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

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHANDLER'S-BOISE, LLC,

Plaintiff-Appellant,

v.

IDAHO STATE TAX COMMISSION,

Defendant-Respondent.

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

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

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

Honorable Melissa Moody Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

Chandler's-Boise, LLC ("Chandler's") appeals from a District Court summary judgment decision upholding a deficiency determination of the Idaho State Tax Commission ("Commission"). The Commission erroneously determined that gratuities added by Chandler's to certain customer checks were subject to sales and use taxes and required Chandler's to pay the resulting deficiency in the amount of $40,426. The District Court's decision upholding the Commission's determination ignored unambiguous statutory language that was later clarified by a legislative amendment confirming that the gratuities at issue should never have been subject to sales and use taxes. The District Court's decision should be reversed.

B. Statement of Facts

The facts of this case are undisputed and were stipulated to by the parties. From May 1, 2007 through May 31, 2010 (the "Audit Period"), Chandler's operated a steak and seafood restaurant in downtown Boise, Idaho. R. pp. 34-36 (Jt. Stip. of Facts ¶¶ 1-3, 11 (hereafter, "Stip.")). During the Audit Period, Chandler's added gratuities to banquet meals, restaurant dining services for groups having six or more persons, and room service meals (the "Gratuities"). R. p. 36 (Stip. ¶ 12). Such bills listed the Gratuities as a separate line item, and the bills did not indicate that the Gratuities could be declined in full or in part. R. pp. 36, 48 (Stip. ¶¶ 12-13, Ex. D). Chandler's did not charge its customers sales or use tax on the Gratuities during the Audit Period. R. p. 36 (Stip. ¶ 15).

The Commission's Sales, Use, and Miscellaneous Tax Audit Bureau (the "Bureau") audited Chandler's' Audit Period operations (the "Audit"). R. p. 35 (Stip. ¶ 4). After the Audit, the Bureau determined that the Gratuities were mandatory service charges subject to sales tax and issued a Notice of Deficiency for the resulting deficiency on June 18, 2010. R. pp. 35, 39 (Stip. ¶ 5, Ex. A).

C. Course of Proceedings Below

Chandler's filed a Petition for Redetermination of Notice of Deficiency Determination on August 20, 2010. R. pp. 35, 40-41 (Stip. ¶ 6, Ex. B). On July 14, 2015, the Commission 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"). R. pp. 35, 42-46 (Stip. ¶¶ 7-8, Ex. C).[1]

Chandler's filed a Complaint for Judicial Review and Redetermination of Tax with the District Court challenging the Commission's updated Notice of Deficiency Determination on October 13, 2015. R. pp. 4-9 (Complaint); R. p. 35 (Stip. ¶ 10).

Chandler's and the Commission filed cross-motions for summary judgment on March 1, 2016. R. pp. 54-55, 77-78. The District Court granted summary judgment in favor of the Commission on April 7, 2016, affirming the Commission's deficiency determination (the "District Court Decision"). R. pp. 126-131. Judgment was entered on April 8, 2016. R. pp. 133-134. Chandler's filed its Notice of Appeal on May 19, 2016. R. pp. 135-138.

[1] Although the original tax due under the Notice of Deficiency was $83,368.00, this amount was later reduced to $40,426 after Chandler's provided additional documentation in connection with its petition for redetermination. *See* R. pp. 35, 37, 42-46 (Stip. ¶¶ 8, 17, Ex. C (acknowledging that due to the additional documentation provided by Chandler's, the Bureau "modified the audit findings, which resulted in a decrease of the proposed liability.")).

II. ISSUES PRESENTED ON APPEAL

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

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

3. 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 allegedly only financial service charges, not restaurant service charges;

4. Whether the District Court erred in failing to find that IDAPA 35.01.02.043.04(c) is arbitrary and unreasonable because it does not conform to Idaho Code § 63-3613 and is not reasonably directed to the accomplishment of the principles of that law;

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

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

III. ARGUMENT

A. Standard of Review

The District Court considered Chandler's' appeal of the Commission's Final Decision *de novo* pursuant to Idaho Code Section 63-3049. R. p. 127. On appeal, "[t]his Court reviews the district court's decision directly, and utilizes the Tax Commission's administrative determination as merely an articulation of the position of the Tax Commission as a party to the action." *Gracie, LLC v. Idaho State Tax Comm'n*, 149 Idaho 570, 572, 237 P.3d 1196, 1198 (2010).

