

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

In the Matter of the Protest of	)	
	)	DOCKET NO. 1-573-251-072
	)	
Petitioner.	)	DECISION
<hr style="width: 45%; margin-left: 0;"/>	)	

(Petitioner) protested the Notice of Deficiency Determination (Notice) issued by the Sales Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission). The Notice proposed sales and use tax, penalty, and interest in the amount of \$259,236, for the audit period January 1, 2014, through December 31, 2018 (Audit Period).

The Commission hereby upholds the Bureau’s Notice for the reasons detailed below.

**Background and Audit Findings**

Petitioner is an online retailer of tires and automobile accessories. Petitioner began as the direct shipper mail order business portion of (Related). The mail order direct shipping allowed customers not located near a store to have the ability to purchase tires from Related. Petitioner and Related are owned by the - are run by the same corporate officers, and maintain a corporate office at

Prior to 2019, Petitioner did not collect Idaho sales tax. Petitioner obtained a seller’s permit starting in January 2019, after the United States Supreme Court decision rendered in *South Dakota v. Wayfair, Inc.* 585 U.S. (2018), 138 S.Ct. 2080, opened a gateway to allow states to require businesses without a physical presence in that state to collect sales tax if such businesses made significant transactions within that state. Following the *Wayfair* decision Idaho passed legislation in 2019, Idaho Code section 63-3605E, that requires a marketplace facilitator that makes more than \$100,000 in sales in any 12-month period, must collect and remit sales tax to the state.

The Bureau discovered Petitioner was making non-taxed sales of tires and wheels to Idaho customers prior to the *Wayfair* decision. The Bureau researched Petitioner's business activities to determine if substantial nexus existed. The Bureau's research determined substantial nexus existed for Petitioner, so sales records were requested for the review period. Petitioner did not agree with the Bureau's nexus determination and refused to provide any information or records. Because of this, the Bureau projected Petitioner's Idaho sales for the audit period. The Bureau used sales reported to Idaho from January 1, 2019, to May 30, 2019, on Petitioner's sales and use tax returns to obtain a monthly sales average for Idaho. The monthly sales average of \$58,759 was used to project Idaho sales over the period January 1, 2014 – December 31, 2018. Each twelve-month period equaled \$705,112 in projected sales. In total, the Bureau projected Petitioner had \$3,525,560 in sales over the entire review period and issued a Notice.

Petitioner appealed the Notice issued on September 25, 2020, claiming the Bureau's determination of sales and use tax nexus for sales made to Idaho customers was incorrect. Petitioner argues in their protest that Idaho used the *Wayfair* decision issued July 2018 to determine nexus which was not meant to be retroactive. The Bureau received and acknowledged the protest from Petitioner and forwarded the case to the Appeals Unit (Appeals) for assignment.

Appeals contacted Petitioner and scheduled an informal hearing that was held on July 14, 2022, to discuss the case. The topics discussed at the hearing were nexus, warranties, service contracts, and service labor. During the hearing, the Commission requested information from both Petitioner and Related on service contracts, warranties, and third party repairs. Petitioner did not provide supporting documentation for the items in question. The Commission received written responses for several questions asked during the hearing and two affidavits from employees. The last affidavit was received in March of 2023 from the tax manager of Related who holds the same

position for Petitioner. Petitioner informed the Commission at that time they did not have further information to provide and wished to have a decision issued.

### **Relevant Tax Code and Analysis**

Petitioner does not believe they have a sufficient physical presence in Idaho to meet the requirements of Idaho Code section 63-3611(2). Petitioner questions if Idaho can assert jurisdiction to require it to collect and remit sales tax prior to *Wayfair*. During the informal hearing, Petitioner claimed they were a separate and distinct entity from and in direct competition with Related rather than working in conjunction with them. Petitioner protested the Bureau's determination of nexus using Idaho Code section 63-3615(A) Substantial Nexus, believing the original requirements listed in ICS 63-3611(2) were not met.

Idaho Code Section 63-3611 states:

**63-3611.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; and
- (2) Has sufficient contact with this state, in accordance with the constitution of the United States, to allow the state to require the seller to collect and remit use tax on sales of tangible personal property or services made to customers in this state.
- (3) The term includes any of the following:
  - (a) Any retailer maintaining, occupying or using, permanently or temporarily, directly or indirectly, or through a subsidiary or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business or maintaining a stock of goods.
  - (b) Any retailer having any representative, agent, salesman, canvasser or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, installing or the taking of orders for any tangible personal property.
  - (c) Any retailer, with respect to a lease or rental, deriving rentals from a lease or rental of tangible personal property situated in this state.

- (d) Any retailer engaging in any activity in connection with servicing or installing tangible personal property in this state.
- (e) Any retailer with substantial nexus in this state within the meaning of section [63-3615A](#), Idaho Code.
- (f) Any retailer having a franchisee or licensee operating under its trade name if the franchisee or licensee is required to collect the tax under the provisions of this section.

