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Chandler's-Boise v. Idaho State Tax Com'n Appellant's Reply Brief Dckt. 44211

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHANDLER'S-BOISE, LLC,

Plaintiff-Appellant,

v.

IDAHO STATE TAX COMMISSION,

Defendant-Respondent.

Supreme Court Docket No: 44211
Ada County No.: CV-OC-15-17617

REPLY BRIEF OF PLAINTIFF/APPELLANT CHANDLER'S-BOISE, LLC

Appeal from the District Court of the Fourth Judicial District of the State of Idaho In and For the County of Ada

Honorable Melissa Moody Presiding

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I. INTRODUCTION

Chandler's[1] seeks a ruling that service charges to customers related to preparing and serving food, which were not retained by Chandler's and were given to the employees involved in the preparation and service of food, are not subject to the Idaho sales tax as tangible personal property. The plain language of the relevant statutes supports Chandler's' position, as does the Legislature's clarification of Idaho Code Section 63-3613 in 2011.

Chandler's does not argue that the Amendment should be applied beyond the retroactive date identified in the Amendment. Instead, the Amendment demonstrates that Commission Rule 43.04, which was the catalyst for the Amendment, was contrary to the language of Idaho Code Section 63-3613. The Amendment supports the position Chandler's has advanced all along—that the Gratuities are not subject to the Idaho sales tax. The Amendment made the legislature's position explicit, but that does not mean that the pre-Amendment version of the statute does not support Chandler's' position. Additionally, there is Idaho precedent supporting application of the substance of a clarificatory amendment, like the Amendment, to circumstances arising before the effective date of the amendment. The Commission has not rebutted this precedent.

The District Court Decision, which relied on Commission Rules that were unreasonable and contrary to the relevant statutes, should be reversed.

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[1] The terms used herein have the meanings defined in the Opening Brief of Plaintiff/Appellant Chandler's-Boise, LLC, filed October 11, 2016 ("Opening Brief").

II. ARGUMENT IN REPLY

A. Under the plain language of the pre-Amendment Idaho Code Section 63-3613, the Gratuities are not subject to the sales tax.

1. The Gratuities are exempt from the sales tax because the term "sales price" does not include the services at issue here.

Chandler's agrees with the Commission that the language of Idaho Code Section 63-3613 is plain and that "If the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect . . . ." Respondent Idaho State Tax Commission's Brief, filed December 8, 2016 ("Commission Brief") p. 5 (citing *Jayo Dev., Inc. v. Ada Cty. Bd. of Equalization*, 158 Idaho 148, 152, 345 P.3d 207, 211 (2015) (hereafter "*Jayo*")).

Contrary to the Commission's position, however, Idaho Code Section 63-3613, and in particular subsections (b)(4) and (b)(8), unambiguously establish that the Gratuities are *not* subject to the sales tax and that the Commission failed to properly apply Idaho Code Section 63-3613 to the Gratuities. The Legislature expressed such intent by the plain meaning of the pre- and post-Amendment versions of Idaho Code Section 63-3613—which is, that service charges like the Gratuities should not be subject to the sales tax.

a. The Commission's reliance on Idaho Code Section 63-3612(2)(b) is misplaced because that section defines "sale," not "sales price"—the tax base for applying the sales tax.

As explained in Chandler's' Opening Brief, Idaho Code Section 63-3619, the principal statute that imposes the Idaho sales tax, states in relevant part, "An excise tax is hereby imposed upon each ***sale*** at retail at the rate of six percent (6%) of the ***sales price*** of all ***retail sales*** subject

to taxation under this chapter . . . ." I.C. § 63-3619[2] (emphasis added). A transaction must fall within each of these three emphasized terms in order to be subject to an excise tax. Chandler's does not dispute that the Gratuities arose as part of a "sale" and "retail sales;" but Chandler's vigorously disputes that the definition of the "sales price" includes the Gratuities paid in this case. *See* I.C. § 63-3612(2)(b); I.C. § 63-3609.

The Commission relies upon Idaho Code Section 63-3612(2)(b) to allege that the Gratuities are taxable. Commission Brief p. 6, pp. 10-11.[3] But while Idaho Code Section 63-3612(2)(b) includes gratuities in the definition of a "sale," this does not mean that the Gratuities at issue here are subject to the sales tax. *See* I.C. § 63-3619 (titled "Imposition and Rate of the Sales Tax").

