

IDAHO STATE TAX COMMISSION

COMMISSIONERS' SPECIAL BUSINESS MEETING MINUTES OF MEETING NOVEMBER 2, 2022

In attendance: Chairman Jeff McCray and Commissioners Katsilometes, Moyle, and Zwygart; John Bernasconi, Aaron Yost, Tom Shaner, Cynthia Adrian, Elena Gonzalez, Eric Mahler, Phil Skinner, and Greg Busmann, were present in the room.

Guests: Miguel Legaretta, President – Associated Taxpayers of Idaho, and Rick Smith, Attorney – Hawley Troxell Ennis and Hawley, was present in the room; Laura Lantz, Executive Director – Idaho Society of Certified Public Accountants, joined by phone.

Public Session

Chairman McCray called the special meeting to order and welcomed all those in attendance, both in the room and on the phone.

Business requiring a vote of the Commission

Resolution 22-04: Pending Rules

Chairman McCray invited Tom Shaner, Government Affairs Research Manager to present the Rules. Mr. Shaner introduced Resolution 22-04 for consideration. The first two dockets are Income Tax Administrative Rules. The dockets were separated between existing rules and the new single sales factor market-based sourcing statute, specifically. In the Beer and Wine Administrative Rule, Docket Number 35-0109-2201, Rule 14 Financial Security references the Administrative and Enforcement Rule 600 that no longer exists. This reference in Rule 14.02 is no longer valid; therefore, he requests paragraph 14.02 be stricken from the approved resolution. The last docket is the Administrative and Enforcement Rules Docket.

This is the culmination of the long process of reviewing rules as directed by the Governor's Zero-based Rulemaking process. There have been at least two public meetings for each docket, and they've received various public comments throughout the process.

Chairman McCray noted there are those that would like to make public comment; he recognized Laura Lantz, Executive Director of the ISCPA. Ms. Lantz noted her comments are made on behalf of the Society about the proposed passing of the Income Tax Rules. This is an overall comment on the process of taking examples out of Rule. At the last open meeting, stakeholders representing Idaho businesses and Idaho CPAs spent a significant amount of time providing examples of what should be kept in the Rule. They have valid concerns and believe it is a mistake to move examples out of rule and into guidance, and that it is a detriment to Idaho taxpayers and to tax professionals to not have substantial examples in voted-upon rules. She believes it's important to keep the examples in rule, and they've provided suggestions on how to remedy the proposed rules. She understands there are competing opinions on what should and should not be in rule. She is discouraged that nothing was added back in. She only wanted to provide her opinion and concluded by thanking everyone and saying she respects and appreciates the Commissioners and the staff at the Idaho Tax Commission for the time they've spent on this. Everyone has been great to work with and she thanked the Commission for their time.

Chairman McCray recognized Rick Smith with the Hawley Troxel law firm who said he has been involved in the legislative effort leading to the changes in I.C. § 63-3027 and has followed the rulemaking effort. He's worked with Laura Lantz and the Idaho Society of CPAs, the Associated Taxpayer's of Idaho, represented by Miguel Legarreta, here today, and the Idaho Association of Commerce and Industry (IACI), and other groups in monitoring this process. He echoed Ms. Lantz' statements that staff has

worked hard with taxpayers, listening to their comments, and allowing for their input, but there are still areas about which they are concerned, and he hopes the Commission will listen to these concerns today.

Mr. Smith provided his comments in writing prior to this meeting and hopes the Commission has had an opportunity to read them. He reviewed those comments for the Commission and said he endorses Ms. Lantz's comments about the examples being left in Rule. Those who drafted the legislation feel strongly about the issue of examples. He knows the Governor's concern about the number of pages in Rule but encourages the Commission to keep the examples in Rule because industry feels they are helpful and necessary. He reviewed that the issues submitted in his written comments involve special industry and whether the election to use something other than the single sales factor can be made on an annual basis or is a one-time election. The next issue refers to an election for special industries to opt out of the special industry regulation. They believe it would be helpful for the Rule to clarify and to affirm the election that special industries have under subsection 10.b of § 63-3027.

Commissioner Moyle asked Mr. Smith to identify the industries he is representing. Mr. Smith replied that with respect to the annual election, he has been working with the Idaho Banker's Association. Regarding the other issues, he is more an ombudsman for taxpayers; he works closely with IACI and ATI. He doesn't know how many are in favor, specifically, of the proposals he's made today, but his sense is that virtually all are. Commissioner Zwygart asked Mr. Smith what is the benefit of an annual election? Mr. Smith responded that he believes most elections are annual elections. Mr. Smith clarified that the way the rule now reads is that the election is made once then the taxpayer must petition the Tax Commission anytime they feel a change is necessary. A taxpayer could petition every year, but it's an administrative burden for both the taxpayer and the Commission.