Subsection (3)(e), above, references Idaho Code Section 63-3615(A). which states:

**63-3615A. SUBSTANTIAL NEXUS.** (1) Subject to the limitation in subsection (2) of section 63-3611, Idaho Code, a retailer has substantial nexus with this state if both of the following apply:

- (a) The retailer and an in-state business maintaining one (1) or more locations within this state are related parties; and
- (b) The retailer and the in-state business use an identical or substantially similar name, trade name, trademark or goodwill to develop, promote or maintain sales, or the in-state business provides services to, or that inure to the benefit of, the out-of-state business related to developing, promoting or maintaining the in-state market.

(2) Two (2) entities are related parties under this section if they meet any one (1) of the following tests:

- (a) Both entities are component members of the same controlled group of corporations under section 1563 of the Internal Revenue Code;
- (b) One (1) entity is a related taxpayer to the other entity under the provisions of section 267 of the Internal Revenue Code;
- (c) One (1) entity is a corporation and the other entity and any party, for which section 318 of the Internal Revenue Code requires an attribution of ownership of stock from that party to the entity, own directly, indirectly, beneficially, or constructively at least fifty percent (50%) of the value of the outstanding stock of the corporation; or
- (d) One (1) or both entities is a limited liability company, partnership, estate or trust, none of which is treated as a corporation for federal income tax purposes, and such limited liability company, partnership, estate or trust and its members, partners or beneficiaries own in the aggregate directly, indirectly, beneficially, or constructively at least fifty percent (50%) of the profits, capital, stock or value of the other entity or both entities.

(3) The provisions of this section shall not apply to a retailer that had sales in this state in the previous year in an amount of less than one hundred thousand dollars (\$100,000).

(4) The definition of "Internal Revenue Code" in section 63-3004, Idaho Code, shall apply to this section.

Petitioner did not address whether it satisfies the requirements set forth by Idaho Code section 63-3615(A)(1) (a) and (b) as it does not believe the state has proven a connection with Idaho that would satisfy Idaho Code section 63-3611(2), constitutional nexus requirement. Petitioner cited three United States Supreme Court rulings to support their stance; *SFS Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn. 1991), cert. denied, 501 U.S. 1223 (1991); *Bloomington's by Mail Ltd. v. Commonwealth Department of Revenue*, 567 A.2d 773 (Pa. 1989), aff'd, 591 A.2d 1047 (1991), cert. denied, 504 U.S. 955 (1992); and *Current v. State Bd. Of Equalization*, 29 Cal. Rptr. 2d 407 (1<sup>st</sup> Dist. 1994).

Both *SFS Folio* and *Bloomington's* revolved around the same facts ruled upon in *Quill*, *supra*, 504 U.S. 298, 112 S.Ct. 1904 (1992). In *Quill*, the defendant was a catalog retailer of office supplies that did not have a physical presence or related entities present in South Dakota. The only contact with the states in *SFS Folio* and *Bloomington's* came from catalog and flyer mailings to residents. The United States Supreme Court ruled the commerce clause was not overcome by the state. *Quill* helped establish the "bright line test" in determining substantial nexus by states. The bright line test put an emphasis on a company's physical presence in a state to prove nexus.

*Current* (Plaintiff) involved a parent and subsidiary business conducting sales of merchandise in the state of California. *Plaintiff* only made mail order sales into California while the parent company had a physical presence in the state that included sales representatives and contract retailers. The court ruled that *Plaintiff's* development, design, production, and marketing of its novelty products was substantially dissimilar enough from the parent company that it afforded no basis for the California code to assert nexus. *Current*, *SFS Folio*, and *Bloomington's*

are from a time before the widespread use of the internet for business purposes and the company structures are dissimilar to Petitioner's.

The Bureau used Idaho Code sections 63-3611 Retailer Engaged In Business In This State and 63-3615(A) Substantial Nexus to determine Petitioner's nexus. *Wayfair* was not used as it was inapplicable to the period reviewed. Several connections with Related that established nexus in Idaho were discovered during the review process. Petitioner had sufficient contact with Idaho long before the *Wayfair* decision. Petitioner began as the mail order division of Related for customers that did not live near a retail location. Related's website directed these customers to Petitioner's phone number initially and then website once the internet came to be. Related continued referring customers to Petitioner for its mail order business as recently as 2017. As late as August 20, 2018, Related's website was informing customers that if they did not wish to return tires purchased from Petitioner by mail, they could bring their returns into its stores. This included warranty repairs and replacements for tires purchased from Petitioner.

