

9-9-2009

# Gracie LLC, v. Idaho State Tax Com'n Clerk's Record v. 1 Dckt. 36111

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IN THE  
SUPREME COURT  
OF THE  
STATE OF IDAHO

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GRACIE, LLC, an Idaho limited liability company,  
and BARNES & BARNES ENTERPRISES, LLC,  
an Idaho limited liability company,

PETITIONERS-APPELLANTS,

vs.

IDAHO STATE TAX COMMISSION, a political  
subdivision of the State of Idaho,

RESPONDENT.

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*Appealed from the District Court of the Fourth Judicial  
District of the State of Idaho, in and for ADA County*

*Hon PATRICK H. OWEN, District Judge*

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DEREK A. PICA

*Attorney for Appellant*

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BRIAN D. NICHOLAS  
Deputy Attorney General

*Attorney for Respondent*

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FILED - COPY  
APR - 9 2008  
Supreme Court \_\_\_\_\_ Court of Appeals \_\_\_\_\_  
Entered on ATS by: \_\_\_\_\_

36111

IN THE SUPREME COURT OF THE STATE OF IDAHO

GRACIE, LLC, an Idaho limited liability company, and BARNES & BARNES ENTERPRISES, LLC, an Idaho limited liability company,

Petitioners-Appellants,

vs.

IDAHO STATE TAX COMMISSION, a political subdivision of the State of Idaho,

Respondent.

Supreme Court Case No. 36111

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE PATRICK H. OWEN

DEREK A. PICA

ATTORNEY FOR APPELLANT

BOISE, IDAHO

BRIAN D. NICHOLAS

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

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Gracie, LLC, Barnes &amp; Barnes Enterprises, LLC vs. Idaho State Tax Commission

Date	Code	User		Judge
11/2/2007	NCOC	CCTEELAL	New Case Filed - Other Claims	Patrick H. Owen
	PETN	CCTEELAL	Petition for Judicial Review	Patrick H. Owen
	SMFI	CCTEELAL	Summons Filed	Patrick H. Owen
11/16/2007	AFOS	CCTEELAL	Affidavit Of Service 11.2.07	Patrick H. Owen
12/4/2007	ANSW	CCEARLJD	Answer to Petition for Judicial Review (Nicholas for Idaho State Tax Commission)	Patrick H. Owen
12/7/2007	ORDR	CCHUNTAM	Order Governing Judicial Review	Patrick H. Owen
1/7/2008	NOHG	CCTEELAL	Notice Of Status Conference 1.25.08 @ 4 pm	Patrick H. Owen
	HRSC	CCTEELAL	Hearing Scheduled (Status 01/25/2008 04:00 PM)	Patrick H. Owen
1/25/2008	HRHD	CCLEONCR	Hearing result for Status held on 01/25/2008 04:00 PM: Hearing Held	Patrick H. Owen
1/28/2008	HRSC	CCLEONCR	Notice of Telephonic Status Conference (Status by Phone 02/22/2008 03:00 PM)	Patrick H. Owen
2/22/2008	HRHD	CCHUNTAM	Hearing result for Status by Phone held on 02/22/2008 03:00 PM: Hearing Held	Patrick H. Owen
2/25/2008	HRSC	CCHUNTAM	Hearing Scheduled (Court Trial 08/11/2008 09:00 AM) 1 DAY	Patrick H. Owen
	HRSC	CCHUNTAM	Hearing Scheduled (Pretrial Conference 07/28/2008 03:00 PM)	Patrick H. Owen
	HRSC	CCHUNTAM	Hearing Scheduled (Status by Phone 07/14/2008 04:00 PM)	Patrick H. Owen
7/14/2008	HRHD	CCHUNTAM	Hearing result for Status by Phone held on 07/14/2008 04:00 PM: Hearing Held	Patrick H. Owen
7/16/2008	STIP	MCBIEHKJ	Stipulated Facts	Patrick H. Owen
7/23/2008	STIP	CCANDEJD	Stipulation for Briefing Schedule	Patrick H. Owen
7/30/2008	HRVC	CCHUNTAM	Hearing result for Pretrial Conference held on 07/28/2008 03:00 PM: Hearing Vacated	Patrick H. Owen
8/5/2008	HRVC	CCHUNTAM	Hearing result for Court Trial held on 08/11/2008 09:00 AM: Hearing Vacated 1 DAY	Patrick H. Owen
8/22/2008	BREF	CCTOWNRD	Petitioner's Brief on Review	Patrick H. Owen
	AFFD	CCTOWNRD	Affidavit of Derek A. Pica	Patrick H. Owen
	MOSJ	CCBOYIDR	Motion For Summary Judgment	Patrick H. Owen
	MEMO	CCBOYIDR	Memorandum in Support of Motion for Summary Judgment	Patrick H. Owen
9/11/2008	BREF	CCDWONCP	Petitioner's Reply Brief on Review	Patrick H. Owen
	MOSJ	CCDWONCP	Motion For Summary Judgment	Patrick H. Owen
	REPL	CCBOYIDR	Reply Brief Memorandum	Patrick H. Owen
9/29/2008	HRSC	CCHUNTAM	Hearing Scheduled (Hearing Scheduled 11/18/2008 04:00 PM) Oral Argument	Patrick H. Owen
10/3/2008	NOHG	CCGARDAL	Amended Notice Of Hearing 11.24.08 @ 3 pm	Patrick H. Owen
	HRSC	CCGARDAL	Hearing Scheduled (Hearing Scheduled 11/24/2008 03:00 PM)	Patrick H. Owen

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Date: 3/9/2009

Fourth Judicial District Court - Ada County

User: CCTHIEBJ

Time: 01:31 PM

ROA Report

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Case: CV-OC-2007-19593 Current Judge: Patrick H. Owen

Gracie, LLC, etal. vs. Idaho State Tax Commission

Gracie, LLC, Barnes & Barnes Enterprises, LLC vs. Idaho State Tax Commission

Date	Code	User		Judge
10/3/2008	HRVC	CCGARDAL	Hearing result for Hearing Scheduled held on 11/18/2008 04:00 PM: Hearing Vacated Oral Argument	Patrick H. Owen
11/24/2008	DCHH	CCHUNTAM	Hearing result for Hearing Scheduled held on 11/24/2008 03:00 PM: District Court Hearing Held Court Reporter: Kasey Redlich Number of Transcript Pages for this hearing estimated: Less than 100 pages	Patrick H. Owen
12/24/2008	CDIS	CCKENNJA	Civil Disposition: Memorandum Decision & Order entered for: Idaho State Tax Commission, Defendant; Barnes & Barnes Enterprises, LLC, Plaintiff; Gracie, LLC, Plaintiff. Filing date: 12/24/2008	Patrick H. Owen
	STAT	CCKENNJA	STATUS CHANGED: Closed	Patrick H. Owen
2/3/2009	APSC	CCTHIEBJ	Appealed To The Supreme Court	Patrick H. Owen
2/17/2009	RQST	CCAMESLC	Request for Additional Documents in the Record	Patrick H. Owen
2/23/2009	JDMT	CCHUNTAM	Judgment	Patrick H. Owen

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NOV 02 2007

J. DAVID NAVARRO, Clerk  
By A. GARDEN  
DEPUTY

**DEREK A. PICA, PLLC**  
**ATTORNEY AT LAW**  
**199 N. CAPITOL BLVD., SUITE 302**  
**BOISE, ID 83702**

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**IDAHO STATE BAR NO. 3559**

**ATTORNEY FOR** Petitioners

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GRACIE, LLC, an Idaho Limited Liability )  
Company, and BARNES & BARNES )  
ENTERPRISES, LLC, an Idaho Limited )  
Liability Company, )  
Petitioners, )  
vs. )  
IDAHO STATE TAX COMMISSION, )  
a Political Subdivision of the State of Idaho, )  
Respondent. )

Case No. CV 00 0719593

**PETITION FOR  
JUDICIAL REVIEW**

Petitioners allege:

COUNT ONE

I.

That Petitioner, Gracie, LLC, is an Idaho Limited Liability Company with its principal place of business in the county of Ada, state of Idaho.

II.

That Petitioner, Barnes & Barnes Enterprises, LLC, is an Idaho Limited Liability



Company with is principal place of business in the county of Ada, state of Idaho.

III.

That Respondent, Idaho State Tax Commission, is a political subdivision of the state of Idaho.

IV.

That Petitioner, Gracie, LLC, owns and operates three (3) Planet Beach Tanning Spa franchises in the state of Idaho. Two (2) are located in the county of Ada and one (1) is located in the county of Canyon.

V.

That Petitioner, Barnes & Barnes Enterprises, LLC, owns and operates three (3) Planet Beach Tanning Spa franchises in the state of Idaho. All three (3) are located in the county of Ada.