Chairman McCray addressed Phil Skinner, Tax Commission Lead Deputy Attorney General, saying that as he understands it, the annual election is more for how we allocate money coming in, and asked Mr. Skinner to explain the language. Mr. Skinner said there was previously three-factor apportionment: sales, property, and payroll, were used to determine what slice of the pie Idaho would tax. The new statute makes single sales factor the default. Most companies will file tax returns that say how much Idaho sales they had as the numerator, and all other sales as the denominator. There is an election for certain special industries to choose to still use three-factor apportionment when figuring their apportionment factor to determine what part Idaho will tax. This draft rule says that if the taxpayer elects to use the three-factor, and later decides to use single-factor, they will need to ask the Commission to change. Chairman McCray clarified that there are only specific entities that can choose to use three-factor. Mr. Skinner agreed and enumerated that electrical corporations, telephone corporations, communications companies, and anyone who falls into the Special Industry regulation, such as: financial institutions, trucking companies, construction companies, broadcasting companies, and publishing companies.

Commissioner Zwygart asked if there is a process for taxpayers to contact the Tax Commission wishing to change from single- to three-factor? Mr. Shaner responded saying there is no process for this one specifically, because it doesn't exist yet. There is a similar process wherein the taxpayer sends an advance written request within 30 days with an explanation for the request. Mr. Shaner further observed that the special industry regulations were originally adopted because those industries didn't fit the normal patterns. To have them opting in and out seems like a double standard. They requested and were granted the special industry regulations because of their unique situations.

Eric Mahler, Tax Commission Deputy Attorney General, was recognized to comment on the discussion. He said he sees nothing in the statute indicating an intent for an annual election. There would be an inequitable benefit and the only remedy to that would be to pass regulations which would create more burden for the taxpayer and on the Commission. Setting up a regime for special industries would not be available to all taxpayers, thereby giving more favorable options to some taxpayers over others by

allowing them to have additional options. He believes to maintain consistency and fairness to all taxpayers, and consistency of application of the law, that it is best to just have a one-time election and if the business changes, they can follow the current rules and apply to the Commission. Allowing an annual election would permit inequities; whereas, if there is a consistent treatment, there is more fairness both to the Tax Commission and to the taxpayers and a simplicity for the taxpayers.

Mr. Skinner noted Rule 310, included with the draft Resolution before the Commission, indicates that to change the election, a petition must be made to the Tax Commission. After public comment, this is the language that was submitted and agreed upon. Mr. Smith thanked Mr. Skinner for the clarification. He believes the election would be relatively easy. In response to Mr. Mahler, he said the statute treats special industry differently. All they're saying is, consistent with everything in title 67, chapter 30, it should be done annually. Everywhere in 3027, in all of chapter 30, they're talking about an annual tax preparation process. Virtually everything is done on an annual basis when preparing annual tax returns. He believes if the legislature wanted to make it a one-time election, they would have said so. Otherwise, the default should be a recognition that it is an annual election.

Commissioner Moyle said the statute is silent on this issue and asked if, when he was working on the legislation, were they thinking about it? The single sales factor was for these special industries, and she asked if that was discussed, whether they could go back and forth? Was that the intent? She's listened to the committee hearings, and it seems they wanted the single sales factor and that was specifically why this piece of legislation was brought, not so they could pick and choose. Mr. Smith replied that it is the other way round; they didn't necessarily want the single sales factor, they wanted the ability to continue to use the three-factor formula. They wanted to have the choice. He doesn't believe it was considered. The default for everything like this is that it would be an annual election, and perhaps that's what everyone else was thinking and is why it wasn't specifically addressed.

Chairman McCray closed comments and said this has been a very exhaustive process. He thanked Agency staff for putting the Rules together and organizing the public meetings. As noted, we did hold extra meetings to ensure everyone had an opportunity to be heard and were able to submit comment. He appreciates Ms. Lantz and Mr. Smith recognizing the work of staff. He also appreciates the public's involvement; it was refreshing to see the dialogue.

Chairman McCray called for deliberation. Commissioner Moyle said the statute is silent and that is the problem, making this difficult. Now she is inferring, through her vote, what they intended and that is frustrating. This needs to be brought back for legislators to consider. We did anticipate the ability for business to come back and forth with this and doesn't believe that option has been removed from them. Rule 310, section 3 says a petition to change the election must be included and can happen with the permission of the Tax Commission. She feels the Rules are okay as written and it's her hope that we get it cleared up statutorily rather than through the Rules. The Rules are not the proper place for this to be addressed.

Commissioner Zwycart said the tax planning that will be done by special industries and going back and forth from year to year will be a nightmare. He doesn't think they will shift back and forth every year, but to change due to economic factors won't be terribly cumbersome. He appreciates the comments, and why they were made, but he doesn't see the change as being difficult.

Chairman McCray said he appreciates the comments, and the Commission took the time to review everything thoroughly and deliberately. The vote taken today is not done so lightly and is in the best interest of the citizens and the state.

Commissioner Zwycart motioned to accept Resolution 22-04: Pending Rules as it is presented. Commissioner Moyle asked to amend the motion and strike the requested paragraph from the Beer and

Wine Rules, 14.02. Commissioner Katsilometes seconded the amended motion. Chairman McCray clarified that the motion before the Commission is to approve Resolution 22-04: Pending Rules as amended striking, in the Idaho Beer and Wine Tax Administrative Rule, section 14, subsection 2. All commissioners voted aye, and Resolution 22-04: Pending Rules was approved.

There being no further business, Chairman McCray adjourned the meeting.

Maria Young

Jeff McCray, Chairman