

In the Matter of the Protest of

Petitioner.

DECISION

service the portable toilets. The Bureau asserted that the separately stated service fees were also taxable, resulting in the petition for redetermination.

In the recent audit of Petitioner's business, the Bureau found that Petitioner was not collecting sales tax on any portion of the rental fees associated with the rental of portable toilets. The Bureau also noted that Petitioner was not paying sales tax on the purchase of the portable toilets it was renting. Petitioner maintains an inventory of single, double, and handicap portable toilets. Petitioner does not currently pay sales tax on the purchase of the portable toilets, nor does Petitioner collect sales tax from its customers on the rental of the portable toilets.

When renting a portable toilet, Petitioner requires the customer to sign a rental contract that holds that customer responsible for any damage to the portable toilet during the time that the customer has possession of the toilet.

The customer has the option to pay for the servicing of the portable toilet either daily or weekly. This servicing includes the removal of waste, toilet cleaning, sanitizing, scenting, and the provision of two extra-large rolls of toilet paper. Petitioner pays sales tax on the purchase of these supplies.

The Bureau held that what Petitioner was providing was a "mixed transaction," part of which is taxable as a rental of tangible personal property and part of which is a non-taxable service. In the event that the rental of the portable toilet was a one-day rental, the Bureau held the entire fee is subject to sales tax because the service fee was not optional in this case. Because there was no separate statement of the fee, the Bureau apportioned the fee between the rental and the service for rentals that exceeded one day using information provided by Petitioner.

Relevant Tax Code and Analysis

In Idaho, the sale of tangible personal property is taxable unless an exemption applies. Rentals of tangible personal property are included in the definition of a taxable sale. Idaho Code § 63-3612(2)(h)

IDAPA 35.01.02.024 discusses the rental or lease of tangible personal property, clarifies the difference between a bare equipment rental and a fully operated equipment rental, and discusses how the purchase of rental equipment should be treated in each case:

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 (7-1-93)

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 primarily rents bare equipment may buy the equipment without paying tax to the vendor by giving him a resale certificate. . . . (4-4-13)

03. Fully Operated Equipment Rentals. (7-1-93)

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. (7-1-93)

b. A fully operated equipment rental is an agreement in which the owner or supplier of the equipment or property supplies the equipment or property along with an operator, and the property supplied is of no value to the customer without the operator. (4-4-13)

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. Special rules apply to transient equipment used for short periods in Idaho. See Rule 073 of these rules. (7-1-99)

d. If the equipment or property has value to the customer without an operator, then the lease or rental of the equipment or property is a distinct transaction. It is subject to sales or use tax and its price must be stated separately from the price of the service provided by the operator. (4-4-13)

e. Example: A crane rental company provides a mobile crane to a contractor, along with an operator. The contractor may not use the crane without the operator, so the leasing company is not required to charge sales tax on the lease of the crane. (4-4-13)

f. Example: Pick-Up Industries provides a three (3) cubic yard trash container to a customer. Pick-Up also provides trash hauling service to empty the container. Since the container is used to store trash between collections, its transfer to a customer is a lease subject to sales tax. . . (7-1-93)

IDAPA 35.01.02.024, excerpted in relevant part.

IDAPA 35.01.02.011.02 provides guidance on how to treat a sale that is a mixed transaction of the transfer of tangible personal property and the provision of a service:

02. Retail Sales of Tangible Personal Property Together with Services. The sales tax applies to retail sales of tangible personal property. It does not apply to the sale of services except as stated above. However, when a sale of tangible personal property includes incidental services, the tax applies to the total amount charged, including fees for any incidental services except separately stated transportation and installation fees. The fact that the charge for the tangible personal property results mainly from the labor or creativity of its maker does not turn a sale of tangible personal property into a sale of services. The cost of any product includes labor and manufacturing skill. To determine whether a transaction is a retail sale of tangible personal property or a sale of services, the following tests must be applied. (7-1-93)

a. To determine whether a transfer of tangible personal property is a taxable retail sale or is merely incidental to a service transaction, the proper test is to determine whether the transaction involves a consequential or inconsequential professional or personal service. If the service rendered is inconsequential, then the entire transaction is taxable. If a consequential service is rendered, then it must be determined whether the transfer of the tangible personal property is an inconsequential part of the transaction. If so, then none of the consideration paid is taxable. (7-1-93)

b. To determine whether a mixed transaction qualifies as a sale of services, the object of the transaction must be determined; that is, is the buyer seeking the service itself, or the property produced by the service. (7-1-93)

c. When a mixed transaction involves the transfer of tangible personal property and the performance of a service, both of which are consequential elements whose costs may be separately stated, then two (2) separate transactions exist. The one attributable to the sale of tangible personal property is subject to sales tax while the other is not. . . . (7-1-93)

IDAPA 35.01.02.011.02

Petitioner's Protest

Petitioner protested the imposition of tax on the rental of the portable toilets, asserting that the rental of the portable toilets is a service, therefore the equipment itself is not subject to sales tax. Petitioner states that after the resolution of a prior appeal, they were under the impression that this was a service and that they were going to receive additional guidance from the Commission. Petitioner asserted that it had been told by the Commission not to tax the separately stated service on the portable toilet rentals and that the rule would be proposed in the next legislative session.

