the taxpayer indicate that there was such an inquiry.

Relevant Tax Code for the Imposed Tax Liability

Idaho imposes a sales tax on the sale of prepared and served meals:

(2) "Sale" shall also include the following transactions when a consideration is transferred, exchanged or bartered:..

(b) Furnishing, preparing, or serving food, meals, or drinks and nondepreciable goods and services directly consumed by customers included in the charge thereof (Idaho Code § 63-3612).

The failure to remit all taxes collected from customers can constitute fraud:

If any part of any deficiency is due to fraud with intent to evade tax, then fifty percent (50%) of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected and paid (Idaho Code § 63-3046(b)).

A successor to a business can be liable for amounts owed by its predecessor unless the successor takes certain precautions:

Successors' liability. (a) If any vendor liable for any amount under this act sells out his business or stock of goods, the vendee shall make inquiry of the state tax commission and withhold from the purchase price any amount of tax that may be due under this act until such time as the vendor produces a receipt stating that no amount is due.

(b) If the purchaser of a business or stock of goods fails to withhold from the purchase price as above required, he becomes personally liable for the payment of the amount required to be withheld by him to the extent of the purchase price valued in money.

(c) The state tax commission shall, as soon as practicable after receiving written inquiry as to the amount due and no later than thirty (30) days after receipt of the inquiry or, if necessary, thirty (30) days from the date the vendor's records are made available for audit, but in any event no later than sixty (60) days after receiving the inquiry, issue a statement to the purchaser setting forth the amount of tax due by the vendor, if any. Failure of the state tax commission to issue such statement will release the purchaser from any obligation to withhold from the purchase price as above required (Idaho Code § 63-3628).

Taxpayer's Protest and the Commission's Analysis of Findings

Prior to the hearing there were matters under protest which were subsequently resolved between the taxpayer and the auditor, and the liability assessed by this decision reflects the adjustments made in the taxpayer's favor.

The taxpayer protested the imposition of penalty and interest, asserting that only tax can be retroactively collected from a deficiency against a successor for liability initiating with its predecessor. As noted, the successor's liability statute, Idaho Code § 63-3628, mentions only tax. However, the administrative and enforcement code provides for penalty and interest imposition on all taxes owed, without exception, and the relevant statutes are incorporated into the enforcement provisions of the Sales Tax Act by reference:

The state tax commission shall give written notice of its determination and the amount of the deficiency, including any interest and penalties, to the person from whom such deficiency amount is due in the manner prescribed by section 63 3045, Idaho Code (Idaho Code § 63-3629(c)).

Interest on deficiencies. Interest upon any deficiency shall be assessed at the same time as the deficiency and shall be due and payable upon notice and demand from the state tax commission and shall be collected as a part of the tax at the rate provided in section 63 3045, Idaho Code, from the date prescribed for the payment of the tax (Idaho Code § 63 3632).

Additions and penalties. The additions, penalties and requirements provided by the Idaho Income Tax Act, sections 63 3046, 63 3075, 63 3076 and 63 3077, Idaho Code, shall apply in the same manner and to the same extent to this act as to the Idaho Income Tax Act and shall cover acts, omissions, and delinquencies under this act similar to acts, omissions and delinquencies under the Idaho Income Tax Act and such additions, penalties and requirements shall, for this purpose, be described as and be for acts, omissions, delinquencies and requirements under the Idaho Sales Tax Act (Idaho Code § 63 3634).

Collection and enforcement. The collection and enforcement procedures provided by the Idaho Income Tax Act, sections 63 3030A, 63 3038, 63 3039, 63 3040, 63 3042, 63 3043, 63 3044, 63 3045B, 63 3047, 63 3048, 63 3049, 63 3050 through 63 3064, 63 3065A, 63 3071 and 63 3074, Idaho Code, shall apply and be available to the state tax commission for enforcement of the provisions of this act

and collection of any amounts due under this act, and said sections shall, for this purpose, be considered part of this act and wherever liens or any other proceedings are defined as income tax liens or proceedings, they shall, when applied in enforcement or collection under this act, be described as sales and use tax liens and proceedings (Idaho Code § 63 3635).