Even though Idaho Code Section 63-3612(2)(b) references services performed in conjunction with the "sale" of food and beverages, this does not negate the broad exception of gratuities from "sales price" under Idaho Code Section 63-3613(b). Notably, the Amendment dealt only with Idaho Code Section 63-3613 (definition and exceptions for "sales price"), and the Legislature did not similarly address Idaho Code Section 63-3612 (definition of "sale"), yet the Commission amended its rules in response to the Amendment to provide that no sales tax applies to a gratuity paid in addition to a meal (when certain conditions are met). *See* Commission Brief p. 36 and Addendum Document No. 8 thereto. If it were correct that the definition of "sale"

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[2] The citations to the tax provisions of the Idaho Code herein refer to the applicable 2010 version, with the exception of reference to the Amendment.

[3] The Commission also cites to legislative history for Idaho Code Section 63-3612(2)(b), which is not relevant because Chandler's does not dispute that the Gratuities arose as part of a "sale" as defined by that statute. *See* Commission Brief pp. 12-13.

controls over the definition of "sales price," then the Legislature would have had to amend Idaho Code Section 63-3612 in order to necessitate the Commission's post-Amendment rule changes.

The District Court, therefore, incorrectly ruled that the definition of a "sale" under Idaho Code Section 63-3612(b) would preempt the application of the "sales price" exemptions found in Idaho Code Section 63-3613(b). R. p. 130. Absent a "sale" falling within the definition of "sales price," no "sale" can be subject to the sales tax. *See* I.C. § 63-3619 (requiring more than just a "sale," but also requiring a "sale at retail" and imposing a 6% sales tax upon the "sales price").

b. Idaho Code Section 63-3613(b) specifically excludes charges attributable to "services rendered in . . . applying the property sold" and "service charges."

The Commission argues that Idaho Code Section 63-3613(a)(2)—the broad definition of "sales price"—applies to the Gratuities because it includes "labor or service costs." The Commission then argues that the exemptions found in the same section do not apply to the Gratuities. Commission Brief p. 7 (citing I.C. § 63-3613 and Commission Rules).

The exceptions set forth in Idaho Code Section 63-3613(b)(4) and § (b)(6) are not so narrow as to exclude the Gratuities. Indeed, Idaho Code Section 63-3613(b) just as broadly exempts gratuities from the definition of "sales price" because such charges represent "[t]he amount charged for labor or ***services rendered in installing or applying the property sold*** . . ." or "[t]he amount charged for finance charges, carrying charges, ***service charges*** . . .", as long as neither amount is used as a means of avoiding sales tax on the actual sales of tangible personal property. *See* I.C. § 63-3613(b)(4) and (b)(6) (emphasis added).

There are no facts in the Record of this case to demonstrate how the exemptions in Idaho

Code Section 63-3613(b)(4) and (b)(6) cannot apply to the service of food, when charges for the service of food are stated separately—as is undisputed in this case. R. pp. 36, 48 (Stip. ¶ 12, Ex. D). The Commission's examples related to Idaho Code Section 63-3613(b)(4) are not found in the statutory text, but rather are found in the Commission Rules. Commission Brief p. 8. Chandler's' position may conflict with the Commission Rules, but it does not contradict the plain language of the statute.

Similarly, the Commission argues that the Gratuities cannot fall under the exemption for "services charges" under Idaho Code Section 63-3613(b)(6) because that section applies solely to financial or bank-related charges. Commission Brief pp. 9-10. While it is true that subsection (b)(6) lists certain financial-related charges, it also lists, without qualification, "service charges." The Gratuities are separately stated service charges paid to those involved in preparing or serving a meal, and not retained by Chandler's. R. p. 96 (Affidavit of Rex Chandler ¶ 3). To the extent Chandler's carries the burden of showing applicability of a sales tax exemption (*see* Commission Brief p. 25), Chandler's has shown that the Gratuities are excepted from the definition of "sales price" under Idaho Code Section 63-3613(b)(6), and are thus exempt from the sales tax.

The Commission cites to the 1965 legislative history related to Idaho Code Sections 63-3613(b)(4) and (b)(6) to support its argument that the Gratuities do not fall within these exceptions. Commission Brief p. 13. However, with both parties arguing that Idaho Code Section 63-3613 is unambiguous, "the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to consider rules of statutory construction. This is because [t]he asserted purpose for enacting the legislation cannot modify its plain meaning."

