

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)	
)	DOCKET NO. 25284
[Redacted],)	
)	
Petitioner.)	DECISION
_____)	

On March 8, 2012, 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, and interest for the period March 1, 2008, through February 28, 2011, in the total amount of \$45,264. On May 8, 2012, the taxpayer filed a timely appeal and petition for redetermination of the Notice. At the taxpayer's request, the Commission held an informal hearing on January 8, 2013.

The Commission is fully apprised of the audit findings and the taxpayer's objections. Further, it has considered information obtained at the informal hearing. For the reasons that follow, the Commission upholds the audit findings.

Background

[Redacted], provides "[Redacted]" according to information from the taxpayer cited by the auditor. According to the auditor's notes and the taxpayer's narrative at the hearing, a member of the LLC confers with clients regarding the type, quantity, and placement of decorations, furniture, and accessories at [Redacted]. Once an agreement is reached, the taxpayer [Redacted] consistent with the agreement. The taxpayer may [Redacted] as necessary. The auditor notes that the taxpayer did not pay tax on the price of the rented property, having provided vendors with resale exemption certificates. The significance of this fact is discussed later in this narrative.

On the day of the event, the taxpayer delivers [Redacted] to take care of any unanticipated need. After [Redacted] concludes, the taxpayer removes the [Redacted].

The auditor contends that the taxpayer makes a bare-rental (i.e., no operator) of tangible personal property to its clients, and that the charges are taxable rentals, as are the services agreed to be rendered as part of the rented property. The taxpayer believes that it provides a non-taxable service and is in full control of the tangible personal property used in providing the service.

Applicable Tax Law

In Idaho, the sale of tangible personal property is taxable unless an exemption applies. A taxable sale for the purpose of the Sales and Use Tax Act includes the rental of tangible personal property. It also includes services that are agreed to be rendered as a part of the sale or rental of tangible personal property. A retailer can buy or rent resale inventory without owing or paying tax. (Idaho Code §§ 63-3609, 63-3612 and 63-3613). Refunds for tax paid in error to vendors are allowed up to three (3) years from the time the vendor made payment to the Commission (Idaho Code § 63-3626).

Taxable “use” has a specific definition in the Sales and Use Tax Act. The term “use” includes the exercise of any right or power over tangible personal property incident to the ownership or the leasing of that property (Idaho Code § 63-3615(b)).

Summary of Taxpayer's Protest Letter and Analysis

The taxpayer's protest is limited to the auditor's proposed sales tax liability, arguing that it provides a non-taxable service rather than a rental of tangible personal property. It sells a service package that includes items it uses, not a collection of items it rents to clients. The taxpayer remains at each client location, and in essence "operates" the event as well as the material provided. The taxpayer does not hold a client responsible for breakage or theft of reusable items.

While it does not argue in the defined language of sales and use tax law, it contends that its clients do not have the requisite possession or control of the provided goods to require that a tax be imposed and collected. The taxpayer is resolute that it charges for design and consultation services, not for the rental of tangible personal property.

For argumentation, the taxpayer compares the rental of a backhoe with the services provided by a backhoe operator. The former is generally a taxable rental and the latter is not a rental, as explained in this administrative rule:

Rule 024. Rentals or Leases of Tangible Personal Property.

01. In General. The lease or rental of tangible personal property, including licensed motor vehicles, is a sale.

02. **Bare Equipment Rental. A bare equipment rental, that is, a rental of equipment without operator, is a taxable sale.** The owner of the equipment is a retailer and must get a seller's permit and collect and remit sales taxes. The equipment owner must collect sales tax on each rental payment and remit the tax to the State Tax Commission just like any other retailer. The tax applies whether the equipment is rented by the hour, day, week, month, or on a mileage, or any other basis. The equipment owner who mainly rents bare equipment may buy the equipment without paying tax to the vendor by giving him a resale certificate.... 03. Fully Operated Equipment Rentals.

a. **A fully operated equipment rental, equipment with operator, is a service rather than a retail sale** of tangible personal property. No sales tax is due on a fully operated equipment rental.

b. **A fully operated equipment rental** is an agreement in which the owner or supplier of the equipment or property supplies it along with operators

who are his own employees, and **the property supplied is of no value to the customer without the owner's employees.**

c. The owner or supplier of the equipment or property used in a fully operated equipment rental is the consumer of the equipment or property, and is subject to sales or use tax when he buys or uses the equipment in Idaho.....

d. **If the equipment or property has value to the customer without the owner's or supplier's employees, then the lease or rental of the equipment or property is a distinct transaction....**(IDAPA 35.01.02.024, excerpted in relevant part. Emphasis added).