VI.

That on March 23, 2007, Respondent, Idaho State Tax Commission, issued a Notice of Deficiency Determination to Petitioner, Gracie, LLC assessing sales and use tax and interest for the period of January 1, 2004 through December 31, 2006 relating to equipment purchases by Petitioner, Gracie, LLC for use of its clients in its Planet Beach Tanning Spas in the amount of \$27,966.00.

VII.

That on March 20, 2007, Respondent, Idaho State Tax Commission, issued a Notice of Deficiency Determination to Petitioner, Barnes & Barnes Enterprises, LLC assessing sales and use tax and interest for the period of January 1, 2004 through December 31, 2006 relating to equipment purchases by Petitioner, Barnes & Barnes Enterprises, LLC for use of its clients in its Planet Beach Tanning Spas in the amount of \$1,315.00.

VIII.

That both Petitioner, Gracie, LLC and Petitioner, Barnes & Barnes Enterprises, LLC, hereinafter collectively "Petitioners," filed timely protests and petitions for redetermination before Respondent, Idaho State Tax Commission, and an informal hearing was held before Respondent, Idaho State Tax Commission on June 25, 2007.

IX.

That on August 9, 2007 Respondent, Idaho State Tax Commission, issued Decisions as to Petitioner Gracie, LLC and Barnes & Barnes Enterprises, LLC's protests and Petitions For Redetermination upholding the sales and use tax and interest assessments against both Petitioners. True and correct copies of the Decisions by the Respondent, Idaho State Tax Commission, are attached hereto as Exhibits "A" and "B" respectively.

X.

That both Petitioners were also provided with a Notice of Right to Appeal by Respondent, Idaho State Tax Commission, a true and correct copy of which is attached hereto as Exhibit "C" notifying Petitioners they had the right to appeal before the District Court of Ada County within ninety-one (91) days of the date the Decisions were received by each Petitioner respectively.

XI.

That Petitioners believe the equipment purchases they have made for the use of their clients in their respective Planet Beach Tanning Spas are exempt from the imposition of sales and use taxes pursuant to Idaho Code § 63-3601 et seq. as the equipment is being sold by the Planet Beach Tanning Spas as defined in Idaho Code § 63-3612(2)(f) and therefore, is not being "used" by Planet Beach Tanning Spas by statutory definition as set forth in Idaho Code § 63-3615.

XII.

That the Decisions by Respondent, Idaho State Tax Commission on August 9, 2007 against Petitioners imposing a use tax on purchases of tanning and spa equipment by Petitioners is contrary to Idaho law and must be overturned.

XIII.

That pursuant to Idaho Code § 12-117, Petitioners are entitled to attorney fees and costs incurred in this action as Respondent, Idaho State Tax Commission is acting without a reasonable basis in fact or law.

COUNT TWO

I.

Petitioners reallege all of the allegations set forth in Count One as if fully set forth herein.

II.

That in the alternative, if the Court determines that Petitioners are “using” the equipment to provide services to their clients in their Planet Beach Tanning Spas, the Petitioners believe those services are not subject to the imposition of sales tax pursuant to Idaho Code § 63-3601 et seq.

III.

That if in fact a determination is made that Petitioners are selling services in their Planet Beach Tanning Spas when providing the use of tanning and spa equipment to their clients, that Respondent, Idaho State Tax Commission should be ordered to reimburse all sales tax collected and remitted by Petitioners relating to the use of said equipment from January 1, 2004 to present in an amount to be proven at a trial of this action.

IV.

That Petitioners be awarded attorney fees and costs incurred in this action pursuant to Idaho Code § 12-117.

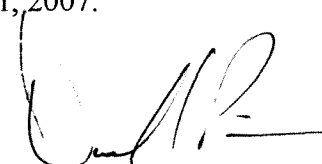
WHEREFORE, Petitioners pray for entry of a Judgment pursuant to Count One as follows:

1. Declaring that equipment purchases made by Petitioners are not subject to the imposition of a sales or use tax pursuant to Idaho Code § 63-3601 et seq.;
2. Reversing the Decision entered by Respondent, Idaho State Tax Commission against each respective Petitioner;
3. Awarding Petitioners attorney fees and costs incurred in this action pursuant to Idaho Code § 12-117; and
4. For such other relief as the Court deems just and reasonable.

IN THE ALTERNATIVE, Petitioners pray for entry of Judgment pursuant to Count Two as follows:

1. Declaring that Petitioners' providing of tanning and spa services to clients are not subject to sales tax pursuant to Idaho Code § 63-3601 et seq.;
2. Ordering Respondent, Idaho State Tax Commission to reimburse all sales taxes collected and remitted to Respondent, Idaho State Tax Commission, relating to tanning and spa services provided to clients from January 1, 2004 to present in an amount to be proven at a trial of this action;
3. Awarding Petitioners attorney fees and costs pursuant to Idaho Code § 12-117; and
4. For such other and further relief as the Court deems just and reasonable.

DATED this 2<sup>nd</sup> day of November, 2007.



\_\_\_\_\_  
Derek A. Pica  
Attorney for Petitioners

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

In the Matter of the Protest of )  
 )  
GRACIE, LLC, ) DOCKET NO. 20159  
 )  
Taxpayer. ) DECISION  
 )  
\_\_\_\_\_ )

On March 23, 2007, the staff of the Sales Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination to Gracie, LLC (taxpayer), proposing sales and use tax and interest for the period of January 1, 2004, through December 31, 2006, in the total amount of \$27,966.

On April 26, 2007, the taxpayer filed a timely appeal and petition for redetermination. The taxpayer requested an informal hearing before the Commission, which was held June 25, 2007.

The taxpayer is a franchisee of Planet Beach and operates three tanning salons in Idaho. At issue is the imposition of use tax on purchases of tanning beds and other spa equipment.

In its protest letter the taxpayer argued that, since it was selling the use of the tanning beds, they were purchased for resale. It also argued that it was being subjected to double taxation which violates Article VII, Section 5 of the Idaho State Constitution. The taxpayer did not raise these arguments at the hearing. Nevertheless, the Commission notes that purchases of parts for tanning beds were held to be consumed by the tanning salon and not for resale in a previous decision issued by the Commission. (See docket # 18223.) This decision was upheld by the Board of Tax Appeals. Also, the Idaho Supreme Court has ruled that the constitutional provision on double taxation applies only to property taxes and not to other taxes. See, *Idaho*

*Gold Dredging v. Balderston*, 58 Idaho 692, 78 P.2d 105, (1938); *Geo. B. Wallace, Inc., v. Pfost*, 57 Idaho, 279, 290, 65 P.2d 725, 729 (1937).

The taxpayer cited an Arizona case, *Energy Squared, Inc. v. Arizona Department of Revenue*, 203 Ariz. 507, 56 P. 3d 686 (2002). This case dealt with tanning salons that operated in substantially the same manner as the taxpayer. The Arizona Department of Revenue had ruled that the tanning salons' sales were rentals of tangible personal property and therefore taxable. There was a lengthy statement of facts, in which the court stressed safety precautions employed to prevent injury from excessive tanning. The court held that the salons did not surrender control of the tanning beds to the customers and that the charges for using the beds were not taxable.

The Commission does not disagree with this ruling. If the taxpayer were renting the tanning beds, the purchase of the beds themselves would be purchases for resale. In this case, however, the taxpayer is providing a service and is therefore the consumer of the tanning beds.

The Tax Commission has long held that sales of tanning services are charges for the privilege of using tangible personal property or facilities for recreation and therefore included within the definition of "sale" in Idaho Code § 63-3612(2)(f). The taxpayer has provided evidence of the therapeutic benefits of tanning, apparently to show that tanning is not recreational. The Commission need not reach a decision on that issue, however, because the sales of tanning services are not in dispute. The taxpayer's argument is that, if sales of tanning services are taxable, purchases of the tanning beds and other equipment should be exempt.

As noted earlier, the Commission has ruled that the beds are not purchased for resale. The taxpayer acknowledges that it is not renting the tanning beds to its customers. Instead it is providing a service. In *Boise Bowling Center v. State of Idaho*, Idaho 367, 461 P.2d 262,

(1969), the Idaho Supreme Court ruled that purchases of pin setting equipment by a bowling alley were consumed by the bowling alley, and therefore subject to use tax:

The mere fact that goods bought are used for the benefit of the customers or clients of the purchaser in no way detracts from their character as consumer goods. The goods are consumed by the purchaser in furtherance of his enterprise. The fact that the goods are used for the benefit of the purchaser's customers, or in the case of a bowling establishment or hotel, that the goods are used by the patrons themselves does not alter their character in the hands of the original purchaser (hotel owner or proprietor of a bowling establishment). They are and remain consumer goods which are consumed by the original purchaser in the course of his business. *Boise Bowling* at 369

The Commission also notes, as the *Boise Bowling* decision alludes, that sales of hotel furnishings are taxable, even though the hotel rents the room and charges tax to its guests. See Idaho Sales Tax Rule 028 (IDAPA 35.01.02.028.03).<sup>1</sup> This is consistent with numerous decisions from other states holding that hotels and motels are the consumers of furnishings and supplies used in guest rooms.<sup>2</sup>

---

<sup>1</sup> It is true that sales of disposable items consumed by guests are exempt. There is a specific statute providing that exemption, Idaho Code § 63-3612(3). No such statute applies to tanning salons.