Jayo, 158 Idaho at 152, 345 P.3d at 211 (citation omitted) (brackets in original).

2. The Commission Rules do not change the plain language of Idaho Code Section 63-3613 and should not take precedence over the statute where the rules are not grounded in the language of the statute.

There is no dispute between the parties about which rules were applied in this case. Opening Brief pp. 8-10; Commission Brief pp. 5-6. In spite of the plain language of Idaho Code Section 63-3613, Commission Rule 43.04, defining gratuities, and Commission Rule 43.05, defining service charges, created a distinction between voluntary and non-voluntary charges for tips. The sales tax does not apply to a tip if the customer is advised that he may decline to pay the tip, but does apply if the customer is not so advised. Commission Rule 43.04. Additionally, "service charges" are "part of the selling price of the meals or drinks" and are subject to the sales tax. Commission Rule 43.05. These rules resulted in the Gratuities, which consisted of charges for *services*, being improperly taxed the same way as *tangible personal property*. This was not a reasonable application of the law.

a. The District Court relied heavily on Commission Rule 43.04.

There is no doubt that the District Court relied on Commission Rule 43.04 in reaching its decision that the Gratuities were subject to the sales tax. The District Court Decision began with a discussion of the applicability of Commission Rule 43.04, explaining that when a charge is added and a customer is not advised he can decline the charge, it is not a gratuity. R. pp. 127-128. As such, the District Court found that this case did not involve gratuities, and that the Gratuities are subject to the sales tax under Commission Rule 43.04. R. p. 128. The District Court also ruled that the statutory exemption did not apply, and ended by again noting that "the

tips in this case were not gratuities and they were clearly subject to sales tax." R. p. 131. Commission Rule 43.04, therefore, carried substantial weight in the District Court Decision.

b. Commission Rule 43.04 is not entitled to deference because the voluntariness distinction is not reasonable.

The parties agree that the four-part *Simplot* test applies to determine agency deference. *See generally J.R. Simplot Co. v. Tax Comm'n,* 120 Idaho 849, 820 P.2d 1206 (1991). Additionally, the parties do not dispute that the Commission is entrusted to administer the relevant statutes, so the first element related to agency deference is met in this case. As to the second element, the Commission has yet to identify a reasonable basis for its rules that is based on the language of the applicable statutes, instead asserting its rules have been approved by the Legislature at various times and can be clearly administered in practice. Each of the Commission's arguments must fail.

First, contrary to the Commission's assertion (*see* Commission Brief pp. 14-15), the fact that the Legislature stated in 1996 that existing Commission Rules would remain in effect does not mean that the Legislature explicitly approved of Commission Rule 43.04. Rather, the Legislature simply made clear that despite a statutory amendment effective in 1997, the existing rules would remain in full force and effect until rescinded or amended by the Commission.

Second, legislative history for a failed statutory amendment in 1988 does not change the plain language of Idaho Code Section 63-3613 and does not render Commission Rule 43.04 reasonable. The Commission points to legislative history for a bill that never became law as evidence that Commission Rule 43.04 is reasonable. Commission Brief pp. 16-18. For unknown

reasons, in 1988 the Legislature did not address the issues later clarified by the Amendment in 2011. That, however, does not prove that Commission Rule 43.04 is reasonable. Essentially, the Commission asks this Court to afford greater weight to a bill that *never* passed than to the Amendment, which *did* pass. Chandler's has set forth Idaho law concerning the effect of a clarificatory amendment like the Amendment (*see infra*), but the Commission set forth no Idaho law demonstrating what weight, if any, a failed amendment should be afforded (and Chandler's located none).

Third, the Commission's substantive defense of its rules has no foundation in the statutory text. The Commission argues that Commission Rule 43.04 provided a "bright line" rule for taxability, and that the distinction somehow fit into the definition of "sale" and "sales price." Commission Brief p. 16. However, nothing in Idaho Code Sections 63-3612 or 63-3613 provides for a distinction based on whether a gratuity is disclosed as voluntary or not, so it is unclear how the distinction "neatly" and "squarely" fits into those statutory provisions, as the Commission contends. Commission Brief p. 16. The Commission has yet to identify the specific basis for its rules in the statutes and has not shown how the distinction based on voluntariness, rather than on the intrinsic nature of charges themselves, is reasonable.