Thus, where the taxpayer views setting up chairs and tables in certain places to be a non-taxable service, the Commission views such arrangements as the taxable [Redacted]. The taxpayer doesn't "operate" the furniture in the sense that an operator manages a backhoe. Where a backhoe has no use to the customer without an operator, the [Redacted] are fully utilized by the taxpayer's clients' guests.

The taxpayer believes that providing custom ordered decorations is a sufficient example of its contention that it provides a service, but the Commission concludes that the decorations are nevertheless useful to the client and guests without the supervision or services of the taxpayer. While decorations aren't necessarily "used" in the ordinary (i.e., dictionary definition) sense of the word by the client and guests, neither are they operated in the sense it is described in Rule 024, above. While the taxpayer is present and can move the furniture and decorations to other locations, the clients' guests nevertheless use the property in the sense defined in Idaho Code § 63-3615(b) cited previously.

Overall, the fact that the taxpayer remains at each venue to set up and adjust furniture and trimmings and accessories over the time of the event isn't enough to transform the taxable rental of tangible personal property into a non-taxable service. Further, the taxpayer's advice to its clients in what it provides to each client based on clients' desires is not, in itself, convincing that it provides a service. Rental arrangements are frequent where the retailer makes a

recommendation on what is necessary based on a customer's description of tasks to be performed.

Finally, the taxpayer's tax exempt purchase of certain reusable items by providing a resale certificate to its vendors suggests that the taxpayer had some understanding that it would be renting the goods, and should charge and collect a tax from its clients on the rental.

The Commission is not aware of an Idaho court case that is on point with this determination. Court cases from other jurisdictions are not binding on disputes in Idaho, but to the extent that there are factual similarities and comparable laws, the results are instructive.

In a case before the Supreme Court of Georgia, the following facts were discussed and a conclusion was reached. The appellant in the case

...owns mobile advertising signs, which he leases to customers for the purpose of advertising their businesses. The signs are placed either on the premises of the customers' businesses or at other locations throughout the area which the appellant owns or to which he has access. **The appellant advises his customers concerning the arrangement of the letters on the signs. The appellant is entirely responsible for the physical placement of the signs, as well as their repair and maintenance. However, the ultimate decision as to how the letters are arranged and where the signs are to be placed rests with the customer.**

The State Revenue Commissioner determined that these transactions are rentals of tangible personal property subject to a sales and use tax...

..the appellant argues that his leases of advertising signs are personal service transactions which involve sale as an inconsequential element for which no separate charge is made, and which would, therefore, be exempt from sales and use taxation ...

The revenue commissioner argues that the transactions in which the taxpayer is engaged are leases of tangible personal property, taxable under Code Ann. s 92-3403aG, supra. As authority for this argument, the commissioner cites Undercofler v. Whiteway Neon Ad., Inc., 114 Ga.App. 644, 152 S.E.2d 616 (1966). In that case, the Court of Appeals held that the lease of an advertising sign, built to the specifications of the lessee, was subject to sales and use taxation under Code Ann. s 92-3403aG, supra.

We agree with the revenue commissioner that under the authority of *Undercofler v. Whiteway Neon Ad., Inc.*, supra, the leases of advertising signs by the appellant are taxable leases of tangible personal property, subjecting the appellant to sales and use tax liability [collection] under Code Ann. s 92-3403aG, supra. Cf. *Turner Communications Corp. v. Chilivis*, 239 Ga. 91, 236 S.E.2d 251 (1977).

