

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)	
)	DOCKET NO. 25448
[Redacted],)	
)	
Petitioner.)	DECISION
_____)	

On October 23, 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, travel and convention tax, and interest for the period January 1, 2008, through May 31, 2012, in the total amount of \$2,990.

On December 21, 2012, the taxpayer filed a timely appeal and petition for redetermination of the Notice. At the request of the taxpayer, the Commission held an informal hearing on February 19, 2013. The Commission is fully informed of the audit findings, the taxpayer's protest, and information obtained at the hearing. For the reasons that follow, the Commission upholds the audit findings.

Background and Audit Findings

The taxpayer, a resident of Idaho, owns a vacation home in this state. The home is rented periodically for short-term lodging. The Idaho tax code imposes two statewide taxes on lodging: a six percent sales tax, and a two percent Hotel/Motel Room and Campground Sales Tax, commonly referred to as the travel and convention tax. The terms are used interchangeably in this decision.

The taxpayer did not have Commission-issued permits to collect either tax from lodgers, and the auditor asserted those taxes on lodging transactions for the period noted previously.

The Taxpayer's Protest

From the protest letter dated December 21, 2012, the taxpayer states:

The Idaho Code Sections referenced in the Notice of Deficiency (Sections 67-4711 and 63-3612) refer only to hotels, motels, campgrounds, or (in the case of 63-3612(g)) trailer park accommodations. The property I rented was a single-family residence, and, therefore, the taxes are inapplicable (Parenthetical text in the original).

In addition to this argument, the taxpayer believes that the Commission has not established sufficient guidelines with respect to the imposition of tax on vacation home lodging to justify a retroactive tax application.

The taxpayer refers to Sales and Use Tax Administrative Rule 025:

RENTALS OR LEASES OF REAL PROPERTY

In General. The sale, lease, or rental of real property, including office space, **living space**, lockers, boat docks, billboards, parking spaces, spaces for booths at fairs, and real property storage spaces **is not subject to sales tax** (IDAPA 35.01.02. 025.01, emphasis added).

The previous reference underscores the taxpayer's argument that living space is not subject to sales tax.

Relevant Tax Law

The statewide sales tax is imposed on short-term lodging:

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

(g) Providing hotel, motel, campground, or trailer court accommodations, nondepreciable goods directly consumed by customers and included services, except where residence is maintained continuously under the terms of a lease or similar agreement for a period in excess of thirty (30) days (Idaho Code § 63-3612).

A statewide Hotel/Motel Room and Campground Sales Tax is also imposed on short-term lodging:

“Sale” means the renting of a place to sleep, to an individual by a hotel, motel, or campground for a period of less than thirty one (31) continuous days (Idaho Code § 67-4711(7)).

Neither the Sales Tax Act, nor the Hotel/Motel Room and Campground Sales Tax code, mentions vacation homes *per se*. Rather, as noted above, the sales tax statute, Idaho Code § 63-3612(2)(g), refers to “hotel, motel, campground, or trailer court accommodations.”

The travel and convention tax code defines the terms “hotel/motel”:

“Hotel/Motel” means an establishment which provides lodging to members of the public for a fee, and **shall include** condominiums, townhouses or **any other establishment which makes a sale** as herein defined (Idaho Code § 67-4711(5), emphasis added).

Each of the two tax codes has administrative rules intended for interpretation of the code sections and their application to transactions. Sales Tax Administrative Rule 028 refers the reader to the travel and convention tax administrative rules for its full implementation:

Fees. Fees charged for providing hotel, motel, and campground accommodations are subject to the state sales tax, the Idaho Tourism and Convention taxes and may be subject to the Greater Boise Auditorium District sales tax. These taxes are explained in the Commission’s rules entitled Hotel/Motel Room and Campground Sales Tax Rules, IDAPA 35.01.06 (IDAPA 35.01.02. 028.01).

