

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

In the Matter of the Protest of	)	
	)	DOCKET NO. 39253
<b>[Redacted]</b>	)	
,	)	
	)	
Petitioner.	)	DECISION
_____	)	

On February 12, 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 use tax and interest for the period March 1, 2011, through February 28, 2014, in the total amount of \$27,207.

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 July 20, 2015. Present at the informal hearing were Commissioner **[Redacted]**, Deputy Attorney General **[Redacted]**, and Tax Policy Specialist **[Redacted]**.

**Background & Protest**

The Petitioner is an Idaho based retailer and real property contractor. The Bureau conducted a routine comprehensive audit of the Petitioners business and found errors related to real property improvements and ordinary purchases.

These errors have been categorized in the following table, apportioning the use tax and interest by how they are being resolved.

Portions	A	B	C	Totals
Tax	\$23,052	\$313	\$1,505	\$24,870
Interest	<u>\$2,172</u>	<u>\$29</u>	<u>\$136</u>	<u>\$2,337</u>
	<u>\$25,224</u>	<u>\$342</u>	<u>\$1,641</u>	<u>\$27,207</u>

- A. Settlement Agreement – Represents amounts that the Commission and the Petitioner were able to resolve through the settlement process. This portion of the proposed use tax and interest will not be addressed in this decision.
- B. Decision - Represents the amount that the Petitioner has asserted that it is in agreement with.
- C. Decision – Represents the amount that the Petitioner requested that the Commission address in this decision, specifically the imposition of use tax on building materials incorporated into real property improvements for an exempt entity.

In its protest of the imposition of use tax on building materials incorporated into real property improvements for an exempt entity, the Petitioner posits that it is unethical for the Bureau to expect contractors to pay a use tax on the materials it will be installing into real property for a tax exempt entity and expect for the contractor to include that amount into the bid to the exempt entity. The Petitioner goes on to state that it believes that if the tax code actually calls for this, it needs to be changed.

### **Analysis**

Idaho Code § 63-3621 imposes a use tax on the storage, use, or other consumption of tangible personal property in this state. 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 rate is the same as the sales tax. A person who

pays sales tax to his vendor when buying tangible personal property does not owe any use tax. Use tax is only due when the purchaser does not pay sales tax at the time of sale.

Idaho Code § 63-3612 states that “the term ‘sale’ means any transfer of title, exchange or barter, conditional or otherwise, of tangible personal property for a consideration...” Sales of real property improvements are not included within this definition and are, therefore, not subject to sales or use tax. Sales and use taxes are imposed only on retail sales. Retail sales are sales to the ultimate consumer. Idaho Code § 63-3609 defines retailer as:

**63-3609. RETAIL SALE -- SALE AT RETAIL.** -- The terms “retail sale” or “sale at retail” means a sale for any purpose other than resale in the regular course of business or lease or rental of property in the regular course of business where such rental or lease is taxable under section 63-3612(h), Idaho Code.

(a) All persons engaged in constructing, altering, repairing or improving real estate, are consumers of the material used by them; all sales to or use by such persons of tangible personal property are taxable whether or not such persons intend resale of the improved property.

(b) For the purpose of this chapter, the sale or purchase of personal property incidental to the sale of real property or used mobile homes is deemed a sale of real property.

For this reason, contractors improving real property pay sales or use taxes on all their purchases of building materials that they install in real property. The Petitioner in this case is arguing that if the building materials are purchased to be installed into real property belonging to an exempt entity, then no sales or use tax should be due.

Idaho Code § 63-3622O lists exempt private and public organizations that are exempted from the taxes imposed by the Sales Tax Act:

**63-3622O. EXEMPT PRIVATE AND PUBLIC ORGANIZATIONS.** (1) There are exempted from the taxes imposed by this chapter:

(a) Sales to or purchases by hospitals, health-related entities, educational institutions, forest protective associations and canal companies which are nonprofit organizations; and

(b) Donations to, sales to, and purchases by the Idaho Foodbank Warehouse, Inc.; and

(c) Donations to, sales to, and purchases by food banks or soup kitchens of food or other tangible personal property used by food banks or soup kitchens in the growing, storage, preparation or service of food, but not including motor vehicles or trailers; and

(d) Sales of clothes to, donations of clothes to, and purchases of clothes by nonsale clothiers; and

(e) Sales to or purchases by centers for independent living; and

(f) Sales to or purchases by the state of Idaho and its agencies and its political subdivisions; and

(g) Sales to or purchases by volunteer fire departments or licensed emergency medical service agencies; and

(h) Sales to or purchases by a qualifying senior citizen center; and

(i) Sales to or purchases by the Blind Services Foundation, Inc.; and

(j) Donations to, sales to or purchases by the Advocates for Survivors of Domestic Violence and Sexual Assault, Inc., a nonprofit corporation; and

(k) Sales to or purchases by nonprofit organizations offering free dental clinic services to children; and

(l) Admissions to and purchases by museums, as defined in subsection (2) of this section. . . .

Within the same statute that provides exemption for these entities, it specifically states that the exemptions granted by subsection (1) “do not include the use of tangible personal property by a contractor used to improve real property of an exempt entity when such use is within the definition provided by § 63-3615(b), Idaho Code, whether the use tax liability is included in a contract total or stated separately in a contract” according to Idaho Code § 63-3622O(4).

Use as defined by 63-3615(b) includes “the exercise of any right or power over tangible personal property . . . by any person in the performance of a contract, or to fulfill contract or subcontract obligations, whether the title of such property be in the subcontractor, contractor, contractee, subcontractee, or any other person . . .”

In this case the Commission agrees with the Bureaus imposition on use tax on materials incorporated into real property belonging to an exempt entity. Based upon the previously listed

exclusion, a contractor improving real property should be paying a sales or use tax on all materials regardless of whom the work is being done for.

In conclusion, the portion of the Notice referenced earlier in the decision as portion (A), was resolved separately in the settlement agreement for docket 39253. The Commission hereby upholds the amount held by the Bureau for portions (B) and (C).

The Bureau added interest to the use tax deficiency. The Commission reviewed the additions and found it to be appropriate per Idaho Code § 63-3045 and has updated interest accordingly. Interest will continue to accrue at the rate set forth in Idaho Code § 63-3045(6) until paid.

THEREFORE, the portion of the Notice of Deficiency Determination dated February 12, 2015, referenced above as issues (B) & (C) are 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>
\$1,818	\$0	\$237	<u>\$2,055</u>
		Payment	351
		Balance	<u>\$1,704</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 \_\_\_\_\_ 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.

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