

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

In the Matter of the Protest of	)	
	)	DOCKET NO. 24926
[Redacted],	)	
	)	
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, 2007, through August 31, 2011, in the total amount of \$59,401. 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], was a [Redacted] owned by [Redacted], [Redacted], and [Redacted]. It had one operating location in Idaho. [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.

### Relevant Tax Code

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)).

### 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 provided no explanation for its failure to remit all of the sales tax it collected. The Commission upholds the imposition of the fraud penalty. The extensive time period covered by the Notice and upheld in the decision is justified by the following statute:

Period of limitation upon assessment and collection. Except as otherwise provided in this section:

(a) The amount of taxes imposed by this chapter shall be assessed within three (3) years after the due date of the return or the date the return was filed, whichever is the later...

(c) In the case of taxes owed by a person who has failed to file a return as provided in section 63 3623, Idaho Code, the amount of taxes imposed in this chapter shall be assessed within seven (7) years of the time the return upon which the tax asserted to be due should have been filed.

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

(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).

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, 2007, through August 31, 2011.

The Bureau added interest and penalty to the sales and use tax deficiency. The Commission reviewed those additions, found both to be appropriate per Idaho Code §§ 63-3045 and 63-3046, 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>
\$36,874	\$18,437	\$5,736	\$61,047

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

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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.

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