The Hotel/Motel Room and Campground Sales Tax Rules provide a broad definition of “hotel” and “motel” that the Commission believes encompasses vacation homes in the definition of lodging establishments:

Hotel or Motel Defined. The words hotel or motel means any person, partnership, corporation, trustee, receiver, or other association, regularly engaged in the business of furnishing rooms for use or occupancy, whether personal or commercial, in return for a consideration or which holds itself out as being regularly engaged in such business (IDAPA 35.01.06.010.02).

The Commission concludes that the code and rules reasonably extend the state's reach to tax the use of short-term lodging accommodations regardless of type.

The taxpayer's reference to the exclusion of tax on the rental of living space (IDAPA 35.01.02. 025.01, Rentals or Leases of Real Property), neglects to include Subparagraph 02 of Rule 025:

Hotel, Motel, and Campground Accommodations. The charge for providing hotel, motel, and campground accommodations is subject to sales tax as provided by Section 63-3612, Idaho Code. See ISTC Rule 028 ((IDAPA 35.01.02. 025.02).

Thus, the point of Rule 025's two subparagraphs is to distinguish between living space, which is not taxable, and lodging, which is taxable, rather than to confer an exemption from tax on the short-term rental of the taxpayer's vacation home. In fact, for the purpose of defining lodging subject to tax, the tax code defines "sale" to be limited to a period of less than thirty one (31) continuous days (Idaho Code § 67-4711(7)). "Living space" rental thus refers to apartments and homes rented or leased by the month, year, or longer period. This type of rental or lease is not lodging subject to either of the two taxes at issue.

The sales tax code defines "retailer" for the purpose of identifying those with a responsibility to collect tax on transactions that occur in-state:

Retailer engaged in business in this state. "Retailer engaged in business in this state" as used in this chapter means any retailer who:

(1) Engages in recurring solicitation of purchases from residents of this state or otherwise purposefully directs its business activities at residents of this state (Idaho Code § 63-3611).

The permissible period of time for which the Commission can impose tax retroactively is defined by statute. Those taxpayers with an obligation to collect and remit tax, but do not have a permit to do so, are subject to a maximum seven-year assessment period:

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 (Idaho Code § 63-3633).

Analysis and Conclusion

The Sales Tax Administrative Rules incorporate the Hotel/Motel Room and Campground Sales Tax Rules by reference, which in turn refer to the Hotel/Motel Room and Campground Sales Tax Act. The Commission thus concludes that the two relevant code sections and their respective rules are intended to be read together for a complete understanding of the taxes imposed by law. Under that premise, the Commission further concludes that there is no express exemption from collecting either tax for vacation home lodging transactions, and that the previously cited code and rules are broad enough to include them.

The Commission also concludes that the taxpayer can be defined as a retailer for sales tax purposes per Idaho Code § 63-3611, and a retailer for travel and convention tax per Rule 010 (IDAPA 35.01.06.010.02). The taxpayer's vacation home is available for short-term rental and has advertising exposure through a "Vacation Rental by Owner" website. The size of the audit deficiency is indicative of an on-going business, though consideration to the business' viability is not a statutory consideration. The taxpayer lists rental income on its income tax returns.

Neither tax code makes a distinction between passive and active investments, nor are the codes concerned with the level of marketing used by retailers to achieve sales. There is no statutory threshold with respect to how many transactions must occur before tax must be imposed. Many similarly situated taxpayers are registered with the Commission to collect sales, and travel and convention tax from customers who rent vacation homes.

Finally, while it has no direct bearing on the outcome of this protest, the Commission calls attention to the fact that both sales, and travel and convention taxes are to be collected by the retailer/lodging property operator from the lodgers. The burden of the tax falls to the buyers (Idaho Code § 63-3619), although the Commission has recourse against the seller if the collection and remittance obligation is not met.

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 travel and convention tax liability for the period January 1, 2008, through May 31, 2012.

The Bureau added interest to the sales and travel and convention tax deficiency. The Commission found it appropriate per Idaho Code §§ 63-3045 and has updated interest accordingly. Interest is calculated through November 30, 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 October 23, 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>SALES TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$1,987	\$312	\$2,299
 <u>T & C TAX</u>		
<u>\$ 662</u>	<u>681</u>	<u>1,343</u>
2,649	993	3,642

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.