"This Court reviews the district court's grant of summary judgment under the same standard employed by the district court." *Id.* "Summary judgment is proper '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 judgment as a matter of law.'" *Id.* (citing Idaho R. Civ. P. 56(c)[2]). Further, where the parties file cross-motions for summary judgment, this Court "freely reviews the entire record that was before the district court to determine whether either side was entitled to judgment as a matter of law and whether the inferences drawn by the district court are reasonably supported by the record." *Gracie, LLC*, 149 Idaho at 572, 237 P.3d at 1198; *see PacifiCorp v. Idaho State Tax Comm'n*, 153 Idaho 759, 767, 291 P.3d 442, 450 (2012) ("This Court exercises free review over the district court's conclusions of law to determine whether the court correctly stated the applicable law and whether the legal conclusions are sustained by the facts found.") (citing *Kennedy v. Schneider*, 151 Idaho 440, 442, 259 P.3d 586, 588 (2011)).

B. The District Court erred in determining that the Gratuities are subject to the sales tax because the plain meaning of the applicable statutes illustrates that the Gratuities are not subject to the sales tax.

The Gratuities do not fall within the term "sales price" for purposes of the sales tax because (1) 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 63-3613(b)(6); and (2) the Commission's rules conflict with the applicable statutes and thus are not controlling.

[2] As of July 1, 2016, this rule is found in a slightly different form at Idaho Rule of Civil Procedure 56(a). The District Court Decision predated this change.

1. **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, the Gratuities are not subject to sales tax.**

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)[3] (emphasis added). There are, therefore, three defined terms relevant to this statute. Chandler's does not dispute that the Gratuities arose as part of a "sale" and "retail sales." *See* I.C. § 63-3612(2)(b) ("sale" includes "[f]urnishing, preparing, or serving food, meals, or drinks. . . and services directly consumed by customers included in the charge thereof."); I.C. § 63-3609 ("retail" means "a sale for any purpose other than resale in the regular course of business . . . ."). The Gratuities, however, are specifically excluded from the definition of "sales price."

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. Idaho Code Section 63-3613(a) defines the "sales price" of personal property as including "services agreed to be rendered as a part of the sale . . . ." Idaho Code Section 63-3613(b), however, excludes certain amounts from the definition of "sales price": "[t]he term 'sales price' does not include . . . [t]he amount charged for ***labor or services rendered in installing or applying the property sold***, provided that said amount is stated separately . . ." or "[t]he amount charged for finance charges, carrying charges, ***service charges*** . . . ", on condition that charges under either scenario are "not used as a

[3] The citations to the tax provisions of the Idaho Code herein refer to the applicable 2010 version, with the exception of reference to the 2011 amendment.

means of avoiding imposition of this tax upon the actual sales price of the tangible personal property." I.C. § 63-3613(b)(4) and (6) (emphasis added).

It was undisputed at the District Court level that the Gratuities were "paid exclusively to those employees of Chandler's who where [sic] 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 where [sic] retained by Chandler's or otherwise paid to any person not directly involved in preparing or providing the meal to a customer." R. p. 96 (Affidavit of Rex Chandler ¶ 3); *see* Tr. p. 6, l. 4 – p. 7, l. 11 (parties stipulated to admit the affidavit). Consistent with the distinction between the sale of food and beverages and the nature of tips for the service of those items, all of the relevant Chandler's bills contained a separate line item for a "Gratuity." R. pp. 36, 48 (Stip. ¶ 12, Ex. D).

Under these facts and the relevant statutory language, the Gratuities are not subject to sales tax because the term "sales price" specifically excludes amounts separately charged for services, such as the Gratuities. Thus, Gratuities are services "rendered in . . . applying the property sold" or an "amount charged for . . . service charges" and as such specifically excluded from the "sales price" upon which tax is calculated.

