

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)
) DOCKET NO. 39152
[Redacted] ,)
)
 Petitioner.) DECISION
)
_____)

On September 30, 2014, 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, penalty, and interest for the period August 1, 2011, through January 31, 2014, in the total amount of \$174,445.

On October 13, 2014, 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 November 13, 2015. Present at the informal hearing were Commissioner **[Redacted]**, Deputy Attorney General **[Redacted]**, and Tax Policy Specialist **[Redacted]**.

The Commission is fully advised of the contents of the audit file, as well as information obtained at the hearing and thereafter. For the reasons that follow, the Commission upholds the audit findings.

Background

The Petitioner is a vision care provider with multiple locations in the state of Idaho. The Bureau conducted a routine comprehensive audit of the Petitioner's business for the purpose of determining compliance with Idaho sales and use tax law. After its review, the Bureau determined that the Petitioner was not taxing all of its sales that were subject to sales tax and that the Petitioner was not remitting all of the sales tax it did collect from its customers. The Bureau calculated the deficiency and issued the Notice referenced above.

Petitioner's Protest and Review

The Petitioner protested the imposition of sales tax asserting that the audit was conducted using “unreasonable methods of interpreting and calculating the tax due.” The Petitioner stated that the audit itself was conducted as a result of an “unethical targeting of the professional ophthalmic industry related to **[Redacted]** .” The Petitioner stated that “it appears that the optometric industry is under attack regarding these types of vision plan tax calculations and asserted that it is being asked to pay a sales tax obligation that is inequitable and wholly unreasonable.”

The Tax Policy Specialist assigned to the petition for redetermination met with the Petitioner on March 18, 2015, to clarify the protested issues. The Petitioner asserted that in the initial audit the Bureau did not clearly understand or correctly interpret its accounting practices and, as a result, the amount due was incorrect. In fact, the Petitioner believes it has been reporting more tax than is due. In order to get a clearer understanding of the business's accounting practices and the errors identified in the audit, the Bureau was asked to provide an auditor unconnected to the original examination to review a test period, and then use the findings to either substantiate or refute the prior auditor's determination that sales tax was collected but not remitted to the State.

The Petitioner provided complete customer invoices (referred to as fee slips) for a portion of one of the originally sampled months, February 2013; the days provided were February 1, 4, 5, 6, 7, and 8. The reviewing auditor then examined these fee slips and any attached insurance documents and created an Excel spreadsheet file to itemize all the details. The hard copy fee slips were reconciled to the Excel file noted above. Two dates were noted on some of the invoices, and it was explained by the Petitioner that the ‘Service Date’ is the actual date of

service, and the 'Posted Date' is when the transaction was finalized in the computer system. The Petitioner finalizes a transaction when the customer has made whatever payment is required up-front; any insurance is then subsequently billed. Sales tax reporting to the state is based on the posted date, and the fee slips reviewed are listed by their posted date.

Since only a portion of the month's invoices were reviewed, a direct comparison to the February 2013 Form 850, Sales and Use Tax Return, was not possible. The reviewing auditor requested the worksheets or breakdown of the fee slips (showing itemization) and other figures that were used to calculate the actual amounts reported for the entire month. An itemized breakdown was necessary in order to reconcile the invoiced line items and sales tax directly to the Form 850 figures. In response, a daily sales breakdown for February 2013 was provided to the reviewing auditor in Excel format, and a reconciliation was satisfactorily performed from the invoices to the daily sales breakdown. This process allowed the reviewing auditor to verify there were no missing sales within the six day sample.

The sales tax accrual amounts for two of the six days reviewed show more tax reported than was actually charged to and collected from customers. Before calculating the error rate, the reviewing auditor disregarded any reporting of sales tax that was not actually collected from the customer. The result was that for the 6 days reviewed, overall, 98.33 percent of the accrued tax was charged to and collected from customers, with the remainder having been charged to and collected from other sources (due to the setup of the fee slip invoicing and insurance billing, this would be an issue covered in the review of questioned taxable sales). The percentage was then applied to the accrued amounts for the other days of the test month (for which fee slips were not reviewed) in order to adjust for the possibility that there were similar occurrences (to the benefit

of the Petitioner). The result is the total sales tax collected/accrued (Table A, line iv) for February 2013.

While the sales tax collected on the invoices flows through to the daily sales breakdown, the totals do not flow from the daily sales report to the Form 850. First, items subject to use tax were found to have been erroneously included in the sales tax remitted and were not listed on the appropriate line of the return (the same issue also appears to have happened in March 2013). It appears that the taxable and non-taxable figures were backed out from the tax total paid on the Form 850 (Table A, line i). The reviewing auditor removed the use tax of \$14.40 (Table A, line ii) from the total tax figure reported to arrive at the actual sales tax remitted (Table A, line iii) on the February 2013 Form 850.

The reviewing auditor subtracted the total sales tax collected/accrued (Table A, line iv) from the actual sales tax remitted (Table A, line iii) in order to determine the amount either over reported or under-reported for the period. This calculation revealed that the Petitioner under-reported for the period in the amount of \$904.04 (Table A, line v) resulting in an error rate of 28.52 percent (Table A, line vi) of the sales tax reported on the February 2013 Form 850. This percentage is higher than the original Auditor's findings.