Petitioner has requested that the Commission abate the amount at issue based upon its failure to provide guidance after the last audit. Petitioner posits that if it had been given clear guidance, it would have been easy for them to collect and remit sales tax from their customers.

Analysis and Conclusion

There is no question that the rental of a portable toilet without any fees for servicing the rental equipment is a taxable sale, essentially it is a bare equipment rental.

There is no question that the servicing of a customer-owned portable toilet would be a service and not subject to sales tax.

The Bureau has held that each of these are consequential elements of the rental of the portable toilet. The Commission finds that Petitioner's argument that provision of both the rental equipment and the servicing of that rental equipment somehow changes the entire transaction into a service makes little sense. The Commission fails to see how servicing the rental equipment

renders rental of the portable toilet to be an inconsequential part of the transaction.

The Commission explored the idea that the rental of a portable toilet could somehow be an operated equipment rental. IDAPA 35.01.02.024.03 defines a fully operated equipment rental as “an agreement in which the owner or supplier of the equipment or property supplies the equipment or property along with an operator, and the property supplied is of no value to the customer without the operator.” An operator is not necessary for the customer to use a portable toilet; therefore, the property supplied has value to the customer without an operator. The portable toilet is placed in the location the customer designates for the period of time that the customer specifies. The portable toilet is in the sole possession and control of the customer and in the event that it is damaged while it is in the customer’s possession, the customer is responsible for the costs of repairing or replacing it. The Commission does not believe that the rental of a portable toilet meets the definition of a fully operated equipment rental.

The Commission agrees with the Bureau that the rental of the portable toilet combined with the servicing of the toilet is in fact a “mixed transaction,” part of which is taxable as a rental of tangible personal property and part of which is a non-taxable service.

Petitioner puts a lot of weight to its argument that the amount at issue is due to the lack of guidance provided by the Commission after the previous audit. The Commission reviewed the previous audit and its subsequent appeal in order to verify what sort of guidance, if any, was provided to Petitioner. The protested issue at that time was for the separately stated service fee associated with the rental of a portable toilet. Petitioner was advised in writing at that time it should not collect tax on the separately stated service fees. There is nothing documented in the appeal file that leads the Commission to believe that Petitioner was advised it should stop taxing the rentals altogether because it is a service. To do so would go against long-standing rules and

regulations that the rental of tangible personal property in conjunction with a nontaxable service is a taxable rental under Idaho Code § 63-3612. *See, e.g., “Memorandum Decision,” Browning Ferris Industries, Inc v. The State Tax Commission of the State of Idaho*, No. 76537, (D. Ada Jul. 27, 1983) (rental of trash “dumpsters” subject to tax); *Ryder v. Idaho State Tax Comm’n*, 130 Idaho 245 (1997) (rental of radio pagers in conjunction with non-taxable communication service subject to sales tax).

In both cases the rental of the tangible personal property in conjunction with a nontaxable service were seen to be separate consequential elements of what is being provided.

On appeal, a deficiency determination issued by the Tax Commission “is presumed to be correct, and the burden is on the taxpayer to show that the Commission’s decision is erroneous.” *Parker v. Idaho State Tax Comm’n*, 148 Idaho 842, 845, 230 P.3d 734, 737 (2010); *Albertson’s Inc. v. State Dep’t of Revenue*, 106 Idaho 810, 814, 683 P.2d 846, 850 (1984). The Tax Commission requires Petitioner to provide adequate evidence to establish that the amount asserted in the Notice is incorrect. Here, Petitioner did not provide adequate evidence. As a result, the Commission will uphold the Notice.

Absent information to the contrary, the Commission finds the Notice prepared by the Bureau to be a reasonably accurate representation of Petitioner’s sales and use tax liability for the period September 1, 2012, through August 31, 2015.

The Bureau added interest 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 28, 2017, 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 April 7, 2016, is hereby APPROVED, in accordance with the provisions of this decision, and is AFFIRMED and MADE FINAL.

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

<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$14,482	\$1,603	\$16,085
	Payment	<u>(\$7,714)</u>
		<u>\$8,371</u>

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

An explanation of Petitioner's right to appeal this decision is included with this decision.

DATED this _____ day of _____, 2017.

IDAHO STATE TAX COMMISSION

COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 2017 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.