<sup>2</sup> Footnote 7 of *Mayflower Park Hotel, Inc. v. State, Dept. of Revenue*, 123 Wash.App. 628, 98 P.3d 534 (2004) cites the following decisions, all of which held various items to be consumed by the hotels: *Hotels Statler Co. v. District of Columbia*, 199 F.2d 172, 174 (D.C.Cir.1952) (china, glass, table linens, bed linen, towels, light bulbs, draperies and carpets “do not become parts of the room but are properties used by the hotel in furthering the sales of its rooms soap, toothpicks, stationery and similar articles actually consumed by guests are de minimis.”); *Atlanta Americana Motor Hotel Corp. v. Undercofler*, 222 Ga. 295, 149 S.E.2d 691, 695 (1966) (“the plaintiff itself used the property to make its rooms livable, and thus rentable to guests”); *Theo. B. Robertson Products Co. v. Nudelman*, 389 Ill. 281, 59 N.E.2d 655, 657 (1945) (“While no agent or employee of the hotel actually uses or consumes such paper articles and soaps, the use is no less the use by the hotel, for it is generally recognized that such articles are to be furnished by the hotel as a standard method of doing its business just as the carpets on the floor and the pictures on the wall are furnished.”); see also *City of Colorado Springs v. Inv. Hotel Properties, Ltd.*, 806 P.2d 375, 379 (Colo.1991) (“Investment Ltd. purchased the hotel property primarily for its own use in the conduct of its business of providing furnished rooms to guests for rental fees” and thus it was not “a wholesale purchase for resale and [was] subject to the imposition of a use tax”); *Kentucky Bd. of Tax Appeals v. Brown Hotel Co.*, 528 S.W.2d 715, 718 (Ky.1975) (in a use tax case, “the hotel is the ultimate consumer and user of the tangible personal property, even though the guests paid sales tax on the room-rental charge and the price of the meal”); *Telerent Leasing Corp. v. High*, 8 N.C.App. 179, 174 S.E.2d 11, 16 (1970) (“The consideration paid is for the lodging or accommodation itself-not for a specific bed, lamp, painting, table, chair or television.”); *Sine v. State Tax Comm'n*, 15 Utah 2d 214, 390 P.2d 130, 131 (1964) (“the motel owner is the ultimate consumer [of linens, towels, soap, mattress covers, blankets, etc.] under the letter and spirit of the use tax act”).

WHEREFORE, the Notice of Deficiency Determination dated March 23, 2007, is APPROVED, AFFIRMED and MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the taxpayer pay the following tax and interest:

<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$25,837	\$2,461	\$28,298

Interest is calculated through July 30, 2007 and will continue to accrue at the rate set forth in Idaho Code § 63-3045(6) until paid.

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 included with this decision.

DATED this 9<sup>th</sup> day of August, 2007.

IDAHO STATE TAX COMMISSION

  
\_\_\_\_\_  
COMMISSIONER

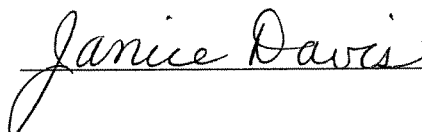
CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I have on this 9<sup>th</sup> day of August, 2007, served a copy of the within and foregoing DECISION by sending the same by United States mail, postage prepaid, in an envelope addressed to:

GRACIE LLC  
1646 N CHAUCER WAY  
EAGLE ID 83616-3546

Receipt: 7005 2570 0000 5059 8535

DEREK A PICA  
ATTORNEY AT LAW  
199 NORTH CAPITOL BLVD  
SUITE 302  
BOISE ID 83702

  
\_\_\_\_\_



BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of	)	
	)	DOCKET NO. 20167
BARNES & BARNES ENTERPRISES LLC,	)	
	)	DECISION
Taxpayer.	)	
_____	)	

On March 20, 2007, the staff of the Sales Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination to Barnes & Barnes Enterprises, LLC (taxpayer), proposing sales and use tax and interest for the period of January 1, 2004, through December 31, 2006, in the total amount of \$1,315.

On May 1, 2007, the taxpayer filed a timely appeal and petition for redetermination. The taxpayer requested an informal hearing before the Commission, which was held June 25, 2007.

The taxpayer is a franchisee of Planet Beach and operates three tanning salons in Idaho. At issue is the imposition of use tax on purchases of tanning beds and other spa equipment.

In its protest letter the taxpayer argued that, since it was selling the use of the tanning beds, they were purchased for resale. It also argued that it was being subjected to double taxation which violates Article VII, Section 5 of the Idaho State Constitution. The taxpayer did not raise these arguments at the hearing. Nevertheless, the Commission notes that purchases of parts for tanning beds were held to be consumed by the tanning salon and not for resale in a previous decision issued by the Commission. (See docket # 18223.) This decision was upheld by the Board of Tax Appeals. Also, the Idaho Supreme Court has ruled that the constitutional provision on double taxation applies only to property taxes and not to other taxes. See, *Idaho Gold Dredging v. Balderston*, 58 Idaho 692, 78 P.2d 105, (1938); *Geo. B. Wallace, Inc., v. Pfost*, 57 Idaho, 279, 290, 65 P.2d 725, 729 (1937).

The taxpayer cited an Arizona case, *Energy Squared, Inc. v. Arizona Department of Revenue*, 203 Ariz. 507, 56 P. 3d 686 (2002). This case dealt with tanning salons that operated in substantially the same manner as the taxpayer. The Arizona Department of Revenue had ruled that the tanning salons' sales were rentals of tangible personal property and therefore taxable. There was a lengthy statement of facts, in which the court stressed safety precautions employed to prevent injury from excessive tanning. The court held that the salons did not surrender control of the tanning beds to the customers and that the charges for using the beds were not taxable.

The Commission does not disagree with this ruling. If the taxpayer were renting the tanning beds, the purchase of the beds themselves would be purchases for resale. In this case, however, the taxpayer is providing a service and is therefore the consumer of the tanning beds.

The Tax Commission has long held that sales of tanning services are charges for the privilege of using tangible personal property or facilities for recreation and therefore included within the definition of "sale" in Idaho Code § 63-3612(2)(f). The taxpayer has provided evidence of the therapeutic benefits of tanning, apparently to show that tanning is not recreational. The Commission need not reach a decision on that issue, however, because the sales of tanning services are not in dispute. The taxpayer's argument is that, if sales of tanning services are taxable, purchases of the tanning beds and other equipment should be exempt.

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The mere fact that goods bought are used for the benefit of the customers or clients of the purchaser in no way detracts from their

character as consumer goods. The goods are consumed by the purchaser in furtherance of his enterprise. The fact that the goods are used for the benefit of the purchaser's customers, or in the case of a bowling establishment or hotel, that the goods are used by the patrons themselves does not alter their character in the hands of the original purchaser (hotel owner or proprietor of a bowling establishment). They are and remain consumer goods which are consumed by the original purchaser in the course of his business. *Boise Bowling* at 369

The Commission also notes, as the *Boise Bowling* decision alludes, that sales of hotel furnishings are taxable, even though the hotel rents the room and charges tax to its guests. See Idaho Sales Tax Rule 028 (IDAPA 35.01.02.028.03).<sup>1</sup> This is consistent with numerous decisions from other states holding that hotels and motels are the consumers of furnishings and supplies used in guest rooms.<sup>2</sup>

WHEREFORE, the Notice of Deficiency Determination dated March 20, 2007, is APPROVED, AFFIRMED and MADE FINAL.

---

<sup>1</sup> It is true that sales of disposable items consumed by guests are exempt. There is a specific statute providing that exemption, Idaho Code § 63-3612(3). No such statute applies to tanning salons.

