

5-19-2016

Chandler's-Boise v. Idaho State Tax Com'n Clerk's Record Dckt. 44211

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IN THE SUPREME COURT OF THE STATE OF IDAHO

CHANDLER'S-BOISE, LLC,

Plaintiff-Appellant,

vs.

IDAHO STATE TAX COMMISSION,

Defendant-Respondent.

Supreme Court Case No. 44211

CLERK'S RECORD ON APPEAL

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

HONORABLE MELISSA MOODY

CLINT R. BOLINDER

ATTORNEY FOR APPELLANT

BOISE, IDAHO

ERICK M. SHANER

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

Chandler's Boise LLC vs. Idaho State Tax Commission

Date	Code	User		Judge
10/13/2015	NCOC	CCMYERHK	New Case Filed - Other Claims	Melissa Moody
	COMP	CCMYERHK	Complaint Filed	Melissa Moody
	SMFI	CCMYERHK	Summons Filed	Melissa Moody
10/15/2015	ACCP	CCSNELNJ	Acceptance Of Service (10/15/15)	Melissa Moody
11/3/2015	ANSW	TCLAFFSD	Tax Commission's Answer (Shaner for Idaho State Tax Commission)	Melissa Moody
11/9/2015	ORDR	DCHOUSKN	Order for Telephonic Status Conference	Melissa Moody
11/10/2015	HRSC	CCMEYEAR	Hearing Scheduled (Status by Phone 11/30/2015 03:00 PM)	Melissa Moody
11/30/2015	HRHD	CCMEYEAR	Hearing result for Status by Phone scheduled on 11/30/2015 03:00 PM: Hearing Held	Melissa Moody
	HRSC	CCMEYEAR	Hearing Scheduled (Motion 04/04/2016 10:00 AM) Hearing on Cross Motions for Summary Judgment	Melissa Moody
12/1/2015	SCHE	DCHOUSKN	Scheduling Order	Melissa Moody
1/29/2016	STIP	CCWEEKKG	Joint Stipulation of Fact	Melissa Moody
3/1/2016	MOTN	CCVIDASL	Idaho Tax Commissions Cross Motion for Summary Judgment	Melissa Moody
	MEMO	CCVIDASL	Idaho State Tax Commissions Memorandum in Support of Summary Judgment	Melissa Moody
	MOSJ	CCBUTTAR	Motion For Summary Judgment	Melissa Moody
	MEMO	CCBUTTAR	Plaintiff's Memorandum In Support Of Motion For Summary Judgment	Melissa Moody
	AFFD	CCBUTTAR	Affidavit Of Rex Chandler	Melissa Moody
3/22/2016	REPL	CCBUTTAR	Plaintiff's Reply To Defendant's Cross-Motion For Summary Judgment	Melissa Moody
	MOTN	CCLOWEAD	Idaho State Tax Commission's Motion to Strike (Affidavit of Rex Chandler)	Melissa Moody
	REPL	CCLOWEAD	Reply Memorandum in Support of Idaho State Tax Commission's Motion for Summary Judgment	Melissa Moody
4/1/2016	RSPN	CCFERGLL	Response In Opposition To Idaho State Tax Commissions Motion To Strike (Affidavit Of Rex Chandler)	Melissa Moody
4/4/2016	DCHH	CCMEYEAR	Hearing result for Motion scheduled on 04/04/2016 10:00 AM: District Court Hearing Held Court Reporter: Tiffany Fisher Number of Transcript Pages for this hearing estimated: Hearing on Cross Motions for Summary Judgment less than 150	Melissa Moody
4/7/2016	ORDR	DCHOUSKN	Order Granting Idaho State Tax Commission's Motion for Summary Judgment and Denying Chandler's - Boise, LLC's Motion for Summary Judgment	Melissa Moody
4/8/2016	JDMT	DCHOUSKN	Judgment	Melissa Moody

Chandler's Boise LLC vs. Idaho State Tax Commission

Date	Code	User		Judge
4/12/2016	CDIS	CCMEYEAR	Civil Disposition entered for: Idaho State Tax Commission, Defendant; Chandler's Boise LLC, Plaintiff. Filing date: 4/12/2016	Melissa Moody
	STAT	CCMEYEAR	STATUS CHANGED: Closed	Melissa Moody
5/19/2016	NOTA	CCLOWEAD	NOTICE OF APPEAL	Melissa Moody
	APSC	CCLOWEAD	Appealed To The Supreme Court	Melissa Moody
7/6/2016	NOTC	TCWEGEKE	Notice of Transcript of 55 Pages Lodged - Supreme Court No. 44211	Melissa Moody

NO. _____ FILED _____
A.M. _____ P.M. *JMS*

OCT 13 2015

CHRISTOPHER D. RICH, Clerk
By HALEY MYERS
DEPUTY

MELISSA MOODY

Clint R. Bolinder [ISB #5667]
GIVENS PURSLEY LLP
601 W. Bannock Street
P.O. Box 2720
Boise, ID 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
2864200_2 [8975-6]

Attorneys for Plaintiff

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

CHANDLER'S-BOISE, LLC,

Plaintiff,

v.

IDAHO STATE TAX COMMISSION,

Defendant.

Case No. CV OC 15 17617

**COMPLAINT FOR JUDICIAL
REVIEW AND
REDETERMINATION OF TAX**

Chandler's-Boise, LLC, an Idaho limited liability company ("Chandler's"), pursuant to Idaho Code § 63-3049 hereby complains against the Idaho State Tax Commission (the "Commission") as follows:

I. GENERAL ALLEGATIONS

1. The Commission is an executive department of the State of Idaho.
2. Chandler's is an Idaho limited liability company.
3. Chandler's maintains its principal place of business in the State of Idaho.
4. For the period of May 1, 2007 through May 31, 2010 (hereafter, "Audit Period"), Chandler's owned and operated a steak and seafood restaurant commonly known as "Chandler's," which is located within Hotel 43 in downtown Boise, Idaho.

5. During the Audit Period, Chandler's' point of sale system automatically added gratuities to dining groups having six (6) or more persons (hereafter, "Gratuities").
6. The Gratuities were not mandatory and the charge could be removed or adjusted at the request of the applicable dining group.
7. Chandler's did not charge its customers a sales or use tax on the amount of Gratuities.

II. ADMINISTRATIVE PROCEEDINGS

8. The Commission, through its Sales, Use, and Miscellaneous Tax Audit Bureau, conducted a comprehensive sales and use tax audit of Chandler's' Audit Period operations.
9. On June 18, 2010, the Commission issued a Notice of Deficiency Determination to Chandler's in the amount of \$91,243 ("Original Notice"), which listed a \$83,368 tax deficiency and \$7,875 of related interest. A true and correct copy of the Original Notice is attached hereto as Exhibit "A".
10. The Commission based its determination on, inter alia, Idaho Code § 63-3613 (defining "sales price") and its own sales tax rules, Sales Tax Administrative Rule (hereafter "ISTC Rule") 043.04 and 043.05 (discussing gratuities and mandatory service charges)¹ alleging that "Sales tax was not collected on mandatory gratuities/service charges. . ." and therefore asserted a deficiency.
11. On August 20, 2010, Chandler's protested the deficiency and filed a Petition for Redetermination of Notice of Deficiency Determination.
12. As a result of Chandler's providing certain requested documentation, the Commission later reduced the tax deficiency by \$42,942.00, which resulted in a remaining original tax deficiency of \$40,426. The Commission similarly adjusted the related accrued interest.

¹ The relevant Sales Tax Administrative Rules are codified at IDAPA § 35.01.02, et seq. (2010).

13. As indicated on the Commission letter dated October 30, 2014, attached hereto as Exhibit "B", such August 10, 2010 appeal and petition was timely.
14. On January 27, 2015, the Commission held an informal, in-person hearing with Chandler's.
15. On July 14, 2015, the Commission issued a written decision, a copy of which is attached hereto as Exhibit "C" (the "Decision").
16. In its Decision, the Commission affirmed its updated Notice of Deficiency Determination, and ordered that Chandler's pay tax in the amount of \$40,426, plus accrued interest in the amount of \$11,741 (calculated through October 30, 2015); provided however, payment ordered under the Decision is \$42,419, since Chandler's had previously paid the sum of \$9,748 in connection with its administrative appeal.
17. Chandler's has deposited with the ISTC the sum required to seek judicial review under Idaho Code § 63-3049(b).
18. Chandler's now files this Complaint with the District Court for a judicial review and re-determination of the Commission's updated Notice of Deficiency Determination.
19. In particular, Chandler's contends that the Gratuities are not mandatory service charges, but rather, gratuities not subject to the sales or use tax under applicable Idaho law.

III. COUNT ONE

20. Each and every allegation in paragraphs 1 through 19 is restated as though set forth fully herein.
21. The Commission misapplies Idaho Code Section 63-3613² in the Commission's evaluation of the Gratuities.

² All Idaho Code citations contained in this Count are to those statutes existing during the Audit Period (May 1, 2007 through May 30, 2010).

22. Idaho Code Section 63-3619 is the principal statute that imposes an Idaho sales tax, which 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 . . .” (emphasis added).
 23. Under Idaho Code Section 63-3619, for something to be subject to a sales tax it must be both: a “sale” (defined in Idaho Code § 63-3612) and included in the definition of “sales price” (defined in Idaho Code § 63-3613).
 24. Chandler’s does not dispute that the Gratuities are encompassed within the definition of a “sale” under Idaho Code Section 63-3619.
 25. The Gratuities, however do not fall within the definition of “sales price” under Idaho Code Section 63-3613.
 26. Idaho Code Section 63-3613(b)(4) specifically excepts the Gratuities from the definition of “sales price”.
 27. Idaho Code Section 63-3613(b) states, in relevant part:

The term “sales price” *does not include* any of the following:
. . .
4. *The amount charged for labor or services* rendered in installing or applying the property sold, *provided that said amount is stated separately and such separate statement is not used as a means of avoiding imposition of this tax* upon the actual sales price of the tangible personal property; . . .
- Idaho Code § 63-3613(b) (emphasis added).
28. The Gratuities represent amounts “charged for labor or services.”
 29. The Gratuities were charged in connection with Chandler’s sale of food and beverage to its customers.
 30. The Gratuities charged were separately stated on each customer’s meal ticket.

31. The separate statement of Gratuities was not used as a means of avoiding imposition of a sales tax upon the actual sales price of tangible personal property.
32. Chandler's is not liable for Idaho sales or use tax on the Gratuities.

IV. COUNT TWO

33. Each and every allegation in paragraphs 1 through 32 is restated as though set forth fully herein.
34. The subsequent actions of the Idaho Legislature demonstrate that Idaho Code Section 63-3613 should be construed broadly with respect to gratuities.
35. In 2011, the Idaho legislature added subpart (f) to Idaho Code Section 63-3613. 2011 Idaho Sess. Laws 628, enacting H.B. 213 (2011) ("H.B. 213").
36. According to the Idaho legislature, the H.B. 213 was enacted "to define 'sales price' for sales and use tax purposes *to clarify that sales price shall not include a gratuity or tip received when paid to the service provider of a meal. . . .*" (emphasis added).
37. Subpart (f) of Idaho Code Section 63-3613 states:

(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.
38. H.B. 213 and subpart (f) of Idaho Code 63-3613 directly conflicts with ISTC Rules 043.04 and 043.05.
39. H.B. 213 and the related Idaho Code Section 63-3613(f) of directly supports the Legislature's intent that the definition of "sales price" under Idaho Code Section 63-3613 exclude gratuities as being subject to the sales or use tax.

40. This Court should apply the meaning and substance of H.B. 213, which clarified the legislature's intent, as it existed in 2010, regarding the sales taxability of gratuities, to the Gratuities in question.
41. Chandler's is not liable for Idaho sales or use tax on the Gratuities.

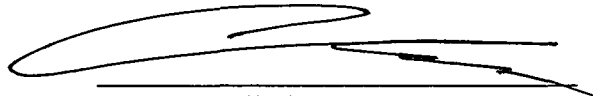
V. PRAYER FOR RELIEF

WHEREFORE, Chandler's requests as follows:

- A. That the assessment by the Commission against Chandler's for sales and use tax and interest be denied.
- B. That the Court award Chandler's reasonable attorneys' fees and costs incurred in this action.
- C. That the Court award Chandler's such other and further relief as the Court deems just and proper.

DATED this 13th day of October, 2015.

GIVENS PURSLEY LLP



Clint R. Bolinder
Attorneys for Plaintiff



June 18, 2010

Letter ID: L1732436352
Reference: 00317062408

REX CHANDLER
CHANDLERS BOISE LLC
981 W GROVE STREET
BOISE ID 83702

NOTICE OF DEFICIENCY DETERMINATION
CHANDLERS STEAKHOUSE
Sales & Use Tax

The Idaho State Tax Commission has determined that you owe the following Sales and/or Use Tax, plus penalty and interest, according to Idaho Code sections 63-3626, 63-3629, 63-3632, and 63-3634 as follows:

PERIOD FROM	PERIOD THROUGH	TAX	PENALTY	INTEREST	BALANCE
05/01/07	05/31/10	\$83,368.00	\$0.00	\$7,875.00	\$91,243.00
TOTAL DUE					\$91,243.00

REASON FOR DEFICIENCY: The reasons for this deficiency are noted in the attached exhibits, schedules, or other documents. Please refer to these documents.

If you do not agree with this determination, you have 63 days from the date of this Notice or until August 20, 2010 to file a written petition for redetermination. Your protest must be sent to the Idaho State Tax Commission at the address shown below. You must state the specific, factual and legal reasons you believe this determination is in error.

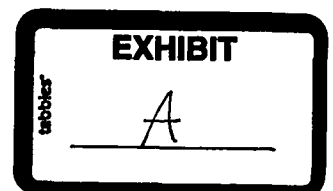
If no protest is filed with the Idaho State Tax Commission within the 63-day period described above, this determination becomes final. You will have no further right to appeal. The tax due, plus penalty and interest owed, will become a due and payable assessment. If the assessment is not paid, collection actions will be taken according to the law.

An explanation of your right to appeal this determination is enclosed with this Notice.

Mark D. Stones
Tax Audit Manager
Phone: (208) 334-7686
Fax: (208) 332-6619

Enclosure

CERTIFIED MAIL NO: 2840



Statement No.: L1854660992 Statement Date: 17-Jun-2010 File Reference No.: 003170624 Account: Sales & Use Tax Filing Period: 5/31/2010 Requester's Name: Beverly Elliott 205274954 003170624 CHAN 08 0510 M 97 4	Amount Paid: \$91,243.00
--	--------------------------

CHANDLERS STEAKHOUSE
PO BOX 600
HAILEY ID 83333-0600

VCSIMP

Please return the bottom portion with your payment to the IDAHO STATE TAX COMMISSION. Include the file reference number on the check to ensure proper credit.

Statement No.: L1854660992 Statement Date: 17-Jun-2010 File Reference No.: 00317062408 Requester's Name: Beverly Elliott	Amount Paid: \$91,243.00
---	--------------------------

VCSIMP

CHANDLERS STEAKHOUSE
PO BOX 600
HAILEY ID 83333-0600

205274954 003170624 CHAN 08 0510 M 97 4



June 18, 2010

ATTENTION: REX CHANDLER
CHANDLER'S BOISE, LLC
981 W GROVE ST
BOISE, ID 83702

Re: Sales and Use Tax Audit
Permit Number: 003170624-08

Dear Mr. Chandler,

An audit of the books and records of Chandler's Boise, LLC has been completed with respect to the Idaho Sales Tax Act and the Idaho Sales and Use Tax Administrative Rules. The period under examination is from May 1, 2007 to May 31, 2010. The audit procedures used and the corresponding results are summarized below. Appropriate workpapers are enclosed.

For your information, the workpapers are called schedules. The schedule's name is located in the upper left-hand corner below your company name. The amount questioned column is usually the amount of the invoice or purchase price. The amount taxable column is the amount being held taxable for the audit. If there is a zero in this column then no further research is required. The items/remarks column explains what items comprise the amount being held taxable or other information concerning that particular line item.

AREAS OF NO ADDITIONAL LIABILITY

Sales tax accrued was reconciled to sales tax reported and remitted to the state. Sales and use tax reports (5/1/07 – 5/31/10) were reconciled to Chandler's Quick Books Sales Report and General Ledger, variances were immaterial.

GENERAL INFORMATION

Idaho Code Section (ICS) 63-3613 states, "The term "sales price" means the total amount for which tangible personal property, including services agreed to be rendered as a part of the sale, is sold, rented or leased, valued in money, whether paid in money or otherwise, without any deduction on account."

Sales Tax Administrative Rule 043.04 and 043.05 state:

"A gratuity is defined as something given voluntarily or beyond obligation. Gratuities may sometimes be referred to as a tip." "Amounts designated as service charges, added to the price of meals or drinks, are a part of the selling price of the meals or drinks and accordingly, must be included in the purchase price subject to tax, even though such service charges are made in lieu of tips and paid over by the retailer to his employees." Service charges may sometimes be referred to as mandatory gratuities.

Rule 43.04 (b) states, "When an amount is added to a customer's bill by the retailer and the customer is advised in writing on the face of the bill that he may decline to pay all or part of the amount, that amount is a gratuity. Sales tax will not apply to the gratuity." Rule 43.04 (c) states "When an amount is added to a customer's bill by the retailer, and the customer is not advised in writing on the face of the bill that he may decline to pay all or part of the amount, it is not a gratuity and the fee so added is subject to the sales tax."

ITEMS SUBJECT TO SALES TAX

Non Taxed Mandatory Gratuities (Schedule S-1):

Audit Procedure: The General Ledger and computerized reports which itemized gratuities for the audit period were provided and examined to verify proper tax treatment for the audit period. Actual food and beverage tickets from the audit period were made available to the auditor.

Audit Results: Sales tax was not collected on mandatory gratuities/service charges, and actual food and beverage tickets were available for the audit period to verify if a gratuity disclaimer was printed on the bottom of the ticket. The auditor reviewed several dinner tickets which did not have the gratuity disclaimer printed on the ticket. Mandatory/gratuities/service charges for the audit period have been extended as taxable.

ITEMS SUBJECT TO USE TAX

Idaho Sales Tax Administrative Rule 072 states: "Use tax is imposed upon the privilege of using, storing, or otherwise consuming tangible personal property within Idaho. Tangible personal property which is used or consumed strictly by the business and is not held for resale in the regular course of business is taxable to you when it is purchased. If the property is purchased from an Idaho retailer and Idaho sales tax is charged by and remitted to the retailer, then no use tax will apply to the property. The tax is imposed on the value of the tangible personal property. A recent sales price is presumptive evidence of the value. In the absence of a recent sales price, the value of the property subject to the use tax will be the fair market value at the time of first use in Idaho." Please refer (ICS) 63-3621.

If the property is purchased outside the state or from a retailer not subject to the Commission's jurisdiction and is subsequently used, stored, or otherwise consumed in this state, then a use tax will apply. Use tax is remitted directly to the state on line 4 of your sales tax return.

If supporting documentation can be provided that verifies the tax has been paid, the extended items will be zeroed on the schedules.

Questioned Assets (Schedule U-1):

Audit Procedure: The majority of assets purchased were examined for the entire audit period to verify proper tax treatment. Assets from the General Ledger detail report and reports listing assets acquired, (prior to the business opening), were traced to purchase invoices to verify proper tax treatment.

Audit Results: On many items, sales tax was paid at purchase. There was not any use tax remitted to the state. Not all assets have been examined that were listed on Federal Income Tax returns for 2008, 2009 and any additions for 2010.

The following items have been extended as taxable:

- Glassware
- Items that were missing additional information and/or documentation

Questioned Purchases (Schedules U-2):

Audit Procedure: Purchases were examined for the entire audit period to verify proper tax treatment. Some purchases from the General Ledger detail report were traced to purchase invoices to verify proper tax treatment.

Audit Results: Sales tax was paid to vendors on the majority of the purchases. Only items that were not taxed correctly or were missing documentation have been scheduled.

The following items are extended as taxable:

- Aloha TS Terminal, software license agreement and software – (Refer to STA Rule 27)
- Uniforms
- Magazine subscriptions
- Printing
- Items that were missing information and/or documentation

Meals Given to Employees & Guest (Schedules U-3):

Use tax is due on free food provided to either customers/guest or employees (during their work hours or after). The use tax is due on the cost of the food. Free food includes meals given in the form of a gift card, gift certificate, and/or free food coupon. The only type of “free” food that would not be taxable is discounted food (not to go below the average food cost) or offers where a purchase of food is required to get the item (i.e.: coupons for “buy one, get one free” or “free appetizer with purchase of meal”).

Audit Procedure: Use tax was not remitted to the state on free food provided to either employees or guest. The taxpayer was not aware use tax was due on meals given away.

Audit Results: Family meals are provided to staff working in the evening. Management and guests also receive fee food and beverages. Since the auditor did not receive documentation on the free food given away, an estimate was done.

The items are extended as taxable using the following calculations:

The family meals were based on 15 employees receiving 1 meal per day (a \$3 food cost) and receiving 7 meals per week each year.

Meals for the owner were based on 3 meals/beverages per week each year (a \$36 food/beverage cost- selected from the restaurant menu)

Manager meals were based on 1 manager receiving 1 meal per day (a \$18 foodcost - food selected from the restaurant menu)

Chandler's guests/comp meals/beverages were based on 1 meal per day (a \$36 food/beverage cost - selected from the restaurant menu) each day of the year.

CODE AND RULES

For additional research, the following are the two internet locations for the entire Idaho Code and Rules.

Code: <http://www3.state.id.us/idstat/TOC/63036KTOC.html>

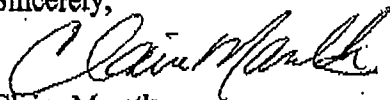
Rules: <http://www2.state.id.us/adm/adminrules/rules/idapa35/35index.htm>

PENALTY AND INTEREST

Interest is mandated and computed pursuant to Idaho Code Section 63-3623(c) and Sales Tax Administrative Rule 122. Interest cannot be waived as it is statutorily required. A penalty was not imposed. A notice of deficiency is enclosed notifying you of the tax and interest to date.

Thank you for your assistance and cooperation during the audit examination.

Sincerely,



Claire Maretka
Principal Tax Auditor
(208) 332-4072

Enclosures

Cc: Timothy L. Aingworth, CPA

October 30, 2014

RECEIVED

OCT 31 2014

GIVENS PURSLEY LLP
ATTN: CLINT BOLINDER
601 W BANNOCK ST
BOISE ID 83702

Givens Pursley, LLP

RE: Petition for redetermination of Notice of Deficiency Determination, Chandlers Boise LLC. Sales and use tax audit for the period May 1, 2007 – May 31, 2010. Docket: 25740.

Dear Mr Bolinder,

The Tax Commission received your letter dated August 20, 2010 and acknowledges a proper tax protest has been filed.

The Tax Commission has adopted the following alternatives for redetermining a protested deficiency determination.

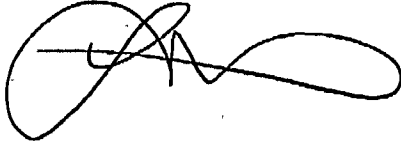
1. A hearing may be scheduled before one Commissioner or a designee of the Commission and members of the Tax Commission staff at the offices of the Tax Commission in Boise. Hearings by telephone are acceptable as well. If you wish to submit additional documents for consideration please send them to me at least two weeks prior to the date of the hearing.
2. If you do not wish to personally appear, additional statements, documents, or other materials may be submitted for the Commission's consideration. If you want to submit additional documents, please specify the date by which these documents will be provided.

If you desire a hearing, please provide a list of dates after January 5, 2015 when you are available. If the Commission receives no response from you within 30 days, a decision may be issued based on material currently in the file.



Please address further correspondence in this matter to my attention. If you wish, send available dates via e-mail to the address noted below.

Sincerely,

A handwritten signature in black ink, appearing to be 'Leah Parsons', written in a cursive style with a large loop at the end.