Fourth and finally, Commission Rule 43.04 conflicts with the Commission's mixed transaction test met by Chandler's, which is further evidence of the unreasonableness of the Commission Rules. Opening Brief pp. 9-10. The District Court made no ruling on the mixed transaction issue. The Commission, however, asserts that Chandler's is wrong and that IDAPA § 35.01.02.11.02(c) does not apply to restaurants or meal services. The Commission relies on its

interpretation of the language of Commission Rule 11.02(c) (as informed by other rules) and its non-exhaustive illustrative list of mixed transactions—which does not mention restaurants. Commission Brief pp. 22-25. For the reasons stated in its Opening Brief, Chandler's contends that the language of Rule 11.02(c) provides that the purchase of food and provision of services are two distinct transactions that are not taxed identically. This supports Chandler's argument that Commission Rule 43.04, which in this case caused services to be taxed as personal property, is not reasonable.

c. Commission Rule 43.04 is not entitled to deference because it conflicts with Idaho Code Sections 63-3612 and 3613.

As to the third element related to agency deference, the Commission asserts on the one hand that "[t]he statute does not expressly treat the technical matter at issue," and on the other hand that "Idaho Code §§ 63-3612 and § 3613 clearly impose tax on the meals in question in this matter." Commission Brief p. 18. Idaho Code Sections 63-3612 and 3613, however, make no distinction concerning voluntariness of the requirement of payment of the gratuity as the Commission has done in its rules. And, the Commission never identifies a statutory foundation for its voluntariness distinction. Commission Brief pp. 18-19. Indeed, whether the gratuity relates to the sale of a service or a tangible good is one rational and reasonable interpretation of the statute, or perhaps whether or not the gratuity is actually received by the business as part of the sale or given over to the server, another such reasonable interpretation. But it is completely arbitrary (and what the Legislature was acting to "clarify") in light of the language of the statutes

to impose a distinction solely in the realm of food service that the sales price includes mandatory "gratuities" but does not include discretionary gratuities.

Finally, the Commission argues that the rationales underlying the rule of deference are present here. Commission Brief pp. 19-22. Because, however, the Commission's interpretation set forth in Rule 43.04 fails the second and third prongs of the *Simplot* test, there is no reason to analyze the rationales underlying the fourth prong and the rule of deference, and spend the pages of briefing as does the Commission in its brief discussing *Canty v. Idaho State Tax Commission*, 138 Idaho 178, 59 P.3d 983 (2002). This Court should not give Rule 43.04 deference and should instead apply the statutory language, as clarified by the Amendment in 2011.

B. The Amendment clarified the meaning of Idaho Code Section 63-3613 and the legislative history of the Amendment demonstrates that the Commission Rules misinterpreted the statute.

1. Chandler's does not challenge the Amendment's retroactivity date.

The Commission asserts that Chandler's is asking this Court to apply the Amendment beyond the stated retroactive date. Commission Brief pp. 25-29. Chandler's, however, acknowledged that "the legislature made the Amendment effective and retroactive to January 1, 2011 (outside the Audit Period) . . . ." Opening Brief p. 15. Chandler's does not and could not assert an earlier retroactive date for the Amendment. Thus, the *explicit* exclusion of gratuities and tips from the definition of "sales price" in subpart (f) of Idaho Code Section 63-3613 does not apply to the Gratuities.

However, that the explicit exclusion in subpart (f) does not apply to the Gratuities does not mean that the Amendment is irrelevant for purposes of determining whether the Gratuities

are subject to the sales tax under Idaho Code Section 63-3613. Chandler's' position is that the addition of subpart (f) clarified the meaning of the statute and reinforced how the statute should have been applied all along.[4] As described below, Idaho authority concerning the impact of clarificatory amendments supports Chandler's' position.