The District Court, however, determined that the Gratuities did not fall under the exclusions of Idaho Code Sections 63-3613(b)(4) and (6), finding that neither exclusion applied in the food and beverage context. R. pp. 128-130 (District Court Decision). This is despite the fact that neither Idaho Code Section 63-3613(b)(4) nor (6) excludes services associated with the

sale of food and beverages. The District Court erred by narrowly construing these provisions in a way that categorically excluded the Gratuities.

The District Court also incorrectly found that even if Idaho Code Section 63-3613(b)(4) or 63-3613(b)(6) applied to the Gratuities, "the tips would still be taxable . . . 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 . . . Under the more specific statute on serving food and beverage, the tips are taxable." R. p. 130 (District Court Decision) (citing I.C. § 63-3612(2)(b)). The statute cited by the District Court, Idaho Code Section 63-3612, provides guidance and definition for the term "***sale***" rather than for the term "***sales price.***" As noted above, Chandler's does not dispute that the Gratuities arose as part of a "sale" under Idaho Code Section 63-3612(2)(b).[4] Idaho Code Section 63-3619, however, only imposes an excise tax where "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 (emphasis added). The District Court erred by conflating the terms "sale" and "sales price" and finding that the statute concerning a "sale" could somehow preempt the statute concerning the "sales price."

The District Court thus erred in finding that the Gratuities do not fall within the exclusion from the definition of "sales price" under Idaho Code Section 63-3613(b)(4) and (6).

[4] 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.

2. The Commission Rules impermissibly treat the Gratuities as goods sold by expanding the statutory definition of "sales price" in a way that conflicts with the statute and other provisions of the Commission Rules.

The relevant administrative rules upon which the Commission and District Court relied conflict with Idaho Code Section 63-3613(b)(4) and other relevant administrative rules (Idaho Administrative Code Section 35.01.02 being hereafter, "Commission Rules"). The Commission Rules attempt to limit Idaho Code Section 63-3613(b)(4)'s exception of "labor or services" from the definition of "sales price" under: (i) Commission Rule 43.04, defining gratuities, and (ii) Commission Rule 43.05, defining service charges. These Commission 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) (italics added).

Under these rules, the Commission reasoned that because Chandler's 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. R. pp. 43-44 (Final Decision). The District Court likewise determined that under the language of Rule 43.04(c), the Gratuities are not considered "gratuities" under the Commission's Rules and are subject to the sales tax under Rule 43.05. R. pp. 127-128 (District Court Decision).

Commission Rules 43.04 and 43.05 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 Idaho Code Section 63-3619(b)(6) (whether classified as services or service charges). Rule 43.04(c) creates a distinction regarding notice on the face of the bill that has no basis in Idaho Code Section 63-3613. Additionally, these rules conflict with Commission 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 Commission 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). Commission Rule 11.02(c) thus establishes that 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.*

Significantly, in the course of amending Idaho Code Section 63-3613, the Legislature considered how these separate transactions had become conflated as a result of the Commission's Rules. The legislative history for House Bill No. 213, which amended Idaho Code 63-3613, is attached hereto as an Addendum pursuant to I.A.R. 35(f). The minutes of the Senate Local Government & Taxation Committee dated March 22, 2011 reflect that the statute was changed because Rule 43.04(c) created an inconsistency, or inaccuracy that needed to be clarified. For instance, "**Senator Hill** said that, generally speaking, services are not subject to sales tax. It shouldn't make any difference whether the gratuity is written in voluntarily or added as a certain percent for larger groups. This is a matter of equity and this should be fixed." Addendum p. 18 (emphasis in original). As discussed in more detail below, while not determinative of the issue before this Court, the legislative history indicates that the Amendment was enacted to correct the inconsistency arising from the Commission's interpretation of the relevant statutes as reflected in Rule 43.04.

Consequently, application of Commission Rules 43.04 and 43.05 in the instant case would be inconsistent with Idaho Code Sections 63-3613(b)(4) and (6) and Commission Rule 11.02, which set 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." The District Court Decision to the contrary constitutes reversible error.

3. The District Court erred in failing to find that Commission Rule 43.04(c) is arbitrary and unreasonable because it does not conform to Idaho Code Section 63-3613 and is not reasonably directed to the accomplishment of the principles of that law.