Leah Parsons • Tax Policy Specialist
Idaho State Tax Commission • Tax Policy
phone: (208) 334-7538 • fax: (208) 334-7844
e-mail: leah.parsons@tax.idaho.gov • website: tax.idaho.gov

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)
)
CHANDLERS OF BOISE LLC,)
)
Petitioner.)
_____)

DOCKET NO. 25740

DECISION

RECEIVED

JUL 16 2015

Givens Pursley, LLP

On June 18, 2010, the staff of the Sales, Use, and Miscellaneous Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination (Notice) to Chandlers of Boise LLC (Petitioner), proposing sales tax, use tax, penalty, and interest for the period May 1, 2007, through May 31, 2010, in the total amount of \$91,243.

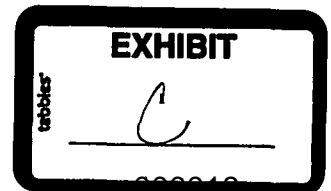
On August 20, 2010, the Petitioner filed a timely appeal and petition for redetermination of the Notice. At that time, additional documentation was provided for review. The Bureau reviewed the documentation and modified the audit findings, which resulted in a decrease in the proposed liability.

At the Petitioner's request, the Commission held an informal hearing on November 3, 2014. Present at the informal hearing were Commissioner Ken Roberts, Deputy Attorney General Erick Shaner, and Tax Policy Specialist Leah Parsons.

The Commission is fully advised of the contents of the audit file, as well as information obtained at the hearing and thereafter, and hereby issues its decision upholding the revised audit findings.

Background and Audit Findings

The Petitioner owns and operates a restaurant in Boise, Idaho. The Bureau conducted a routine comprehensive audit of the Petitioner's business for the purpose of determining sales and



use tax law compliance. After its review, the Bureau asserted errors in sales, fixed asset additions, ordinary purchases, and meals given to employees and guests.

The only errors still under protest and relevant to this discussion are related to the imposition of sales tax on the separately stated service charges for the mandatory gratuities. The Bureau discovered that the Petitioner was not charging sales tax on the service charge portion of each transaction. The Bureau held these charges subject to sales tax based on the following rule:

05. Service Charges. Amounts designated as service charges, added to the price of meals or drinks, are a part of the selling price of the meals or drinks and accordingly, must be included in the purchase price subject to tax... (IDAPA 35.01.02.43.05)

The Petitioner's Protest

The Petitioner protested the imposition of sales tax on the service charges for the mandatory gratuities, arguing that these charges were never meant to be subject to sales tax. The Petitioner's argument hinges on a bill that was introduced and passed during the 2011 legislative session. House Bill 213 added the following language to Idaho Code § 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. (Idaho Code § 63-3613).

The Petitioner argues that this statute was amended by the legislature for the purpose of clarification and, regardless of the effective date of this amendment, reflected how the statute should have been interpreted all along.

Relevant Law & Conclusion

Idaho Code § 63-3619 imposes a sales tax on every retail sale. This tax applies to the sale of tangible personal property and other sales specifically included by law. The statutory definition of a sale contains the relevant inclusion:

Idaho Code 63-3612. Sale.

...(2) "Sale" shall also include the following transactions when a consideration is transferred, exchanged or bartered:

...(b) Furnishing, preparing, or serving food, meals, or drinks and nondepreciable goods and services directly consumed by customers included in the charge thereof. (Emphasis added. Idaho Code § 63-3612(2)(b)).

Based on this law and IDAPA 35.01.02.43.05 quoted above, the charges for catered meals and associated services have long been included in the taxable sales price by the Commission. The only consistent exclusion has been voluntary gratuities which are specifically exempted by Administrative Rule. This treatment is consistent with taxation of sales of restaurant meals in which the entire charge is subject to sales tax despite the portion of the charge that could be attributed to services provided, such as the wait staff, management, and valet parking.

The changes to Idaho Code § 63-3613 were given effect retroactively to January 1, 2011, by the legislature. The Commission takes this as clear guidance that the legislature intended the change in statute to take effect on January 1, 2011, and no earlier. The Commission is an administrative agency, not a legislative one. It will not substitute an alternative interpretation when it finds no ambiguity in the statutes.

The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Albee v. Judy, 136 Idaho 226, 230, 31 P.3d 248,252 (2001). If the language of the statute is unambiguous, "the clear expressed intent of the legislature must be given effect and there is no occasion for construction." Udy v. Custer County, 136 Idaho 386, 388, 34 P.3d 1069,

1071 (2001) (citing: Ada County Assessor v. Roman Catholic Diocese, 123 Idaho 425,428, 849 P.2d 98,101 (1993)).

Absent information to the contrary, the Commission finds the deficiency prepared by the Bureau to be a reasonably accurate representation of the Petitioner's sales and use tax liability for the period May 1, 2007, through May 31, 2010.

The Bureau added interest and penalty to the sales and use tax deficiency. The Commission reviewed those additions, found both to be appropriate per Idaho Code §§ 63-3045 and 63-3046, and has updated interest accordingly. Interest is calculated through October 30, 2015, and will continue to accrue at the rate set forth in Idaho Code § 63-3045(6) until paid.

THEREFORE, the Notice of Deficiency Determination dated June 18, 2010 is hereby APPROVED, in accordance with the provisions of this decision, and is AFFIRMED and MADE FINAL.

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

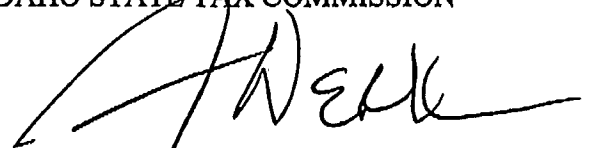
<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$40,426	\$11,741	\$52,167
	Payment Received	<u>(9,748)</u>
	Amount Due	<u>\$42,419</u>

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

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

DATED this 14th day of July 2015.

IDAHO STATE TAX COMMISSION



COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July 2015, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

CHANDLERS OF BOISE LLC
981 W GROVE STREET
BOISE ID 83702

Receipt No. 7010 2780 0003 0178 3632

Copy mailed to:

CLINT R BOLINDER
GIVENS PURSLEY LLP
601 W BANNOCK STREET
BOISE ID 83702

Faustina Peters

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
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 \$25,000.00); 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.

NO. _____ FILED 1218
A.M. _____ P.M.

NOV 03 2015

CHRISTOPHER D. RICH, Clerk
By STACEY LAFFERTY
DEPUTY

LAWRENCE G. WASDEN
IDAHO ATTORNEY GENERAL

ERICK M. SHANER [ISB NO. 5214]
DAVID B. YOUNG [ISB NO. 6380]
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO
P.O. BOX 36
BOISE, ID 83722-0410
TELEPHONE: (208) 334-7530
FACSIMILE: (208) 334-7844
Email: erick.shaner@tax.idaho.gov

Attorney for the 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

CHANDLER'S-BOISE, LLC,)	
	)	CASE NO. CV-OC-15-17617
Plaintiff,)	
	)	TAX COMMISSION'S ANSWER
v.)	
)	
IDAHO STATE TAX COMMISSION,)	
)	
Defendant.)	
)	

On October 13, 2015, the Plaintiff, Chandler's-Boise, LLC, (Chandler's) filed a Complaint For Judicial Review And Redetermination Of Tax (Complaint) with this Court to appeal the decision (Decision) issued by the Idaho State Tax Commission (Tax Commission) on July 14, 2015, in Tax Commission Docket No. 25740. The Decision asserts Idaho sales and/or use tax for the period May 1, 2007, through May 31, 2010 (Audit Period), relating to sales and use tax issues concerning gratuities.

Service of the Summons and Complaint was completed on Thursday, October 15, 2015. Pursuant to this Court's summons, the Defendant, the Tax Commission, by and through its legal counsel, now responds to the Complaint.

STANDARD AND SCOPE OF REVIEW

This Action Proceeds as an Original De Novo Bench Trial under Idaho Code § 63-3049

An appeal of a Tax Commission decision is governed by Idaho Code § 63-3049. That statute states a taxpayer may appeal a decision of the Tax Commission by filing a complaint with the district court. The case is to proceed as other civil cases, but is to be a bench trial. The standard of review for this appeal is de novo. Parker v. Idaho State Tax Commission, 148 Idaho 842, 230 P.3d 734 (2010). *See* Idaho Code § 63-3812(c) (appeal from a decision of the Board of Tax Appeals to the district court "shall be heard and determined by the court without a jury in a trial de novo on the issues in the same manner as though it were an original proceeding in that court.")

This matter is not governed by Idaho Rules of Civil Procedure (IRCP) 84. IRCP 84 does not apply to this proceeding because Idaho Code § 63-3049 provides the procedure and standard of review that is applicable. *See* IRCP 84(a)(1). IRCP 84 provides for judicial review of the administrative record created by an agency conducting hearings under the provisions of the Idaho Administrative Procedures Act. However, the hearing before the Tax Commission is not conducted under the Idaho Administrative Procedures Act. Idaho Code § 63-107 (hearings before the Commission concerning a redetermination of taxes "are not contested cases within the meaning of chapter 52, title 67, Idaho Code"). The Commission does not record the hearings or otherwise compile an administrative record. Accordingly, an appeal from a decision of the Tax

Commission cannot be confined to a review of the record below, but must proceed as an original action in the district court.

DEFENSES AND RESPONSES TO COMPLAINT

12(b) Motions

The Complaint fails to state a claim upon which relief can be granted and should be dismissed by this Court pursuant to IRCP 12(b)(6). The Complaint sets forth no factual allegations which, if proven, would legally entitle the plaintiff to the relief claimed.

Responses to Averments

The Tax Commission specifically responds to the factual averments in each paragraph of the Complaint as set forth below, and denies each and every averment not specifically admitted herein. The Tax Commission asserts any proper defenses raised by the Tax Commission up to now by the Tax Commission, including, but not limited to defenses raised by the Audit Bureau or by the Tax Commission in the Decision. The numbered responses below correspond to the numbered paragraphs in Chandler's Complaint.

1. For purposes of this matter, the Tax Commission admits that it is an executive department of the State of Idaho.
2. The Tax Commission admits that according to the records of the Idaho Secretary of State, Chandler's is an Idaho limited liability company.
3. The Tax Commission admits that Chandler's maintains its principal place of business in the state of Idaho

4. The Tax Commission admits that Chandler's owned and operated a steak and seafood restaurant commonly known as "Chandler's", located within Hotel 43 in downtown Boise, Idaho, during the period of May 1, 2007, through May 31, 2010 (Audit Period).

5. The Tax Commission admits that during the Audit Period, Chandler's point of sale system automatically added gratuities to dining groups having six (6) or more persons (Gratuities).

6. The Tax Commission denies the averments in paragraph 6. The check or bill Chandler's gave to its customers in dining groups having six (6) or more persons gave no indication in writing that the gratuity charges could be declined in all or in part. The Gratuities are taxable charges.

7. The Tax Commission admits that Chandler's did not charge its customers a sales or use tax on the amount of Gratuities charged to its customers.

II. ADMINISTRATIVE PROCEEDINGS

8. The Tax Commission admits its Sales, Use, and Miscellaneous Tax Audit Bureau, conducted a comprehensive sales and use tax audit of Chandler's Audit Period operations.

9. The Tax Commission admits that on June 18, 2010, it issued a Notice of Deficiency Determination to Chandler's in the amount of \$91,243 (Original Notice), which listed an \$83,368 tax deficiency and \$7,875 of related interest. A true and correct copy of the Original Notice was attached to the Complaint as Exhibit "A".

10. The Tax Commission admits the averments in paragraph 10, however, denies the averments in part, because the reasons for the Notice of Deficiency Determination were more fully set forth therein. The Tax Commission also notes that this is a de novo proceeding. Gracie, LLC v. Idaho State Tax Comm'n, 149 Idaho 570, 572, 237 P.3d 1196, 1198 (2010). As a de

novo proceeding, the matter will be heard “on the issues in the same manner as though it were an original proceeding in that court.” *See*, Idaho Code § 63-3812(c). The Tax Commission’s Notice of Deficiency Determination was attached to the Complaint as Exhibit “A”.

11. The Tax Commission admits that Chandler’s protested the deficiency and filed a Petition for Redetermination of Notice of Deficiency Determination on August 20, 2010.

12. The Tax Commission admits that it reduced the tax on the deficiency to \$40,426, based upon additional documentation submitted by Chandler’s. Interest was reduced accordingly.

13. The Tax Commission admits that it confirmed by letter dated October 30, 2014, that Chandler’s protest was proper. A correct copy of the letter was attached to the Complaint as Exhibit “B”.

14. The Tax Commission admits that it did hold an informal, in-person hearing with Chandler’s on January 27, 2015.

15. The Tax Commission admits that it issued a written decision on July 14, 2015. A correct copy was attached to the Complaint as Exhibit “C”.

16. The Tax Commission’s Decision is attached to the Complaint as Exhibit “C”, and speaks for itself. Chandler’s had previously paid the sum of \$9,748 in connection with issues to which it agreed tax was owed. Chandler’s has only appealed the Gratuities issue and the amount for this issue is the asserted amount of \$42,419 in the Decision, plus accruing interest.

17. The Tax Commission admits that Chandler’s has deposited the required amount in order to seek judicial review of the Decision pursuant to Idaho Code § 63-3049(b).

18. The Tax Commission admits that Chandler’s filed a Complaint with the District Court seeking judicial review of the Decision in this matter.

19. The Tax Commission denies the averments in paragraph 19. Chandler's owes sales and use tax on the gratuities held taxable in the Decision.

III. COUNT ONE

20. The Tax Commission admits that in this paragraph Chandler's states that each and every allegation in paragraphs 1 through 19 is restated as though set forth fully in Count One.

21. The Tax Commission denies that it misapplies Idaho Code § 63-3613 when evaluating Gratuities as averred in paragraph 21. The Tax Commission admits that Chandler's states that all Idaho Code citations contained in Count One are to the statutes existing during the Audit Period (May 1, 2007 through May 30, 2010). The Tax Commission admits that the particular statutes cited by Chandler's in Count I are to those statutes in effect during the Audit Period.

22. Chandlers refers to Idaho Code § 63-3619 in paragraph 22. Idaho Code § 63-3619 speaks for itself. To the extent Chandler's argues that Idaho Code § 63-3619 does not support the Tax Commission's Decision, the Tax Commission denies the averments in paragraph 22.

23. Chandlers refers to Idaho Code §§ 63-3619, 3612, and 3613 in paragraph 23. These Idaho Code provisions speak for themselves and support the Tax Commission's Decision. The Tax Commission denies the averments in paragraph 23 to the extent they do not support the Tax Commission's Decision. Generally, for something to be subject to a sales tax it is within the definition of a sale and the amount taxable is included in the definition of sales price.

24. Idaho Code § 63-3619 referred to in paragraph 24 speaks for itself and supports the Tax Commission's Decision. The Tax Commission admits that Gratuities are taxable under Idaho Code § 63-3619.

25. The Tax Commission denies the averments in paragraph 25. The Idaho Code supports the Tax Commission's Decision. The amount charged for the Gratuities does fall within the definition of sales price in Idaho Code § 63-3613.

26. The Tax Commission denies the averments in paragraph 26. Chandler's misapplies the statute referred to in paragraph 26.

27. The Tax Commission notes that Chandler's refers to Idaho Code § 63-3613(b)(4) in paragraph 27. Idaho Code § 63-3613(b)(4) speaks for itself. Chandler's misapplies the statute quoted in paragraph 27.

28. The Tax Commission denies the averments in paragraph 28. Chandler's misapplies the law.

29. The Tax Commission denies the averments in paragraph 29, because the averments in the context of Chandler's argument misapply the law.

30. The Tax Commission denies the averments in paragraph 30, because the averments in the context of Chandler's argument, misapply the law.

31. The Tax Commission lacks sufficient information to form a belief as to the averments in paragraph 31 and therefore denies the same.

32. The Tax Commission denies the averments in paragraph 32. Chandler's is liable for Idaho sales or use tax on the Gratuities.

IV. COUNT TWO

33. The Tax Commission admits that in this paragraph 33, Chandler's states that each and every allegation in paragraphs 1 through 32 is restated as though set forth fully in Count Two.

34. The Tax Commission denies the averments in paragraph 34. In fact, the Idaho Legislature placed a specific retroactivity clause when it passed H.B. 213 in 2011. From the plain wording of the statute, the amendments to Idaho Code § 63-3613 were specifically intended to apply only from January 1, 2011 forward.

35. The Tax Commission admits that in 2011, the Idaho legislature added subpart (f) to Idaho Code § 63-3613. However, the Tax Commission denies the legislative history supports Chandler's arguments; instead the legislative history supports the Tax Commission's Decision.

36. The Tax Commission admits that the title to H.B. 213 used the words recited in paragraph 26. However, the Tax Commission denies the legislative history supports Chandler's arguments; instead the legislative history supports the Tax Commission's Decision.

37. The legislative history of Idaho Code § 63-3613 in 2011 speaks for itself. The Tax Commission admits that subpart (f) of Idaho Code § 63-3613 reads as set out in paragraph 37. However, the Tax Commission denies the statutory wording supports Chandler's arguments; instead the legislative history supports the Tax Commission's Decision.

38. The Tax Commission denies that the new language in the H.B. 213 and subpart (f) legislation support Chandler's arguments. The language in effect in Idaho Code § 63-3613 during the Audit Period as well as the Tax Commission's Sales Tax Rules 43.04 and 43.05 in effect during the Audit Period supports the Tax Commission's Decision.

39. The Tax Commission denies the averments in paragraph 39. H.B. 213 and the related Idaho Code § 63-3613(f) directly supports the Legislature's plain wording that gratuities would be not be taxable as the statute dictates, but only on and after January 1, 2011 and transactions occurring in the Audit Period prior to January 1, 2011, are taxable.

40. The Tax Commission denies the averments in paragraph 40. The Court should follow the plain meaning of H.B. 213's retroactivity clause and apply the amendments only from January 1, 2011, and forward.

41. The Tax Commission denies the averments in paragraph 41. Chandler's is liable for Idaho sales or use tax on the Gratuities.

V. PRAYER FOR RELIEF

WHEREFORE, the Tax Commission requests as follows:

A. That the assessment by the Tax Commission against Chandler's for sales and use tax and interest be upheld, and that Plaintiff's request for relief be denied.

B. That the Court award the Tax Commission reasonable attorneys' fees and costs incurred in this action pursuant to Idaho Code §§ 63-3049, 12-117, 12-121, and any other applicable law.

C. That the Court award the Tax Commission such other and further relief as the Court deems just and proper.

DATED this 3rd day of November 2015.



ERICK M. SHANER
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of November 2015, I caused to be served a true and correct copy of the foregoing TAX COMMISSION'S ANSWER, by depositing the same in the United States Mail, postage prepaid, and addressed to the following:

CLINT R BOLINDER
GIVENS PURSLEY LLP
PO BOX 2720
BOISE ID 83702-2720



ERICK M. SHANER
DEPUTY ATTORNEY GENERAL

Moody
anna
DOB
2-1-16

ORIGINAL



NO. _____ FILED _____
A.M. _____ P.M. 3:53

JAN 29 2016

CHRISTOPHER D. RICH, Clerk
By AUSTIN LOWE
DEPUTY

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

CHANDLERS-BOISE, LLC,)
)
 Plaintiff,)
)
 v.)
)
 IDAHO STATE TAX COMMISSION,)
)
 Defendant.)
 _____)

CASE NO. CV-OC-15-17617
JOINT STIPULATIONS OF FACT

COME NOW the parties, Chandlers-Boise, LLC (Chandlers), Plaintiff, represented by
Clint Bolinder, Givens, Pursley, LLP, and the Idaho State Tax Commission (Commission),
Defendant, represented by Erick M. Shaner and David B. Young, Deputy Attorneys General, and
submit the following Stipulations of Fact pursuant to the Court's scheduling order and Idaho
Rules of Civil Procedure 56(c) in this matter:

Company Background

1. Chandlers is an Idaho limited liability company.
2. Chandlers maintains its principal place of business in the state of Idaho.

W

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3. Chandlers owns and operates a steak and seafood restaurant commonly known as "Chandlers," which is located within Hotel 43 in downtown Boise, Idaho.

Procedural History

4. The Commission, through its Sales, Use, and Miscellaneous Tax Audit Bureau, conducted a comprehensive sales and use tax audit of Chandlers' operations.

5. On June 18, 2010, the Commission issued a Notice of Deficiency Determination to Chandlers. A true and correct copy of the original Notice is attached hereto as Exhibit "A".

6. On August 20, 2010, Chandlers timely protested the deficiency and filed a Petition for Redetermination of Notice of Deficiency Determination. See attached as Exhibit "B".

7. On November 3, 2014, the Commission held an informal, in-person hearing with Chandlers regarding the Notice of Deficiency pursuant to Idaho Code § 63-3045(2).

8. On July 14, 2015, the Commission issued a written decision upholding the amounts at issue in this matter, a true and correct copy of which is attached hereto as Exhibit "C" (Decision).

9. Chandlers deposited the required amount in order to pursue the appeal of the Decision pursuant to Idaho Code § 63-3049(b).

10. Chandlers filed a Complaint with the District Court for judicial review and re-determination of the Commission's updated Notice of Deficiency Determination on October 13, 2015.

Facts

11. For the period of May 1, 2007, through May 31, 2010 (Audit Period), Chandlers owned and operated a steak and seafood restaurant commonly known as "Chandlers," which is located within Hotel 43 in downtown Boise, Idaho.

12. During the Audit Period, Chandlers' automatically added gratuities to banquet meals, restaurant dining services for groups having six (6) or more persons, and room service meals (Gratuities). Attached as Exhibit "D", is a photocopy of three examples of Chandlers checks/bills showing where Chandlers point of sale system automatically added Gratuities. Reading from left to right the first photocopy is an example of a banquet check (banquet checks are for restaurant dining services and not actual "banquet services;" the banquet designation occurs when the group reaches a certain size and requires more than one server), the middle photocopy is an example of a restaurant dining services check, and lastly on the farthest right is a photocopy of a check/bill for a meal delivered in a customer's hotel room as room service. The same formats of checks/bills were given to all similarly situated customers for all of the amounts in issue in this matter.

13. The checks/bills Chandlers gave to its customers did not indicate that the gratuity charges could be declined in all or in part. See true and correct copies attached as Exhibit "D".

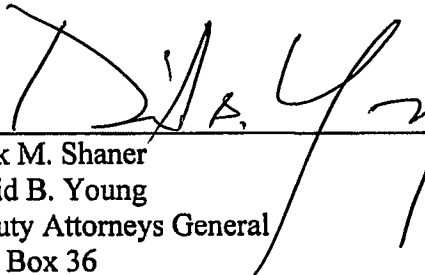
14. Sales Reports dated June 1 and 14, 2010, generated by Chandlers during the audit show the Gratuities that were automatically added to customers' checks/bills by amounts under the column entitled "AutoGratuity." See a true and correct copy attached as Exhibit "E".

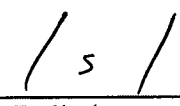
15. Chandlers did not charge its customers sales or use tax on the amount charged for Gratuities during the Audit Period.

16. During the audit, Paul Delgado, General Manager of Chandlers, sent an email on June 8, 2010, to Tax Commission staff informing them that Chandlers was now collecting sales tax on automatic gratuities. See a true and correct copy of email dated June 8, 2010, at 6:21 p.m. in attached Exhibit "F".

17. If Chandlers prevails in this case, the amount of the tax due in this matter should be reduced by \$32,327, plus associated interest.

AGREED AND APPROVED AS TO FORM:

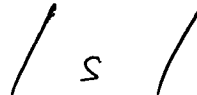
By 
Erick M. Shaner
David B. Young
Deputy Attorneys General
P.O. Box 36
Boise, ID 83722-0410
[Attorneys for Idaho State Tax Commission]

By 
Clint Bolinder
Givens Pursley LLP
P.O. Box 2720
Boise, Idaho 83702-2720
[Attorneys for Chandlers-Boise, LLC]

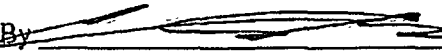
16. During the audit, Paul Delgado, General Manager of Chandlers, sent an email on June 8, 2010, to Tax Commission staff informing them that Chandlers was now collecting sales tax on automatic gratuities. See a true and correct copy of email dated June 8, 2010, at 6:21 p.m. in attached Exhibit "F".

17. If Chandlers prevails in this case, the amount of the tax due in this matter should be reduced by \$32,327, plus associated interest.