Petitioner gives customers located in the Treasure Valley a list of potential installers for the tires and wheels purchased from them. This list is made up of several Idaho locations in the Treasure Valley and one independent service shop located 40 miles outside the area. This was the same for eastern and northern Idaho markets. None of the independent installers listed were located near a Related store or were direct competitors of Related. Petitioner also directs its customers located outside Idaho borders to Related retail locations in Idaho if one is not located near them in another state. By doing this, Petitioner and Related are assisting each other to maintain and expand their market shares in Idaho.

Petitioner and Related use the same trademarks, trade names, and good will to develop and promote Idaho sales. The only difference between Petitioner and Related's logo is the word

“Direct”. The design, color, and placement of the logo are all the same. Both companies use the same media resources (You Tube Videos) to explain Certificates for Replacement. Complaints and Accessibility issues for Petitioner are directed to send their feedback to, accessibility@ .com. The Commission researched the corporate listings of Petitioner and Related with the Arizona Corporation Commission. Both companies are owned by the same parent corporation, have the same corporate officers, and are headquartered in the same building in Petitioner and Related use the same Tax Manager and points of contact for Idaho permits.

The Commission used these connections, along with the following court rulings as legal precedent in its decision. These cases involve businesses that were akin to Petitioner’s business operations and set up with Related.

1. *Borders Online, LLC v. State Board of Equalization*, 129 CA. App. 4<sup>th</sup> 1179 (1<sup>st</sup> Dist. 2005)
2. *New Mexico Taxation and Revenue Department v. BarnesandNoble.com, LLC*, 303 NMSC P.3d 824 (2013)

*Borders* and *BarnesandNoble.com* have similar operations to Petitioner and Related. The online business was a separate legal entity from the in-state stores, and both legal entities were owned by a single parent company. The online businesses sold the same products as the in-state stores and the in-state stores advertised that online customers could return products at the physical locations. In both cases, the online business shared the same intangibles, trademarks, as the instate stores. *Borders* and *BarnesandNoble.com* portrayed themselves as being direct competitors of the online businesses. In both cases, the state courts found in favor of the taxing authority establishing nexus.

To support their argument, Petitioner provided two sworn statements, one from the Tax Manager of Related and one from the Senior Director of E-Commerce & User Experience of - as evidence of direct competition. The Tax Manager of Related, who acts in the same position for Petitioner, provided a sample purchase document explaining Petitioner's return/refund policy. The sample purchase document was a copy of the certificate for refund, repair, or replacement from 2013. While Petitioner makes the conclusion that it is in direct competition with Related, the reality is that both businesses rely on each other to conduct business.

Another factor showing a connection between the two companies is the Certificates for Refund and Replacement issued by both. Related directs customers of Petitioner to bring their tires into its shops and they will do the best they can to take care of them. One of the affidavits received from Petitioner was from the Senior Director of E-Commerce claiming the statement made on Related's website was done so in error by an ex-employee with creative freedom of content. Despite this claim, to date, Related has not removed the statement from their website under customer care, returns.

This information shows us that Petitioner meets the qualifications of Idaho Code section 63-3615(A)(1)(a) and (b) which supports the substantial nexus determination. The information meets the requirements of Idaho Code section 63-3611(2) as Petitioner has more than met the requirements of nexus for commerce clause purposes. The Commerce Clause helps maintain open trade and commerce between states and eliminates the improper use of tariffs and taxes to unduly burden out-of-state retailers for interstate commerce. Conversely, the Commerce Clause is not meant to be used as a mechanism to allow inequities in commerce for competing industries and businesses.



## Conclusion

Petitioner was reviewed for potential nexus concerning sales and use tax. The connection between Related and Petitioner proved to be more than just mere competitors in the same marketplace. The Bureau attempted to obtain financial records for sales made to Idaho customers and the supporting documentation (sales invoices) to accurately calculate sales tax due for the audit period. Petitioner ignored all attempts by the Bureau to obtain this information.

The Commission requires Petitioner to provide adequate evidence to establish that the amount asserted in the Notice is incorrect. Petitioner was unable to provide adequate evidence to establish the amount asserted in the Notice is incorrect. 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 tax liability for the period January 1, 2014 through December 31, 2018.

The Bureau added penalty and interest to the sales and use tax deficiency. The Commission reviewed those additions, found both to be appropriate per Idaho Code sections 63-3045 and 63-3046, and has updated interest accordingly. Interest will continue to accrue at the rate set forth in Idaho Code section 63-3045(6) until paid.

THEREFORE, the Notice of Deficiency Determination dated September 25, 2020, 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, penalty, and interest:

<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$211,535	\$10,575	\$61,894	\$284,004

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

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

DATED this \_\_\_\_\_ day of \_\_\_\_\_ 2023.

IDAHO STATE TAX COMMISSION

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_\_ day of \_\_\_\_\_ 2023,  
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:

Receipt No.

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