Contrary to the Commission's assertion, this Court's decision in *Jayo* is consistent with Chandler's' argument. In *Jayo*, a real estate developer sought a site improvement tax exemption based on a 2012 statute allowing for an exemption for property held by "the land developer." 158 Idaho at 151, 345 P.3d at 210. The developer asserted that under the plain language of the statute, it was entitled to the exemption, and further argued that a 2013 amendment to the statute made clear that the developer was entitled to the exemption. *Id.* The *Jayo* court ruled that the 2012 statute was unambiguous and that the developer did not qualify for the exemption under the plain language of the 2012 statute. *Id.* at 151-52, 345 P.3d at 210-11. As to the 2013 amendment, it changed the statutory language at issue in a way that would have permitted the exemption sought by the developer. *Id.* at 153, 345 P.3d at 212. The court ruled that it did not need to consider the 2013 amendment because the 2012 statute unambiguously barred the exemption sought by the developer. *Id.* The *Jayo* court further stated that because the 2013 amendment was only retroactive to January 1, 2013, the court would not apply the amendment to the developer's asserted 2012 exemption. *Id.* at 154, 345 P.3d at 213.

[4] Chandler's does not assert the Gratuities fall under the explicit exemption of subpart (f) added by the Amendment. The Commission's argument regarding the narrow construction of the 2011 exemption is thus inapposite. Commission Brief p. 37.

Jayo did not involve the situation in this case—where a tax was imposed primarily because of an administrative rule with no basis in the relevant statutes, and where the legislature clarified a statute as a result of an agency rule that was inconsistent with the statute. Additionally, as explained above, the plain language of the pre-Amendment statute supports Chandler's' position, whereas in *Jayo*, the plain language of the pre-amendment statute unambiguously defeated the developer's position. The Commission's attempt to recast Chandler's' argument as one of retroactivity rather than clarification and to bring this case within the rule of *Jayo* should be rejected.

2. The Amendment was a response to the Commission Rules, showing that the Commission had misinterpreted the statute by taxing services as goods.

The Legislature's addition of subpart (f) to Idaho Code Section 63-3613 supports Chandler's' position that the Gratuities should never have been subject to the Idaho sales tax for two reasons: (1) the legislative history of the Amendment demonstrates that the Amendment was necessary because of the Commission's misinterpretation of the statute, and (2) the legislature explicitly stated that the purpose of the Amendment was to "clarify" the meaning of the statute.

The Amendment added subpart (f) to Idaho Code Section 63-3613:

> (f) Sales price shall not include a gratuity or tip received when paid to the service provider of a meal. The gratuity or tip can be either voluntary or mandatory, but must be given for the service provided and as a supplement to the service provider's income.

2011 Idaho Sess. Laws 628 (Addendum to Opening Brief p. 5).

Chandler's does not dispute that subpart (f) contains language that was not previously included in Idaho Code Section 63-3613 or that Commission Rule 43.04 was longstanding. *See*

Commission Brief pp. 30-33. The fact, however, that Commission Rule 43.04 was in effect for many years and was enforced by the Tax Commission at least one other time in 2011 (*see* Commission Brief p. 32) does not mean that the Commission was legally correct in doing so and does not undercut the relevance of the Amendment in interpreting the pre-Amendment version of Idaho Code Section 63-3613.

There is no need to guess at the Legislature's purpose in enacting the Amendment because the legislative history is clear and the Legislature stated its intent in the act. As explained in Chandler's' Opening Brief, the legislation was needed to: (1) resolve a discrepancy caused by the Commission Rules; (2) correct a double-taxation issue; and (3) clarify and make consistent that services are not subject to the sales tax. Opening Brief pp. 14-15.

The Commission asserts that "[t]he Legislature did not strengthen the law by the 2011 Amendment, it changed the law," and further asserts that "[a] statutory amendment is assumed to change existing law rather than strengthen it." Commission Brief p. 29 and n. 2. The Supreme Court of Idaho, however, explained in *Stonecipher v. Stonecipher* that "[i]n enacting amendments to existing statutes, the legislature must have intended to clarify, strengthen ***or*** make some change in existing statutes." 131 Idaho 735, 963 P.2d 1172 (1998) (emphasis added). The use of the disjunctive "or" indicates that amendments can have various purposes, including clarification.

The Statement of Purpose for the Amendment provides that the bill: "[a]dds language to ***clarify*** that sales price shall not include a gratuity or tip when serving meals, and therefore, is not taxed, making consistent that services are exempt from sales tax." *See* Addendum to Opening

Brief p. 3. Further, the Amendment's purpose was to "***clarify*** that sales price shall not include a gratuity or tip received when paid to the service provider of a meal . . . ." 2011 Idaho Sess. Laws 628 (emphasis added) (Addendum to Opening Brief p. 5).[5]

Despite repeated use of the word "clarify" and the legislative history, the Commission maintains that the Amendment "had to be passed to change longstanding law" and that the comments in the legislative history "reflect significant changes in the law . . . ." Commission Brief pp. 33-34. This position ignores the Legislature's use of the word "clarify" and the legislative history showing the Commission's application of the Commission Rules was the catalyst for the Amendment.