AGREED AND APPROVED AS TO FORM:

By 

Erick M. Shaner
David B. Young
Deputy Attorneys General
P.O. Box 36
Boise, ID 83722-0410
[Attorneys for Idaho State Tax Commission]

By 

Clint Bolinder
Givens Pursley LLP
P.O. Box 2720
Boise, Idaho 83702-2720
[Attorneys for Chandlers-Boise, LLC]



June 18, 2010

Letter ID: L1732436352
Reference: 00317062408

REX CHANDLER
CHANDLERS BOISE LLC
981 W GROVE STREET
BOISE ID 83702

NOTICE OF DEFICIENCY DETERMINATION
CHANDLERS STEAKHOUSE
Sales & Use Tax

The Idaho State Tax Commission has determined that you owe the following Sales and/or Use Tax, plus penalty and interest, according to Idaho Code sections 63-3626, 63-3629, 63-3632, and 63-3634 as follows:

PERIOD FROM	PERIOD THROUGH	TAX	PENALTY	INTEREST	BALANCE
05/01/07	05/31/10	\$83,368.00	\$0.00	\$7,875.00	\$91,243.00
TOTAL DUE					\$91,243.00

REASON FOR DEFICIENCY: The reasons for this deficiency are noted in the attached exhibits, schedules, or other documents. Please refer to these documents.

If you do not agree with this determination, you have 63 days from the date of this Notice or until August 30, 2010 to file a written petition for redetermination. Your protest must be sent to the Idaho State Tax Commission at the address shown below. You must state the specific, factual and legal reasons you believe this determination is in error.

If no protest is filed with the Idaho State Tax Commission within the 63-day period described above, this determination becomes final. You will have no further right to appeal. The tax due, plus penalty and interest owed, will become a due and payable assessment. If the assessment is not paid, collection actions will be taken according to the law.

An explanation of your right to appeal this determination is enclosed with this Notice.

Mark D. Stones
Tax Audit Manager
Phone: (208) 334-7686
Fax: (208) 332-6619

Enclosure

CERTIFIED MAIL NO: 2840



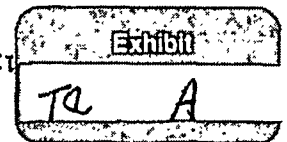
Idaho State Tax Commission • Sales Tax Audit • 800 Park Blvd., Plaza IV PO Box 36 Boise, ID 83712-7742 •
www.tax.idaho.gov • Equal Opportunity Employer • Hearing Impaired TDD 1-800-377-5529

PAGE 02

TIMOTHY AINGMORTH

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11:57



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IDAHO
State Tax Commission

PO Box 30 • Boise ID 83722-0410
800 Park Blvd., Plaza IV • Boise ID 83712-7742

October 30, 2014

RECEIVED

OCT 31 2014

GIVENS PURSLEY LLP
ATTN: CLINT BOLINDER
601 W BANNOCK ST
BOISE ID 83702

Givens Pursley, LLP

RE: Petition for redetermination of Notice of Deficiency Determination, Chandlers Boise
I.T.C. Sales and use tax audit for the period May 1, 2007 May 31, 2010. Docket: 25740.

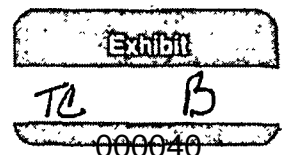
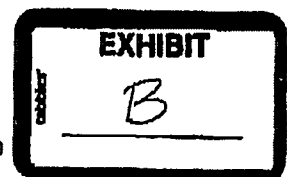
Dear Mr Bolinder,

The Tax Commission received your letter dated August 20, 2010 and acknowledges a proper tax protest has been filed.

The Tax Commission has adopted the following alternatives for redetermining a protested deficiency determination.

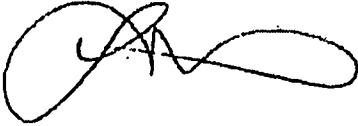
1. A hearing may be scheduled before one Commissioner or a designee of the Commission and members of the Tax Commission staff at the offices of the Tax Commission in Boise. Hearings by telephone are acceptable as well. If you wish to submit additional documents for consideration please send them to me at least two weeks prior to the date of the hearing.
2. If you do not wish to personally appear, additional statements, documents, or other materials may be submitted for the Commission's consideration. If you want to submit additional documents, please specify the date by which these documents will be provided.

If you desire a hearing, please provide a list of dates after January 5, 2015 when you are available. If the Commission receives no response from you within 30 days, a decision may be issued based on material currently in the file.



Please address further correspondence in this matter to my attention. If you wish, send available dates via e-mail to the address noted below.

Sincerely,

A handwritten signature in black ink, appearing to be 'Leah Parsons', written in a cursive style.

Leah Parsons • Tax Policy Specialist
Idaho State Tax Commission • Tax Policy
phone: (208) 334-7538 • fax: (208) 334-7844
e-mail: leah.parsons@tax.idaho.gov • website: tax.idaho.gov

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)
)
CHANDLERS OF BOISE LLC,) DOCKET NO. 25740
)
)
Petitioner.) DECISION
)

On June 18, 2010, the staff of the Sales, Use, and Miscellaneous Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination (Notice) to Chandlers of Boise LLC (Petitioner), proposing sales tax, use tax, penalty, and interest for the period May 1, 2007, through May 31, 2010, in the total amount of \$91,243.

On August 20, 2010, the Petitioner filed a timely appeal and petition for redetermination of the Notice. At that time, additional documentation was provided for review. The Bureau reviewed the documentation and modified the audit findings, which resulted in a decrease in the proposed liability.

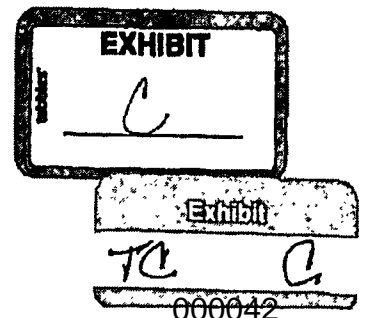
At the Petitioner's request, the Commission held an informal hearing on November 3, 2014. Present at the informal hearing were Commissioner Ken Roberts, Deputy Attorney General Erick Shanon, and Tax Policy Specialist Leah Parsons.

The Commission is fully advised of the contents of the audit file, as well as information obtained at the hearing and thereafter, and hereby issues its decision upholding the revised audit findings.

Background and Audit Findings

The Petitioner owns and operates a restaurant in Boise, Idaho. The Bureau conducted a routine comprehensive audit of the Petitioner's business for the purpose of determining sales and

DECISION - 1
lcp/lj/25740



use tax law compliance. After its review, the Bureau asserted errors in sales, fixed asset additions, ordinary purchases, and meals given to employees and guests.

The only errors still under protest and relevant to this discussion are related to the imposition of sales tax on the separately stated service charges for the mandatory gratuities. The Bureau discovered that the Petitioner was not charging sales tax on the service charge portion of each transaction. The Bureau holds these charges subject to sales tax based on the following rule:

05. Service Charges. Amounts designated as service charges, added to the price of meals or drinks, are a part of the selling price of the meals or drinks and accordingly, must be included in the purchase price subject to tax... (IDAPA 35.01.02.43.05)

The Petitioner's Protest

The Petitioner protested the imposition of sales tax on the service charges for the mandatory gratuities, arguing that these charges were never meant to be subject to sales tax. The Petitioner's argument hinges on a bill that was introduced and passed during the 2011 legislative session. House Bill 213 added the following language to Idaho Code § 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. (Idaho Code § 63-3613).

The Petitioner argues that this statute was amended by the legislature for the purpose of clarification and, regardless of the effective date of this amendment, reflected how the statute should have been interpreted all along.

Relevant Law & Conclusion

Idaho Code § 63-3619 imposes a sales tax on every retail sale. This tax applies to the sale of tangible personal property and other sales specifically included by law. The statutory definition of a sale contains the relevant inclusion:

Idaho Code 63-3612. Sale.

... (2) "Sale" shall also include the following transactions when a consideration is transferred, exchanged or bartered:

... (b) Furnishing, preparing, or serving food, meals, or drinks and nondepreciable goods and services directly consumed by customers included in the charge thereof. (Emphasis added. Idaho Code § 63-3612(2)(b)).

Based on this law and IDAPA 35.01.02.43.05 quoted above, the charges for catered meals and associated services have long been included in the taxable sales price by the Commission. The only consistent exclusion has been voluntary gratuities which are specifically exempted by Administrative Rule. This treatment is consistent with taxation of sales of restaurant meals in which the entire charge is subject to sales tax despite the portion of the charge that could be attributed to services provided, such as the wait staff, management, and valet parking.

The changes to Idaho Code § 63-3613 were given effect retroactively to January 1, 2011, by the legislature. The Commission takes this as clear guidance that the legislature intended the change in statute to take effect on January 1, 2011, and no earlier. The Commission is an administrative agency, not a legislative one. It will not substitute an alternative interpretation when it finds no ambiguity in the statutes.

The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Albee v. Judy, 136 Idaho 226, 230, 31 P.3d 248,252 (2001). If the language of the statute is unambiguous, "the clear expressed intent of the legislature must be given effect and there is no occasion for construction." Udy v. Custer County, 136 Idaho 386, 388, 34 P.3d 1069,

1071 (2001) (citing: Ada County Assessor v. Roman Catholic Diocese, 123 Idaho 425,428, 849 P.2d 98,101 (1993)).

Absent information to the contrary, the Commission finds the deficiency prepared by the Bureau to be a reasonably accurate representation of the Petitioner's sales and use tax liability for the period May 1, 2007, through May 31, 2010.

The Bureau added interest and penalty to the sales and use tax deficiency. The Commission reviewed those additions, found both to be appropriate per Idaho Code §§ 63-3045 and 63-3046, and has updated interest accordingly. Interest is calculated through October 30, 2015, and will continue to accrue at the rate set forth in Idaho Code § 63-3045(6) until paid.

THEREFORE, the Notice of Deficiency Determination dated June 18, 2010 is hereby APPROVED, in accordance with the provisions of this decision, and is AFFIRMED and MADE FINAL.

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

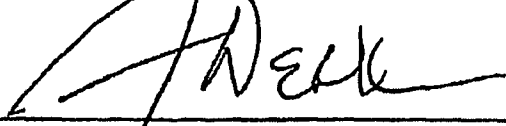
<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$40,426	\$11,741	\$52,167
	Payment Received	(9,748)
	Amount Due	<u>\$42,419</u>

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

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

DATED this 14th day of July 2015.

IDAHO STATE TAX COMMISSION



COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July 2015, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

CHANDLERS OF BOISE LLC
981 W GROVE STREET
BOISE ID 83702

Receipt No. 7010 2780 0003 0178 3632

Copy mailed to:

CLINT R BOLINDER
GIVENS PURSLEY LLP
601 W BANNOCK STREET
BOISE ID 83702

Fawstina Peters

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
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 \$25,000.00); 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.

CHANDLERS
STEAKHOUSE

981 W Grove St.
Boise, ID 83702
208.383.4300

Server: Banquet
Table 104/1
Guests: 11
Reprint #: 1

05/21/2010
9:04 PM
80002

051 De Fere (2 @28.00) 56.00
CAB (3 @25.00) 75.00
CHARD (3 @25.00) 75.00
APPS (10 @10.00) 100.00
DINNER (10 @60.00) 600.00

Subtotal 906.00
Tax 54.36

Total 960.36
Gratuity 19.00% 172.14
Total 1132.50

HOUSE ACCT #00001 1132.50

+ Tip: _____

= Total: _____

X _____

Balance Due 0.00

CHANDLERS
STEAKHOUSE

981 W Grove St.
Boise, ID 83702
208.383.4300

*Dinner
bottom*

Server: Trey
Table 44/1
Guests: 6
Reprint #: 1

05/22/2010
11:10 PM
70011

549 Hall Cab (2 @78.00) 156.00
Bud Light 4.00
Medit Mussels 12.00
Prawn Cocktail 10.50
Caesar Salad 7.00
Surf 'n' Turf (3 @75.00) 225.00
Cowboy Steak 38.00
King Salmon 27.00
Halibut 30.00
Choc Souffle (2 @12.00) 24.00
Cheesecake 7.50
Key Lime 5.50

Subtotal 546.50
Tax 32.79

Total 579.29
Gratuity 18.00% 98.37
Total 677.66

AMEX #XXXXXXXXXXXX3002 677.66
Tip 10.00
Total 687.66

Auth:507930 Exp 1213

Grand Total 687.66
Balance Due 0.00

CHANDLERS
STEAKHOUSE

981 W Grove St.
Boise, ID 83702
208.383.4300

*Room
Service*

Server: Robert
Table 904/1
Guests: 1
Reprint #: 1

05/21/2010
6:24 PM
40009

Folie a Deux Zinfandel (2 @10.00) 20.00
Prawn Cocktail 10.50
10 oz Filet 38.00
Au Gratin Potatoes 7.50

Subtotal 76.00
Tax 4.56

Delivery Charge 5.00

Total 85.56
Gratuity 19.00% 14.44
Total 100.00

Room Chg #315 100.00

+ Tip: _____

= Total: _____

X _____

Balance Due 0.00

000048
TC
D

1 - Chandler's/Metro Cafe
981 W Grove St
Boise, ID 83702

Sales Report

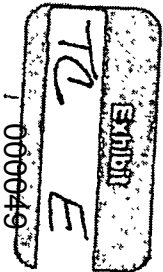
05/12/2007 - 05/31/2010

Page 2
05/01/2010 - 10:35 AM
#217

Non-Cash Payments

	Amount	Charge Tips	AutoGratuity	Sales
AMEX	3783323.37	424818.65	171065.58	3187338.13
VISA	6628784.80	783478.73	233174.40	6802110.77
M/C	1838288.64	223658.08	58257.44	1558353.11
DISCOVER	78315.91	10121.42	1872.72	68321.77
Check	1647.38	177.88	8.83	1459.87
HOUSE ACCT	140278.76	8385.14	15088.30	118806.32
H43 Charge	198.49	43.71	0.00	154.77
Room Chg	821410.64	80854.50	55972.84	684483.30
Gift Card	326284.28	8598.61	3345.05	313339.62
Totals	13818493.38	1549339.73	538788.17	11530387.48

*Voluntary
contributions
by guest*



1 - Chandler's/Metro Cafe
 981 W Grove St.
 Boise, ID 83702

Sales Report
 05/12/2007 - 12/31/2007

Page 2
 08/14/2010 - 11:17 AM
 64.20

Non-Cash Payments

	Qty	Amount	Charge Tips	AutoGratuity	Sales
AMEX	4458	745398.23	83581.87	33892.15	628112.21
VISA	11053	1302241.33	152038.45	48123.81	1102078.07
M/C	3218	371402.88	44166.37	12135.68	315100.85
DISCOVER	123	11583.43	1424.04	210.51	8828.88
Check	39	1647.38	177.88	8.83	1459.87
HOUSE ACCT	48	13783.58	502.13	1447.72	11813.71
H43 Charge	3	188.48	43.71	0.00	154.77
Room Chg	3593	182480.87	18017.82	10138.47	138334.58
Gift Card	407	34405.03	865.78	631.14	32808.11
Totals	22942	2643109.19	288828.05	106389.29	2237891.85

1 - Chandler's/Metro Cafe
 981 W Grove St.
 Boise, ID 83702

Sales Report
 01/01/2008 - 12/31/2008

Page 2
 08/14/2010 - 10:45 AM
 64.20

Non-Cash Payments

	Qty	Amount	Charge Tips	AutoGratuity	Sales
AMEX	7702	1308205.84	142542.74	63021.03	1103542.07
VISA	18045	2217804.01	288584.26	77559.03	1873680.72
M/C	5497	642340.59	78550.88	22041.54	543748.18
DISCOVER	251	26048.71	3807.88	417.26	22023.58
HOUSE ACCT	185	61725.08	2855.83	8822.13	61947.12
Room Chg	6418	327418.35	28974.46	24628.40	273813.49
Gift Card	1429	104081.77	3248.20	1089.32	99784.25
Totals	40527	4888622.35	524584.24	185558.71	3868499.40

1 - Chandler's/Metro Cafe
 981 W Grove St.
 Boise, ID 83702

Sales Report
 01/01/2009 - 12/31/2009

Page 2
 08/14/2010 - 11:08 AM
 64.20

Non-Cash Payments

	Qty	Amount	Charge Tips	AutoGratuity	Sales
AMEX	6870	1177654.61	134382.58	52185.39	891086.63
VISA	17242	2126705.84	255145.53	73753.71	1787808.40
M/C	4753	589183.16	70980.89	16250.02	481852.25
DISCOVER	226	27188.64	3418.84	754.03	23014.67
HOUSE ACCT	113	40049.75	2133.18	3813.98	34102.81
Room Chg	5858	221328.88	24224.33	13784.58	183310.07
Gift Card	1575	119414.44	3535.29	1171.71	114708.44
Totals	38435	4281528.22	493802.75	161733.40	3825989.07

1 - Chandler's/Metro Cafe
981 W Grova St.
Boise, ID 83702

Sales Report

01/01/2010 - 05/31/2010

Page 2
08/14/2010 - 11:23 AM
6.4.20

Non-Cash Payments

	Qty	Amount	Charge Tips	AutoGratuity	Sales
AMEX	3254	651066.69	64322.45	22167.02	464567.22
VISA	8003	982013.82	119711.49	33737.85	926584.58
M/C	2178	255342.01	31959.94	7830.22	215551.85
DISCOVER	106	13515.13	1669.58	490.92	11354.63
HOUSE ACCT	48	24741.37	784.00	3004.49	20942.88
Room Chg	2278	110174.44	11737.89	7411.39	91025.16
Gift Card	962	68383.04	1949.34	472.88	65960.82
Totals	16832	2005236.60	232144.69	75104.77	1697987.14

To: 'Paul Delgado'
Cc: Tim Aingworth
Sent: Tuesday, June 15, 2010 1:47 PM
Subject: FW: gratuity report

Hi Paul & Tim,

I wanted to let you know with the information I have at this time I will be issuing a report and a notice of deficiency on Friday, June 20th.

I will not be coming to the Boise office at this time to look at other invoices. Paul if you could please give me information regarding family meals, manager comp meals, customer comp meals, and the "pre-opening"/practice night, it would be appreciated. Perhaps you are in the process of gathering this info that was requested in the email below last week.

If you do not think you can have this to me by tomorrow, please let me know.

I appreciate your help,
Claire

Claire Maretka
Principal Tax Auditor
PH: (208) 332-4072
FAX: (208) 334-7655
claire.maretka@tax.idaho.gov

From: Clara Maretka
Sent: Wednesday, June 09, 2010 3:49 PM
To: 'Paul Delgado'
Cc: Tim Aingworth
Subject: RE: gratuity report

Hi Paul,

If you run a similar report off your POS system like the one you sent, but broken down by yearly totals. The reason for this is to calculate the correct interest owed, since interest rates change each year.

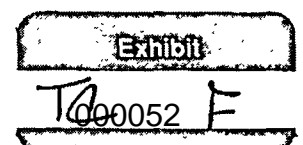
I'm glad to hear you are compliant with collecting sales tax on included gratuities. Please let me know what date you started doing that.

I'm working on selecting invoices to review. Please let the owner know that with a random sample, if there are any errors, it will be projected over the 3 years.
(or Tim can advise him)

When I was at your office we talked about family meals, manager comp meals, customer comp meals, and the "pre-opening"/practice night. If you can please provide me with Chandler's cost of the family meals, and if these meals are served 7 days a week. I'll also need a report, or some type of documentation of the manager & customer comp meals & Chandler's cost. I will also need the cost of food that was served on the pre-opening night.

Thank you for your help,
Claire

Claire Maretka
Principal Tax Auditor



P/F: (208) 332-4072

FAX: (208) 334-7655

claire.maretka@tax.idaho.gov

From: Paul Delgado [mailto:paul@chandlersboise.com]

Sent: Tuesday, June 08, 2010 6:21 PM

To: Clara Maretka

Cc: Tim Aingworth

Subject: gratuity report

Hi Clara, Attached is the payments report straight off of our POS for opening day (5/12/07) through 5/31/10. The column of charge tips are tips that were voluntarily written in by guests. The Auto Gratuity column are tips that were included in the check. It does not break down which ones were from banquets and which ones were from parties of 6 or more in the dining room. Will this suffice for you for documenting tips/included gratuities? I also want to let you that we are now compliant with the law and we now are collecting tax on included gratuities. I have the go ahead to get you credit card bills. Is there any chance you can give me some random dates to look up rather than asking for every single bill since we've opened? That is a pretty hard task to do and as you saw when you were here, I'm always maxed out and busy.

Thank you,
Paul Delgado
General Manager
Chandlers Steakhouse
208-383-4300

MAR 01 2016

CHRISTOPHER D. RICH, Clerk
By ALESIA BUTTS
DEPUTY

ERICK M. SHANER [BAR NO. 5214]
DAVID B. YOUNG [BAR NO. 6380]
DEPUTY ATTORNEY GENERAL
Idaho State Tax Commission
P.O. Box 36
Boise, ID 83722-0410
(208) 334-7530

Attorneys for the Idaho State Tax Commission

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

CHANDLERS-BOISE, LLC)	
Petitioner,	)	Case No.: CV-OC-15-17617
)	
v.	)	IDAHO STATE TAX COMMISSION'S
	)	CROSS-MOTION FOR SUMMARY
IDAHO STATE TAX COMMISSION,	)	JUDGMENT
)	
Respondent.)	

The Idaho State Tax Commission, by and through its attorneys of record, moves this Court for an order granting summary judgment upholding the July 14, 2015, Idaho State Tax Commission's written decision. See Joint Stipulations of Fact, ¶ 8. This motion is made on the grounds that there is no genuine issue of material fact in this case, and Respondent is entitled to judgment as a matter of law. This motion is based upon I.R.C.P. 56 and the records and documents on file in this matter.

Stipulated facts for this motion were previously submitted by the parties. A memorandum in support of this motion is being filed contemporaneously with this motion.

The Court has set a deadline of Tuesday, March 22, 2016 for the submission of reply briefs on this motion. Oral argument on this motion was previously set by the Court and is to take place at 10:00 a.m. on Monday, April 4, 2016 at the Ada County Courthouse.

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DATED this 15th day of March, 2016.

IDAHO STATE TAX COMMISSION



ERICK M. SHANER
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of March, 2016, I served a true and correct copy of the within and foregoing IDAHO STATE TAX COMMISSION'S CROSS-MOTION FOR SUMMARY JUDGMENT by the method(s) indicated below, and addressed to each of the following:

CLINT BOLINDER
GIVENS PURSLEY LLP
PO BOX 2720
BOISE ID 83701-2720

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



ERICK M. SHANER
DEPUTY ATTORNEY GENERAL

445

MAR 01 2016

CHRISTOPHER D. RICH, Clerk
By ALESIA BUTTS
DEPUTY

ERICK M. SHANER [BAR NO. 5214]
DAVID B. YOUNG [BAR NO. 6380]
DEPUTY ATTORNEY GENERAL
Idaho State Tax Commission
P.O. Box 36
Boise, ID 83722-0410
(208) 334-7530

Attorneys for the Idaho State Tax Commission

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

CHANDLERS-BOISE, LLC)	
Petitioner,	)	CASE NO. CV-OC-15-17617
)	
v.	)	IDAHO STATE TAX
	)	COMMISSION'S MEMORANDUM
IDAHO STATE TAX COMMISSION,	)	IN SUPPORT OF SUMMARY
	)	JUDGMENT
Respondent.)	
)	
)	

Comes now the Idaho State Tax Commission by and through its counsel, and hereby submits its Memorandum in Support of its Motion for Summary Judgment.

I.

INTRODUCTION

A. Nature of the Case.

This is a sales and use tax case. Chandlers-Boise, LLC ("Chandlers") appeals a decision of the Idaho State Tax Commission ("Commission") assessing an Idaho sales and use tax deficiency for the period of May 1, 2007, through May 31, 2010 ("Audit Period"). See Joint Stipulation of Facts, ¶ 8 and 11.

The Commission asserts that there exists no genuine issue of material fact regarding Chandlers' sales and use tax liability, and as a matter of law, Chandlers owes the amounts

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asserted in the Commission's decision in this matter. *See* Joint Stipulations of Facts, ¶ 8. Although some references to statute and rule have changed, all code references in this brief are to Idaho statute and rules in place at the time of the transactions in question. *See* Session Laws and Rules attached as Exhibit 1.