The revenue commissioner argues that the appellant's leases of the advertising signs are controlled by Revenue Regulation 560-12-2-.82(4), which provides that, "An agreement which grants to a party advertiser the rights to possess, control or use described personalty at a stated location is considered a lease and the gross lease or rental charge is taxable."

The revenue commissioner argues that under the leasing arrangements, as testified to by the appellant, **the customer does have the right to "possess, control or use" the signs.** We agree. **Even though the appellant is responsible for the physical placement, maintenance, and repair of the signs, the ultimate decision as to where the signs are to be placed and for what length of time the signs are to remain at that location is in the customer. Thus, when the signs are placed on the customer's property, the customer has the right to possess, control, and use the signs; when the signs are placed on property of the appellant, the customer still retains, at the least, the right of control** (*Register Mobile Advertising, Inc. V. Strickland*, 242 Ga. 604, 250 S.E.2d 468, (1978),emphasis added).

While Idaho has no specific revenue regulation wherein an advertiser with the rights to possess, control, or use described personality at a stated location is considered a lease (*Register Mobile Advertising, Inc. V. Strickland*), the Commission notes that the advertisers in the Georgia case conferred with the taxpayer appellant on the design of the signage and placement, much like the clients in the case at issue take advice from the taxpayer, but ultimately agree to what will be provided, where it will be placed, and for how long. A sign is not in any way manipulated once it is set in place, yet the court agreed with the revenue department that the advertisers had the right to possess, control, and use the signs under these conditions, even for signs placed on the appellant's land, and that the transactions were rightly characterized as leases subject to tax. These facts are readily transferable to the current case.

“Use,” then, is a threshold easily reached. In the Commission’s opinion, the clients and guests of the taxpayer in the case at issue used the goods provided by the taxpayer and the taxpayer should have collected a tax.

While maintaining that the audit findings are in error, the taxpayer believes that if a decision is reached that the taxpayer is in error, the Commission should show leniency or cancel the debt because it relied on erroneous information it claimed to have received from Commission employees in the fall 2005. The legal basis for such an assertion is the doctrine of equitable estoppel.

Equitable estoppel arises:

“[w]hen a party makes a false representation or concealment of a material fact with actual or constructive knowledge of the truth; it is made with the intent that it be relied upon; the party asserting estoppel does not know or could not discover the truth; and the party asserting estoppel relies on it to the party's prejudice.” *Hecla Min. Co. v. Star-Morning Min. Co.*, 122 Idaho 778, 782, 839 P.2d 1192, 1196 (1992); *Allen v. Reynolds*, 145 Idaho 807, 186 P.3d 663, (2008).

The Commission notes that the taxpayer did not rely on written advice, nor can the taxpayer identify the Commission employee who allegedly gave the incorrect advice in a telephone conversation or correspondence; however, even if one assumes the taxpayer was advised incorrectly, there is no precedent in Idaho to support the argument that the Tax Commission can be estopped from asserting a deficiency in this case. In fact, the Idaho Supreme Court has ruled the opposite:

‘In the levy and imposition of taxes, the state acts in its sovereign capacity, and hence, in an action for the collection thereof, cannot be subjected to an equitable estoppel.’ (Citations omitted.)

The government is not estopped by previous acts or conduct of its agents with reference to the determination of tax liabilities or by failure to collect the tax, nor will the mistakes or misinformation of its officers estop it from collecting the tax. (Citations omitted.) *State of Idaho v. Adams*, 90 Idaho 195, 409 P.2d 415 (1965).

Absent information to the contrary, the Commission finds the deficiency prepared by the Bureau to be a reasonably accurate representation of the taxpayer's sales and use tax liability for the period March 1, 2008, through February 28, 2011.

The Bureau added interest to the sales and use tax deficiency, per Idaho Code § 63-3045. Interest is calculated through September 16, 2013, and will continue to accrue at the rate set forth in Idaho Code § 63-3045(6) until paid.

THEREFORE, the Notice of Deficiency Determination dated March 8, 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 and interest:

<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$40,340	\$6,819	\$47,159

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 _____ 2013.

IDAHO STATE TAX COMMISSION

COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____ 2013, 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.