For largely the same reasons set forth above, Commission Rule 43.04(c) is invalid because it is arbitrary and unreasonable. Chandler's raised this issue at oral argument on the cross-motions for summary judgment, and it is consistent with the argument set forth above that there is a conflict between the Commission Rules and the relevant statute. *See* Tr. p. 36, l. 8 – p. 42, l. 14. The District Court Decision, however, does not address whether Rule 43.04(c) is reasonable or rooted in the statute at all. R. pp. 126-131.

"[A]dministrative rules are invalid which do not carry into effect the legislature's intent as revealed by existing statutory law, and which are not reasonably related to the purposes of the enabling legislation." *Mason v. Donnelly Club*, 135 Idaho 581, 583, 21 P.3d 903, 905 (2001) (brackets in original) (citation omitted). There is an established framework for reviewing an agency's rule:

> This Court has established a four-prong test for determining the appropriate level of deference to be given to an agency construction of a statute. First, we must determine if the agency has been entrusted with the responsibility to administer the statute at issue. Second, the agency's statutory construction must be reasonable. Third, we must determine whether the statutory language at issue does not expressly treat the precise question at issue. Finally, we must ask whether any of the rationales underlying the rule of deference are present. If the four-prong test is met, then courts must give "considerable weight" to the agency's interpretation of the statute.

Id. (citing *J.R. Simplot Co. v. Tax Comm'n,* 120 Idaho 849, 820 P.2d 1206 (1991) (internal citations omitted). Chandler's does not dispute that the Commission has been entrusted with the

responsibility to administer the tax statutes at issue here. *See J.R. Simplot Co.*, 120 Idaho at 863, 820 P.2d at 1220 ("we note that the Tax Commission is 'impliedly clothed with power to construe' the tax statutes at issue in this case").

As to the second element, however, Commission Rule 43.04(c) has no basis in the language of Idaho Code Section 63-3613. Nothing in Idaho Code Section 63-3613 provides for a distinction based on whether a gratuity is disclosed as voluntary or not. And, it makes no sense for such a distinction given that gratuities are related to food and beverages sold and the inherent nature of gratuities is not somehow changed based on whether payment of gratuities is disclosed as voluntary or not. In this case, the Gratuities were listed as separate line-items, were not included in the price of food and beverages, and thus should not have been taxed as personal property. *See* R. p. 96 (Affidavit of Rex Chandler ¶ 3).

As to the third element—whether the statute expressly treats the question at issue—in this case, as discussed above, Idaho Code Sections 63-3613(4) and 63-3613(b)(6) do address the issue presented here. "An agency construction will not be followed if it contradicts the clear expressions of the legislature because 'the court, as well as the agency, must give effect to the unambiguously expressed intent of [the Legislature].'" *Id.* at 862, 820 P.2d at 1219 (citation omitted).

Because the Commission's interpretation set forth in Rule 43.04(c) fails the second and third prongs of the *Simplot* test, there is no reason to analyze the rationales underlying the rule of deference. *Id.* ("If an agency, with authority to administer a statutory area of the law, has made a reasonable construction of a statute on a question without a precise statutory answer then, under

the fourth prong of the test, a court must ask whether any of the rationales underlying the rule of deference are present.").

The *Simplot* test is not met in this case and thus the District Court should not have used Rule 43.04(c) as the determinative regulation in this case or afforded that rule any deference because it is invalid.

C. The District Court erred in determining that the 2011 amendment to Idaho Code Section 63-3613 did not clarify the meaning of the statute as it existed all along.

The Idaho legislature amended Idaho Code Section 63-3613 in 2011 by enacting House Bill No. 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) (Addendum p. 5). Other than certain other minor adjustments to irrelevant parts of the statute, the Amendment added a new subpart, (f), which 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.

Id.

The addition of subpart (f) is entirely supportive of Chandler's' 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 in addition to their base income. R. p. 96 (Affidavit of Rex Chandler ¶ 3). Given the language of the Amendment, the legislative history associated with the

Amendment, and Idaho authority applying clarificatory statutory amendments, the Amendment supports Chandler's' position that the Gratuities are not part of the "sales price."

1. The legislative history of the Amendment reflects intent to clarify the statute as a result of a discrepancy that arose from the Commission's Rules.