B. Facts and Procedural History.

Chandlers owns and operates a steak and seafood restaurant which is located within Hotel 43 in downtown Boise, Idaho. *See* Joint Stipulations of Fact, ¶ 3. The Commission, through its Sales, Use and Miscellaneous Tax Audit Bureau conducted a comprehensive sales and use tax audit of Chandlers' operations. *Id.*, ¶ 4. During the Audit Period, Chandlers' point of sale system automatically added gratuities to banquet meals, restaurant dining services for groups having six or more persons, and room service meals ("Gratuities"). *Id.*, ¶ 12. The check or bill Chandlers gave to its customers did not indicate that the gratuity charges could be declined or paid, all or in part. *Id.*, ¶ 13. In this memo, the term "Gratuity" refers to amounts, tips, fees, or service charges automatically added to a customer's bill by the service provider of a meal, when the customer is not advised in writing on the face of the bill that she may decline to pay all or part of the added amount. According to rules promulgated under Idaho Code § 63-105(2): "When an amount is added to a customer's bill by the retailer, and the customer is not advised in writing on the face of the bill that he may decline or pay all or part of the amount, it is not a gratuity and the fee so added is subject to the sales tax." IDAPA 35.01.02.43.04 (emphasis added). This rule is at the heart of the matter in this case.

During the Audit Period, after the discovery of Chandlers' non-compliance with IDAPA 35.01.02.43.04, Chandlers' General Manager informed the Commission, "I also want to let you that we are now compliant with the law and we now are collecting tax on included gratuities."

See Joint Stipulation of Facts, ¶ 16. On June 18, 2010, the Commission issued a Deficiency Determination to Chandlers. *Id.*, ¶ 5.

Following the issuance of this Deficiency Determination, Chandlers protested the deficiency and filed a Petition for Redetermination of Deficiency Determination. *Id.*, ¶ 6. On November 3, 2014, the Commission held an informal hearing with Chandlers. *Id.*, ¶ 7. Following the hearing, the Commission issued a written decision upholding the amounts at issue in this matter. *Id.*, ¶ 8.

After the Audit Period in this matter, the Idaho Legislature added a relevant provision to the Idaho Code section defining “sales price.” Idaho Code § 63-3613(f). Although the new section excludes Gratuities from the definition of “sales price,” the effective date of the new section only extends back to January 1, 2011 – which is after the Chandlers audit period. The new section does not apply to the transactions in this case. 2011 Idaho Sess. Laws 628 (codified as amended at Idaho Code § 63-3613) in Exhibit 1.

C. Standard of Review.

A summary judgment procedure is appropriate in a district court appeal of an administrative decision. Beker Industrial, Inc. v. Georgetown Irrigation District, 101 Idaho 187, 610 P.2d 546 (1980). Summary judgment is applicable on trial de novo when there is no genuine issue of material fact, and a party is entitled to judgment as a matter of law. Yribar v. Fitzpatrick, 87 Idaho 366, 393 P.2d 588 (1964). *See also* I.R.C.P. 56(c).

When parties file cross motions for summary judgment, the standard of review remains the same. Intermountain Forest Management, Inc. v. Louisiana Pacific Crop., 136 Idaho 233, 235 31 P.3d 921, 924 (2001). The court must evaluate each party’s motions on its own merits and determine whether there exists a genuine issue of material fact. *Id.*

Ordinarily, the moving party bears the initial burden to show the absence of any genuine issue of material fact. The party opposing the summary judgment must present the court with more than mere speculation or conclusory allegations in order to rebut the moving party's showing. B & K Fabricators, Inc. v. Sutton, 126 Idaho 934, 937, 894 P.2d 167, 170 (Ct. App. 1995). In instances where the parties file cross motions for summary judgment and rely on the same facts, issues, and theories, "the parties effectively stipulate that there is no genuine issue of material fact that would preclude the district court from entering summary judgment." Intermountain Forest Management, Inc. v. Louisiana Pacific Crop., 136 Idaho 233, 235 31 P.3d 921, 924 (2001).

II.

DISCUSSION

A. The Tax Commission Correctly Determined That Gratuities Are Subject To Taxation Under Idaho Code § 63-3612(2)(b) And IDAPA 35.01.02.43.04, Petitioner's Alternative Theory Using Idaho Code § 63-3613(b)(4) Is Incorrect.

Petitioner argues a line of reasoning that Idaho Code § 63-3619 is the principal statute that imposes an Idaho sales tax, which 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 . . ." (emphasis added). They continue their line of reasoning by arguing that under Idaho Code § 63-3619, for something to be subject to a sales tax it must be both: a "sale" (defined in Idaho Code § 63-3612) and included in the definition of "sales price" (defined in Idaho Code § 63-3613).

Petitioner then argues that Gratuities do not fall within the definition of "sales price" under Idaho Code § 63-3613, because Idaho Code § 63-3613(b)(4) specifically exempts the Gratuities from the definition of "sales price." Idaho Code § 63-3613(b) states, in relevant part:

The term “sales price” *does not include* any of the following:

4. The amount charged for labor or services rendered in installing or applying the property sold, provided that said amount is stated separately and such separate statement is not used as a means of avoiding imposition of this tax upon the actual sales price of the tangible personal property; . . .

Idaho Code § 63-3613(b) (emphasis added).

Chandlers argues that Gratuities represent amounts “charged for labor or services.” They further argue that the Gratuities were charged in connection with Chandlers' sale of food and beverage to its customers, were separately stated on each customer's meal ticket, and that the separate statement of Gratuities was not used as a means of avoiding imposition of a sales tax upon the actual sales price of tangible personal property. Thus, they conclude that no sales or use tax should have been levied on their Gratuities.

Petitioner's line of reasoning is not correct. Gratuities do not represent amounts “charged for labor or services” in the context of Idaho Code § 63-3613(b)(4). Instead, Idaho Code § 63-3613(b)(4) speaks to the common example of, for instance, a customer buying a home refrigerator. As long as the installer separately states the labor or services to install the refrigerator separate from the price of the refrigerator, only the refrigerator will be taxable.

Here, the Gratuities are not subject to the test set out in Idaho Code § 63-3613(b)(4). That is because Idaho Code § 63-3612(2)(b) clearly and expressly resolves that “[F]urnishing, preparing, or serving food, meals, or drinks and nondepreciable goods and services directly consumed by customers included in the charge thereof,” such as Gratuities, are taxable. (emphasis added).

Consistent therewith, IDAPA 35.01.02.043.04 and .05 provide a bright line test that if the bill for the food does not give the customer the option in writing to decline or pay all or part of the Gratuities, then the Gratuities are taxable as being included in the charge for the food:

04. Gratuities...

...

(c) When an amount is added to a customer's bill by the retailer, and the customer is not advised in writing on the face of the bill that he may decline or pay all or part of the amount, it is not a gratuity and the fee so added is subject to the sales tax.

05. Service Charges. Amounts designated as service charges, added to the price of meals or drinks, are a part of the selling price of the meals or drinks and accordingly, must be included in the purchase price subject to tax, even though such service charges are made in lieu of tips and paid over by the retailer to his employees.

IDAPA 35.01.02.043.04 through .05 (emphasis added). Insofar as Petitioner's argument in Idaho Code § 63-3613 is concerned, the following statutory language is applicable:

(a) The term "sales price" means the total amount for which tangible personal property, including services agreed to be rendered as a part of the sale, is sold, rented or leased, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:

...

2. The cost of materials used, labor or service cost, losses, or any other expense.

Idaho Code § 63-3613(a)(2). Per Idaho Code § 63-3613(a)(2), Gratuities are "services agreed to be rendered as a part of the sale . . . without any deduction on account of . . . labor or service cost." This is consistent with Idaho Code §§ 63-3612(2)(b) and 63-3619, in that services or Gratuities *included in the charge* for furnishing, preparing, or serving food, meals, or drinks are taxable. *See* also IDAPA 35.01.02.043.04 and .05. *See* Joint Stipulations of Facts, ¶ 13.

During the Audit Period, Chandlers automatically added Gratuities to banquet meals, restaurant dining services for groups having six (6) or more persons, and room service meals. *See* Joint Stipulations of Fact, ¶ 12. Attached as Exhibit "D" to the Joint Stipulations of Fact, is a photocopy of three examples of Chandlers checks/bills showing where Chandlers point of sale system automatically added Gratuities. *Id.* Reading from left to right the first photocopy is an example of a banquet check (banquet checks are for restaurant dining services and not actual

“banquet services;” the banquet designation occurs when the group reaches a certain size and requires more than one server), the middle photocopy is an example of a restaurant dining services check, and lastly on the farthest right is a photocopy of a check/bill for a meal delivered in a customer’s hotel room as room service. *Id.* The same formats of checks/bills were given to all similarly situated customers for all of the amounts in issue in this matter. *Id.*

The checks/bills Chandlers gave to its customers did not indicate that the gratuity charges could be declined in all or in part. *See* Joint Stipulations of Fact, ¶ 13. *See* true and correct copies attached as Exhibit “D” to the Joint Stipulations of Fact. *Id.*

Sales Reports dated June 1 and 14, 2010, generated by Chandlers during the audit show the Gratuities that were automatically added to customers’ checks/bills by amounts under the column entitled “AutoGratuity.” *See* Joint Stipulations of Fact, ¶ 14. *See* a true and correct copy attached as Exhibit “E” to the Joint Stipulations of Fact. *Id.*

Chandlers did not charge its customers sales or use tax on the amount charged for Gratuities during the Audit Period. *See* Joint Stipulations of Fact, ¶ 15. Because the customers were not advised in writing that they could decline or pay the Gratuity in all or in part, it is subject to sales tax.

The charges for Gratuities, since the adoption of the Idaho sales tax in 1965, have been included in the charge for food per Idaho Code § 63-3612(2)(b) and as part of the taxable sale transaction by the State of Idaho.

IDAPA 35.01.02.43.04 and .05 draw a bright line of taxability. Absent any wording informing customers of their right to decline or pay all or part of the amount, the Gratuities are subject to sales tax.

B. The Legislature’s Subsequent Change To The “Sales Price” Definition Is Immaterial, Because The New Law Contained A Specific Retroactivity Date.

Chandlers erroneously argues that changes made in 2011 should apply back in time to their Audit Period. The changes to Idaho Code § 63-3613 were given effect retroactively only to January 1, 2011, by the Idaho Legislature. 2011 Idaho Sess. Laws 628 (codified as amended at Idaho Code § 63-3613). *See* Exhibit 1. The taxes in issue in this matter predated the retroactivity date set by the Legislature. The transactions occurred between May 1, 2007 and May 31, 2010. Chandlers’ complaint references the statement of purpose, and argues Idaho Code § 63-3613 was enacted to “clarify” the sales price. They assume the inclusion of the word “clarify” implies that Gratuities were already excluded from the “sales price” definition before its passage and during the Audit Period. Chandlers’ argument is incorrect as shown by the argument above, Gratuities since 1965 have been taxable. In addition, the Audit Period pre-dates the stated effective date of the 2011 changes to Idaho Code § 63-3613, as shown below:

|| ← May 2007 – May 2010 → ||
Audit Period

|| ← January 2011
Changes to Idaho Code § 63-3613

The Idaho Legislature provided an effective date of the changes to Idaho Code § 63-3613 that requires no speculation as to when the law took effect; the stated language of its effective date is retroactive to January 1, 2011. *See* 2011 Idaho Sess. Laws 628 (codified as amended at Idaho Code § 63-3613) in Exhibit 1. This is clear guidance that the Legislature intended the change in statute to take effect on January 1, 2011, and no earlier. The Commission is an administrative agency, not a legislative one. It will not substitute an alternative interpretation when it finds no ambiguity in the statutes.

The effective date of the current version of Idaho § 63-3613 is plain. The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Albee v. Judy, 136 Idaho 226, 230, 31 P.3d 248,252 (2001). If the language of the statute is unambiguous, “the clear expressed intent of the legislature must be given effect and there is no occasion for construction.” Udy v. Custer County, 136 Idaho 386, 388, 34 P.3d 1069, 1071 (2001) (citing Ada County Assessor v. Roman Catholic Diocese, 123 Idaho 425, 428, 849 P.2d 98,101 (1993)), *see also* Albee v. Judy, 136 Idaho 226, 231, 31 P.3d 248, 253 (2001).

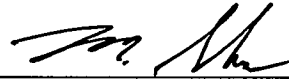
The Idaho Legislature and Governor’s amendment to Idaho Code § 63-3613 in 2011 changed Idaho’s tax policy for Gratuities. Without a statutory change Gratuities would continue to be taxed. Despite Chandlers’ arguments claiming that Gratuities have always been exempted from taxation, the law change was necessary to adopt a new policy direction to exempt amounts, tips, fees, or service charges automatically added to a customer’s bill by the service provider of a meal, when the customer is not advised in writing on the face of the bill that they may decline to pay all or part of the amount added. Petitioner’s argument that the law held otherwise prior to 2011 is incorrect.

III.

CONCLUSION

For the reasons set forth above, the Idaho State Tax Commission respectfully requests that its Motion for Summary Judgment be granted and the Commission’s written July 14, 2015, decision be upheld. The Idaho Code and Regulations in effect during the Audit Period draw a bright line of taxability. Gratuities are subject to sales and use taxation. The subsequent law change took effect after Chandlers’ Audit Period. Therefore, the Commission is entitled to judgment as a matter of law.

DATED this 1st day of March, 2016.



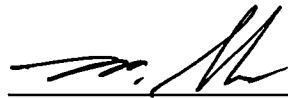
ERICK M. SHANER
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March 2016, I caused to be served a true copy of the foregoing IDAHO STATE TAX COMMISSION'S MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT by the method(s) indicated below, and addressed to each of the following:

CLINT BOLINDER
GIVENS PURSLEY LLP
PO BOX 2720
BOISE ID 83701-2720

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



ERICK M. SHANER
DEPUTY ATTORNEY GENERAL

“Exhibit 1”

Idaho Tax Administration Rules and Session Laws

Code. Organizations selling such meals must obtain an Idaho seller's permit and collect sales tax when selling meals to purchasers who are not senior citizens. (7-1-93)

10. Nontaxable Purchases by Establishments Selling Meals or Beverages. Persons who serve food, meals, or drinks for a consideration may purchase tangible personal property without paying tax if the property is for resale to their customers, is included in the fee charged to the customer, and is directly consumed by the customer in such a way that it cannot be reused. A resale certificate must be provided to the vendor when the establishment purchases such items for resale. See Rule 128 of these rules. Examples of items which are purchased for resale and directly consumed by customers include: (3-15-02)

a. Disposable containers, such as milkshake containers, paper or styrofoam cups and plates, to-go containers and sacks, pizza cartons, and chicken buckets. (7-1-93)

b. Disposable supplies included in the price of the meal or drink, such as drinking straws, stir sticks, paper napkins, paper placemats, and toothpicks. (7-1-93)

c. Candies, popcorn, drinks, or food, when included in the consideration paid for other food, meals, or drinks. (7-1-93)

11. Taxable Purchases by Establishments Selling Meals or Beverages. Tangible personal property which is not included in the fee charged to the customer and not directly consumed by the customer is subject to the tax when purchased by the restaurant, bar, food server, or similar establishment. Tangible personal property which is not directly consumed by the customer includes property that is nondisposable in nature or property that is depreciated in the books and records of the restaurant, bar, or similar establishment. Examples of taxable purchases include: (7-1-93)

a. Waxed paper, stretch wrap, foils, paper towels, garbage can liners, or other paper products consumed by the retailer, as well as linens, silverware, glassware, tablecloths, towels, and nondisposable napkins, furniture, fixtures, cookware, and menus. (7-1-93)

b. Any tangible personal property available to the general public, such as restroom supplies and matches. (7-1-93)

c. Complimentary candies, popcorn, drinks, or food, when patrons are not required to purchase other food, meals, or drinks in order to receive the complimentary goods. (7-1-93)

042. PRICE LABELS (RULE 042).

Sales of price labels, stickers, pricing ink, pricing guns and shelf labels are considered to be property used and consumed by the store in the course of conducting its business activities and are subject to tax. Pricing labels which contain commodity information such as ingredients, nutritional information, or caloric information are not subject to tax, since the utility of the label does not end with the purchase of the product. (7-1-93)

043. SALES PRICE OR PURCHASE PRICE DEFINED (RULE 043).

01. Sales Price and Purchase Price. The term sales price and purchase price may be used interchangeably. Both mean the price paid by the customer or user to the seller including: (7-1-93)

a. The cost of transporting goods to the seller. See Rule 061 of these rules. (3-20-04)

b. Manufacturer's or importer's excise tax. See Rule 060 of these rules. (3-20-04)

c. Services agreed to be rendered as part of the sale. (7-1-97)

d. Separately stated labor charges to produce or fabricate made to order goods. See Rule 029 of these rules. (3-20-04)

02. Services Agreed to Be Rendered as a Part of the Sale. The sales and use tax is computed on the

sales price of a transaction. The term "sales price" is defined by Section 63-3613, Idaho Code, to include "services to be rendered as a part of the sale." The following items are among those that are part of the sales price and, therefore, may not be deducted before computation of the sales price. This is not intended to be an exclusive list of such items: (3-20-04)

a. Any charges for any services to bring the subject of a sale to its finished state ready for delivery and in the condition specified by the buyer, including charges for assembly, fabrication, alteration, lubrication, engraving, monogramming, cleaning, or any other servicing, customizing or dealer preparation. (3-20-04)

b. Any charge based on the amount or frequency of a purchase, such as a small order charge or the nature of the item sold, such as a slow-moving charge for an item not frequently sold. (3-20-04)

c. Any commission or other form of compensation for the services of an agent, consultant, broker, or similar person. (3-20-04)

d. Any charges for warranties, service agreements, insurance coverage, or other services required by the vendor to be taken as a condition of the sale. If the sale could be consummated without the payment of these charges, the charges are not part of the sales price if separately stated. Also see Rule 049 of these rules. (3-20-04)

03. **Charges Not Included.** Sales price does not include charges for interest, carrying charges, amounts charged for optional insurance on the property sold, or any financing charge. These various charges may be deducted from the total sales price if they are separately stated in the contract. In the absence of a separate statement, it will be presumed that the amount charged is part of the total sales price. (3-20-04)

04. **Gratuities.** A gratuity is defined as something given voluntarily or beyond obligation. Gratuities may sometimes be referred to as tips. (7-1-93)

a. When a gratuity is given directly to employees by the purchaser in the form of cash or the purchaser adds a nonsolicited gratuity to his bill, charge card voucher form, or house account form, no sales tax applies to the gratuity. (7-1-93)

b. When an amount is added to a customer's bill by the retailer and the customer is advised in writing on the face of the bill that he may decline to pay all or part of the amount, that amount is a gratuity. Sales tax will not apply to the gratuity. (7-1-93)

c. When an amount is added to a customer's bill by the retailer, and the customer is not advised in writing on the face of the bill that he may decline to pay all or part of the amount, it is not a gratuity and the fee so added is subject to the sales tax. (7-1-93)

d. When a gratuity is negotiated before the sale, such as in the case of a banquet, tax must be charged on the entire fee so negotiated. Because of the negotiation, the fee loses its identity as a gratuity and becomes a service charge and part of the purchase price of the meal. See Subsection 043.04 of this rule. (7-1-93)

05. **Service Charges.** Amounts designated as service charges, added to the price of meals or drinks, are a part of the selling price of the meals or drinks and accordingly, must be included in the purchase price subject to tax, even though such service charges are made in lieu of tips and paid over by the retailer to his employees. (7-1-93)

044. TRADE-INS, TRADE-DOWNS AND BARTER (RULE 044).

01. **Trade-Ins.** A trade-in is the amount allowed by a retailer on merchandise accepted as payment for other merchandise. Merchandise is tangible personal property which is, or becomes, part of an inventory held for resale. (7-1-93)

02. **Trade-In Allowance.** When a retailer sells merchandise from his resale inventory and lets the customer trade in other goods which the retailer places in his resale inventory, the taxable sales price of the merchandise may be reduced by the amount allowed as trade-in. Example: A customer buys a car from a dealer for four thousand dollars (\$4,000). A trade-in of one thousand five hundred dollars (\$1,500) is allowed for the customer's

consumed by the store in the course of conducting its business activities and are subject to tax. Pricing labels which contain commodity information such as ingredients, nutritional information, or caloric information are not subject to tax, since the utility of the label does not end with the purchase of the product. (7-1-93)

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- b. Manufacturer's or importer's excise tax. See Rule 060 of these rules. (3-20-04)
- c. Services agreed to be rendered as part of the sale. (7-1-97)
- d. Separately stated labor charges to produce or fabricate made to order goods. See Rule 029 of these rules. (3-20-04)

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- a. Any charges for any services to bring the subject of a sale to its finished state ready for delivery and in the condition specified by the buyer, including charges for assembly, fabrication, alteration, lubrication, engraving, monogramming, cleaning, or any other servicing, customizing or dealer preparation. (3-20-04)
- b. Any charge based on the amount or frequency of a purchase, such as a small order charge or the nature of the item sold, such as a slow-moving charge for an item not frequently sold. (3-20-04)
- c. Any commission or other form of compensation for the services of an agent, consultant, broker, or similar person. (3-20-04)
- d. Any charges for warranties, service agreements, insurance coverage, or other services required by the vendor to be taken as a condition of the sale. If the sale could be consummated without the payment of these charges, the charges are not part of the sales price if separately stated. Also see Rule 049 of these rules. (3-20-04)

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- b. When an amount is added to a customer's bill by the retailer and the customer is advised in writing on the face of the bill that he may decline to pay all or part of the amount, that amount is a gratuity. Sales tax will not apply to the gratuity. (7-1-93)
- c. When an amount is added to a customer's bill by the retailer, and the customer is not advised in writing on the face of the bill that he may decline to pay all or part of the amount, it is not a gratuity and the fee so added is subject to the sales tax. (7-1-93)

d. When a gratuity is negotiated before the sale, such as in the case of a banquet, tax must be charged on the entire fee so negotiated. Because of the negotiation, the fee loses its identity as a gratuity and becomes a service charge and part of the purchase price of the meal. See Subsection 043.04 of this rule. (7-1-93)

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02. **Trade-In Allowance.** When a retailer sells merchandise from his resale inventory and lets the customer trade in other goods which the retailer places in his resale inventory, the taxable sales price of the merchandise may be reduced by the amount allowed as trade-in. Example: A customer buys a car from a dealer for four thousand dollars (\$4,000). A trade-in of one thousand five hundred dollars (\$1,500) is allowed for the customer's used car. Tax is charged on two thousand five hundred dollars (\$2,500). To qualify for the trade-in allowance, the property traded in must be consideration delivered by the buyer to the seller. The sales documents, executed not later than the time of sale, must identify the tangible personal property being purchased and the trade-in property being delivered to the seller. The delivery of the trade-in and the purchase must be components of a single transaction. (5-8-09)

03. **Disallowed Trade-In Deductions.** Trade-in deductions are not allowed on transactions between individuals because the trade-in property does not become a part of an inventory held for resale. (3-30-01)

a. Example: Two (2) individuals exchange cars of equal value. No money, property, service, or consideration other than the cars are exchanged. Both parties must pay tax on the fair market value of the vehicle received in the barter. (7-1-93)

b. Example: Two (2) individuals, neither of whom are car dealers, exchange cars of different values. Tom's vehicle, which is worth ten thousand dollars (\$10,000), is transferred to Bill. Bill's car, which is worth eight thousand dollars (\$8,000), is transferred to Tom. Bill pays Tom two thousand dollars (\$2,000). The trade-in allowance is not applicable because neither car is merchandise. Tom pays use tax on eight thousand dollars (\$8,000); Bill pays use tax on ten thousand dollars (\$10,000). (7-1-93)

04. **Insurance Settlements.** An insurance settlement does not qualify as a trade-in. Example: Tom is involved in a car accident. His insurance company determines the damage exceeds the value of the car and settles with Tom on that basis. If Tom buys another car, he must pay sales tax on the entire sales price of the replacement car. (3-30-01)

05. **Core Charges.** Parts for cars, trucks, and other types of equipment are often sold with an added core charge. When the used core is returned, the core charge is refunded. This is essentially a trade-in of a used part for a new part. Since the seller cannot be certain that the customer will return a reusable core, such core charges are subject to sales tax. The tax on the core charge will be refunded by the seller at the time credit for the core charge is allowed. (7-1-93)

06. **Trade-In for Rental/Lease Property.** When tangible personal property is traded in as part payment for the rental or lease of other tangible personal property, sales tax applies to all payments made after the value of the trade-in property has been depleted and the lessor actually begins charging for the lease or rental. The methods of applying the trade-in value to the lease are: (7-1-93)

a. The trade-in value may be subtracted from the value of the leased or rented property, thereby reducing the monthly payments and the sales tax due on those payments. (7-1-93)

(19) "Board" or "commission" shall mean a board, commission, department, division, office, body or other unit of the municipality.