<sup>2</sup> Footnote 7 of *Mayflower Park Hotel, Inc. v. State, Dept. of Revenue*, 123 Wash.App. 628, 98 P.3d 534 (2004) cites the following decisions, all of which held various items to be consumed by the hotels: *Hotels Stailer Co. v. District of Columbia*, 199 F.2d 172, 174 (D.C.Cir.1952) (china, glass, table linens, bed linen, towels, light bulbs, draperies and carpets "do not become parts of the room but are properties used by the hotel in furthering the sales of its rooms soap, toothpicks, stationery and similar articles actually consumed by guests are de minimis."); *Atlanta Americana Motor Hotel Corp. v. Undercofler*, 222 Ga. 295, 149 S.E.2d 691, 695 (1966) ("the plaintiff itself used the property to make its rooms livable, and thus rentable to guests"); *Theo. B. Robertson Products Co. v. Nudelman*, 389 Ill. 281, 59 N.E.2d 655, 657 (1945) ("While no agent or employee of the hotel actually uses or consumes such paper articles and soaps, the use is no less the use by the hotel, for it is generally recognized that such articles are to be furnished by the hotel as a standard method of doing its business just as the carpets on the floor and the pictures on the wall are furnished."); see also *City of Colorado Springs v. Inv. Hotel Properties, Ltd.*, 806 P.2d 375, 379 (Colo.1991) ("Investment Ltd. purchased the hotel property primarily for its own use in the conduct of its business of providing furnished rooms to guests for rental fees" and thus it was not "a wholesale purchase for resale and [was] subject to the imposition of a use tax"); *Kentucky Bd. of Tax Appeals v. Brown Hotel Co.*, 528 S.W.2d 715, 718 (Ky.1975) (in a use tax case, "the hotel is the ultimate consumer and user of the tangible personal property, even though the guests paid sales tax on the room-rental charge and the price of the meal"); *Telerent Leasing Corp. v. High*, 8 N.C.App. 179, 174 S.E.2d 11, 16 (1970) ("The consideration paid is for the lodging or accommodation itself-not for a specific bed, lamp, painting, table, chair or television."); *Sine v. State Tax Comm'n*, 15 Utah 2d 214, 390 P.2d 130, 131 (1964) ("the motel owner is the ultimate consumer [of linens, towels, soap, mattress covers, blankets, etc.] under the letter and spirit of the use tax act").

IT IS ORDERED and THIS DOES ORDER that the taxpayer pay the following tax and interest:

<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$1,215	\$116	\$1,331

Interest is calculated through July 30, 2007, and will continue to accrue at the rate set forth in Idaho Code § 63-3045(6) until paid.

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 included with this decision.

DATED this 9<sup>th</sup> day of August, 2007.

IDAHO STATE TAX COMMISSION

  
\_\_\_\_\_  
COMMISSIONER

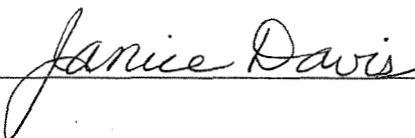
CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I have on this 9<sup>th</sup> day of August, 2007, served a copy of the within and foregoing DECISION by sending the same by United States mail in an envelope addressed to:

JIM BARNES  
BARNES & BARNES  
ENTERPRISES LLC  
1019 AUGUSTA DR  
NAMPA ID 83686-2863

Receipt 7005 2570 0000 5059 8542

DEREK A PICA  
ATTORNEY AT LAW  
199 NORTH CAPITOL BLVD  
SUITE 302  
BOISE ID 83702

  
\_\_\_\_\_

## NOTICE OF RIGHT TO APPEAL

Enclosed is a final decision of the State Tax Commission on the protest, petition for redetermination or claim for refund described in the decision. If you do not appeal the decision within 91 days from the date you receive the decision, you will have no further right to challenge or object to it.

You may appeal this decision by either:

- (a) Filing an appeal with the Board of Tax Appeals  
3380 Americana Terrace, Suite 110  
P.O. Box 83720  
Boise, ID 83720-0088  
(208) 334-3354

*(No appeal may be made to the Board of Tax Appeals in sales, use, or corporate income tax cases in which the amount in dispute at the time of the issuance of the Notice of Deficiency Determination/Overassessment exceeded \$25,000); or*

- (b) Filing an action in the District Court of Ada County or the county in which you reside or have your principal office or place of business.

Before filing with either the Board of Tax Appeals (BTA) or the District Court, you must secure the payment of the tax or deficiency as assessed by depositing cash (or another type of security acceptable to the State Tax Commission) with the State Tax Commission, P.O. Box 36, Boise, Idaho 83722, in an amount equal to twenty percent (20%) of the tax, penalty and interest. In either case, immediate payment of the amount due will not prejudice your right to appeal.

Information about procedures before the BTA is available from the Clerk of the Board at the above address. The BTA conducts hearings in many localities in the state. Proceedings before the BTA are relatively informal. Many taxpayers appear before the BTA without an attorney.

This decision will become a record available for public inspection and copying 120 days from the day it was issued. Information identifying you (name, address, and identification numbers) will be removed from the text. You may request that other information be excised from the public record by submitting a written request identifying the information to be excised within 91 days after the date of this decision.

**If you plan to appeal, it is absolutely essential you do so within 91 days.**

**EXHIBIT** "C"

00018

RECEIVED

DEC 04 2007

NO. \_\_\_\_\_ FILED 4:15  
A.M. \_\_\_\_\_ P.M.

DEC 04 2007

J. DAVID NAVARRO, Clerk  
By M. STROMER  
DEPUTY

Ada County Clerk  
BRIAN D. NICHOLAS  
DEPUTY ATTORNEY GENERAL  
STATE OF IDAHO  
P.O. BOX 36  
BOISE, ID 83722-0410  
TELEPHONE NO. (208) 334-7530  
FACSIMILE NO. (208) 334-7844  
[ISB NO. 3585]

Attorney for Defendant Idaho State Tax Commission

**ORIGINAL**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

GRACIE, LLC, an Idaho Limited Liability )  
Company, and BARNES & BARNES )  
ENTERPRISES, LLC, an Idaho Limited )  
Liability Company, )  
)  
Petitioners, )  
-vs- )  
)  
IDAHO STATE TAX COMMISSION, )  
)  
Respondent. )  
)

CASE NO. CV 0719593

ANSWER TO PETITION FOR JUDICIAL  
REVIEW

COMES NOW the Respondent, Idaho State Tax Commission, by and through its attorney, Brian D. Nicholas, Deputy Attorney General, and hereby answers the Petition for Judicial Review.

1. The Idaho State Tax Commission (Commission) hereby denies each and every allegation not specifically admitted.
2. The Commission admits the allegations contained in paragraphs I through X of Count One.
3. In answering the allegations contained in paragraph XI of Count One the Commission denies that the petitioners are selling the equipment to its customers, but instead

provides a facility whereby they advertise that their customers will receive premier wellness, relaxation, UV therapy, and skin rejuvenation services. As such, the petitioners are using the equipment within the meaning in Idaho Code § 63-3615. The Commission denies the remaining allegations in paragraph XI of Count One.

4. The Commission denies the allegations in paragraph XII of Count One.

5. In answering the allegations in paragraph XIII of Count One. The Commission denies that Idaho Code § 12-117 is the appropriate statute to determine whether attorney fees should be awarded, but instead the appropriate statute is Idaho Code § 63-3049. In any event the Commission denies that the petitioners are entitled to attorney fees. The Commission is acting with a reasonable basis in law and in fact its position is not frivolous or groundless.

6. In answering paragraph II of Count Two, the allegations state legal conclusions to which an answer is not required. To the extent an answer is required, the Commission admits the petitioners are using the equipment but denies that the services are not subject to sales tax.

7. In answering the allegations in paragraph III of Count Two, the Commission denies the factual allegations. The petitioners did not raise a refund claim in the administrative proceeding and therefore are barred from now raising the claim because it failed to exhaust administrative remedies.

8. In answering the allegations in paragraph IV of Count Two the Commission denies that Idaho Code § 12-117 is the appropriate statute to determine whether attorney fees should be awarded, but instead the appropriate statute is Idaho Code § 63-3049, in any event the Commission denies that the petitioners are entitled to attorney fees. The Commission is acting with a reasonable basis in law and in fact and its position is not frivolous or groundless.

#### AFFIRMATIVE DEFENSES

1. Count Two of the Complaint should be dismissed because the petitioners did not exhaust administrative remedies.

2. Count Two of the Complaint should be dismissed because the taxes collected on the petitioners' sale of tanning services is a charge for the use of a recreational facility and are properly subject to tax.

3. Count Two of the Complaint should be dismissed because the claim for refund, assuming the taxes are not legally due, cannot be made unless the petitioners are able to show that sales taxes are refunded to their customers who paid the tax.