The Amendment originated in the House Revenue & Taxation Committee and was first presented on March 1, 2011. The presenter explained that:

> [T]his legislation adds language to the statute to clarify that the sales price does not include a gratuity or a tip when serving meals, and therefore, is not taxed. This language is consistent with the rule which exempts services from sales tax. In the past, when a gratuity was added to the bill it was taxed but if a cash tip was left, it was not taxed. This bill resolves that discrepancy.

Addendum p. 11. The Amendment was taken up again by the House Revenue & Taxation Committee on March 3, 2011, where the presenter further explained that "since a gratuity goes entirely to the servers, who in turn pay taxes on those tips, this legislation corrects a double taxation issue." Addendum p. 13.

Finally, the Amendment was considered by the Senate Local Government & Taxation Committee on March 22, 2011. The minutes for that committee meeting reflect that the presenter distributed copies of Commission Rule 43.04 on "Gratuities" and explained:

> This bill adds language to clarify and make consistent that the sales price should not include gratuity for serving meals and therefore is not subjective [sic] to sales tax. For background, the Tax Commission (ISTC) had a little known rule that in situations (a) and (b) on the handout, are not subject to sales tax but in situations (c) and (d), the gratuity is subjected to sales tax. In all four situations, the gratuity goes into the servers pocket, it does not go to the restaurant. The server then pays federal and state income taxes. The rule has been in place since 1993 and recently it came to light through the audits. After much discussion between ISTC, attorneys, and restaurants, H0213 was crafted. This explicit exemption says tips

> or gratuities on a meal will not be subject to sales tax except when the service charge is added in by banquets, hotels, or convention centers.

Addendum p. 17. The presenter closed by asking for support of the Amendment because of "an inaccuracy in a little known rule that causes of lot of confusion." Addendum p. 18.

As noted, in seconding the motion to send the Amendment to the Senate floor with a do pass recommendation, "**Senator Hill** said that, generally speaking, services are not subject to sales tax. It shouldn't make any difference whether the gratuity is written in voluntarily or added as a certain percent for larger groups. This is a matter of equity and this should be fixed." Addendum p. 18 (emphasis in original). This history shows that Commission Rule 43.04(c)'s misplaced distinction between voluntarily or added gratuities was the impetus for clarifying Idaho Code Section 63-3613.

Although the legislature made the Amendment effective and retroactive to January 1, 2011 (outside the Audit Period), Idaho courts have addressed and applied the *substance* of a clarificatory statutory amendment to facts and circumstances that arose prior to the effective date of such clarificatory statutory amendment.

2. Idaho courts have applied the substance of a clarificatory statutory amendment to circumstances predating the amendment's effective date.

a. Stonecipher v. Stonecipher

The Supreme Court of Idaho explained in *Stonecipher v. Stonecipher* that "[i]n enacting amendments to existing statutes, the legislature must have intended to clarify, strengthen *or* make some change in existing statutes." 131 Idaho 735, 963 P.2d 1172 (1998). The use of the

disjunctive "or" here indicates that legislative amendments can have various purposes, including clarification.

Stonecipher is frequently cited (including by the cases examined below) for the proposition Chandler's 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). 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. In March of 1995, 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. *Id.* 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.

Also in March 1995, however, the legislature added a sentence to Idaho Code Section 5-245, which defined "an action or proceeding" as including an "order to show cause." *Id.* This amendment, however, did not provide for retroactive treatment and was to become effective on July 1, 1995. *Id.; 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 (expressly including "an action or

proceeding to collect child support arrearages" within the meaning of "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 Idaho Code Section 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 principle Chandler's 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.* (emphasis added) (citing I.C. § 5-245). In essence, the *Stonecipher* 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 Supreme 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.*

Similarly, Chandler's requests that this Court apply the reasoning behind the Amendment to sales taxes assessed for the Audit Period ending in 2010, even though the Amendment was effective January 1, 2011.

b. Pearl v. Board of Professional Discipline of Idaho State Board of Medicine

In *Pearl v. Board of Professional Discipline of Idaho State Board of Medicine*, 137 Idaho 107, 113, 44 P.3d 1162, 1168 (2002), 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. On March 31, 1998, the Board of Professional Discipline for the Idaho State Board of Medicine ("Board") 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. [5] *Id.* 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.