(20) "Public officer" shall mean any officer who is in charge of any department or branch of the government of the municipality relating to health, fire, building regulations, or to other activities concerning dwellings in the municipality.

Approved April 6, 2011.

CHAPTER 230
(H.B. No. 213)

AN ACT

RELATING TO SALES TAX; AMENDING SECTION 63-3613, IDAHO CODE, TO DEFINE "SALES PRICE" FOR SALES AND USE TAX PURPOSES TO CLARIFY THAT SALES PRICE SHALL NOT INCLUDE A GRATUITY OR TIP RECEIVED WHEN PAID TO THE SERVICE PROVIDER OF A MEAL AND TO MAKE TECHNICAL CORRECTIONS; DECLARING AN EMERGENCY AND PROVIDING RETROACTIVE APPLICATION.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 63-3613, Idaho Code, be, and the same is hereby amended to read as follows:

63-3613. SALES PRICE. (a) The term "sales price" means the total amount for which tangible personal property, including services agreed to be rendered as a part of the sale, is sold, rented or leased, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:

1. The cost of the property sold. However, in accordance with such rules as the state tax commission may prescribe, a deduction may be taken if the retailer has purchased property for some purpose other than resale or rental, has reimbursed his vendor for tax which the vendor is required to pay to the state or has paid the use tax with respect to the property, and has resold or rented the property prior to making any use of the property other than retention, demonstration or display while holding it for sale in the regular course of business. If such a deduction is taken by the retailer, no refund or credit will be allowed to his vendor with respect to the sale of the property.
2. The cost of materials used, labor or service cost, losses, or any other expense.
3. The cost of transportation of the property prior to its sale.
4. The face value of manufacturer's discount coupons. A manufacturer's discount coupon is a price reduction coupon presented by a consumer to a retailer upon purchase of a manufacturer's product, the face value of which may only be reimbursed by the manufacturer to the retailer.

(b) The term "sales price" does not include any of the following:

1. Retailer discounts allowed and taken on sales, but only to the extent that such retailer discounts represent price adjustments as opposed to cash discounts offered only as an inducement for prompt payment.
2. Any sums allowed on merchandise accepted in payment of other merchandise, provided that this allowance shall not apply to the sale of a "new manufactured home" or a "modular building" as defined herein.
3. The amount charged for property returned by customers when the amount charged therefor is refunded either in cash or credit; but this exclusion shall not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned.

4. The amount charged for labor or services rendered in installing or applying the property sold, provided that said amount is stated separately and such separate statement is not used as a means of avoiding imposition of this tax upon the actual sales price of the tangible personal property; except that charges by a manufactured homes dealer for set up of a manufactured home shall be included in the "sales price" of such manufactured home.

5. The amount of any tax (not including, however, any manufacturers' or importers' excise tax) imposed by the United States upon or with respect to retail sales whether imposed upon the retailer or the consumer.

6. The amount charged for finance charges, carrying charges, service charges, time-price differential, or interest on deferred payment sales, provided such charges are not used as a means of avoiding imposition of this tax upon the actual sales price of the tangible personal property.

7. Delivery and handling charges for transportation of tangible personal property to the consumer, provided that the transportation is stated separately and the separate statement is not used as a means of avoiding imposition of the tax upon the actual sales price of the tangible personal property; except that charges by a manufactured homes dealer for transportation of a manufactured home shall be included in the "sales price" of such manufactured home.

8. Manufacturers' rebates when used at the time of a retail sale as a down payment on or reduction to the retail sales price of a motor vehicle to which the rebate applies. A manufacturer's rebate is a cash payment made by a manufacturer to a consumer who has purchased or is purchasing the manufacturer's product from the retailer.

9. The amount of any fee imposed upon an outfitter as defined in section 36-2102, Idaho Code, by a governmental entity pursuant to statute for the purpose of conducting outfitting activities on land or water subject to the jurisdiction of the governmental entity, provided that the fee is stated separately and is presented as a use fee paid by the outfitted public to be passed through to the governmental entity.

10. The amount of any discount or other price reduction on telecommunications equipment when offered as an inducement to the consumer to commence or continue telecommunications service, or the amount of any commission or other indirect compensation received by a retailer or seller as a result of the consumer commencing or continuing telecommunications service.

(c) The sales price of a "new manufactured home" or a "modular building" as defined in this act chapter shall be limited to and include only fifty-five percent (55%) of the sales price as otherwise defined herein.

(d) Taxes previously paid on amounts represented by accounts found to be worthless may be credited upon a subsequent payment of the tax provided in this chapter or, if no such tax is due, refunded. If such accounts are thereafter collected, a tax shall be paid upon the amount so collected.

(e) Tangible personal property when sold at retail for more than eleven cents (\$.11¢) but less than one dollar and one cent (\$1.01) through a vending machine shall be deemed to have sold at a sales price equal to one hundred seventeen percent (117%) of the price which is paid for such tangible personal property and/or its component parts including packaging by the owner or operator of the vending machines.

(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.

SECTION 2. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval, and retroactively to January 1, 2011.

Approved April 6, 2011.

CHAPTER 231
(H.B. No. 253)

AN ACT

APPROPRIATING ADDITIONAL MONEYS TO THE IDAHO STATE POLICE FOR FISCAL YEAR 2011; APPROPRIATING MONEYS TO THE IDAHO STATE POLICE FOR FISCAL YEAR 2012; LIMITING THE NUMBER OF FULL-TIME EQUIVALENT POSITIONS; EXEMPTING APPROPRIATION OBJECT AND PROGRAM TRANSFER LIMITATIONS; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. In addition to the appropriation made in Section 3, Chapter 200, Laws of 2010, and any other appropriation provided for by law, there is hereby appropriated to the Idaho State Police for the Patrol Program \$62,000 from the Miscellaneous Revenue Fund to be expended for the period July 1, 2010, through June 30, 2011.

SECTION 2. There is hereby appropriated to the Idaho State Police, the following amounts to be expended according to the designated programs and expense classes, from the listed funds for the period July 1, 2011, through June 30, 2012:

	FOR PERSONNEL COSTS	FOR OPERATING EXPENDITURES	FOR CAPITAL OUTLAY	FOR TRUSTEE AND BENEFIT PAYMENTS	TOTAL
I. BRAND INSPECTION:					
FROM:					
State Brand Board					
Fund	\$2,023,900	\$391,100	\$84,700		\$2,499,700
II. POLICE, DIVISION OF IDAHO STATE:					
A. DIRECTOR'S OFFICE:					
FROM:					
General					
Fund	\$1,627,100	\$349,200			\$1,976,300
Idaho Law Enforcement					
Fund	106,800				106,800
Idaho Law Enforcement (Project Choice)					
Fund	162,200	3,100			165,300
Peace Officers					
Fund	800				800
Miscellaneous Revenue					
Fund		56,400			56,400

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NO. _____
A.M. _____ FILED _____ P.M. _____ 138

MAR 01 2016

CHRISTOPHER D. RICH, Clerk
By STACEY LAFFERTY
DEPUTY

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

CHANDLER'S-BOISE, LLC,

Plaintiff,

v.

IDAHO STATE TAX COMMISSION,

Defendant.

Case No. CV-OC-15-17617

**MOTION FOR SUMMARY
JUDGMENT**

COMES NOW, Plaintiff Chandler's-Boise, LLC, an Idaho limited liability company, by and through its attorneys of record, Givens Pursley LLP, and hereby moves this Court for entry of summary judgment in its favor granting all of Chandler's claims more fully set forth in the Complaint. This motion is made based upon Rule 56 of the Idaho Rules of Civil Procedure, together with the Memorandum in Support of Plaintiff's Motion for Summary Judgment, and such other pleadings and documents filed and lodged in this matter.

DATED this 1st day of March, 2016.

GIVENS PURSLEY LLP

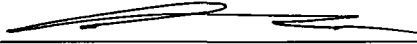
By: _____

Clint R. Bolinder
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2016, I caused to be served a true and correct copy of the foregoing document to the person(s) listed below by the method indicated:

Erick M. Shaner	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
David B. Young	<input type="checkbox"/>	Express Mail
Deputy Attorneys General	<input type="checkbox"/>	Hand Delivery
IDAHO STATE TAX COMMISSION	<input checked="" type="checkbox"/>	Facsimile (208-334-7844)
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Clint R. Bolinder

MAR 01 2016

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Attorneys for Plaintiff

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

CHANDLER’S-BOISE, LLC,

Plaintiff,

v.

IDAHO STATE TAX COMMISSION,

Defendant.

Case No. CV-OC-15-17617

**PLAINTIFF’S MEMORANDUM IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

COMES NOW, Plaintiff Chandler’s-Boise, LLC, an Idaho limited liability company (“Chandlers”), by and through its attorneys of record, Givens Pursley LLP, and hereby submits this Memorandum in Support of Chandlers’ Motion for Summary Judgment.

I. BACKGROUND

The facts of this case are undisputed. From May 1, 2007 through May 31, 2010 (the “Audit Period”), Chandlers operated a steak and seafood restaurant in downtown Boise, Idaho. Jt. Stip. of Facts ¶¶ 1-3, 11 (Jan. 29, 2016) (hereafter, “Stip.”). During the Audit Period, gratuities were added to the bills of certain Chandlers’ customers (e.g. groups with six or more persons) (“Gratuities”). *Id.* ¶ 12. Such bills listed the Gratuities as a separate line item. *Id.* ¶ 12, Ex. D.

The Sales, Use, and Miscellaneous Tax Audit Bureau (the “Bureau”) of Idaho State Tax Commission (“ISTC”) audited Chandlers’ Audit Period operations (the “Audit”). Stip. ¶ 4. After the Audit, the Bureau determined that the Gratuities were mandatory service charges subject to the sales tax and issued a Notice of Deficiency for the resulting deficiency. *See id.* ¶ 5, Ex. A. On July 14, 2015, after Chandlers requested redetermination, ISTC upheld the Bureau’s determination that the Gratuities were subject to the sales tax (the “Final Decision”) and assessed a final deficiency in the amount of \$40,426, plus interest (the “Disputed Taxes”). *Id.* at ¶¶ 5-7 (and accompanying Exhibits).¹

Chandlers now appeals the Final Decision and argues that the Gratuities are not subject to the sales tax because (i) although not retroactively applied, the post-2011 statutory clarificatory amendments explicate the pre-2011 tax treatment of the Gratuities—that they are not subject to the sales tax, and (ii) the plain and unambiguous language of the applicable pre-2011 statutes illustrate that the Gratuities were not mandatory service charges, but rather gratuities not subject to the sales tax.

II. SUMMARY JUDGMENT STANDARD

Summary Judgment is appropriate “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Idaho Rule of Civil Procedure 56(c). The burden of proving that there is no material issue of fact is on the moving party. *Van v. Portneuf Medical Center*, 147 Idaho 552, 556, 212 P.3d 982, 986 (2009). “When an action will be tried before the court without a jury, the judge is not constrained to draw

¹ Although the original tax due under the Notice of Deficiency was \$83,368.00, this amount was later reduced to \$40,426 after Chandlers provided additional documentation in connection with its petition for redetermination. *See* Stip. ¶ 8, Ex. C (acknowledging that due to the additional documentation provided by Chandlers, ISTC “modified the audit findings, which resulted in a decrease of the proposed liability.”).

inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary fact.” *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991). Here, no material fact exists that would preclude summary judgment and summary judgment reversing the assessment of the Disputed Taxes, together with interest thereon, should be entered accordingly.

III. ARGUMENT

Because (i) although not retroactively applied, the post-2011 statutory clarificatory amendments explicate the pre-2011 tax treatment of the Gratuities as not subject to the sales tax, and (ii) the language of the applicable pre-2011 statutes themselves illustrate that the Gratuities were not mandatory service charges, but rather gratuities not subject to the sales tax, the Bureau erroneously assessed the Disputed Taxes and ISTC erroneously upheld the Bureau’s decision.

Idaho Code Section 63-3619, which is 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 (2010) (emphasis added). Thus, the definition of “sales price”—the tax base for purposes of imposing the sales tax—is integral to analyzing the sales taxability of the Gratuities.² Although Idaho Code Section 63-3613(a) (2010) defines “sales price” as including “services agreed to be rendered as a part of the sale. . . ,” Idaho Code Section 63-3613(b) states that “[t]he term “sales price” *does not include* . . . 4. *The amount charged for labor or services rendered in installing or applying the property sold* . . . [or] 6. The amount

² Chandlers does not dispute that the Gratuities arose as part of a “sale” and “retail sales.” See I.C. § 63-3612(2)(b) (“sale” includes “Furnishing, preparing, or serving food, meals, or drinks. . . and services directly consumed by customers included in the charge thereof.”) and I.C. § 63-3609 (“retail” means “a sale for any purpose other than resale in the regular course of business . . .”).

charged for . . . *service charges*” on condition that charges under either scenario “are not used as a means of avoiding imposition of this tax upon the actual sales price of the tangible personal property.” I.C. § 63-3613(b) (emphasis added).

During the Audit and Chandlers’ subsequent request for reconsideration, the Bureau and ISTC (respectively) each misapplied (or failed to properly apply) the above statutes to the Gratuities. As more fully discussed below, the Gratuities do not fall within the term “sales price” for purposes of the sales tax because (i) although not retroactively applied, the post-2011 statutory clarificatory amendments to Idaho Code Section 63-3613 demonstrate the legislature’s meaning behind such statute all along—that gratuities, such as the Gratuities, are not subject to the sales tax; and (ii) the Gratuities are charges for services performed in connection with the sale of tangible personal property under Idaho Code Section 63-3613(b)(4) and/or (6).

A. The 2011 clarificatory amendments to Idaho Code Section 63-3613 demonstrate the legislature’s original intent behind the application of such Section, which is that gratuities such as the Gratuities, are not subject to the sales tax.

The 2011 clarificatory amendments to Idaho Code Section 63-3613 demonstrate the legislature’s original intent in enacting such Section; namely, that gratuities such as the Gratuities are not subject to the sales tax.

In 2011, the Idaho legislature amended Idaho Code Section 63-3613 by enacting House Bill 213 (the “Amendment”). By its own terms, 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). Other than certain other minor adjustments to irrelevant parts of the statute, the Amendment added a new subpart, (f), which stated:

(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.

Id. The addition of subpart (f) is entirely supportive of Chandlers' position—namely, that the Gratuities are not subject to the Idaho sales tax because the Gratuities were all gratuities paid to the respective service providers. R. Chandler Aff. ¶ 3 (Mar. 1, 2016). Although the legislature made the Amendment effective and retroactive to January 1, 2011, Idaho appellate courts, including the Supreme Court of Idaho, have addressed and retroactively applied the *substance* of a clarificatory statutory amendment to facts and circumstances that arose prior to the effective date of such clarificatory statutory amendment.

I. Stonecipher v. Stonecipher (1998) - Supreme Court of Idaho

Stonecipher is frequently cited (including by the cases examined below) for the proposition Chandlers advances, namely—that legislative clarifications merely further describe the statute as such already existed at the time of its enactment, notwithstanding a stated effective date that is later than the events in question (whether the clarification was made effectively retroactively or otherwise). *Stonecipher v. Stonecipher*, 131 Idaho 731, 963 P.2d 1168 (1998).

In *Stonecipher*, the Supreme Court of Idaho analyzed child support payments required by a 1979 divorce decree. In 1988, the legislature enacted Idaho Code Section 5-245, which provides a statute of limitation for claiming unpaid child support. On March 20, 1995,³ Donna, the custodial parent, reopened the 1979 divorce case and sought an order to show cause regarding why the noncustodial parent, Dwight, had not been paying child support. *Stonecipher*, 131 Idaho at 733, 963 P.2d at 1170. Dwight raised Idaho Code Section 5-245 as a defense and claimed that she had not brought “an action or proceeding” in the appropriate timeframe. *Id.* at 735, 963 P.2d at 1172.

³Although this specific date is not specified in the opinion, it is available on the Idaho Supreme Court Data Repository.

Also in March 1995, however, the legislature added a sentence to Idaho Code § 5-245, which defined “an action or proceeding” as including an “order to show cause.” *Id.*; *See* 1995 Sess. Laws, Ch. 264, Sec. 1 (eff. July 1, 1995). This amendment, however, did not provide for retroactive treatment and was to become effective on July 1, 1995. *See* 1995 Sess. Laws, Ch. 264, Sec. 1.

The lower court ruled on the motion for order to show cause and granted Donna child support arrearages and interest under the 1988 version of the statute, inclusive of the additional language and interpretation supported by the 1995 amendment (defining “an action or proceeding”). *Stonecipher*, 131 Idaho at 734-35, 963 P.2d at 1171-72. On appeal, Dwight argued that the lower court should not have applied I.C. § 5-245 to extend the statute of limitation back to 1988 “because Donna’s motion for an order to show cause did not fall within the statute until its 1995 amendment.” *Id.* at 735, 963 P.2d at 1172.

The Supreme Court upheld the lower court’s decision and relied upon the same rule Chandlers relies upon, finding that “[t]he amended version [of I.C. § 5-245] simply 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.’” *Id.* In essence, the Court stated that the legislature’s clarification merely expounded upon language existing in the statute’s 1988 version, but didn’t actually change the legislature’s intent as reflected in the 1988 version. *Id.* In reaching this conclusion, the Court looked to the 1995 Idaho Session Laws, which stated that the act was “amending Section 5-245, Idaho Code, to provide for the types of proceedings for collection of child support within the purview of the section.” *Id.* Because Donna met the statute of limitations prescribed by the 1988 amendment (because her motion for order to show cause was an “action or proceeding”) the portion of the lower court’s judgment

dated from 1988 going forward—including those considerations from the 1995 clarificatory amendment—was affirmed. *Id.*

In summary, the Supreme Court of Idaho applied the reasoning behind a 1995 clarificatory amendment, to a motion made on March 20, 1995 based on a 1988 statute, even though the amendment was not effective until July 1, 1995. Similarly, Chandlers requests that this Court apply the reasoning behind the Amendment (2011) to sales taxes assessed for the Audit Period ending in 2010, even though the Amendment was effective January 1, 2011.

2. *Pearl v. Board of Professional Discipline of Idaho State Board of Medicine (2002) - Supreme Court of Idaho*

In *Pearl*, the Supreme Court of Idaho decided an issue regarding the applicability of Idaho Code Section 54-1806 and related statutes concerning the procedures for professional discipline of certain medical doctors. *Pearl v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 137 Idaho 107, 113, 44 P.3d 1162, 1168 (2002). On March 31, 1998, the Board of Professional Discipline for the Idaho State Board of Medicine filed a complaint against Dr. Pearl alleging violations of her standard of care. *Id.* at 111, 44 P.3d at 1166. There, a hearing officer determined Pearl had violated the applicable standards on three of the eight counts against her. *Id.* The Board considered the hearing officer's position and found that Dr. Pearl had violated her duties. *Id.* Dr. Pearl appealed to the District Court and argued she was entitled to a hearing before a panel of licensed physicians and not the hearing officer under the relevant statutes. ⁴ *Id.*

⁴ Dr. Pearl's argument and the Court's analysis is complicated. At that time, the applicable statute stated that the board could: (i) "make findings respecting matters before it or before a hearing committee or authorized hearing officer"; and (ii) "appoint *hearing committees* to take evidence, conduct hearings and make recommended findings and conclusions . . . , which hearing committees shall be of such number and size as the disciplinary board directs composed of licensed physicians resident and licensed to practice medicine and surgery in Idaho." I.C. § 54-1806A(6) (1998) (emphasis added). As a maxim of statutory interpretation, in the event of a conflict, the more specific provision overrules the more general. *Patterson v. State*, 128 Idaho 4794, 915 P.2d 724 (1996). Thus, Dr. Pearl claimed she was entitled to the more specific, that is, a decision by committee. See *Pearl*, 137 Idaho at 112, 44 P.3d at 1167 ("Dr. Pearl argues that there is a conflict between statutes and that the more specific statute should control.").

The district court ruled against Dr. Pearl, and Dr. Pearl appealed to the Supreme Court of Idaho. *Pearl*, 137 Idaho at 111, 44 P.3d at 1166.

In 2000, during that appeal, the Idaho legislature revised Idaho Code Section 54-1806 to specifically permit hearing officers to “take evidence, conduct hearings and make recommend findings and conclusions.” *Id.* (quoting I.C. § 54-1806 (2000)). This revision was approved by the legislature on April 14, 2000 and made effective July 1, 2000—just over two years after the Board initiated action against Dr. Pearl. *See id.* at 114, 44 P.3d at 1169; 2000 Sess. Laws, Ch. 322 (eff. July 1, 2000). Dr. Pearl argued that the legislature enacted the 2000 revisions merely to deal with her prior argument (that is, in the district court) that hearing officers could not conduct disciplinary proceedings. *Pearl*, 137 Idaho at 114, 44 P.3d at 1169. Citing *Stonecypher*, the Court responded:

If the revision was indeed a response to Dr. Pearl's lawsuit, it gives credence to the Board's initial interpretation—the legislature responded to a possible ambiguity in the statute and wanted to ensure that hearing officers retained the power to conduct hearings, *just as had always been assumed*. It is reasonable to conclude that the legislature clarified Idaho law to ensure that hearing officers could conduct disciplinary proceedings.

Id. (emphasis added). Because it was “reasonable” that the legislature “clarified Idaho law,” the Court held that the use of the hearing officer was not contrary to the statute at the time of suit.

Id.

Here, this Court should apply the reasoning behind the Amendment to the Gratuities because, like in *Pearl*, the legislature was likely responding to ISTC’s prior incorrect interpretation of the Idaho Legislature’s intent regarding Idaho Code Section 63-3613. As a result, the Amendment “gives credence” to Chandlers’ position that “just as had always been assumed,” the Amendment can be applied to the interpretation of Idaho Code Section 63-3613 in this case.

3. *State v. Barnes* (1999) – Supreme Court of Idaho

In *Barnes*, the court analyzed whether the defendant, Barnes, was properly charged under a statute prohibiting driving while intoxicated. There, Barnes was arrested for driving a snowmobile on the road while intoxicated and charged with violating Idaho Code Section 18-8004, the general motor vehicle statute that makes the offense a misdemeanor, and not Idaho Code Section 67-7110, the snowmobile operation statute that makes the offense an infraction. *State v. Barnes*, 133 Idaho 378, 384, 987 P.2d 290, 292-93, 296 (1999). After Barnes was charged, the legislature amended Idaho Code Section 67-7110 and made the snowmobile-specific offense a misdemeanor (like Idaho Code Section 18-8004).

After examining the definition of “motor vehicle” and other definitions, the Supreme Court of Idaho held that Barnes was properly charged under the general statute, even though she could have also been charged under the snowmobile specific statute. *Id.* at 384, 987 P.2d at 296. While it is not clear from the opinion, Barnes appears to have argued that she was only charged with the misdemeanor because of the legislature’s 1999 amendment to Idaho Code Section 67-7110 (the snowmobile specific statute). In addressing that concern the Court remarked:

[T]he 1999 Idaho Legislature amended Chapter 71, Title 67 of the Idaho Code to provide that the operation of a snowmobile or all terrain vehicle under the influence of alcohol, drugs or other intoxicating substance on a public roadway or highway shall be a misdemeanor. 1999 Idaho Sess. Laws Ch. 359 (House Bill 55, effective July 1, 1999). However, this enactment does not affect the outcome of the present case. This Court recently held that when the legislature enacts an amendment to an existing statute, it has done so to clarify, strengthen or make a change to an existing statute. [citing *Stonecipher*]. It is clear that by amending Chapter 71, Title 67 of the Idaho Code, the legislature intended to simply clarify and strengthen this chapter so that there would be no mistake that the operation of a snowmobile on a public roadway or highway while intoxicated results in the same legal consequences as the operation of any other motor vehicle while intoxicated, *i.e.*, a misdemeanor. Thus, the fact that the legislature has clarified the snowmobile statute does not mean that Barnes was improperly charged under I.C. § 18-8004.