4. The petitioners' position in pursuing this action is frivolous or groundless.

WHEREFORE, the Commission requests that the Court hold that:

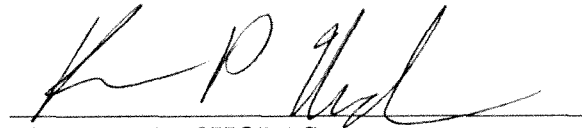
1. The petitioners' complaint be dismissed and the plaintiffs take nothing;
2. The Commission's decision dated August 9, 2007, be affirmed and approved;
3. The petitioner, Gracie LLC, be ordered to pay use taxes for the periods January 1, 2004 through December 31, 2006, in the amount of \$25,837.00, and applicable interest pursuant to Idaho Code § 63-3045, less a payment of \$5,800.00;
4. The petitioner, Barnes & Barnes LLC, be ordered to pay use taxes for the periods January 1, 2004 through December 31, 2006, in the amount of \$1,215.00, and applicable interest pursuant to Idaho Code § 63-3045, less any payments made;
5. The Commission be awarded its reasonable attorney fees pursuant to Idaho Code § 63-3049;



6. The Commission be ordered such other and further relief as the Court deems just.

DATED this 3<sup>rd</sup> day of December, 2007

IDAHO STATE TAX COMMISSION



BRIAN D. NICHOLAS  
DEPUTY ATTORNEY GENERAL

**CERTIFICATE OF SERVICE**

I hereby certify that on this 3<sup>rd</sup> day of December, 2007, a copy of the within and foregoing ANSWER TO PETITION FOR JUDICIAL REVIEW was served by the method indicated below:

DEREK A PICA PLLC  
ATTORNEY AT LAW  
199 N CAPITOL BLVD SUITE 302  
BOISE ID 83702

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Telecopy (Fax)



BRIAN D. NICHOLAS  
DEPUTY ATTORNEY GENERAL

RECEIVED  
JUL 16 2008

ORIGINAL

Ada County Clerk

DEREK A. PICA, PLLC  
ATTORNEY AT LAW  
199 N. CAPITOL BLVD., SUITE 302  
BOISE, ID 83702

TELEPHONE: (208) 336-4144  
FACSMILIE: (208) 336-4980  
IDAHO STATE BAR NO. 3559

ATTORNEY FOR PETITIONERS

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. 9:50 P.M.

JUL 16 2008

J. DAVID NAVARRO, Clerk  
BY KATHY J. BIEHL  
CLERK

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GRACIE, LLC, an Idaho Limited Liability )  
Company, and BARNES & BARNES )  
ENTERPRISES, LLC, an Idaho Limited )  
Liability Company, )

Petitioners, )

vs. )

IDAHO STATE TAX COMMISSION, )  
a Political Subdivision of the State of Idaho, )

Respondent. )

Case No. CV OC 0719593

**STIPULATED FACTS**

COMES NOW, Petitioners, Gracie, LLC and Barnes & Barnes Enterprises, LLC,  
by and through their attorney of record, Derek A. Pica, and Respondent, Idaho State Tax  
Commission, by and through its attorney of record, Brian D. Nicholas, Deputy Attorney  
General for the State of Idaho, and hereby stipulate and agree to the following facts:

1. This is a sales and use tax case. The Petitioners, Gracie, LLC, and Barnes

& Barnes Enterprises, LLC are Idaho limited liability companies with principal places of business in the county of Ada, state of Idaho. The Respondent, Idaho State Tax Commission, is an agency of the state of Idaho and is the agency charged with administering the sales and use taxes for the State.

2. Petitioner, Gracie, LLC, owns and operates three (3) Planet Beach Tanning Spa franchises in the state of Idaho. Two (2) are located in the county of Ada and one (1) is located in the county of Canyon. Petitioner, Barnes & Barnes Enterprises, LLC, owns and operates three (3) Planet Beach Tanning Spa franchises in the state of Idaho. All three (3) are located in the county of Ada.

3. On March 23, 2007, the Idaho State Tax Commission issued a Notice of Deficiency Determination to Petitioner, Gracie, LLC assessing sales and use tax and interest for the period of January 1, 2004 through December 31, 2006 relating to equipment purchases by Gracie, LLC for use of its clients in its Planet Beach Tanning Spas in the amount of \$27,966.00. The Notice was issued pursuant to Idaho Code § 63-3629.

4. On March 20, 2007, the Idaho State Tax Commission issued a Notice of Deficiency Determination to Barnes & Barnes Enterprises, LLC assessing sales and use tax and interest for the period of January 1, 2004 through December 31, 2006 relating to equipment purchases by Barnes & Barnes Enterprises, LLC for use of its clients in its Planet Beach Tanning Spas in the amount of \$1,315.00. The Notice was issued pursuant to Idaho Code § 63-3629.

5. Both Gracie, LLC and Barnes & Barnes Enterprises, LLC, hereinafter collectively "Petitioners," filed timely protests and petitions for redetermination pursuant

to Idaho Code § 63-3631, and an informal hearing was held on June 25, 2007 with the Tax Commission.

6. On August 9, 2007 the Idaho State Tax Commission issued Decisions as to Petitioner Gracie, LLC and Barnes & Barnes Enterprises, LLC's protests and Petitions for Redetermination upholding the sales and use tax and interest assessments against both Petitioners. True and correct copies of the Decisions by the Respondent, Idaho State Tax Commission, are attached hereto as Exhibits "A" and "B" respectively. The Decisions were issued pursuant to Idaho Code §§ 63-3635 and 63-3045B.

7. Both Petitioners timely sought judicial review of the Decisions pursuant to Idaho Code §§ 63-3635 and 63-3049. Both Petitioners deposited twenty percent (20%) of the amount claimed due with the Tax Commission.

8. The items at issue is the equipment purchased by the Petitioners. The Petitioners did not pay sales or use tax on the equipment when purchased. The Commission asserts that the Petitioners are the users of the equipment and therefore are required to pay sales or use tax. The Petitioners assert their customers are the users of the equipment and as such, the Petitioners do not owe sales or use tax.

9. At all six (6) locations, Petitioners have tanning and spa equipment located in individual rooms. For a fee, a customer is entitled to use a tanning bed or piece of spa equipment for a certain period of time. Sales tax is collected on all fees charged and collected by Petitioners and remitted to the Idaho State Tax Commission monthly pursuant to Idaho Code § 63-3612(2)(f). The fee varies depending on the type of tanning bed or piece of spa equipment the customer wants to use.

10. When using tanning equipment, a customer is required by federal law to

wear eyewear to protect their eyes. Eyewear can be purchased from Petitioner or the customer can bring their own. Petitioner does not provide customers with eyewear. If a customer chooses to purchase eyewear from Petitioner, sales tax is collected on the sale and remitted to the Idaho State Tax Commission monthly.

11. All use of tanning beds and spa equipment is strictly controlled by Petitioners' employees. All tanning beds and spa equipment is controlled by a computer and a "T-max" that is hooked up to each tanning bed and piece of spa equipment. A customer "cannot" turn on a tanning bed or piece of spa equipment from a room. The tanning beds and spa equipment are turned on by an employee of Petitioners from the computer at the front desk.

12. All use of tanning beds and spa equipment is strictly controlled by Petitioners' employees as to the amount of time the customer can use the tanning bed or spa equipment. Customers normally make appointments. The maximum time a customer can use any tanning bed or piece of spa equipment is twenty (20) minutes. A customer can only use an elite tanning bed for a maximum of ten (10) minutes. The time limits are for safety reasons as customers cannot be over exposed, except in the case of the hydromassage. Further, no customer is allowed to tan more than one (1) time in a twenty-four hour period.

13. After every use of a tanning bed or piece of spa equipment by a customer, Petitioners' employees clean and sanitize the tanning bed or piece of spa equipment prior to use by another customer.

14. Every tanning bed has an hour meter on it as after a certain amount of use, the tanning beds must have routine maintenance, etc.

15. In addition to sales of eyewear, Petitioners also generate revenue from the sale of tanning lotions and skin care products. On each sale, sales tax is collected and remitted to the Idaho State Tax Commission monthly. Lotions and skin care products are not provided to customers by Petitioners. However, a customer can bring a tanning lotion they purchased from another business for use while tanning.

16. The Planet Beach website describes the services provided by the franchisees such as the Petitioners as the sale of services whereby the customer will receive premier wellness, relaxation, UV therapy, and skin rejuvenation. For example, the Planet Beach website describes one of its services called the Contempo Spa® concept. “A Contempo Spa® merges the services of a day spa to the benefits of UV Therapy, performed via automated equipment. Members don’t have to worry about having to feel uncomfortable in the presence of others in order to receive the benefits of massage and tanning services, for example. In addition, all services can be performed in twenty minute sessions [or less] each. The idea: At the touch of a button our members enjoy a private spa experience at a fraction of the cost . . . and in far less time than a day spa! It truly is the perfect hybrid of spa services and UV Therapy!”