Additionally, the Commission argues that its post-Amendment changes to Rule 43.04 show that the Amendment changed the law. Commission Brief pp. 36-37. All the post-Amendment rule shows, however, is that the Commission had to change Commission Rule 43.04 because it was blatantly inconsistent with the Amendment—which did not distinguish between

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[5] It is important to note that this language appears in the Bill itself that was passed by the Legislature, even though it does not appear in the codified law. We are not, therefore, simply talking about legislative history indicating an intent to "clarify" but simply reading the express language of the statute as so indicating. As was recently stated by this Court:

> All portions of a bill that is passed by the Legislature become law in the absence of a gubernatorial veto, even if not compiled in the Idaho Code. We recently explored this issue in *Peterson v. Peterson*, 156 Idaho 85, 320 P.3d 1244 (2014). There, the district court held that a retroactivity clause contained within a bill which was not assigned a statutory designation within the Idaho Code 'was merely legislative history' and could not be considered when reviewing unambiguous statutes. *Id.* at 88, 320 P.3d at 1247. We held that the district court erred in so holding, stating: 'The entire bill became a law regardless of how it was compiled in the Idaho Code.'

Hoffer v. Shappard, 160 Idaho 870, ____ n. 8, 380 P.3d 681, 696 n. 8 (2016) (*citing Peterson v. Peterson*, 156 Idaho 85, 320 P.3d 1244 (2014)).

voluntary and non-voluntary services charges (as the pre-Amendment Commission Rule 43.04 had). The Legislature's approval of the updated rule does not somehow prove that the Amendment was not a clarification.

3. The Amendment clarified how Idaho Code Section 63-3613 should have been applied all along and did not constitute a departure from the existing statute.

Chandler's sets forth multiple cases involving the effect of clarificatory amendments that support its argument that the Gratuities are not part of the "sales price." Opening Brief pp. 15-23. The cases advanced by Chandler's are instructive to this case and show that the question of whether the Gratuities are subject to the sales tax under the pre-Amendment version of Idaho Code Section 63-3613 can be answered by looking to the plain language of the pre-Amendment statute *and* by looking at the Amendment (though not applying it retroactively).

The District Court did not address these cases or Chandler's' clarification argument, instead focusing on the retroactivity date of the Amendment and basing its decision on the Commission Rules. R. p. 131 (District Court Decision). Similarly, here the Commission has broadly asserted that the cases are irrelevant because they all involved amendments that strengthened the original laws and the cases did not involve retroactivity. Instead of directly responding to one of Chandler's' central arguments, the Commission refers to its briefing to the District Court related to the Idaho cases pertaining to clarification. Commission Brief p. 35 (citing R. pp. 117-121).

With respect to retroactivity, Chandler's does not assert that the subpart (f) of Idaho Code Section 63-3613, added by the Amendment, should apply to the Gratuities. The Audit Period was

beyond the Amendment's retroactive date. Thus, any distinction of these cases based on presence or lack of a retroactive date makes no difference. Additionally, absence of a retroactivity clause in the cases supports Chandler's' position because "statutes should not be construed to be retroactive," which means that the cases addressed the substance of clarificatory amendments despite the amendments' prospective application. *Stonecipher*, 131 Idaho at 1172, 963 P.2d at 735.

With respect to the Commission's argument that the cases involved strengthening of a statute rather than a change in the law as seen here, Chandler's has set forth each case in detail and contends each case is analogous to the instant case. For example, the amendment in *Stonecipher* "***clarified*** the language of the original statute by providing a list, though non-exhaustive, of terms to be encompassed by 'an action or proceeding to collect child support arrearages.'" *Stonecipher*, 131 Idaho at 735, 963 P.2d at 1172 (emphasis added) (applying the reasoning behind a 1995 clarificatory amendment to a motion made before the amendment's applicability, based also on the plain language on a 1988 statute). Similarly, here the plain language of the pre-Amendment statute *and* the Amendment terms show that the Gratuities should never have been subject to the sales tax.