Id.

While the Court ultimately relies upon the general statute to uphold the misdemeanor, the influence of the legislative change illustrates that the legislature desired a person who operated a snowmobile while intoxicated to be charged with a misdemeanor. To that end, *Barnes* reaffirms the general and often-cited rule in *Stonecipher* that an amendment made to clarify does not change the interpretation of the original statute, as that interpretation was deemed to be inclusive of the matters covered by the clarification, regardless of the date in which the statute became effective.

In this case, the reasoning behind the Amendment is already encompassed within the definition of “sale price” and the exclusions therefrom under Idaho Code Section 63-3613(b)(4) and/or (6). Thus, similar to *Barnes*, this the Amendment’s reasoning should be applied to the Gratuities because it is clear that by amending Idaho Code Section 63-3613, “the legislature intended to simply clarify [such section] so that there would be no mistake” that gratuities, such as the Gratuities, are not subject to the sales tax under Idaho Code 63-3613(b)(4).

4. *State v. Gillespie* (2013) – Court of Appeals of Idaho

In *Gillespie*, the Court of Appeals held that a 2012 statutory amendment referred to as a “clarification” did not change the meaning of the prior version of the statute applied to a crime committed (and charged) in 2008, notwithstanding the fact that the amendment did not become effective until July 1, 2012:

Gillespie asserts that the definition in former I.C. § 18-1507(2)(k) must not have included digitally produced or reproduced images because the term “digitally” was added to the statute in 2012. He reasons that because the legislature saw fit to add specific reference to digital images by the 2012 amendment, the legislature was acknowledging that digital images were not encompassed within the prior definition.

...

We are not persuaded. Contrary to Gillespie's argument, a change to the application or substantive meaning of a statute is not the only reason for legislative amendment; the legislature also makes amendments to clarify or strengthen the existing provisions of a statute. [citing *Stonecipher* and other sources]. Thus, the statutory amendment adding “digitally” to the definition of sexually exploitative materials does not inherently signify a legislative intent or belief that digital images were theretofore excluded from the statute.

State v. Gillespie, 155 Idaho 714, 718-19, 316 P.3d 126, 129-30 (Ct. App. 2013), review denied (Aug. 5, 2014). The Court thereafter relied upon the plain language of the 2008 version of the statute to determine that the prior version necessarily included the term “digitally,” even though the statute did not use the word and even though the amendment to Idaho Code Section 15-1507A did not become effective until July 1, 2012—four years after Gillespie was charged. *Id.* at 718, 316 P.3d at 129; 2012 Sess. Laws, Ch. 269, Sec. 2 (eff. July 1, 2012). Here, Chandlers seeks to have the underlying reasoning behind the Amendment applied to the Gratuities, for an Audit Period ending just before the effective date of the Amendment itself.

5. *Sutherland on Statutory Construction*

Notable treatises on statutory construction, while not primary authority, recognize there is a trend of courts finding that the original meaning of a statute is inclusive of the clarification.

For example, Sutherland on Statutory Construction states:

An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute. This has led courts to logically conclude that an amendment was adopted to make plain what the legislation had been all along from the time of the statute's original enactment.

1A SUTHERLAND ON STAT. CONST. § 22:31 (2015) (footnotes omitted).

* * *

Each of the above illustrates that Idaho Code Section 63-3613, as it existed in 2010, could reasonably be read to encompass the intent set forth in the Amendment, without regard to

the effective date of such Amendment. While the addition of Idaho Code Section 63-3613(f) by H.B. 213 became effective January 1, 2011, as illustrated by *Stonecypher, Pearl, Barnes, and Gillespie* above, this does not mean that the pre-2011 Idaho Code 63-3613(b)(4) and/or (6) did not already incorporate or otherwise encompass this concept, nor does it mean that the Court is prohibited from so ruling. Indeed, the purpose of a clarificatory amendment is primarily that—to make sure there is “no mistake” as to the proper meaning and interpretation of the statute to the Gratuities. Here, the enactment of H.B. 213 and the text of Idaho Code Section 63-3613(f) clarifies what the legislature meant in enacting Idaho Code Section 63-3613 in the first place, and what such Section contemplated all along—that gratuities such as the Gratuities should not, and are not, subject to a sales tax.

B. Because the plain language of the term “sales price” does not include the cost of services, and because the Gratuities reflect services rendered as part of the sale, such Gratuities are not subject to the sales tax.

The Gratuities are not subject to the sales tax because the term “sales price” specifically excludes services rendered as part of a sale. The Audit outcome and Final Decision primarily rests their conclusions on administrative rules. The plain meaning of all of such provisions, together with the relevant statutes, indicate that the Gratuities are not subject to sales tax because: (i) the definition of “sales price” under Idaho Code Section 63-3613(b)(4) specifically excludes amounts separately charged for services, such as the Gratuities; and (ii) the relevant administrative rules to which ISTC conflicts with Idaho Code Section 63-3613(b)(4) and other relevant administrative rules.

1. The plain meaning of the applicable pre-2011 statutes illustrate that the Gratuities are not subject to the sales tax.

The Gratuities are not subject to the sales tax because they are therefore not part of the applicable tax base. As already described above, Idaho Code Section 63-3613 states “The term

'sales price' does not include . . . [t]he "amount charged for labor or services rendered . . . provided that said amount is stated separately . . . [or] the amount charged for . . . service charges. . . ." I.C. § 63-3613(b)(4) and (6). The Final Decision incorrectly cited Idaho Code Section 63-3612 stating that "Based on this law and IDAPA 35.01.02.43.05 the charges for catered meals and associated services have long been included in the taxable sales price by [ISTC]." Final Decision, p. 3. This conclusion misapplies the relevant provisions discussed above, since Idaho Code Section 63-3612 does not assess the tax itself (Idaho Code Section 63-3619 does), but rather only describes transactions which *may* ultimately have a sales tax assessed upon them. The Gratuities were separately stated charges that reflected "labor or services" or other "service charges" performed in connection with Chandlers' sale of food or beverage to its customers. Consequently, the Gratuities fall within the exclusion from the definition of "sales price" under Idaho Code Section 63-3613(b)(4).

2. *While the 2010 Idaho Administrative Code would otherwise treat the Gratuities as indistinguishable from the goods sold, such provisions expand the Idaho Code's definition of "sales price" and directly conflict with other provisions of the Idaho Administrative Code.*

Notwithstanding the foregoing, the Decision also roots its position, in part, in two subparts to Idaho Administrative Code Section 35.01.02.43 (Idaho Administrative Code Section 35.01.02 being hereafter, "ISTC Rule"), which attempt to limit Idaho Code Section 63-3619(b)(4)'s exception of "labor or services" from the definition of "sales price" under: (i) ISTC Rule 43.04, defining gratuities, and (ii) ISTC Rule 43.05, defining service charges. These ISTC Rules state:

04. Gratuities. A gratuity is defined as something given voluntarily or beyond obligation. Gratuities may be sometimes referred to as tips.

- a. When a gratuity is given directly to employees by the purchaser in the form of cash or the purchaser adds a nonsolicited gratuity to his bill,

charge card voucher form, or house account form, no sales tax applies to the gratuity.

b. When an amount is added to a customer's bill by the retailer and the customer is advised in writing on the face of the bill that he may decline to pay all or part of the amount, that amount is a gratuity. Sales tax will not apply to the gratuity.

c. When an amount is added to a customer's bill by the retailer, and the customer is not advised in writing on the face of the bill that he may decline to pay all or part of the amount, it is not a gratuity and the fee so added is subject to the sales tax.

...

05. Service Charges. Amounts designated as service charges, added to the price of meals or drinks, are a part of the selling price of the meals or drinks and accordingly, must be included in the purchase price subject to tax. . . .

IDAPA § 35.01.02.043.04 to .05 (2010). During the course of the Audit and entrance of the Final Decision, ISTC reasoned that because Chandlers automatically added Gratuities to the certain customers' bills and provided no additional language regarding the elective nature of the gratuities, that the charge was not a "gratuity," but a "service charge" under Rule 43.05 above and therefore was subject to the sales tax.

Not only do the above Rules and the Final Decision attempt to change the broad exception for services performed in conjunction with the purchase of tangible personal property under Idaho Code Section 63-3619(b)(4) and (6) (whether classified as services or service charges), but it also conflicts with ISTC Rule 11.02(c), since the Gratuities are merely a "consequential element" of the underlying transaction, which can be and were actually "separately stated." According to ISTC Rule 11.02(c):

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

IDAPA § 35.01.02.11.02(c) (2010). Therefore, pursuant to ISTC Rule 11.02(c) the purchase of food and provision of services are two distinct transactions: the cost of food being attributable to the sale of tangible personal property and the Gratuity (the “other”) is not. *Id.*

Consequently, application of ISTC Rules 43.04 and 43.05 in this situation would be inconsistent with Idaho Code 63-3613(b)(4) and (6) and ISTC Rule 11.02, which clearly sets forth when charges for services (even “service charges”) performed in conjunction with the sale of tangible personal property falls within the statutory definition of “sales price.” Accordingly, the Gratuities should not be subject to the sales tax.

IV. CONCLUSION

Because (i) although not retroactively applied, the post-2011 statutory clarificatory amendments explicate the pre-2011 tax treatment of the Gratuities—that they are not subject to the sales tax, and (ii) the plain and unambiguous language of the applicable pre-2011 statutes illustrate that the Gratuities were not mandatory service charges, but rather gratuities not subject to the sales tax, Chandlers’ Motion for Summary Judgment should be granted.

DATED this 1st day of March, 2016.

GIVENS PURSLEY LLP


By: 

Clint R. Bolinder
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2016, I caused to be served a true and correct copy of the foregoing document to the person(s) listed below by the method indicated:

Erick M. Shaner	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
David B. Young	<input type="checkbox"/>	Express Mail
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Clint R. Bolinder

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Attorneys for Plaintiff

NO. _____
FILED _____
A.M. _____ P.M. _____

MAR 01 2016

CHRISTOPHER D. RICH, Clerk
By STACEY LAFFERTY
DEPUTY

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

CHANDLER'S-BOISE, LLC,

Plaintiff,

v.

IDAHO STATE TAX COMMISSION,

Defendant.

Case No. CV-OC-15-17617

AFFIDAVIT OF REX CHANDLER

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

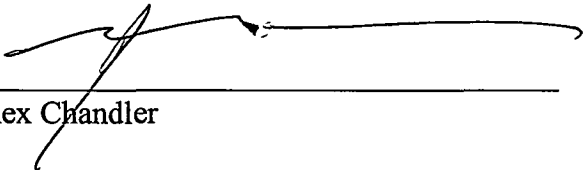
COMES NOW, Rex Chandler, your affiant, who being first duly sworn, deposes, states and avers as follows:

1. I reside in the state of Idaho. I make this affidavit based upon my personal knowledge and to the best of my information and belief.

2. I am the sole member and owner of Chandler's-Boise, LLC ("Chandlers") and oversee all aspects of the operations of Chandlers.

13

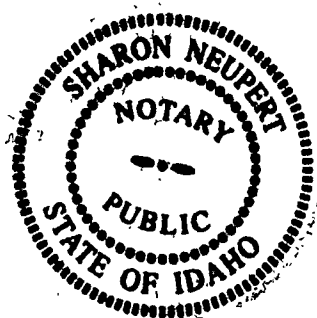
3. All "Gratuities" referenced in that certain Joint Stipulation of Facts submitted by the parties on January 29, 2016, in the above entitled case where paid exclusively to those employees of Chandlers who were directly involved in preparing or providing the meal to a customer, including, but is not limited to, the server, the busser and the bartender, as additional income to the base wages of such employees and no portion of such Gratuities were retained by Chandlers or otherwise paid to any person not directly involved in preparing or providing the meal to a customer.



Rex Chandler

SUBSCRIBED AND SWORN before me this 1st day of March, 2016.

Sharon Neupert
NOTARY PUBLIC FOR IDAHO
Residing at BOISE ID
Commission Expires FEB 22, 2019



CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2016, I caused to be served a true and correct copy of the foregoing document to the person(s) listed below by the method indicated:

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

CHANDLER'S-BOISE, LLC,

Plaintiff,

v.

IDAHO STATE TAX COMMISSION,

Defendant.

Case No. CV-OC-15-17617

**PLAINTIFF'S REPLY TO
DEFENDANT'S CROSS-MOTION
FOR SUMMARY JUDGMENT**

COMES NOW, Plaintiff Chandler's-Boise, LLC, an Idaho limited liability company ("Chandlers"), by and through its attorneys of record, Givens Pursley LLP, and hereby submits this Reply to Defendant's Cross-Motion for Summary Judgment dated March 1, 2016.

A. ISTC mischaracterizes Chandlers' argument to be that H.B. 213 and Idaho Code 36-3613(f) (2011) themselves should be applied to the gratuities at issue.

In its Memorandum in Support of its Cross-Motion for Summary Judgment (the "Memo"), the Idaho State Tax Commission ("ISTC") mistakenly argues that Chandlers' position is that the "changes made in 2011 should apply back in time to their Audit Period." Memo. p. 8 (Mar. 1, 2016). This is not Chandlers' position, but rather, that House Bill 213 (2011) merely clarified what Idaho Code Section 63-3613, as it existed during the relevant audit period, meant

all along—that gratuities, such as the gratuities at issue (“Gratuities”), are not subject to the Idaho sales tax. *See* 2011 Idaho Sess. Laws 628 (hereafter, the “Amendment”).

As more fully set forth in Chandlers’ Memorandum in Support of Motion for Summary Judgment, this interpretation can be made without regard to the retroactivity of the Amendment itself and without regard to the post-audit nature of the Amendment, pursuant to precedent set by the Supreme Court of Idaho and the Idaho Court of Appeals. *See, e.g., Stonecipher v. Stonecipher*, 131 Idaho 731, 963 P.2d 1168 (1998) (applying the reasoning behind a 1995 clarificatory amendment to a motion made before the applicable statute’s applicability, based on a 1988 statute); *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); and *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).

B. Idaho Code Section 63-3613 unambiguously supports Chandlers’ position that the Gratuities are not taxable.

Chandlers agrees with ISTC that the language of Idaho Code Section 63-3613 is plain. *See* Memo. p. 9. Nonetheless, contrary to ISTC’s position, Chandlers asserts that 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 ISTC failed to properly apply Idaho Code Section 63-3613 to the Gratuities. Nonetheless, this Court is not prohibited from examining the pre- and post-amendment Idaho Code Section 63-3613 and the legislature’s intent with respect thereto. *See Pearl*, 137 Idaho at 113-14, and 44 P.3d at 1168-69 (applying the reasoning of a clarificatory amendment without making a specific finding that the statute at issue was

ambiguous and noting that the legislature “responded to a possible ambiguity in the statute” by enacting the clarificatory amendment). As explained by the ISTC, “If the language of the statute is unambiguous, ‘the clear expressed intent of the legislature must be given effect’” Memo. p. 9 (quoting *Udy v. Custer County*, 136 Idaho 386, 388, 34 P.3d 1069, 1071 (2001)). 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 gratuities should not be subject to the sales tax.

C. The Text of House Bill 213 (2011) establishes that amendment to Idaho Code § 63-3613 was not a drastic change in policy, but rather, a clarification made to ensure ISTC correctly interpreted the statute, “just as always had been assumed.”

ISTC argues that notwithstanding the use of the word “clarify” (which is not merely an allegation, as ISTC argues, but a fact supported by the text of House Bill 213 (2011)), the Amendment reflected a drastic change in tax policy. Memo. p. 9. This position is advanced without providing any authority for the matter, and which directly conflicts with the purpose of a clarificatory amendment. *See, id.; Pearl v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 137 Idaho 107, 114, 44 P.3d 1162, 1169 (2002) (“the legislature responded to a possible ambiguity in the statute and wanted to ensure that hearing officers retained the power to conduct hearings, just as had always been assumed.”). As more fully set forth in Chandlers’ Memorandum in Support of Motion for Summary Judgment, the Supreme Court of Idaho and the Idaho Court of Appeals acknowledge the distinction between clarificatory amendment and other amendments. Although ISTC alleges that the Gratuities should be subject to the sales tax because ISTC has historically subjected such charges to the sales tax, such allegation is not supported by the record and, even if supported, does not mean that ISTC’s interpretation and application of the law is proper. *See* Memo. p. 8.

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D. ISTC’s excessive reliance on Idaho Code § 63-3612(2)(b) is misplaced because Idaho Code § 63-3612(2)(b) only defines “sale” and not “sales price”—the tax base for applying the sales tax.

Although the Gratuities may fall within the definition of a “sale” under Idaho Code § 63-3612(2)(b), this does not mean that the Gratuities are, in fact, subject to the Idaho sales tax. ISTC maintains its reliance upon Idaho Code § 63-3612(2)(b) to allege that the Gratuities are taxable, while failing to properly apply the relevant statutory provisions at issue. Memo. p. 5. 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 (2010) (titled “Imposition and Rate of the Sales Tax”). Idaho Code Section 63-3612(2)(b) does nothing other than to provide a definition of the term “sale” as used in the Idaho Sales Tax Act. *See, e.g.*, I.C. §§ 63-3602 through 6918 (setting forth the definitions of, inter alia, retail sale, retailer, sale, sales price, seller, tangible personal property, and the like).

ISTC is so transfixed on one element (i.e. definition of “sale”) that it glosses over another equally important element: “sales price.” ISTC essentially argues that because Idaho Code Section 63-3612(2)(b) references services performed in conjunction with the sale of food and beverage, this somehow invalidates or otherwise negates the broad exception of gratuities from “sales price” under Idaho Code Section 63-36913(b). Memo. p. 5. This position is unsupported. Absent a “sale” from falling within the definition of “sales price”, no “sale” can be subject to the sales tax. *See* Idaho Code Section 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”).

E. ISTC erroneously interprets Idaho Code § 63-3613(a) as including the Gratuities, when Idaho Code § 63-3613(b) specifically excludes charges attributable to “services rendered in . . . applying the property sold” and “service charges”.

Although ISTC justifies its position by arguing that Idaho Code Section 63-3613(a)(2)—the broad definition of “sales price”—applies since it includes “labor or service costs”, it does

not apply subpart (b) of that same section because “(b)(4) speaks to the common example of, for instance, a customer buying a home refrigerator.” Memo. pp. 5-6. 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” since such charges represent “[t]he amount charged for labor or services rendered in installing or applying the property sold . . .” and “[t]he amount charged for 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). Here the Gratuities were separately stated charges incurred on account of applying the property sold and/or service charges, which are excepted from the definition of “sales price” under Idaho Code § 63-3613(b).

F. Chandlers’ manager’s post-audit email is unresponsive of and irrelevant to ISTC’s position that the Gratuities are taxable.

Chandlers’ general manager’s post-audit email regarding compliance with the law and collection of tax on gratuities is unresponsive of and irrelevant to ISTC’s position because the economic burdens of the tax, incorrect as it is, is not on Chandlers to the extent it collects the sales tax from its customers. Memo. pp. 2-3; I.C. § 63-3619(b) (the sales tax “shall be collected by the retailer from the consumer”). Thus, disregarding any additional administrative burden, collection of a sales tax on the Gratuities was without additional cost to Chandlers. Furthermore, a layperson’s opinion regarding the interpretation or application of the law is not dispositive on the issue. See *Alholm v. O’Bryan Law Ctr., P.C.*, No. CIV. 98-1987 JRT/RLE, 2000 WL 1196202, at *6 (D. Minn. Mar. 27, 2000) (“because Mrs. Alholm is a layperson, and is not an attorney or trained in the law, and since the existence of an attorney-client relationship is a question of law, any subjective belief, on her part, as to whether an attorney-client relationship

existed, cannot be dispositive on the issue.”). Finally, subsequent remedial measures are inadmissible to prove culpable conduct. Idaho R. Evid. 407.

* * *

For the reasons set forth above, this Court should deny ISTC’s Cross-Motion for Summary Judgment.

DATED this 22nd day of March, 2016.

GIVENS PURSLEY LLP

By: 

Clint R. Bolinder
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 2016, I caused to be served a true and correct copy of the foregoing document to the person(s) listed below by the method indicated:

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MAR 22 2016

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

CHANDLERS-BOISE, LLC)
)
 Petitioner,)
)
 v.)
)
 IDAHO STATE TAX COMMISSION,)
)
 Respondent.)
 _____)

CASE NO. CV-OC-15-17617

REPLY MEMORANDUM IN
SUPPORT OF IDAHO STATE TAX
COMMISSION'S MOTION FOR
SUMMARY JUDGMENT

ORIGINAL

I.

INTRODUCTION

The Idaho State Tax Commission (Commission) submits this memorandum in response to Chandlers-Boise, LLC's (Chandlers) Memorandum in Support of Motion For Summary Judgment filed with the Court on March 1, 2016. This memorandum, along with the Commission's initial memorandum filed on March 1, 2016, addresses the arguments set out by Chandlers, and also supports the Commission's position that the sales tax transactions at issue are taxable.

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II.

DISCUSSION

A. The Tax Commission Correctly Determined That Gratuities Are Subject To Taxation; Petitioner's Alternative Theory Using Idaho Code § 63-3613(b)(4) and (6) Is Incorrect.

The Commission is not aware of Idaho Code § 63-3613(b)(4) and (b)(6) ever being applied or interpreted, by any court, the Board of Tax Appeals, or the Commission, to apply to food service. As discussed later in this brief, the plain language of Idaho Code § 63-3613(b)(4) and (b)(6) has no applicability to food service, but instead clearly and unambiguously applies to installation services and financial service transactions respectively. Because the statute plainly did not apply to food service prior to the changes to Idaho Code § 63-3613(f) by the Idaho Legislature (2011 Amendment or Amendment), the Amendment cannot be considered as merely “clarifying” pre-existing law, but significantly and substantially changing longstanding law. *See*, 2011 Idaho Sess. Laws 628.

Petitioner argues that Gratuities (the term “Gratuity” in the memorandum refers to amounts, tips, fees, or service charges automatically added to a customer’s bill by the service provider of a meal, when the customer is not advised in writing on the face of the bill that she may decline to pay all or part of the added amount) do not fall within the definition of “sales price” under Idaho Code § 63-3613, because Idaho Code § 63-3613(b)(4) and (b)(6) specifically exempts the Gratuities from the definition of “sales price.” However, Idaho Code § 63-3613(b)(4) and (6) state, in relevant part:

The term “sales price” **does not include** any of the following:

- ...
4. The amount **charged for labor or services** rendered in **installing or applying** the property sold, provided that said amount is stated separately and such separate statement is not used as a means of avoiding imposition of this tax upon the actual

sales price of the tangible personal property; except that charges by a **manufactured homes dealer for set up of a manufactured home shall be included in the "sales price" of such manufactured home.**

6. The amount charged for **finance charges, carrying charges, service charges, time-price differential, or interest on deferred payment sales,** provided **such charges** are not used as a means of avoiding imposition of this tax upon the actual sales price of the tangible personal property.

Idaho Code § 63-3613(b)(4) and (6) (emphasis added).

Chandlers argues that Gratuities represent amounts “charged for labor or services” or “service charges” respectively. *Id.*

Petitioner’s line of reasoning is not correct. As the Idaho Supreme Court noted in Sanchez v. State, Dep't of Correction, 143 Idaho 239, 242, 141 P.3d 1108, 1111 (2006):

Administrative regulations are subject to the same principles of statutory construction as statutes. The language of either should be given its plain, obvious and rational meaning. In other words, if the language is clear and unambiguous, the Court need not engage in any statutory construction. “Only where the language is ambiguous will this Court look to rules of construction for guidance and consider the reasonableness of proposed interpretations.”

(internal citations omitted).

Gratuities do not represent amounts “charged for labor or services” in the context of Idaho Code § 63-3613(b)(4). Instead, Idaho Code § 63-3613(b)(4) speaks to the common example of, for instance, a customer buying a home refrigerator. As long as the installer separately states the labor or services to install the refrigerator separate from the price of the refrigerator, only the refrigerator will be taxable.