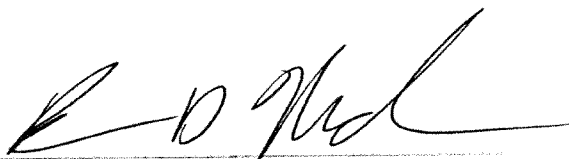
17. In the above stipulated facts, the term “use” is included to describe Petitioners’ customer’s activities involving tanning and spa equipment located in Petitioners’ tanning spa franchises. By describing Petitioners’ customer’s activities involving equipment in Petitioners’ tanning spa franchises with the term “use,” the parties intend the word to be given its ordinary meaning without reference to any specific legal definition, and neither the Petitioners or Respondent should not be given any advantage or disadvantage in regard to their respective legal positions by the Court.

DATED this 15<sup>th</sup> day of July, 2008.



DEREK A. PICA  
Attorney for Petitioners

DATED this 14<sup>th</sup> day of July, 2008.



BRIAN D. NICHOLAS  
Attorney for Respondent

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
AM. \_\_\_\_\_ PM. \_\_\_\_\_  
DEC 24 2008  
J. DAVID NAVARRO, Clerk  
BY J. KENNEDY  
DEPUTY

1  
2 IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
3 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

4  
5 GRACIE, LLC, an Idaho Limited Liability  
6 Company, and BARNES & BARNES  
7 ENTERPRISES, LLC, and Idaho Limited  
Liability Company,

8 Petitioners,

9 vs.

10 IDAHO STATE TAX COMMISSION, a  
11 Political Subdivision of the State of Idaho,

12 Respondent.

Case No. CV-OC-0719593

MEMORANDUM DECISION  
AND ORDER

13  
14 This is an appeal from decisions of the Idaho State Tax Commission (Tax Commission)  
15 upholding Notices of Deficiency Determination against Gracie, LLC (Gracie) and Barnes &  
16 Barnes Enterprises, LLC (Barnes), (collectively Petitioners). The Court heard argument on this  
17 matter on November 25, 2008. Derek A. Pica appeared and argued on behalf of Petitioners. Brian  
18 D. Nicholas, Deputy Attorney General for the State of Idaho, appeared and argued for the Tax  
19 Commission.

20 For the reasons set forth below, the Court will affirm the decisions of the Tax Commission  
21 against Petitioners.

22  
23 **Background and Prior Proceedings**

24 Gracie and Barnes separately own and operate a number of "Planet Beach" franchised  
25 tanning spas located in Ada County and Canyon County. Petitioners purchased tanning beds and  
26



1 other spa equipment from their out of state franchisor and this equipment was installed in each  
2 tanning spa location. Petitioners did not pay Idaho sales or use taxes on this tanning and spa  
3 equipment when it was purchased and installed.

4 The tanning and spa equipment at each location is located in individual rooms. Petitioners'  
5 employees control the use of all tanning and spa equipment. Each piece of equipment is hooked  
6 up to, and controlled by, a computer. When a customer wants to use a piece of equipment, an  
7 employee turns it on using the computer at the front desk. Customers are unable to turn on the  
8 tanning and spa equipment from the individual rooms. The employees also control the amount of  
9 time a customer can spend in each piece of equipment. Following each use of a tanning bed or  
10 piece of spa equipment by a customer, employees clean and sanitize the tanning bed.  
11

12 Customers are charged a fee to use a tanning bed or spa equipment. The fee charged is  
13 based on the type of equipment used and the amount of time the customer wants to use it. Sales  
14 tax is collected by Petitioners for the fees charged. Customers can also purchase protective  
15 eyewear, tanning lotions and skin care products at Planet Beach tanning spas. Sales tax is  
16 collected from the sale of these items. Each month Petitioners remit the sales taxes derived from  
17 the sale of their tanning services and retail products to the State of Idaho.

18 On March 20, 2007, the staff of the Sales Tax Audit Bureau of the Tax Commission  
19 issued a Notice of Deficiency Determination to Barnes, pursuant to Idaho Code § 63-3629,  
20 assessing use tax and interest for the period of January 1, 2004, through December 31, 2006, for  
21 the equipment it purchased from its franchisor. The deficiency claimed was a total of \$1,315.00.  
22 Similarly, on March 23, 2007, the staff of the Sales Tax Audit Bureau of the Tax Commission  
23 issued a Notice of Deficiency Determination to Gracie assessing use tax and interest for the period  
24  
25  
26

1 of January 1, 2004, through December 31, 2006, for the equipment it purchased from its  
2 franchisor. The deficiency claimed was \$27,966.00.

3 Petitioners timely petitioned for review of these determinations to the Tax Commission  
4 and sought for redetermination pursuant to Idaho Code § 63-3631. The Tax Commission held an  
5 informal hearing on June 25, 2007. On August 9, 2007, The Tax Commission issued decisions  
6 upholding the assessments of the use tax and interest against Petitioners. Tax Commission Docket  
7 Nos. 20159, 20167.

8 On November 2, 2007, Petitioners timely petitioned the District Court for judicial review  
9 of the adverse determinations by the Tax Commission pursuant to Idaho Code § 63-3049. In a  
10 February 25, 2008 Order Governing Proceedings and Setting Trial, the Court set the matter for a  
11 one day court trial to be held on August 11, 2008. In a telephone status conference held off the  
12 record on July 14, 2008, the parties agreed to submit the case for summary determination upon  
13 stipulated facts. On July 16, 2008, the parties filed a pleading containing the stipulated facts.

14 On August 22, 2008, the Tax Commission moved for summary judgment, claiming that  
15 there were no genuine issues of material fact, and that Petitioners were liable for payment of  
16 Idaho's use tax for the purchase of tanning beds and other spa equipment installed at the Planet  
17 Beach spas. On August 22, 2008, Petitioners filed their Brief on Review and argued that the Tax  
18 Commission erroneously affirmed staff's Notices of Deficiency. On September 11, 2008,  
19 Petitioners filed a motion for summary judgment asking the Court to rule on the issues presented  
20 pursuant to I.R.C.P. 56. Petitioners and the Tax Commission agree there are no genuine issues of  
21 material fact. Each side asserts it is entitled to judgment as a matter of law.  
22  
23  
24  
25  
26

### Standard of Review

1  
2 “Summary judgment is appropriate if the pleadings, affidavits, and discovery documents  
3 on file with the court . . . demonstrate no material issue of fact such that the moving party is  
4 entitled to a judgment as a matter of law.” *Brewer v. Washington RSA No. 8 Ltd. Partnership*, 145  
5 Idaho 735, \_\_\_, 184 P.3d 860, 863 (2008) (quoting *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d  
6 126, 127 (1988) (citing I.R.C.P. 56(c)). The burden of proof is on the moving party to  
7 demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Finance Corp.*,  
8 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935  
9 P.2d 165, 168 (1997)). In construing the facts, the court must draw all reasonable factual  
10 inferences in favor of the non-moving party. *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408,  
11 \_\_\_, 179 P.3d 1064, 1066 (2008).

12  
13 “Once the moving party establishes the absence of a genuine issue of material fact, the  
14 burden shifts to the non-moving party,” to provide specific facts showing there is a genuine issue  
15 for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139  
16 Idaho 81, 85, 73 P.3d 94, 98 (2003)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho  
17 84, 87, 996 P.2d 303, 306 (2000).

18 The non-moving party’s case must be anchored in something more than speculation; a  
19 mere scintilla of evidence is not enough to create a genuine issue. *Zimmerman v. Volkswagon of*  
20 *America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 69 (1996). The non-moving party may not simply  
21 rely upon mere allegations in the pleadings, but must set forth in affidavits specific facts showing  
22 there is a genuine issue for trial. I.R.C.P. 56(e); see *Rhodehouse v. Stutts*, 125 Idaho 208, 211,  
23 868 P.2d 1224, 1227 (1994). If the non-moving party does not provide such a response,  
24 “summary judgment, if appropriate, shall be entered against the party.”  
25  
26

## Analysis

1  
2 The Idaho Sales Tax Act, title 63, Chapter 3601, *et seq.*, governs sales and use tax in the  
3 State of Idaho. A sales tax is imposed upon each retail sale of tangible personal property<sup>1</sup>  
4 purchased by the ultimate consumer located in the State of Idaho. Idaho Code § 63-3619. A  
5 “retail sale” is a “sale for any purpose other than resale in the regular course of business or lease or  
6 rental of property in the regular course of business where such rental or lease is taxable under  
7 section 63-3612(h), Idaho Code.” Idaho Code § 63-3609.