Table A: Sales Tax Collected but Not Remitted (review of original worksheet S-2)		Sample
i.	Total Tax Reported on February 2013 Form 850:	3,183.78
ii.	Less Use Tax Paid per Petitioner's Records (\$240 taxable):	(14.40)
iii.	Actual Sales Tax Remitted on February 2013 Form 850:	3,169.38
iv.	Less Total Sales Tax Collected/Accrued for February 2013 Period:	(4,073.42)
v.	Total Over Reported or (Under Reported) for Period Reviewed:	(904.04)
vi.	Error Rate: Under-Reported / Total Sales Tax Remitted:	28.52%

The review conducted by the auditor shows that the Petitioner accrues the sales tax invoiced to its customers on posted transactions in the proper reporting month, but does not report the entirety of the accrued tax. The Petitioner asserts that the total under reported (Table A, line v) is the result of insurance adjustments that come in within the same month. When reporting the sales tax each month, the Petitioner reduces the amount accrued by adjustments received from insurance during the same month. This is where the variance originates. In essence, when the Petitioner collects the full amount of sales tax from a customer, it then reduces the amount of sales tax remitted after the insurance pays a reduced amount which results in the Petitioner keeping the difference. On all the fee slips reviewed, any sales tax itemized on the slips was paid by the customer.

The reviewing auditor concluded that the additional documentation provided by the Petitioner not only substantiated the previous auditor's determination that the Petitioner underpaid sales tax but indicated that the liability asserted in the Notice should have been even higher. The Petitioner was provided a copy of the report prepared by the reviewing auditor.

Relevant Tax Code for the Asserted Tax Liability

In Idaho, the sale of tangible personal property is subject to tax unless an exemption applies (Idaho Code § 63-3619).

A Retailer has a responsibility to remit all sales tax collected to the state of Idaho. Idaho Code § 63-3623A identifies "all moneys collected by retailers in compliance with [Chapter 36, Title 63, Idaho Code,]" as "state money" and goes on to state that "[s]uch money shall not, for any purpose, be considered to be a part of the proceeds of the sale to which the tax relates." IDAPA 35.01.02.105 also states that "[t]he sales or use tax collected by a retailer from a customer at the time of purchase becomes state money at that time. The collected amounts may

not be put to any use other than that allowed by Chapter 36, Title 63, Idaho Code, and these rules.”

The failure to remit all taxes collected from customers may constitute fraud:

Penalties and additions to the tax in case of deficiency.

(a) If any part of any deficiency is due to negligence or disregard of rules but without intent to defraud, five percent (5%) of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected and paid in the same manner as if it were a deficiency.

(b) 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)

Furthermore, for sales tax collected and not remitted, there is no statute of limitations on the assessment or collection,

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

- (1) In cases where the facts disclose a false or fraudulent act with the intent to evade tax, or
- (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(d)).

Analysis and Conclusion

The informal hearing was held at the conclusion of the review. The Petitioner maintains that the facts of the case are very complex and that evidence of this complexity can be found in what it calls the differing opinions of the two auditors that examined its records. The Commission agrees with the Petitioner that this case does have a level of complexity. The Petitioner made only limited documentation available to the Commission. Pursuant to Idaho Code § 63-3624, the Commission is authorized to examine the Petitioners records, yet the Petitioner did not allow the Commission access to all of the records requested by either of the auditors.

The Petitioner argues that there is an explanation for the variances identified by both auditors. Its position is largely based upon its continued assertions that insurance adjustments

offset the sales tax accrued. However, the Commission cannot take a position on this argument as the Petitioner has not provided documentation of these offsets.

In the event that the Petitioner had provided documentation that breaks down each of the insurance adjustments, this still may not have resolved the issue at hand. Both auditors asserted that the Petitioner had not remitted all of the sales tax it collected from its customers. The Petitioner, as an Idaho retailer, has a responsibility to remit all sales tax collected to the state of Idaho. At no point does the sales tax collected belong to the retailer. Adjustments to this amount should only be made if the tax is first refunded to its customer.

In this case, two auditors have reviewed the very limited documentation the Petitioner chose to provide and both came to the conclusion that sales tax has been underpaid. Based upon the information available the Petitioner has not shown *how* these auditors have miscalculated the Petitioner's liability. The Commission upholds the audit findings.

The Petitioner alleges that the Bureau unfairly targeted its business for audit. The Commission has not found evidence of unfair targeting in this matter. Idaho law provides that any business is subject to audit for the purpose of determining compliance with Idaho sales and use tax law according to Idaho Code § 63-3624. Once selected for an audit the question is whether tax was correctly collected and remitted. This decision determines that tax was incorrectly collected and remitted.

In closing, the Petitioner has not provided evidence adequate to establish that the amount asserted in the Notice of Deficiency Determination 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 Petitioner 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 a reasonably accurate representation of the Petitioner's sales and use tax liability for the period August 1, 2011, through January 31, 2014.

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 July 29, 2016, 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 September 30, 2014, is hereby APPROVED, 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>
\$155,619	\$7,781	\$21,353	\$184,753

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 included with this decision.

DATED this _____ day of _____ 2016.

IDAHO STATE TAX COMMISSION

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.