Per Idaho Code § 63-3613(b)(4), a restaurant server would not normally describe their job in terms of “installing or applying” food. Such a usage is nonsensical. Petitioner’s interpretation stifles the true meaning of this section. When read in its entirety, the section is plainly applicable to activities consistent with the Commission’s rule relating to “installing or

applying” property sold as such is found in IDAPA 35.01.02.014.05 through .06, where installation of not built-in microwave ovens, freestanding stoves, refrigerators, etc. are covered. The “services rendered” in Idaho Code § 63-3613(b)(4) has no applicability to restaurants or gratuities.

Likewise, Idaho Code § 63-3613(b)(6) is similarly misapplied. Petitioner appears to have ignored all the words of Idaho Code § 63-3613(b)(6), except for “service charges.” However, as with most statutes, two words rarely dictate the meaning of the entire provision. Thus, when encountering the phrase “service charges” in a list of phrases referring to finance or bank related charges, the meaning of “service charges” is not ambiguous.

Even if it were ambiguous, the statutory maxim *ejusdem generis* would dictate that “service charges” refers to similar financial charges. In the statute the words “such charges” are defined by the specifically enumerated related financial related words preceding “such charges.” In Sanchez v. State, Dep't of Correction, 143 Idaho 239, 244, 141 P.3d 1108, 1113 (2006), the Idaho Supreme Court stated, “Where general words of a statute follow an enumeration of persons or things, such general words will be construed as meaning persons or things of like or similar class or character to those specifically enumerated.” The “service charges” in Idaho Code § 63-3613(b)(6) do not have application in the context of restaurants or gratuities.

Additionally, the Commission specifically notes in the rule in IDAPA 35.01.02.043.03 relates to Idaho Code § 63-3613(b)(6):

03. Charges Not Included. Sales price does not include charges for interest, carrying charges, amounts charged for optional insurance on the property sold, or any financing charge. These various charges may be deducted from the total sales price if they are separately stated in the contract. In the absence of a separate statement, it will be presumed that the amount charged is part of the total sales price. (3-20-04)

Mixed Transaction Argument

Petitioner then claims that IDAPA 35.01.02.011.02.c. should be followed, rather than IDAPA 35.01.02.043.04 through 05. This argument is incorrect. IDAPA 35.01.02.011.02 reads:

02. Retail Sales of Tangible Personal Property Together with Services. The sales tax applies to retail sales of tangible personal property. It does not apply to the sale of services except as stated above.

Such services “stated above” in 01.c. are: “Furnishing, preparing or serving food, meals or drinks for compensation. **See Rule 041 for these rules.**”

In part of that Rule, IDAPA 35.01.02.041.02., we read:

Commercial Establishments. Sales tax is imposed on the amount paid for food, meals, or drinks furnished by any restaurant, cafeteria, eating house, hotel, drugstore, diner, club, or any other place or organization regardless of whether meals are regularly served to the public. (7-1-93).

IDAPA 35.01.02.043.04 through 05. (emphasis added), further provide that:

04. Gratuities. A gratuity is defined as something given voluntarily or beyond obligation. Gratuities may sometimes be referred to as tips. (7-1-93)

...

c. When an amount is added to a customer’s bill by the retailer, and the customer is not advised in writing on the face of the bill that he may decline to pay all or part of the amount, it is not a gratuity and the fee so added is subject to the sales tax. (7-1-93)

d. When a gratuity is negotiated before the sale, such as in the case of a banquet, tax must be charged on the entire fee so negotiated. Because of the negotiation, the fee loses its identity as a gratuity and becomes a service charge and part of the purchase price of the meal. See Subsection 043.04 of this rule. (7-1-93)

05. Service Charges. Amounts designated as service charges, added to the price of meals or drinks, are a part of the selling price of the meals or drinks and accordingly, must be included in the purchase price subject to tax, even though such service charges are made in lieu of tips and paid over by the retailer to his employees. (7-1-93)

IDAPA 35.01.02.011.02 and 01.c. and 043.04 through .05 govern the Gratuities in question. Petitioner's mixed transaction theory under IDAPA 35.01.02.011.02(c) is creative, but contrary to the law and facts of this case. Further, the examples of mixed transactions provided by IDAPA 35.01.02.011.03 demonstrate that the mixed transactions were not contemplated under this rule to apply to restaurants or meal service:

03. Determining the Type of Sale. To determine whether a specific sale is a sale of tangible personal property, a sale of services or a mixed transaction, all the facts surrounding the case must be studied and the tests described above must be applied. Here are some examples. (7-1-93)

- a.Example 1: An attorney is retained by a client to prepare his will....
- b.Example 2: The attorney in Example 1 prepares a form book of wills which he intends to sell to other attorneys... .
- c.Example 3: An architect is hired to prepare construction plans for a house....
- d.Example 4: The architect in Example 3 is asked to provide additional copies of the same plans to his original client or to a third party....
- e.Example 5: An artist is commissioned to paint an oil portrait
- f.Example 6: An automobile repair shop does repair work for a customer....
- g.Example 7: A retail clothing store provides needed alterations to items purchased by customers....

None of the preceding mixed service transactions refer to restaurant or food service operations. Again, other provisions of the Commission's rules apply as set out in this memorandum.

Even if the statutes were ambiguous, IDAPA 35.01.043.04 through .05 were added in November 11, 1989, with the amendment of Tax Commission Regulation 13,1.c.iii., which became IDAPA 350.01.043.04 through .05, with the cumulative statewide publication of the administrative code in 1993. To apply a different interpretation than the longstanding application by the Commission would be an entirely new creation of law. In 1989, over twenty-six years ago, the Rule read as follows:

REGULATION 13,1. Sales Price or Purchase Price Defined.—
(Amended 11/09/89)

...

b. Sales price does not include charges for interest, carrying charges, amounts charged for insurance on the property sold, or any financing charge. These various charges may be deducted from the total sales price if they are separately stated in the contract. In the absence of a separate statement, it will be presumed that the amount charged is part of the total sales price.

c. Gratuities.--A gratuity is defined as something given voluntarily or beyond obligation. Gratuities may sometimes be referred to as tips.

...

iii. When an amount is added to a customer's bill by the retailer, and the customer is not advised in writing on the face of the bill that he may decline to pay all or part of the amount, it is not a "gratuity" and the fee so added is subject to the sales tax.

...

d. Service Charges.--Amounts designated as service charges, added to the price of meals or drinks, are a part of the selling price of the meals or drinks and accordingly, must be included in the purchase price subject to tax, even though such service charges are made in lieu of tips and paid over by the retailer to his employees.

IDAPA 35.02.13,1.a.iii. (emphasis in the original).

Furthermore, when the Sales Tax Act initially became law in Idaho in 1965, the then House Revenue and Taxation Committee (Committee) issued a special report to assist in the interpretation of the new Act. The report of that Committee contained guidance to interpret the new Act. The following guidance was given for Idaho Code § 63-3612(b):

In the absence of specific provision, furnishing meals or drinks might be considered the furnishing of services; to avoid contention in this area, this function is defined as a sale for the purpose of this act.

House Revenue and Taxation Committee Report in Support of House Bill 222, May 14, 1965, p. 10.

This guidance specifically speaks to the facts here, where the Petitioner failed to notify that the service charges could be declined in all or in part they were part of the sale and taxable.

Likewise, the Committee's guidance on Idaho Code § 63-3613(b)(4) relates to installation in the building construction context as follows:

As explained in section 13(a) above, if there are services performed incidental to the sale of property, the sales price would normally include the amount charged for rendering such services. If, however, the bill submitted to the customer separately states a charge for labor or services, the sales tax will be imposed only on the gross price less the amount charged for services. If a furnace is sold to a customer for \$1,500.00 and the gross price includes an amount charged for installation of the furnace, the sales tax will only be imposed on the amount charged for the property sold, the furnace, and will not be imposed upon the charge made for labor or services as part of the gross price, if these are set forth separately in the bill delivered to the customer. In determining the charge made for material which is installed in this manner, the retailer will be expected to include in the price his normal markup and not use this as a means of avoiding imposition of the tax upon the actual transaction.

House Revenue and Taxation Committee Report in Support of House Bill 222, May 14, 1965, p. 16.

Likewise again, the Committee's guidance on Idaho Code § 63-3613(b)(6) related to financial transactions is as follows:

Charges which essentially are imposed to finance credit transactions may be deducted from the total sales price if they are separately stated and designated as such in the contract.

House Revenue and Taxation Committee Report in Support of House Bill 222, May 14, 1965, p. 17.

Here, the Gratuities are not subject to the test set out in Idaho Code § 63-3613(b)(4) or (b)(6). That is because Idaho Code § 63-3612(2)(b) clearly and expressly resolves that “[f]urnishing, preparing, or serving food, meals, or drinks and nondepreciable goods and services directly consumed by customers included in the charge thereof,” such as Gratuities, are taxable. (emphasis added).

Consistent therewith, IDAPA 35.01.02.043.04 and .05 provide a bright line test that if the bill for the food does not give the customer the option in writing to decline or pay all or part of the Gratuities, then the Gratuities are taxable as being included in the charge for the food:

04. Gratuities...

...

(c) When an amount is added to a customer's bill by the retailer, and the customer is not advised in writing on the face of the bill that he may decline or pay all or part of the amount, it is not a gratuity and the fee so added is subject to the sales tax.

05. Service Charges. Amounts designated as service charges, added to the price of meals or drinks, are a part of the selling price of the meals or drinks and accordingly, must be included in the purchase price subject to tax, even though such service charges are made in lieu of tips and paid over by the retailer to his employees.

IDAPA 35.01.02.043.04 through .05 (emphasis added). Insofar as Petitioner's argument in Idaho Code § 63-3613 is concerned, the following statutory language is applicable:

(a) The term "sales price" means the total amount for which tangible personal property, **including services agreed to be rendered as a part of the sale,** is sold, rented or leased, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:

...

2. The cost of materials used, **labor or service cost,** losses, or any other expense.

The plain meaning of Idaho Code § 63-3613(b)(4) and (b)(6) are unambiguous. As the Idaho Supreme Court in *Farmers Nat. Bank v. Green River Dairy, LLC*, 155 Idaho 853, 856, 318 P.3d 622, 625 (2014) stated:

. . . ambiguity is not established merely because different possible interpretations are presented to a court. If this were the case then all statutes that are the subject of litigation could be considered ambiguous.... [A] statute is not ambiguous merely because an astute mind can devise more than one interpretation of it.

To our knowledge, Idaho Code § 63-3613(b)(4) and (b)(6) have never been applied to a restaurant or food service operator by the Commission in any Tax Commission administrative bulletin, rule, guidance, or decision. Similarly, Idaho Code § 63-3613(b)(4) and (b)(6) have never been interpreted to include a restaurant or food service operator by the Board of Tax Appeals or any court in Idaho. The framework of the Sales Tax Act and Commission's rules as described in this memorandum remove any doubt as to the meaning of the statutes in question supporting the Commission's arguments.

Petitioner seeks to find ambiguity when there is none. The terms "services" and "service charges" cannot be plucked from the Idaho Code § (b)(4) and (b)(6) without analyzing the statute as a whole. As the Idaho Supreme Court stated in Ameritel Inns, Inc. v. Pocatello-Chubbuck Auditorium or Cmty. Ctr. Dist., 146 Idaho 202, 204, 192 P.3d 1026, 1028 (2008):

The interpretation of a statute is a question of law over which this Court exercises free review. The object of statutory interpretation is to give effect to legislative intent. The literal words of the statute provide the best guide to legislative intent, and therefore, the interpretation of a statute must begin with the literal words of the statute. "In determining the ordinary meaning of a statute 'effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant.'" Moreover, the Court must consider all sections of applicable statutes together to determine the intent of the legislature.

(internal citations omitted.) See also, *State v. Schulz*, 151 Idaho 863, 866-67, 264 P.3d 970, 973-74 (2011), and *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 310, 208 P.3d 289, 292 (2009).

The charges for Gratuities, since the adoption of the Idaho sales tax in 1965, have been included in the charge for food per Idaho Code § 63-3612(2)(b) and as part of the taxable sale transaction by the State of Idaho.

Tax Exemptions Are Strictly Construed

IDAPA 35.01.02.43.04 and .05 draw a bright line of taxability. Absent any wording informing customers of their right to decline or pay all or part of the amount, the Gratuities are subject to sales tax.

The original statutes and amendment in Idaho Code § 63-3613(f) upon which Chandlers relies are exemptions from sales tax. The Statement of Purpose to HB 230 in 2011 that resulted in Idaho Code 63-3613(f)(emphasis added), reads, “Adds 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.” The Idaho Supreme Court in *Jayo Dev., Inc. v. Ada Cty. Bd. of Equalization*, 158 Idaho 148, 154 (2015) stated that:

“[t]ax exemptions are disfavored generally, perhaps because they seem to conflict with principles of fairness—equality and uniformity—in bearing the burdens of government.” *Id.* (quoting *In re Sunny Ridge Manor, Inc.*, 106 Idaho 98, 102, 675 P.2d 813, 817 (1984)). Thus, “[s]tatutes granting tax exemptions are strictly construed against the taxpayer and in favor of the State.” *Id.* Further, tax exemptions are to be “narrowly construed” and the “taxpayer must show a clear entitlement to an exemption, as an exemption will never be presumed.” *Id.*

This is yet another reason to uphold the Commission’s Decision in this matter.

B. The Legislature’s Significant Change In Idaho Code § 36-3613(f) Does Not Change Prior Law

Chandlers does not cite to any case where a statute with a specific retroactivity clause is applied beyond the date so specified. Instead, all the scenarios in the cases used by Chandlers clarify the law by strengthening the originally enacted law to which the amendments relate. In this matter, Chandlers asks the Court to use the amendment to Idaho Code § 63-3613(f) not to clarify or strengthen pre-existing law, but instead to change pre-existing law. Chandlers’ cases as argued do not assist the Court in addressing the facts and law in this matter.

Chandlers argues that the Statement of Purpose includes the word “clarify” and that means that the Amendment should be applied retroactively. However, retroactivity was expressly declared only to January 1, 2011 in the Amendment creating Idaho Code § 63-3613(f). The literal wording in a statute controls. In *Verska v. Saint Alphonsus Regional Medical Center*, 151 Idaho 889, 892 – 893, 265 P.3d 502, 505-506 (2011) (emphasis added), the Court stated, **“The asserted purpose for enacting the legislation cannot modify its plain meaning. . .”** *Viking Constr., Inc. v. Hayden Lake Irr. Dist.*, 149 Idaho 187, 191–92, 233 P.3d 118, 122–23 (2010).

An amendment to a statute is presumed to change existing law. The Idaho Supreme Court in *Intermountain Health Care, Inc. v. Bd. of Cty. Comm'rs of Madison Cty.*, 109 Idaho 685, 687, 710 P.2d 595, 597 (1985), held that,

“When a statute is amended, it is presumed that the legislature intended the statute to have a meaning different from that accorded the statute before amendment.”

See also, State v. Reed, 154 Idaho 120, 123, 294 P.3d 1132, 1135 (2012); *Woodvine v. Triangle Dairy, Inc.*, 106 Idaho 716, 721, 682 P.2d 1263, 1268 (1984).

Per the Court in *A & B Irr. Dist. v. Idaho Dep't Of Water Res.*, 153 Idaho 500, 508, 284 P.3d 225, 233 (2012), pursuant to Idaho Code § 73-101,

“[n]o part of these compiled laws is retroactive, unless expressly so declared.’ This tenet of statutory construction extends to statutory amendments. *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 609, 614, 747 P.2d 18, 23 (1987) (holding that it is a long standing rule of this jurisdiction that an amendment to an existing statute will not be held to be retroactive in application absent an express legislative statement to the contrary).

However, where a statute specifically creates a retroactive application as it has in this case, such legislative intent prevails. *Id.*

The treatment of tips or services charges in relation to Gratuities is a long established principle of law stemming from the 1965 enactment of the Sales Tax Act and evidenced by the

1989 enactment of the rule that continued to the 2011 Amendment. “The legislature is presumed not to intend to overturn long established principles of law unless an intention to do so plainly appears by express declaration or the language employed admits of no other reasonable construction.” George W. Watkins Family v. Messenger, 118 Idaho 537, 540, 797 P.2d 1385, 1388 (1990) abrogated on different grounds by Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 265 P.3d 502 (2011) (citing Doolittle v. Morley, 77 Idaho 366, 292 P.2d 476 (1956)); McCann v. McCann, 138 Idaho 228, 236, 61 P.3d 585, 593 (2002).

Where the statute specifically provides for a retroactive application to a certain date, to infer that the amendments were merely clarificatory or strengthened pre-existing law are groundless and frivolous.

Chandlers’ Reliance on the Four Idaho Cases It Cites Is Misplaced

Chandlers refers to four cases. Their facts and legal circumstances as asserted by Petitioner are not helpful to the analysis in this matter.

Stonecipher

In Stonecipher v. Stonecipher, 131 Idaho 731, 963 P.2d 1168 (1998), a wife was trying to collect ordered child support payments from her ex-husband. *Id.* At the time of the divorce in 1979, the wife was required to bring an action within six years of the entry of a judgment or decree per I.C. § 5-215 to enforce child support payments. Stonecipher, at 735, 963 P.2d at 1172. “In 1988, however, the legislature significantly expanded the six-year statute of limitation to allow for an action or proceeding to collect child support arrearages accrued under a support order within five years after the child reaches the age of majority” per Idaho Code § 5-245. *Id.*

Contrary to Chandlers’ assertion, Stonecipher here supports the Commission’s argument. The Court in Stonecipher only allowed the wife to collect accrued child support payments dating

from the 1988 enactment forward. *Id.* The 1988 enactment was not applied retroactively. In 1995, the following sentence was added to Idaho Code § 5-245, “An action or proceeding under this section shall include, but is not limited to, execution on the judgment, order to show cause, garnishment, income withholding, income tax offset or lottery prize offset.” The husband in *Stonecipher* argued that since the words “order to show cause” were added in 1995, that an “order to show cause” was not included originally as “an action or proceeding” and thus the wife’s motion for an order to show cause could not be allowed because the 1995 amendment could not be applied retroactively. *Id.* The Court held that the “magistrate correctly interpreted the statute as originally enacted to benefit” the wife. *Id.* The addition of the words “order to show cause” in 1995 merely strengthened the application and intent of the statute.

Petitioner’s reliance on *Stonecipher* is misplaced. There, the “clarifying” amendment consisted of one sentence the court described as “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. Here, the Amendment was not an illustrative list or addition to an existing subpart. Instead, it created a new taxpayer right. Prior to the Amendment, there was no mention of meals, tips or gratuities in Idaho Code § 63-3613. The Amendment had nothing to “clarify” when enacted; instead, it created a new exemption, in sharp contrast to the illustrative list from *Stonecipher*.

Pearl and Gillespie

Petitioner also mentions *Pearl v. Board of Prof'l Discipline of Idaho State Bd. Of Med.*, 137 Idaho 107, 44 P.3d 1162 (2002). *Pearl* deals with whether an amendment to law could be used to show that an earlier law had the same meaning or a different meaning other than the amendment. In *Pearl*, a doctor was under review for violating the standard of care in her

medical practice. *Pearl*, 137 Idaho at 111, 44 P.3d at 1166. A non-physician hearing officer conducted a hearing in her case. *Id.* The Board of Professional Discipline's standard practice for some time had been to use non-physician hearing officers, and appellate court decisions had even been rendered in Idaho cases where non-physician hearing officers had been used. *Pearl*, 137 Idaho at 112, 44 P.3d at 1167. Upon the Board of Professional Discipline finding violations of the standard of care, Pearl appealed to district court. *Pearl*, 137 Idaho at 111, 44 P.3d at 1166.

While the appeal was pending, the Idaho legislature revised the controlling statute and specifically provided for the Board's standard hearing officer practice. *Id.* Pearl argued that since the Legislature had made the amendment, the law at the time of her hearing could not have allowed non-physician hearing officers to conduct hearings. *Pearl*, 137 Idaho at 112 – 113, 44 P.3d at 1167 – 1168. This is essentially the same argument made by the defendant in *State v. Gillespie*, 155 Idaho 714, 316 P.3d 126 (2013) (where a criminal defendant was convicted under a statute that later was amended and the later amendment specifically dealt with the facts in the defendant's case, the defendant argued that the later amendment showed the earlier statute did not contemplate the crime under which defendant was convicted). The *Pearl* Court first held that the statute in existence at the time of the hearing in question allowed for non-physician hearing officers and that no conflict exists between it and the new statute specifically allowing non-physician hearing officers. *Pearl*, 137 Idaho at 112 -113, 44 P.3d at 1167 – 1168; see also *Gillespie*, 155 Idaho at 718, 316 P.3d at 130 (where the Court also ruled that the statute in existence at the time of the alleged conduct provided criminal penalties for the conduct and the new amendments were not in conflict).

Next, the *Pearl* Court ruled that the Board of Professional Discipline had also correctly interpreted the statute to allow for the use of non-physician hearing officers. *Pearl*, 137 Idaho at

113, 44 P.3d at 1168. Lastly, the *Pearl* Court also held that the new statute resolved any ambiguity that existed and made it certain that non-physician hearing officers could be used. *Pearl*, 137 Idaho at 114, 44 P.3d at 1169; see also *Gillespie, Id.* (where the Court ruled the new amendment strengthened or existing application of the law).

As in *Pearl* and *Gillespie*, the law at the time of the tax transactions in question in this Chandlers matter supported the taxability of Gratuities. The Commission under Chandlers' facts correctly interpreted and applied the law with IDAPA 35.01.02.043.01.04 through 05. However, here is where the facts in *Pearl* and *Gillespie* are different than those here. In *Pearl* and *Gillespie*, the statutory amendments strengthened the pre-existing law. The 2011 Amendment in this Chandlers matter clearly conflicts with the pre-existing law and gives an entirely new meaning and also a new right to an exemption. Thus, as held in *Pearl*, "[i]t is a well established rule of this court that 'where an amendment is made it carries with it the presumption that the legislature intended the statute thus amended to have a meaning different than theretofore accorded it.'" *Pearl*, 137 Idaho 113, 44 P.3d 1168. The facts in *Pearl* and *Gillespie* are different from the facts in this matter and thus the cases as argued by Petitioner do not assist the Court.

Barnes

Chandlers also uses *State v. Barnes*, 133 Idaho 378, 987 P.2d 290 (1999), for similar purposes as the other cases of *Stonecipher*, *Gillespie*, and *Pearl*. In *Barnes*, the defendant challenged her conviction for the operation of a snowmobile while intoxicated. *Barnes*, 133 Idaho at 380, 987 P.2d at 292. When the operation of the snowmobile in question occurred in February of 1997, two different statutes addressed the operation of a snowmobile while intoxicated. *Id.* One statute was a general statute applying to all motor vehicles that provided for a misdemeanor charge and the other was a statute which specifically addressed snowmobiles

and provided for an infraction penalty. *Id.* Barnes argued that she should only be charged under the infraction statute and not the misdemeanor statute. *Id.* The Court ruled that she was correctly charged and convicted under the misdemeanor statute. *Barnes*, at 380 – 384, 987 P.2d 292 – 296.

The Court then addressed that the misdemeanor statute was later amended in 1999 to specifically include snowmobiles. *Barnes*, at 384, 987 P.2d 296. Citing *Stonecipher*, the Court ruled that it was clear that the legislature was only clarifying or strengthening the statute so that there would be “no mistake” that the misdemeanor statute applied to snowmobiles. *Id.* The Court wanted to dispel the argument that the amendment should be read as a change to the law as opposed to a clarification or strengthening of how the law had been applied.

Again, the facts in *Barnes* are entirely different from the facts of this case. The law had been applied by the Commission since 1965 to tax the Gratuities. The rule was put into place in 1989. The Court under Chandlers’ facts in this matter would not be clarifying or strengthening law, if it ruled that the 2011 Amendment changed the pre-existing law. The *Barnes* case is inapplicable in that, there the Court was ratifying how the law was applied, whereas here Chandlers wishes to nullify the actions of the Commission and its long held application of the law. In order to do so, a court cannot recognize a retroactive effect without clear legislative intent.

Here, the 2011 Amendment’s specific retroactivity date cannot be ignored. “[I]n Idaho, a statute is not applied retroactively unless there is ‘clear legislative intent to that effect.’” *Gailey v. Jerome County*, 113 Idaho 430, 432, 745 P.2d 1051, 1053 (1987) (quoting *City of Garden City v. City of Boise*, 104 Idaho 512, 515, 660 P.2d 1355, 1358 (1983)).

