

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

In the Matter of the Protest of	)	
	)	DOCKET NO. 0-054-153-216
<b>[Redacted]</b> ,	)	
	)	
Petitioner.	)	DECISION
_____	)	

On July 31, 2015, 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]** (Petitioner), proposing sales tax, use tax, and interest for the period January 1, 2012, through December 31, 2014, in the total amount of \$59,946. For the reasons that follow, the Commission upholds the audit findings.

On October 2, 2015, the Petitioner filed a timely appeal and petition for redetermination of the Notice. At the Petitioner's request, the Commission held an informal hearing on April 19, 2016. Present at the informal hearing were Commissioner **[Redacted]**, Deputy Attorney General **[Redacted]**, and Tax Appeals Specialist **[Redacted]**.

The Commission, having reviewed the audit file and considered the information provided at the hearing and in the months following, hereby upholds the Notice for the reasons detailed below.

**Background**

The Petitioners business currently includes thirteen restaurants and a catering/event rental business. The Bureau conducted a routine comprehensive audit of the Petitioners business for the purpose of determining compliance with Idaho sales and use tax law. After its review, the Bureau asserted errors in catering sales, fixed asset purchases, ordinary purchases and employee meals. The Petitioner is in agreement with the Bureau's findings with the exception of the imposition of use tax on employee meals.

The Bureau found that the Petitioner provides its employees an allowance for meals. In the event that the employee exceeds the allowance when ordering food, the employee must pay the difference. The Bureau confirmed that the Petitioner does collect sales tax on the amount the employee pays for the meal, and determined that the transaction was conducted properly.

Type	Allowance	Difference	Sales Tax	Use Tax
Discounted Meals	10.00	2.00	0.12	—
Free Meals	10.00	—	—	Held

In the event that an employee meal did not exceed the allowance and the employee received a free meal, the Bureau asserted a use tax on the cost of the food the Petitioner removed from its resale inventory for its own use.

### **Petitioner's Protest**

The Petitioner protested the imposition of use tax on free employee meals and requested that the Notice be reduced by \$5,630 and the associated interest. The Petitioner believes that the following factors support its request:

- 1) The state of Idaho passed legislation specifically excluding those meals from use tax effective April 2, 2015.
- 2) Discounted meals provided to employees were previously exempt from use tax, however meals for employees that were provided free of charge were not.
- 3) There is an “implication that the effect of the law prior to HB 237 did not represent the true intent of the legislature and imposing use tax on those meals would cause an undue burden on the corporation by increasing the cost of free meals provided to its employees.”
- 4) The omission of use tax on free meals was not due to a conscious and intentional failure, rather a misinterpretation of the law as it previously existed. The Petitioner

asserts that it has always acted with intent to comply with the law and feels that this area was vague, and has since been remedied with legislation.

### **Analysis**

In general, a retailer can buy goods it intends to resell exempt from tax (Idaho Code § 63-3609), but the use of those items is taxable. Items withdrawn from a resale inventory for use other than the intended purpose (e.g., free employee meals, complimentary meals and other gifts) are to be taxed on the cost of the items (IDAPA 35.01.02.105.06.b.)

The Petitioner's protest states that there is an "implication that the effect of the law prior to HB 237 did not represent the true intent of the legislature and imposing use tax on those meals would cause an undue burden on the corporation by increasing the cost of free meals provided to its employees."

The Petitioner's protest addresses the changes to Idaho Code § 63-3621 with the passage of HB 237 that took effect on April 2, 2015, where the legislature added the following language to Idaho Code § 63-3621:

(p) The use tax herein imposed shall not apply to a retailer supplying prepared food or beverages free of charge to its employee when that retailer sells prepared food or beverages in its normal course of business.

The Commission takes this as clear guidance that the legislature intended the change in statute to take effect on April 2, 2015, and no earlier. The Petitioner specifically mentions the effective date of the change to the statute in the protest letter, leading the Commission to believe that it must be aware that the law changed on that date. The Commission is an administrative agency, not a legislative one. It will not substitute an alternative interpretation when it finds no ambiguity in the statutes.

The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. *Albee v. Judy*, 136 Idaho 226, 230, 31 P.3d 248,252 (2001.) If the language of

the statute is unambiguous, “the clear expressed intent of the legislature must be given effect and there is no occasion for construction.” *Udy v. Custer County*, 136 Idaho 386, 388, 34 P.3d 1069, 1071 (2001); *Ada County Assessor v. Roman Catholic Diocese*, 123 Idaho 425,428, 849 P.2d 98,101 (1993.)

The Petitioner asserted in its protest that discounted meals provided to employees were previously exempt from use tax; however, meals for employees that were provided free of charge were not. There is a fundamental difference between a sale made by a retailer and inventory that the retailer has given away for free. These different transactions are governed by a different section of the sales tax act.

Idaho Code § 63-3619 imposes a sales tax on every retail sale. This tax applies to the sale of tangible personal property and other sales specifically included by law. Idaho Code § 63-3613 (a) defines the sales price subject to sales tax. In the present case, when the Petitioner made a retail sale to its employee, it appropriately collected sales tax on the amount that the employee paid.

Where the retailer is giving away its inventory, rather than selling its inventory at a reduced rate, this is a different transaction. In general, a retailer can buy goods it intends to resell exempt from tax (Idaho Code § 63-3609), but the use of those items is taxable. Items withdrawn from a resale inventory for use other than the intended purpose (e.g., free employee meals, complimentary meals and other gifts) are to be taxed on the cost of the items (IDAPA 35.01.02.105.06.b.). Idaho Code § 63-3621 imposes a use tax on the storage, use, or other consumption of tangible personal property in Idaho. The rate of the use tax is the same as the sales tax imposed by Idaho Code § 63-3619. The use tax is a complementary tax to the sales tax. Every state that imposes a sales tax also imposes a use tax. The use tax is imposed when the

purchaser or user of the property in Idaho has not paid sales tax on the purchase of the property. Prior to the statute change, the Petitioner unambiguously owed a use tax on the food it took out of its inventory to provide free employee meals.

After the passage of HB 237, the Petitioner can provide prepared food or beverages to its employees free of charge and the food or beverages taken out of its inventory for that purpose will not be subject to use tax. The Commission cautions the Petitioner that in the event that the employee exceeds its allowance and has to pay any amount for a meal, this will be subject to sales tax on the amount that the employee pays.

Absent information to the contrary, the Commission finds the deficiency prepared by the Bureau to be a reasonably accurate representation of the Petitioner's sales and use tax liability for the period January 1, 2012, through December 31, 2014.

The Bureau added interest to the sales and use tax deficiency. The Commission reviewed that addition, and found both it to be appropriate per Idaho Code §§ 63-3045 and 63-3046. Interest has been updated accordingly and was calculated through December 31, 2016.

THEREFORE, the Notice of Deficiency Determination dated July 31, 2015, is hereby UPHeld, in accordance with the provisions of this decision, and is AFFIRMED and MADE FINAL.

IT IS ORDERED that the Petitioner pay the following tax, penalty and interest:

<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$55,319	0	\$4,729	\$60,048
		PAYMENT	(\$59,946)
		TOTAL DUE	\$102

DEMAND for immediate payment of the foregoing amount is hereby made and given.

An explanation of the Petitioner's right to appeal this decision is enclosed.

DATED this \_\_\_\_\_ day of \_\_\_\_\_ 2016.

IDAHO STATE TAX COMMISSION

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COMMISSIONER

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_\_ day of \_\_\_\_\_ 2016, 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.