Notice of redetermination or deficiency -- Interest. 6) (a) Interest shall apply to deficiencies in tax and refunds of tax. Interest shall not apply to any penalty or to unpaid accrued interest. Interest relating to deficiencies or refunds accruing after the original due date of the return, but not including extensions of the due date, shall be computed on the net of any underpayments and overpayments of a tax liability required to be shown as due on the same return. (b) Interest upon any deficiency shall be assessed at the same time as the deficiency, shall be due and payable upon notice and demand from the state tax commission and shall be collected as a part of the tax at the rate per annum determined under the provisions of subsection (6)(c) of this section from the date prescribed for the payment of the tax (Idaho Code § 63-3045).

Assessment of tax. (4) Penalties and additions to tax in the case of a deficiency shall be assessed in the same manner as the taxes and related interest (Idaho Code § 63 3045A).

Penalties and additions to the tax in case of deficiency. (a) If any part of any deficiency is due to negligence or disregard of rules but without intent to defraud, five percent (5%) of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected and paid in the same manner as if it were a deficiency. (b) If any part of any deficiency is due to fraud with intent to evade tax, then fifty percent (50%) of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected and paid (Idaho Code § 63-3046).

Were the preceding not available to the Commission to enable it to assess penalty and interest, it would nevertheless have recourse against the taxpayer's two owners as they had an interest in the predecessor entity as well. [Redacted] was admitted to be the responsible party for safeguarding and remitting sales tax. Responsibility for collected sales tax is referenced in this statute:

Responsibility for taxes. (a) Every person with the duty to account for and pay over any tax which is imposed upon or required to be collected by any taxpayer under this chapter on behalf of such taxpayer as an officer, member or employee of such taxpayer, shall be personally liable for payment of such tax, plus penalties and interest, if he fails to carry out his duty.

(b) Any such individual required to collect, truthfully account for, and pay over any tax imposed by this chapter who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 63 3046(b), Idaho Code, for any offense to which this subsection (b) is applicable (Idaho Code § 63-3627).

Note that the code section above refers to penalty as well as interest, and that the penalty is greater than the one imposed in the Notice at issue for this decision. Further, for sales tax collected and not remitted, there is no statute of limitations on the assessment or collection

The periods of limitation upon assessment and collection provided in this section shall not apply:

- (1) In cases where the facts disclose a false or fraudulent act with the intent to evade tax, or
- (2) To taxes collected by a retailer, seller or any other person who has failed to pay over such taxes to the state tax commission (Idaho Code § 63-3633(d)).

With respect to the unremitted tax itself, the taxpayer provided no explanation for its failure to remit all it collected. The Commission upholds the imposition of the fraud penalty.

In the protest letter and at the hearing, the taxpayer stated that immediate payment of the deficiency would force the business to close. The Commission suggested that the taxpayer provide a settlement offer in writing. This offer, dated June 28, 2012, was accepted by the Commission, which conveyed general acceptance via email on July 26, 2012. The taxpayer's representative replied via email on July 27, 2012, expressing his confidence that the settlement would be acceptable to his client, and that he would reply the following week after consulting with the taxpayer.

When no reply was forthcoming, the Commission again emailed an inquiry on October 24, 2012, which went unanswered as of the date of this decision. The taxpayer can still

pursue a settlement with the Commission's compliance staff if it cannot or fails to pay the amount assessed.

The taxpayer did not provide evidence adequate to establish that the amount asserted in the Notice is incorrect. As a result, the Commission will uphold the Notice. 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.)

Absent information to the contrary, the Commission finds the deficiency prepared by the Bureau to be an accurate representation of the taxpayer's sales and use tax liability for the period August 1, 2010, through April 30, 2011.

The Bureau added interest to the sales and use tax deficiency. The Commission found it appropriate per Idaho Code § 63-3045, and has updated interest accordingly. Interest is calculated through February 28, 2013, and will continue to accrue at the rate set forth in Idaho Code § 63-3045(6) until paid.

THEREFORE, the Notice dated October 31, 2011, is hereby APPROVED, in accordance with the provisions of this decision, and is AFFIRMED and MADE FINAL.

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

<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$8,752	\$4,376	\$753	\$13,881

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 _____ 2012.

IDAHO STATE TAX COMMISSION

COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____ 2012, 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.