8 A compensating “use” tax is imposed on the storage,<sup>2</sup> use<sup>3</sup> or other consumption of  
9 tangible personal property located in the State of Idaho. Idaho Code § 63-3621. There is a  
10 presumption “that all tangible personal property shipped or brought to this state by the purchaser  
11 was purchased from a retailer, for storage, use or other consumption in this state.” Idaho Code §  
12 63-3621(h)<sup>4</sup>. Accordingly, when a consumer purchases tangible personal property from a seller  
13 located out of the State of Idaho, and that sale is not subject to the collection of a sales tax owed to  
14 the State of Idaho, a compensating use tax is imposed. “Every person storing, using or otherwise  
15 consuming, in this state, tangible personal property is liable for the tax,” unless the person  
16 qualifies for an exemption under Idaho Code, the property was purchased for resale, or the  
17 purchaser paid sales tax when purchasing the property. Idaho Code § 63-3621.  
18  
19  
20

21 <sup>1</sup> Idaho Code § 63-3616(a) defines “tangible personal property” as “personal property which may be seen, weighed,  
22 measured, felt or touched, or which is in any other manner perceptible to the senses.”

23 <sup>2</sup> Idaho Code § 63-3615(a) defines the term “storage” as “any keeping or retention in this state for any purpose except  
24 sale in the regular course of business or subsequent use solely outside this state of tangible personal property  
25 purchased from a retailer.”

26 <sup>3</sup> Idaho Code § 63-3615(b) defines the term “use” to include “the exercise of any right or power over tangible personal  
property incident to the ownership or the leasing of that property . . . .”

<sup>4</sup> Idaho Code § 63-3621(h) provides: “It shall be presumed that tangible personal property shipped or brought to this  
state by the purchaser was purchased from a retailer, for storage, use or other consumption in this state.”

1 The Tax Commission argues that Petitioners are liable for a use tax on the spa equipment  
2 Petitioners purchased from their out of state franchisor. The Tax Commission argues that the  
3 purchase from of equipment used in providing tanning services to the public is a retail sale for  
4 which a use tax must be paid.

5 Petitioners contend that they are not obligated to pay Idaho sales and use taxes on the  
6 tanning and spa equipment. Petitioners argue that their purchase of tanning and spa equipment  
7 from their franchisor was not a retail sale as defined by Idaho Code § 63-3609.<sup>5</sup> Petitioners argue  
8 that they are re-selling the use of, or renting, the equipment to their customers as provided in Idaho  
9 Code § 63-3612(f).<sup>6</sup> According to Petitioners, customers at Planet Beach spas use tangible  
10 personal property, namely the tanning and spa equipment, for recreation. Petitioners claim they  
11 are re-selling the use of equipment to their customers. Petitioners argue that because they are re-  
12 selling the use of the equipment, their purchase of the equipment is not subject to Idaho sales or  
13 use taxes. Petitioners argue they are only obligated to collect and remit the sales tax on the use of  
14 the equipment by the customers.  
15

16 Petitioners do not allege that they qualify for any exemption to the use tax as provided in  
17 Idaho Code § 63-3622A-TT.

18 In *Boise Bowling Center v. State*, 93 Idaho 367, 461 P.2d 262 (1969), the Idaho Supreme  
19 Court held that the leasing of bowling equipment by the manufacturer to individual proprietors of  
20 bowling establishments constituted a taxable sale under the Idaho Sales Tax Act. It held that the  
21 purpose of the Act is to tax retail sales. The Court found that the leasing of bowling equipment,  
22

23  
24 <sup>5</sup> Idaho Code § 63-3609 provides, in part, as follows: 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.

25 <sup>6</sup> Idaho Code § 63-3612(2)(f) provides: "Sale shall also include the following transactions when a consideration is  
26 transferred, exchanged or bartered: . . . (f) The use of or the privilege of using tangible personal property or facilities  
for recreation."

1 specifically an automatic pinsetting device, was a retail sale as defined by Idaho Code § 63-  
2 3612(h) of the Act because the equipment was leased for a purpose other than to re-sell or re-lease.

3 The proprietors of the bowling establishments argued that they were re-leasing the bowling  
4 equipment to bowlers such that the lease payments to the manufacturer were not taxable under the  
5 Act. The Supreme Court disagreed and stated the following:

6           Operation of a bowling business involves providing the bowling patron  
7 with a diverse assortment of services and properties, viz., use of a bowling ball,  
8 use of the bowling alley upon which the ball is thrown, use of a score sheet, and  
9 use of the automatic pinsetting machine.

10           It is the combination of these services and properties for which a charge is  
11 exacted . . . . The bowling patron does not rent the automatic pinsetting device by  
12 itself, but rather pays a fee for a 'package' or bowling service which is supplied  
13 by the proprietor.

14 *Id.* at 369, 461 P.2d at 264. The Supreme Court ruled that the bowling lane operators were not re-  
15 selling or re-leasing the equipment they leased from the bowling manufacturer and owed sales tax  
16 on the lease payments for such equipment.

17           In the Court's view, the decision in *Boise Bowling Center v. State* is dispositive on the  
18 issue raised in this appeal. In this case Planet Beach provides tanning and related services to its  
19 customers, and it is the combination of these services that the customer is charged for. Each  
20 customer is provided with the use of an individual room that has been cleaned and sanitized by an  
21 employee following each customer use, the use of tanning or spa equipment and assistance in  
22 turning the equipment on and off. Customers are unable to turn on the tanning and spa equipment  
23 from the individual rooms. Customers are unable to rent the tanning machine by itself and do not  
24 have the option of cleaning and sanitizing the equipment themselves. Customers also purchase  
25 lotions and other products related to the tanning process. Like the bowling patrons in the *Boise*  
26 *Bowling Center* case, customers of Planet Beach spas are paying for a service package when they  
use tanning and spa equipment. The Court finds that Petitioners are not re-selling the use of the

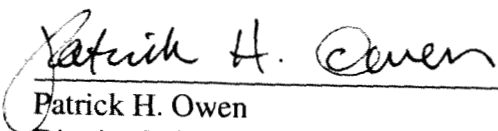
1 tanning and spa equipment, and as such, are subject to liability for payment of the Idaho use tax  
2 for the tanning and spa equipment they purchased from their out of state franchisor.

3 **Conclusion**

4 For the above stated reasons, the Court upholds the decisions of the Tax Commission  
5 imposing use taxes upon Petitioners.

6 IT IS SO ORDERED.

7  
8 Dated this 23 day of December, 2008.

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12 Patrick H. Owen  
13 District Judge  
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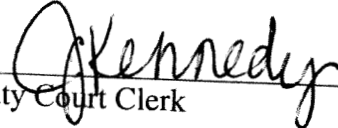
**CERTIFICATE OF MAILING**

I hereby certify that on this 2~~1~~<sup>d</sup> day of December, 2008, I mailed (served) a true and correct copy of the within instrument to:

Derek A. Pica  
ATTORNEY AT LAW  
199 N CAPITOL BLVD STE 302  
BOISE ID 83702

Brian D Nicholas  
DEPUTY ATTORNEY GENERAL  
P O BOX 36  
BOISE ID 83722-0410

J. David Navarro  
Clerk of the District Court

By   
Deputy Court Clerk



4-25

FEB 03 2009

J. DAVID NAVARRO, Clerk  
By L. AMES  
DEPUTY

**DEREK A. PICA, PLLC**  
**ATTORNEY AT LAW**  
**199 N. CAPITOL BLVD., SUITE 302**  
**BOISE, ID 83702**

**TELEPHONE: (208) 336-4144**  
**FACSMILIE: (208) 336-4980**  
**IDAHO STATE BAR NO. 3559**

**ATTORNEY FOR PETITIONERS**

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GRACIE, LLC, an Idaho Limited Liability )  
Company, and BARNES & BARNES )  
ENTERPRISES, LLC, an Idaho Limited )  
Liability Company, )  
 )  
Petitioners, )  
vs. )  
 )  
IDAHO STATE TAX COMMISSION, )  
a Political Subdivision of the State of Idaho, )  
 )  
Respondent. )  
\_\_\_\_\_ )

Case No. CV OC 0719593

**NOTICE OF APPEAL**

TO: Respondent, Idaho State Tax Commission, and its attorney of record, Brian D. Nicholas.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Petitioners/Appellants, Gracie, LLC and Barnes & Barnes Enterprises, LLC, appeal against the above named Respondent to the Idaho Supreme Court from the Memorandum Decision and Order filed on December 24, 2008 in the above-entitled action, Honorable Patrick H. Owen, presiding.

2. That Petitioners/Appellants have a right to appeal to the Idaho Supreme Court, and the Memorandum Decision and Order described in paragraph 1 above is an appealable Order under and pursuant to Rule 11(a)(2) of the Idaho Appellate Rules.

3. The proceedings of the original hearing was recorded by a court reporter.

4. A transcript of the argument on appeal before the District Court is not requested.

5. Issues on Appeal:

a. Whether the District Court erred when it determined Appellants are responsible for use taxes on equipment purchased for use by their customers in their businesses.

b. Whether the district court erred in determining Appellants were not renting equipment.