The Idaho Supreme Court's Recent Ruling In Jayo

In *Jayo Dev., Inc. v. Ada Cty. Bd. of Equalization*, 158 Idaho 148, 153, 345 P.3d 207, 212 (2015), a 2013 amendment to Idaho Code § 63–602W expressly stated that it was to be applied only “retroactively to January 1, 2013.” The Idaho Supreme Court stated, “[h]ad the legislature wished for the amendment to apply retroactively to the 2012 tax year, the legislature could have done so. It did not.” *Jayo*, 158 Idaho at 154, 345 P.3d at 213. So it is with the 2011 Amendment in this case. The legislature did not wish for it to relate back any further than January 1, 2011, and so it does not apply to the transactions at issue in this case. Further, the Court reasoned,

We do not look to or apply the 2013 amendment of Idaho Code section 63–602W to Jayo Development's 2012 property tax exemption application. The district court correctly concluded that Jayo Development was not entitled to the exemption based on the plain and unambiguous language of the 2012 statute.

Id. In *Jayo*, the court did not retroactively apply the amendment and ignore the express intent of the legislature. Here, the same logic applies, the legislature expressly set a retroactivity date, had they wanted the amendment to apply to the earlier tax years in question here, they could have done so. Because the 2011 Amendment changed, rather than merely strengthened the application of existing law, and more importantly contained a specific retroactivity date, the Court is confined to look at the plain meaning of the statutes.

If the legislature wanted to merely clarify or strengthen existing law, it would not have added a new section as it did by adding (f). Instead it would have added wording to the provisions of Idaho Code §§ 63-3613(b)(4) and (b)(6) if such was the intent. The Legislature did not *clarify or strengthen* pre-existing law, it enacted the 2011 Amendment to change the law in a completely opposite direction. A clear retroactive intent is required. It existed here only to January 1, 2011 per the plain words of the statute.

Chandlers is asking the Court to change the meaning of the Idaho Code § 63-3616(f)

retroactivity provision and as though it does not exist and give it no meaning. As explained in *Farmers Nat. Bank v. Green River Dairy, LLC*, 155 Idaho 853, 856, 318 P.3d 622, 625 (2014),

. . . ambiguity is not established merely because different possible interpretations are presented to a court. If this were the case then all statutes that are the subject of litigation could be considered ambiguous.... [A] statute is not ambiguous merely because an astute mind can devise more than one interpretation of it.

Statutes prior to the Amendment in 2011 are unambiguous. The 2011 Amendment is unambiguous. The Gratuities in question were taxable before the Amendment, but not after.

III.

COSTS AND ATTORNEY'S FEES

The Tax Commission requests that the Court award it costs and attorney's fees pursuant to I.R.C.P. 54(e)(1). Petitioner's arguments are frivolous and groundless. Chandlers may have believed and hoped the 2011 Amendment changed prior law, but it did not per the plain words of the statute. As explained above, this case is very similar to *Jayo*, cited above, where costs and attorney's fees were awarded. Idaho Code § 63-3613(f) retroactivity is specific and precise to January 1, 2011. Additionally, Petitioner's arguments regarding Idaho Code 63-3614(b)(4) and (6) are like the arguments in *Jayo*. They are clever, but entirely new and inconsistent with the interpretation and application of the law in place at the time of the transactions in question. In fact, Petitioner's arguments for how the law applied prior to 2011 is before now, an unknown interpretation of the sales tax code and rules. The Commission requests attorneys' fees and costs as requested in the Commission's Answer per Idaho Code §§ 63-3049, 12-117, 12-121, and any other applicable law.

IV.

CONCLUSION

The transactions in question are taxable. For this and the other reasons, the Tax Commission respectfully requests that the Tax Commission's motion for summary judgment be granted and that Petitioner's motion for summary judgment be denied.

DATED this 22ND day of March, 2016.



ERICK M. SHANER
DEPUTY ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March 2016, I caused to be served a true copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF IDAHO STATE TAX COMMISSION'S MOTION FOR SUMMARY JUDGMENT** by the method(s) indicated below, and addressed to each of the following:

CLINT BOLINDER
GIVENS PURSLEY LLP
PO BOX 2720
BOISE ID 83702-2720

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



ERICK M. SHANER
DEPUTY ATTORNEY GENERAL

APR 07 2016

CHRISTOPHER D. RICH, Clerk
By KIERSTEN HOUST
D&PUTY

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

CHANDLER'S-BOISE, LLC,

Plaintiff,

vs.

IDAHO STATE TAX COMMISSION,

Defendant.

Case No. CV OC 2015-17617

ORDER GRANTING IDAHO STATE
TAX COMMISSION'S MOTION FOR
SUMMARY JUDGMENT AND
DENYING CHANDLER'S-BOISE,
LLC'S MOTION FOR SUMMARY
JUDGMENT

Summary

During the period from May 1, 2007 to May 31, 2010, Chandler's, a steak and seafood restaurant, automatically added a tip (18% or 19%) to banquet meals, room service, and dining for large groups. Customers were not advised that the tip could be declined. The tips were paid to the employees involved in preparing or providing the meals, including the server, busser, and bartender. Chandler's did not retain any portion of the tips.

The Idaho State Tax Commission audited Chandler's for this period. The question presented in this case is whether the automatic tips added by Chandler's were subject to sales and use tax during the audit period. For the reasons set forth below,

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the Court finds that the tips were subject to the sales and use tax and therefore affirms the Idaho State Tax Commission's deficiency determination.

Standard of Review

A taxpayer may appeal a determination of the Commission by filing a complaint against the Commission in district court. I.C. § 63-3049. The case proceeds as a *de novo* bench trial. *Parker v. Idaho State Tax Commission*, 148 Idaho 842, 845, 230 P.3d 734, 737 (2010) (interpreting I.C. § 63-3049 and I.C. § 63-3812(c) together). A deficiency determination issued by the Commission is presumed to be correct, and the burden is on the taxpayer to show that the Commission's decision is erroneous. *Id.* (citing *Albertson's, Inc. v. Idaho Department of Revenue*, 106 Idaho 810, 814, 683 P.2d 846, 850 (1984)).

This case is before the Court on cross-motions for summary judgment and the parties have stipulated to the facts, which the Court adopts. On cross-motions for summary judgment, the standard of review remains the same. *Borley v. Smith*, 149 Idaho 171, 176, 233 P.3d 102, 107 (2010). Summary judgment is proper "if . . . the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c).

Discussion

The Tips Were Subject to Sales Tax Under the Law that Applied During the Audit Period

Idaho Administrative Code 35.01.02.043.04(c) (2010) was in effect during the entire audit period and it applies to the facts of this case. It states in full:

When an amount is added to a customer's bill by the retailer, and the customer is not advised in writing on the face of the bill that he may decline to pay all or part of the amount, it is **not a gratuity** and the fee so added **is subject to the sales tax**.

IDAPA 35.01.02.043.04(c) (2010) (emphasis added).

The parties have agreed that the tips were added to customers' bills by the retailer (Chandler's). The parties have agreed that the customer was not advised in writing that the customer could decline to pay all or part of the amount. Curiously, and somewhat confusingly, however, the parties have also agreed to define gratuity in a manner that is directly contrary to the controlling law.

Although the Commission asks this Court to follow the language of IDAPA 35.01.02.043.04(c), the Commission nevertheless defined gratuity in its briefing in a way that is directly contrary to the law the Commission asks the Court to follow. The Commission defined gratuity in its briefing to refer to "amounts, tips, fees, or service charges automatically added to a customer's bill by the service provider of a meal, when the customer is not advised in writing on the face of the bill that she may decline to pay all or part of the added amount." Idaho State Tax Comm'n's Mem. in Supp. of Summ. J. 2, Mar. 1, 2016.

Because the term gratuity is used so pervasively in both parties' briefing, it is important to recognize that, legally speaking,¹ this case does not involve gratuities. The non-gratuities at issue in this case are subject to the sales tax under the plain language of IDAPA 35.01.02.043.04(c).

The Statute Relied on by Chandler's Does Not Apply to the Facts of this Case

Chandler's argues that this Court should not follow IDAPA because it conflicts with Idaho Code § 63-3613(b)(4), -3613(b)(6). This argument fails because the statute relied on by Chandler's does apply to the facts of this case.

¹ The Court recognizes that the common meaning of the term "gratuity" encompasses the tips at issue here. The Court also recognizes that the 2011 statutory amendment to Idaho Code § 63-3613 codified this common meaning. In other words, if the parties were discussing this case in the present, it would be proper to call the tips gratuities. Under the controlling law from 2007 to 2010, however, these tips were not gratuities.

Retailers must collect and remit sales tax on the sales price of property sold, including services. I.C. §§ 63-3619; -3613(a). Sales price is defined by law and a sale is specifically defined to include furnishing, preparing, or serving food, meals, or drinks to customers. I.C. §§ 63-3613; -3612(2)(b). In other words, a sales tax must be paid on serving food and beverage.

Chandler's urges the Court to find that the tips at issue are not included in the definition of sales price under the following exemption:

The term "sales price" does not include any of the following:

.....
The amount charged for labor or services rendered in installing or applying the property sold, provided that said amount is stated separately and such separate statement is not used as a means of avoiding imposition of this tax upon the actual sales price of the tangible personal property; except that charges by a manufactured homes dealer for set up of a manufactured home shall be included in the "sales price" of such manufactured home.

I.C. § 63-3613(b)(4).

The Court rejects this argument. The exemption does not apply to serving food and beverages because it does not make sense to talk about "installing" or "applying" food and beverages.

Chandler's alternatively urges the Court to find that the tips at issue are not included in the definition of sales price under this exemption:

The term "sales price" does not include any of the following:

.....
The amount charged for finance charges, carrying charges, service charges, time-price differential, or interest on deferred payment sales

I.C. § 63-3613(b)(6) (emphasis added).

The Court also rejects this argument. This exemption does not apply because the service charges referred to in that subsection are financial service charges, not restaurant service charges. The Court reaches this conclusion by applying the maxim of *noscitur a sociis*, which means “a word is known by the company it keeps.” *State v. Schulz*, 151 Idaho 863, 867, 264 P.3d 970, 974 (2011). Reading service charges in the context of the other descriptors, it is clear that financial service charges are intended, not restaurant service charges.

Although the Court has rejected Chandler’s argument that Idaho Code § 63-3613(b)(4) and (b)(6) apply to this case, it is necessary to point out that, even if those subsections did apply, the tips would still be taxable. This is because Chandler’s argued-for statute would be preempted by the application of the more specific statute that refers to furnishing, preparing, or serving food, meals, or drinks. I.C. § 63-3612(2)(b); see *In re Schroeder*, 147 Idaho 476, 480, 210 P.3d 584, 588 (Ct. App. 2009) (“[W]here two inconsistent statutes appear to apply to the same subject matter, the more specific statute will control over the more general one.”) Under the more specific statute on serving food and beverage, the tips are taxable.

The Amendment to Idaho Code § 63-3613 Does Not Change the Result Because the Amendment Was Not Retroactive to the Audit Period in Question

As mentioned above, Idaho Code § 63-3613 defines sales price. The definition previously included the tips at issue here. In 2011 the Idaho Legislature amended I.C. § 63-3613 by adding this subsection:

(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 628–30. The Legislature expressly made the amendment retroactive to January 1, 2011. *Id.* Put another way, the amendment was not the state of the law in 2007, 2008, 2009, or 2010, the period in question here.

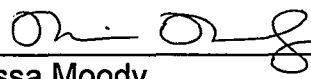
The Court rejects Chandler’s argument that the amendment reflects the state of the law as it existed all along. It does not. In 2007, 2008, 2009, and 2010, the tips in this case were not gratuities and they were clearly subject to sales tax. Beginning January 1, 2011, the tips became gratuities, exempt from sales tax.

Conclusion

The Commission’s motion for summary judgment is granted. Chandler’s motion for summary judgment is denied. The Court affirms the Commission’s written July 14, 2015 decision. A separate appealable judgment will enter.

IT IS SO ORDERED.

DATED this 7th day of April 2016.



Melissa Moody
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 7th day of April 2016, I mailed (served) a true

and correct copy of the within instrument to:

Clint R. Bolinder
GIVENS PURSLEY LLP
PO Box 2720
Boise, ID 83701-2720

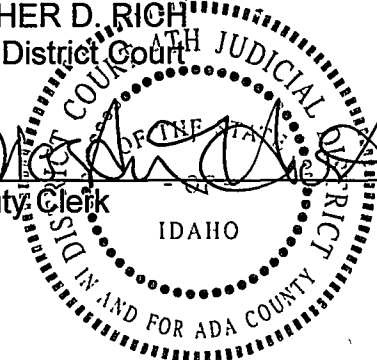
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- Facsimile

Erick M. Shaner
David B. Young
IDAHO ATTORNEY GENERAL'S OFFICE
PO Box 36
Boise, ID 83722-0410

- U.S. Mail, Postage Prepaid
- Interdepartmental Mail
- Electronic Mail
- Facsimile

CHRISTOPHER D. RICH
Clerk of the District Court

By: 
Deputy Clerk



APR 08 2016

CHRISTOPHER D. RICH, Clerk
By KIERSTEN HOUST
DEPUTY

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

CHANDLER'S-BOISE, LLC,

Plaintiff,

vs.

IDAHO STATE TAX COMMISSION,

Defendant.

Case No. CV OC 2015-17617

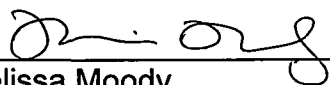
JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

Judgment enters in favor of Defendant Idaho State Tax Commission and against Plaintiff Chandler's-Boise, LLC. Defendant Idaho State Tax Commission's July 14, 2015 written decision is affirmed.

IT IS SO ORDERED.

DATED this 8th day of April 2016.



Melissa Moody
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 8th day of April 2016, I mailed (served) a true and correct copy of the within instrument to:


Clint R. Bolinder
GIVENS PURSLEY LLP
PO Box 2720
Boise, ID 83701-2720

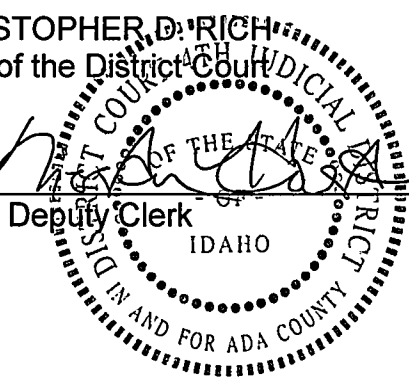
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Erick M. Shaner
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PO Box 36
Boise, ID 83722-0410

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CHRISTOPHER D. RICH
Clerk of the District Court

By: 
Deputy Clerk



MAY 19 2016

CHRISTOPHER D. RICH, Clerk
By AUSTIN LOWE
DEPUTY

Clint R. Bolinder [ISB #5667]
Thomas E. Dvorak [ISB #]
GIVENS PURSLEY LLP
601 W. Bannock Street
P.O. Box 2720
Boise, ID 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
8153964_1 [8975-6]

Attorneys for Appellant

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

CHANDLER'S-BOISE, LLC,

Plaintiff,

v.

IDAHO STATE TAX COMMISSION,

Defendant.

Case No. CV-OC-15-17617

NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENT, IDAHO STATE TAX COMMISSION, AND ITS ATTORNEYS OF RECORD, AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant, Chandler's-Boise, LLC ("Appellant"), appeals against the above named respondent Idaho State Tax Commission ("Respondent") to the Idaho Supreme Court from the *Order Granting Idaho State Tax Commission's Motion for Summary Judgment and Denying Chandler's-Boise, LLC's Motion for Summary Judgment* ("Order")

entered in the above entitled action on April 7, 2016, and the *Judgment* entered on April 8, 2016, the Honorable Melissa Moody presiding.

2. Appellant has the right to appeal to the Idaho Supreme Court, and the Order and Judgment described in Paragraph 1 above are appealable pursuant to Rules 4 and 11(a)(1) of the Idaho Appellate Rules (I.A.R.).

3. Appellant's preliminary statement of the issues on appeal is as follows:

a. Whether the District Court erred in determining that this case does not involve gratuities;

b. Whether the District Court erred in determining that the exemption set forth in Idaho Code § 63-3613(b)(4) does not apply to service food and beverages;

c. Whether the District Court erred in determining that the exemption set forth in Idaho Code § 63-3613(b)(6) does not apply to this case because the service charges referred to in that subsection are financial service charges, not restaurant service charges.

d. Whether the District Court erred in determining that, even if Idaho Code §§ 63-3613(b)(4) and (b)(6) did apply, the tips would still be taxable under Idaho Code § 63-3612(2)(b); and

e. Whether the District Court erred in determining that the 2011 amendment to Idaho Code § 63-3613 did not reflect the state of the law as it existed all along.

Pursuant to I.A.R 17(f), the preliminary statement of issues on appeal set forth above shall not prevent the Appellant from asserting other issues on appeal.

4. No order has been entered sealing all or any portion of the record.

5. (a) Is a reporter's transcript requested? Yes.
(b) Appellant requests the preparation of the reporter's transcript, in both hard copy and electronic format, for the hearing on both parties' Motions for Summary Judgment, held on April 4, 2016, at 10:00 a.m., court reporter Tiffany Fisher, less than 150 pages.
6. Appellant requests the following documents (including all exhibits or attachments thereto) to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R:
 - a. Complaint for Judicial Review and Redetermination of Tax, filed on October 13, 2015;
 - b. Tax Commission's Answer, filed on November 3, 2016;
 - c. Joint Stipulation of Facts, filed on January 29, 2016;
 - d. Idaho Tax Commission's Cross Motion for Summary Judgment, filed on March 1, 2016;
 - e. Idaho State Tax Commission's Memorandum in Support of Summary Judgment, filed on March 1, 2016;
 - f. Plaintiff's Motion for Summary Judgment, filed on March 1, 2016;
 - g. Plaintiff's Memorandum in Support of Motion for Summary Judgment, filed on March 1, 2016;
 - h. Affidavit of Rex Chandler filed on March 1, 2016;
 - i. Plaintiff's Reply to Defendant's Cross-Motion for Summary Judgment, filed on March 22, 2016;

j. Reply Memorandum in Support of Idaho State Tax Commission's Motion for Summary Judgment, filed on March 22, 2016;

k. Order Granting Idaho State Tax Commission's Motion for Summary Judgment and Denying Chandler's-Boise, LLC's Motion for Summary Judgment, filed on April 7, 2016; and

l. Judgment, filed on April 8, 2016.

7. The undersigned, Thomas E, Dvorak, hereby certifies:

(a) That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Tiffany Fisher
Ada County Courthouse
200 W. Front Street
Boise, ID 83702

(b) That the Court Reporter has been paid the estimated fee for preparation of the Reporter's transcript.

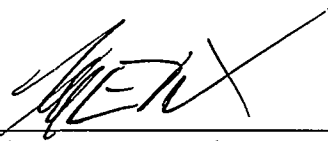
(c) That the estimated fee for preparation of the Clerk's record has been paid.

(d) That all appellate filing fees have been paid.

(e) That a copy of this notice of appeal was and/or will be, simultaneously with filing, served upon all other parties required pursuant to I.A.R. 20.

DATED this 14th day of May, 2016.

GIVENS PURSLEY LLP

By: 
Thomas E, Dvorak
Attorneys for Appellant

CERTIFICATE OF SERVICE

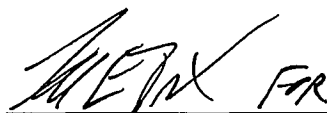
I hereby certify that on this 19th day of May, 2016, I caused to be served a true and correct copy of the foregoing document to the person(s) listed below by the method indicated:

Erick M. Shaner
David B. Young
Deputy Attorneys General
IDAHO STATE TAX COMMISSION
P.O. Box 36
Boise, ID 83722-0410

- U.S. Mail, postage prepaid
- Express Mail
- Hand Delivery
- Facsimile (208-334-7844)

Tiffany Fisher, Court Reporter
Ada County Courthouse
200 W. Front Street
Boise, ID 83702

- U.S. Mail, postage prepaid
- Express Mail
- Hand Delivery
- Facsimile



Clint R. Bolinder

TO: Clerk of the Court
Idaho Supreme Court
451 West State Street
Boise, Idaho 83720
(208) 334-2616

JUL 06 2016
CHRISTOPHER D. RICH, Clerk
By KELLE WEGENER
DEPUTY

IN THE SUPREME COURT OF THE STATE OF IDAHO

----- x Docket No. 44211

CHANDLER'S-BOISE, LLC,	:
	:
Plaintiff-Appellant,	:
	:
vs.	:
	:
IDAHO STATE TAX COMMISSION,	:
	:
Defendant-Respondent.	:

----- x


NOTICE OF TRANSCRIPT OF 55 PAGES LODGED

Appealed from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, Honorable Melissa Moody, District Court Judge.

This transcript contains:

04-04-16 Motion for Summary Judgment Hearing

DATE: July 5, 2016



Tiffany Fisher, Official Court Reporter
Official Court Reporter,
Judge Melissa Moody
Ada County Courthouse
Idaho Certified Shorthand Reporter No. 979
Registered Professional Reporter

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

CHANDLER'S-BOISE, LLC,

Plaintiff-Appellant,
vs.
IDAHO STATE TAX COMMISSION,

Defendant-Respondent.

Supreme Court Case No. 44211

CERTIFICATE OF EXHIBITS

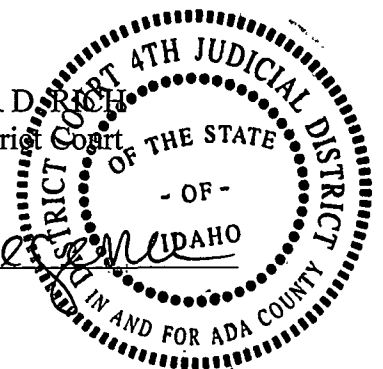
I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

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

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 6th day of July, 2016.

CHRISTOPHER D. RICH
Clerk of the District Court

By K. W. [Signature]
Deputy Clerk



CERTIFICATE OF EXHIBITS

000141

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

CHANDLER'S-BOISE, LLC,

Plaintiff-Appellant,
vs.

IDAHO STATE TAX COMMISSION,

Defendant-Respondent.

Supreme Court Case No. 44211

CERTIFICATE OF SERVICE

I, CHRISTOPHER D. RICH, 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 AND REPORTER'S TRANSCRIPT

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

CLINT R. BOLINDER

ATTORNEY FOR APPELLANT

BOISE, IDAHO

ERICK M. SHANER

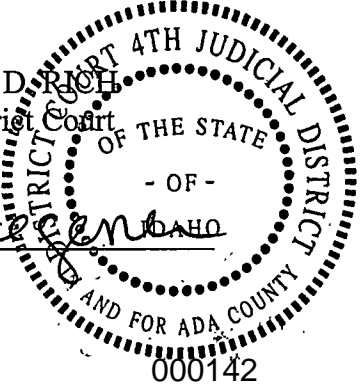
ATTORNEY FOR RESPONDENT

BOISE, IDAHO

Date of Service: JUL 06 2016

CHRISTOPHER D. RICH
Clerk of the District Court

By K. W. Jensen
Deputy Clerk



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

CHANDLER'S-BOISE, LLC,

Plaintiff-Appellant,
vs.

IDAHO STATE TAX COMMISSION,

Defendant-Respondent.

Supreme Court Case No. 44211

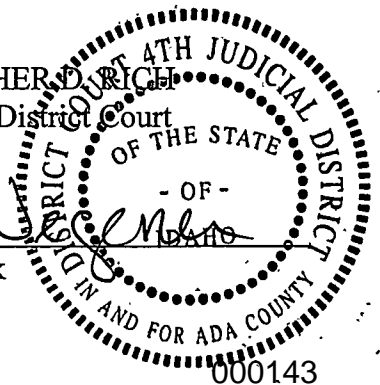
CERTIFICATE TO RECORD

I, CHRISTOPHER D. RICH, 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 under my direction 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 Counsel.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 19th day of May, 2016.

CHRISTOPHER D. RICH
Clerk of the District Court

By _____
Deputy Clerk



CERTIFICATE TO RECORD

000143