Chandler's set forth three other cases involving similar analysis of a clarificatory amendment. *See Pearl v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 137 Idaho 107, 114, 44 P.3d 1162, 1169 (2002) (applying the reasoning behind a 2000 clarificatory amendment, which was effective in 2000, to an administrative proceeding commenced in 1998, based on a 1998 statute); *State v. Barnes*, 133 Idaho 378, 987 P.2d 290, (1999) (the addition of an explicit

provision did not mean that the previous statute excluded the law later made explicit; instead, the "legislature intended to simply clarify and strengthen" the statute); *State v. Gillespie*, 155 Idaho 714, 718-19, 316 P.3d 126, 129-30 (Ct. App. 2013) *review denied* (Aug. 5, 2014) (applying the reasoning behind a 2012 clarificatory amendment, which was not effective until 2012, to a crime charged in 2008).[6]

Under these cases, the fact that subpart (f) added an explicit exclusion for services like the Gratuities from the sales tax does not mean that the concept embodied in subpart (f) was somehow excluded from the plain meaning of the statute prior to the Amendment. Contrary to the Commission's argument, the Amendment, like the clarificatory amendments seen in these cases, clarified and strengthened the meaning of Idaho Code Section 63-3613 as it existed—and should have been interpreted—all along.

C. The Commission is not entitled to any attorney fees or costs.

1. The Commission is not entitled to attorney fees and costs on appeal because Chandler's has a legitimate basis for its position that services should not be taxed as personal property.

The Commission requests attorney fees on appeal pursuant to Idaho Code Sections 63-3049(d), 12-117, and 12-121. The request should be denied because the Commission cannot meet the standard of Idaho Code Section 63-3049(d), which is the exclusive means of awarding fees in a judicial review of a Commission decision.

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[6] Chandler's also cited 1A SUTHERLAND ON STAT. CONST. § 22:31 (2015) for the proposition that an amendment adopted soon after a controversy arises related to a statute "must be accepted as the legislative declaration of the meaning of the original act." Opening Brief p. 23. The Commission citations (Commission Brief pp. 34-35) to a different section of that secondary source (Section 22:30) and one of the case footnotes for Section 22:31 that deals with retroactivity do not undercut the applicability of this secondary authority to Chandler's clarification argument.

This Court has held that where the Legislature includes a specific standard for attorney fees in a particular statute, that statute provides the exclusive basis for fees. *See, e.g., Block v. City of Lewiston*, 156 Idaho 484, 490, 328 P.3d 464, 470 (2014) (fees pursuant to Idaho Code section 12-117 not available where Idaho Tort Claims Act contained fee provision); *Henry v. Taylor*, 152 Idaho 155, 162, 267 P.3d 1270, 1277 (2012) (fees pursuant to Idaho Code sections 12-117 and 12-121 not available where Public Records Act provided exclusive attorney fee provision for those proceedings); *First Fed. Sav. Bank of Twin Falls v. Riedesel Eng'g, Inc.,* 154 Idaho 626, 632, 301 P.3d 632, 638 (2012) ("because section 45–513 is a specific statute providing for the award of attorney fees in proceedings to foreclose a mechanic's lien, Idaho Code sections 12–120(3) and 12-121, which are general statutes, do not apply"); *Shay v. Cesler*, 132 Idaho 585, 587, 977 P.2d 199, 201 (1999) (no recovery of attorney fees under Idaho Code Section 12-120 where wage claim statute containing attorney fee provision provided exclusive basis for recovering fees).

Here, Idaho Code Section 63-3049(d) governs fee awards related to judicial review of Commission decisions. That specific provision controls over general attorney fee provisions. *See Shay*, 132 Idaho at 588, 977 P.2d at 202. Accordingly, the Commission's request for fees under Idaho Code Sections 12-117 and 12-121 must be denied.

With respect to the Commission's request for fees pursuant to Idaho Code Section 63-3049(d), that statute provides that:

> Whenever it appears to the court that:

> (1) Proceedings before it have been instituted or maintained by a party primarily for delay; or
> (2) A party's position in such proceeding is frivolous or groundless; or
> (3) A party unreasonably failed to pursue available administrative remedies; the court, in its discretion, may require the party which did not prevail to pay to the prevailing party costs, expenses and attorney's fees.

I.C. § 63-3049(d).

