

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)
) DOCKET NO. 25221
[Redacted])
)
Petitioner.)
) DECISION
)
_____)

On July 27, 2012, the staff of the Fuels Tax & Registration Fee Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination (Notice) to [Redacted] (taxpayer), proposing fuels tax, use tax, penalty, and interest for the period January 1, 2009, through December 31, 2010, in the total amount of \$15,045.13. For the reasons that follow, the Commission upholds the audit findings.

On August 20, 2012, the taxpayer filed a timely appeal and petition for redetermination of the Notice. The Commission sent a hearing rights letter on September 13, 2012, and the taxpayer replied in a letter received on September 20, 2012, declining a hearing and asking that its objection on record be considered by the Commission in defense of its position.

Background and Relevant Tax Law

The taxpayer is an Idaho-based retailer of [Redacted]. Licensed motor vehicles deliver the product within and from attached [Redacted] equipment. The taxpayer’s vehicles are fueled from bulk tanks at the taxpayer’s Idaho facilities. [Redacted] and equipment used to load the product can use motor fuel, and the mixers often use fuel drawn from the vehicle engine, referred to as a power take-off (PTO).

Motor fuels tax is not due for certain uses of the fuel, as stated in the following statute, in relevant part:

Any person who shall purchase within any one (1) calendar year fifty (50) gallons or more of gasoline used for the purposes described in this subsection shall be

entitled to be refunded the amount of gasoline tax previously paid on that gasoline. Exempt uses are:

- (a) Operating stationary gasoline engines;... (Idaho Code § 63-2410(2)).

In Idaho, the sale, purchase, and use of tangible personal property is subject to tax unless an exemption applies. If sales tax cannot or is not paid to the vendor, the buyer owes a complementary use tax to the state. Payment of use tax extinguishes the sales tax obligation (Idaho Code §§ 63-3612 and 63-3621).

Motor fuel is tangible personal property, but sales and use tax are not due on motor fuel for which motor fuels tax has been paid:

Motor fuels subject to tax. There are exempted from the taxes imposed by this chapter purchases which are subject to the motor fuels tax imposed by chapter 24, title 63, Idaho Code, and purchases upon which motor fuels taxes have actually been paid ... (Idaho Code § 63-3622C).

If motor fuels tax is not paid, or a credit (refund) is taken for the motor fuels tax paid, a use tax is due if the fuel is not consumed in an exempt activity:

01. Exemptions.

a. Motor fuels, including gasoline, diesel and gaseous fuels, upon which the taxes are imposed by Title 63, Chapter 24, Idaho Code, are exempt from sales and use taxes. Also exempt are purchases upon which motor fuels taxes have actually been paid. If such purchases are later included in credits or refunds for motor fuels taxes paid and not subject to taxes imposed by Title 63, Chapter 24, Idaho Code, and no other exemption applies, sales and use taxes will be applicable (IDAPA 35.01.02. 078).

Idaho Tax Form 75, Idaho Fuels Tax Refund Worksheet, is filed by taxpayers to take a credit for motor fuels tax paid upon purchase when the fuel is subsequently used off-road.

Audit Findings

The audit consisted of a review of Form 75 filings wherein the taxpayer claimed credits against tax paid for motor fuel used in its [Redacted]. Credit for fuel claimed as a [Redacted] allowance was denied for certain vehicles in the 2009 period because the taxpayer used an

electric blower rather than motor fuel in a PTO. Other credits were adjusted for various reasons and a fuels tax liability resulted from the review.

Further, the auditor determined a use tax liability from the Form 75 review. While a fuels tax credit taken by the taxpayer was allowed for fuel powering the mixers, the auditor imposed a use tax on that fuel.

Taxpayer's Protest

The taxpayer makes no argument against the validity of the findings. The protest centers on the Tax Commission's right to make an assessment. On October 18, 2011, the taxpayer received a Notice for a sales and use tax liability covering the period April 1, 2008, through January 31, 2011. This period overlaps the current audit period, which is January 1, 2009, through December 31, 2010. The taxpayer contends that the Commission is not able to impose a tax twice for the same tax type (in this case, use tax) for the same period, and to do so constitutes "double jeopardy."

The argument stresses that the taxpayer accepted the earlier assessment for a tax period and cannot later seek an adjustment in its favor. It, therefore, questions why the Commission believes it can reexamine that period for an additional liability. The taxpayer notes that the Bureau sought and obtained a power of attorney for the taxpayer's representative during the fieldwork of the first audit. The Bureau also asked for and obtained a power of attorney for the second (i.e., current) audit period, something the taxpayer contends is unnecessary because the representative in both audits is the same, and the original power of attorney suffices.

For reasons that aren't entirely clear, the taxpayer sees this as evidence in defense of its objection. The original power of attorney covered the audit. The audit was resolved, and the

Commission has no further rights in assessing an additional liability for that period. The taxpayer states in its undated letter received September 20, 2012:

As stated in your Sales and Use Tax Audit, and we quote, “If no protest is filed with the Idaho State Tax Commission within the 63-day period described above, this determination becomes final. You will have no further right to appeal.” If this is the position of the tax commission, how can you now adjust a use tax audit that has become final with no further right to appeal?

Analysis and Conclusion

The Commission’s opinion is that fuel placed in motor vehicle tanks and used for the [Redacted], in this case via a PTO, does not qualify for the production exemption, and it is therefore subject to use tax at 6 percent of the gallon price less state and federal taxes, unless fuels tax has been paid. As noted, the taxpayer had previously obtained a credit for the fuels tax on fuel used by the mixers.

While there exists a sales and use tax production exemption for “[t]angible personal property primarily and directly used or consumed in or during a manufacturing, ... operation... provided that the use or consumption of such tangible personal property is necessary or essential to the performance of such operation” (Idaho Code § 63-3622D(a)(2)), truck-mounted mixers contribute more to transportation than they do to production. Since the mixers fail to qualify for the exemption, the fuel used by them will not be production exempt:

Production Exemption. ...trucks used by a ready-mix operator do not qualify for the production exemption because they are used for transportation. Although they may incidentally contribute to the manufacture of the final article, purchases of the truck, trailer, and the truck-mounted concrete mixer, which becomes a part of the motor vehicle, are not exempt from the tax (IDAPA 35.01.02.016.03).

The taxpayer does not dispute the audit findings but states without authority that the Commission can't audit twice for the same tax and time period, or portion thereof. Yet, an administrative and enforcement code section of the Sales Tax Act allows such an action:

Deficiency determinations. (a) If the state tax commission is not satisfied with the return or returns of the tax, because of errors or omissions discovered in audits or in any other way, it may compute and determine the amount which is due upon the basis of facts contained in the return or returns or upon the basis of any information within its possession or that may come into its possession and assert a deficiency. **One or more deficiency determinations may be made of the amount due for one or for more than one period.** In making such determination, the state tax commission may offset overpayments against amounts due (Idaho Code § 63-3629, emphasis added).

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 January 1, 2009, through December 31, 2010.

The Bureau added interest and penalty to the fuels tax liability and added interest to the 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 January 31, 2013, and will continue to accrue at the rate set forth in Idaho Code § 63-3045(6) until paid.

THEREFORE, the Notice dated July 27, 2012, 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>FUELS TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$806	\$40	\$ 67	\$ 913
<u>USE TAX</u>			
\$13,132	0	1,179	<u>15,224</u>
			<u>\$16,137</u>

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.