6. Appellant requests that the Clerk's Record contain all documents designated in I.A.R. 28.

7. I certify:

a. That a copy of this Notice of Appeal has been served on the Clerk of the District Court.

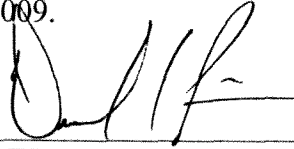
b. That the Clerk of the District Court has not been paid the estimated fee for preparation of the reporter's transcript as no transcript is requested.

c. That the estimated fee for preparation of the Clerk's Record has been paid.

d. That the appellate filing fee has been paid.

That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 3<sup>rd</sup> day of February, 2009.



DEREK A. PICA  
Attorney for Petitioners/Appellants

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 3<sup>rd</sup> day of February, 2009, I caused a true and correct copy of the foregoing NOTICE OF APPEAL to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Civil Procedure, to the following person(s):

Brian D. Nicholas  
Deputy Attorney General  
Idaho State Tax Commission  
800 Park Plaza IV  
P.O. Box 36  
Boise, Idaho 83722-0410

Clerk of the Court  
Ada County Courthouse  
200 West Front Street  
Boise, Idaho 83702

Hand Deliver  
U.S. Mail  
Facsimile  
Overnight Mail



Derek A. Pica

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FEB 17 2009  
Ada County Clerk

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A.M.  
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FEB 17 2009  
J. DAVID NAVARRO, CLERK  
By L. AMES  
DEPUTY

BRIAN D. NICHOLAS  
DEPUTY ATTORNEY GENERAL  
STATE OF IDAHO  
P.O. BOX 36  
BOISE, ID 83722-0410  
TELEPHONE NO. (208) 334-7530  
FACSIMILE NO. (208) 334-7844  
[ISB NO. 3585]

Attorney for Respondent Idaho State Tax Commission

ORIGINAL

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

GRACIE, LLC, an Idaho Limited Liability )  
Company, and BARNES & BARNES )  
ENTERPRISES, LLC, an Idaho Limited )  
Liability Company, )  
 )  
 )  
Petitioners, )  
-vs- )  
 )  
IDAHO STATE TAX COMMISSION, )  
 )  
 )  
Respondent. )  
 )


CASE NO. CV 0719593  
REQUEST FOR ADDITIONAL  
DOCUMENTS IN RECORD

TO: THE ABOVE NAMED DEFENDANTS AND THE CLERK OF THE DISTRICT  
COURT:

Pursuant to Idaho Appellate Rule 28(c), the Idaho State Tax Commission hereby requests  
that the following documents be included in the Clerk's Record on Appeal:

- 1. Stipulated Facts
- 2. Affidavit of Derek A. Pica dated August 20, 2008.
- 3. All Exhibits attached to Petitioner's Brief on Review

Dated this 12<sup>th</sup> day of February, 2009.


  
BRIAN D. NICHOLAS  
DEPUTY ATTORNEY GENERAL

**CERTIFICATE OF SERVICE**

I hereby certify that on this 12<sup>th</sup> day of February, 2009, a copy of the within and foregoing REQUEST FOR ADDITIONAL DOCUMENTS IN RECORD was served by the method indicated below:

DEREK A PICA PLLC  
ATTORNEY AT LAW  
199 N CAPITOL BLVD SUITE 302  
BOISE ID 83702

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Telecopy (Fax)

  
BRIAN D. NICHOLAS  
DEPUTY ATTORNEY GENERAL

RECEIVED

FEB 02 2009

Ada County Clerk

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
 AM \_\_\_\_\_ PM \_\_\_\_\_  
**ORIGINAL**  
 FEB 23 2009  
 BY J. DAVID NAVARRO, Clerk  
 DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

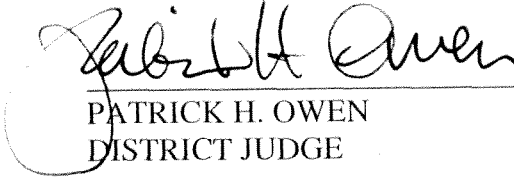
GRACIE, LLC, an Idaho Limited Liability Company, and BARNES & BARNES ENTERPRISES, LLC, an Idaho Limited Liability Company,	)	
	)	CASE NO. CV 0719593
	)	JUDGMENT
Petitioners,	)	
-vs-	)	
IDAHO STATE TAX COMMISSION,	)	
	)	
Respondent.	)	
	)	

THIS MATTER came on regularly before the Court for hearing on Motions for Summary Judgment filed by both parties. The Court entered a Memorandum Decision and Order dated December 23, 2008.

The Honorable Patrick H. Owen presided. The Petitioners were represented by Derek A. Pica, and the Respondant was represented by Brian D. Nicholas. The aforesaid Memorandum Decision and Order constitutes the Court's ruling on a Motion for Summary Judgment and are incorporated herein by reference. For the reasons set forth therein,

IT IS HEREBY ADJUDGED AND DECREED that the administrative decision of the Respondent, the Idaho State Tax Commission, upholding a determination of use tax, penalty, and interest against the Petitioners is affirmed. Judgment is granted in favor of the Respondent and petitioners are allowed an offset for the security deposits made pursuant to Idaho Code § 63-3049(b), which amount the Commission may apply against the assessed amounts.

DATED this 23 day of February, 2009.

  
PATRICK H. OWEN  
DISTRICT JUDGE

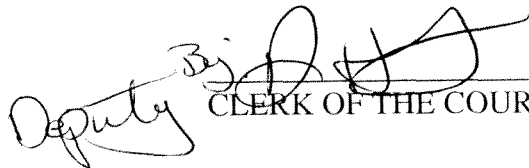
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the \_\_\_\_\_ day of **FEB 23 2009**, 2009, I caused to be served a true copy of the foregoing JUDGMENT by mailing a copy thereof in the United States mail, postage prepaid by first class mail, and addressed to the following:

DEREK A PICA  
ATTORNEY AT LAW  
199 N CAPITOL BLVD SUITE 302  
BOISE ID 83702

BRIAN D NICHOLAS  
DEPUTY ATTORNEY GENERAL  
IDAHO STATE TAX COMMISSION  
PO BOX 36  
BOISE ID 83722-0410

J. DAVID NAVARRO

  
CLERK OF THE COURT

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GRACIE, LLC, an Idaho limited liability  
company, and BARNES & BARNES  
ENTERPRISES, LLC, an Idaho limited  
liability company,

Petitioners-Appellants,

vs.

IDAHO STATE TAX COMMISSION, a  
political subdivision of the State of Idaho,

Respondent.

Supreme Court Case No. 36111

CERTIFICATE OF EXHIBITS

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the course of this action.

I FURTHER CERTIFY, that the following documents will be submitted as EXHIBITS to the Record:

1. Affidavit Of Derek A. Pica, filed August 22, 2008.
2. Petitioners' Brief On Review, filed August 22, 2008.
3. Petitioners' Reply Brief On Review, filed September 11, 2008.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 9th day of March, 2009.

J. DAVID NAVARRO  
Clerk of the District Court

By BRADLEY J. THIES  
Deputy Clerk

SEAL

CERTIFICATE OF EXHIBITS

00045



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GRACIE, LLC, an Idaho limited liability  
company, and BARNES & BARNES  
ENTERPRISES, LLC, an Idaho limited  
liability company,

Petitioners-Appellants,

vs.

IDAHO STATE TAX COMMISSION, a  
political subdivision of the State of Idaho,

Respondent.

Supreme Court Case No. 36111

CERTIFICATE OF SERVICE

I, J. DAVID NAVARRO, the undersigned authority, do hereby certify that I have  
personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of  
the following:

CLERK'S RECORD

to each of the Attorneys of Record in this cause as follows:

DEREK A. PICA

ATTORNEY FOR APPELLANT

BOISE, IDAHO

BRIAN D. NICHOLAS

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

J. DAVID NAVARRO  
Clerk of the District Court

Date of Service: MAR 10 2009

By BRADLEY J. THIES  
Deputy Clerk

CERTIFICATE OF SERVICE

SEAL

00046

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GRACIE, LLC, an Idaho limited liability  
company, and BARNES & BARNES  
ENTERPRISES, LLC, an Idaho limited  
liability company,

Petitioners-Appellants,

vs.

IDAHO STATE TAX COMMISSION, a  
political subdivision of the State of Idaho,

Respondent.

Supreme Court Case No. 36111

CERTIFICATE TO RECORD

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 3rd day of February, 2009.

J. DAVID NAVARRO  
Clerk of the District Court

By BRADLEY J. THIES  
Deputy Clerk

**SEAL**

CERTIFICATE TO RECORD

00047