The Commission appears to assert that Chandler's' arguments are frivolous or groundless, though the Commission does not state which subsection(s) of Idaho Code Section 63-3049(d) apply. *See* Commission Brief p. 2 and pp. 38-39. In support of its fee request, the Commission makes the same arguments it makes in the rest of its brief concerning legislative history, plain meaning, retroactivity, and *Jayo*. Commission Brief pp. 38-39.

Chandler's has advanced legitimate arguments grounded in the express and plain language of Idaho Code Section 63-3613. That language is different from the statute at issue in *Jayo*. The case law cited in terms of the Legislature's power to clarify does not appear to have been applied in this precise context before by this Court, and thus poses a novel question as to the application of existing case law. This is not a situation where Chandler's' argument is based on an "untenable" reading of the express statutory language, and Chandler's has offered a "reasoned basis for [this Court] to blaze a new trail" in applying existing case law regarding "clarification" by the Legislature (as opposed to the retroactive application discussion in *Jayo*) in the context of taxation statutes. *Hart v. Idaho State Tax Comm'n*, 154 Idaho 621, 625, 301 P.3d 627, 631 (2012). Chandler's' arguments are not frivolous and result from differing interpretations of the language of the statute and the interpretative weight of the Amendment.

Even if this Court is ultimately persuaded by the Commission's argument, costs and fees are not warranted under these circumstances.

2. The Commission waived its right to fees and costs at the District Court level.

The Commission requests costs and attorney fees under I.R.C.P. 54(e) for the District Court proceedings. The Commission, however, cannot recover those fees because (1) I.R.C.P. 54(e) is not applicable to a request for fees addressed to the Idaho Supreme Court, and (2) the Commission failed to timely and properly requests fees and costs below and is therefore deemed to have waived any such right to fees.

Rule 1 of the Idaho Rules of Civil Procedure provides, in pertinent part, "[t]hese rules govern the procedure and apply uniformly in the district court and the magistrate divisions of the district courts in the State of Idaho . . . ." I.R.C.P. 1(b). Likewise, Rule 2 of the Idaho Appellate Rules provides "[t]hese rules shall govern all appeals and petitions for special writs or proceedings in the Supreme Court." I.A.R. 2(a). The Appellate Rules go on specifically to provide a means to apply for attorneys fees on appeal in the form of Appellate Rule 41. Thus, the current request for attorneys fees under I.R.C.P. 54(e) is misdirected to this Court.

The Commission originally mentioned a request for fees and costs in its reply brief in support of summary judgment to the District Court, citing I.R.C.P. 54(e)(1) and asserting Chandler's' arguments were frivolous and groundless. R. p. 123. The District Court Decision did not address the request for fees and costs. R. pp. 126-131. The Commission never filed a Memorandum of Costs within 14 days of entry of Judgment as required by I.R.C.P. 54(d)(4), which provides that "[f]ailure to timely file a memorandum of costs is a waiver of the right to

costs."[7] Merely mentioning a request for attorneys fees and costs in a brief is not tantamount to timely filing the required memorandum of fees and costs. *See Estate of Holland v. Metro. Prop. & Cas. Ins. Co.*, 153 Idaho 94, 102, 279 P.3d 80, 88 (2012) (citing applicable Idaho Rules of Civil Procedure to require that in order to qualify as a timely filed "Memorandum of Costs," the document at issue must "itemize each claimed expense," state "that to the best of the party's knowledge and belief the items are correct and the costs are claimed in compliance with this rule" and also state that "[t]he claim for attorneys fees as costs shall be supported by an affidavit of the attorney stating the basis and method of computation of the attorneys fees claimed."). The Commission thus waived its ability to recover fees at the District Court level.

Notably, the Commission has not cross-appealed any order addressing attorney fees because there is no such order. With no proper request below, and no District Court order to review on appeal, this issue is not before this Court and it has been waived.

III. CONCLUSION

For these reasons and those set forth in Chandler's' Opening Brief, this Court should find that the Gratuities are not subject to the sales tax as personal property under the plain language of Idaho Code Sections 63-3613 and 63-3619, and should reverse the District Court Decision.

[7] *See also* I.R.C.P. 54(e)(5), which provides that attorneys fees "are costs in an action and processed in the same manner as other costs and included in the memorandum of costs."

DATED this 19th day of January, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2017, I caused to be served a true and correct copy of the foregoing document to the persons listed below by the method indicated:

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