[5] Dr. Pearl's argument and the Court's analysis are 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. *Paterson v. State*, 128 Idaho 494, 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.").

During the appeal to the district court in 2000, the 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 *Stonecipher*, 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 responding to the Commission's prior incorrect interpretation of the Idaho Legislature's intent regarding Idaho Code Section 63-3613. As a result, the Amendment "gives credence" to Chandler's' position that "just as had always been

assumed," the Amendment can be applied to the interpretation of Idaho Code Section 63-3613 (as improperly narrowed by Commission Rule 43.04) in this case.

c. State v. Barnes

A similar situation arose in *State v. Barnes*, 133 Idaho 378, 987 P.2d 290 (1999). The *Barnes* court analyzed whether the defendant, Barnes, was properly charged under a statute prohibiting driving while intoxicated. 133 Idaho at 380, 987 P.2d at 292. 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. 133 Idaho at 381, 987 P.2d at 293. 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 Court 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 382-84, 987 P.2d at 294-96. 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. at 384, 987 P.2d at 296 (emphasis added).

While the Court ultimately relied upon the general statute to uphold the misdemeanor, the influence of the legislative change illustrated 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.

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.

d. State v. Gillespie

In *State v. Gillespie*, 155 Idaho 714, 718-19, 316 P.3d 126, 129-30 (Ct. App. 2013), the Court of Appeals of Idaho 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.

Gillespie, 155 Idaho at 718-19, 316 P.3d at 129-30. 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, Chandler's seeks to have the underlying reasoning behind the

Amendment applied to the Gratuities, for an Audit Period ending before the effective date of the Amendment itself.

3. The District Court failed to consider the clarification argument and instead focused on the retroactivity date, which is a separate issue.

Each of these Idaho cases illustrate that Idaho Code Section 63-3613, as it existed in 2010, could reasonably be read to encompass the intent set forth explicitly 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. No. 213 became effective January 1, 2011, as illustrated by *Stonecipher*, *Pearl*, *Barnes*, and *Gillespie* above, this does not mean that the pre-Amendment 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. As explained in Sutherland on Statutory Construction:

> 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).

Here, the enactment of H.B. No. 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 for services such as the Gratuities are not subject to a sales tax.

The District Court decided that the Amendment was only retroactive to January 1, 2011. R. pp. 130-131 (District Court Decision). Chandler's does not and could not take issue with that ruling. With respect to the clarification aspect of the Amendment, however, the District Court found:

> 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.

R. p. 131 (District Court Decision). This brief paragraph is the extent of the District Court's analysis with respect to the clarification issue. The District Court determined that the Gratuities were not exempt from sales tax largely due to the Commission Rules, which, as explained, are not consistent with the relevant statutes and were the driving force behind the Amendment. The District Court Decision did not analyze the above cases presented to the District Court, which address a different question than retroactivity. R. pp. 130-131 (District Court Decision).

Although not retroactively applied, the Amendment demonstrates the legislature's meaning behind the statute all along—that gratuities for services, such as the Gratuities, are not subject to the sales tax. The Amendment clarified an issue that arose not because of ambiguity in Idaho Code Section 63-3613, but because of the Commission's incorrect interpretation.

IV. CONCLUSION

The Gratuities, which are tips paid to members of Chandler's' service staff and not to Chandler's, are not subject to the sales tax as personal property under the plain language of Idaho Code Sections 63-3613 and 63-3619. The Commission Rules concerning these statutes impermissibly narrowed the meaning of the exemption for "gratuities" from the sales tax under Idaho Code Section 63-3613, which resulted in the Amendment to clarify that tips for services, such as the Gratuities, are exempt from the sales tax. For these reasons, the District Court Decision that misinterpreted the plain meaning of Idaho Code Section 63-3613 should be reversed.

DATED this 11th day of October, 2016.

GIVENS PURSLEY LLP

Melodie A. McQuade
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 2016, I caused to be served a true and correct copy of the foregoing document to the persons 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

✓ Hand Delivery
___ Facsimile
___ Overnight Courier
___ U.S. Mail

Melodie A. McQuade

HOUSE BILL 213

Full Bill Information

Individual Links:

Bill Text
Statement of Purpose / Fiscal Note
Legislative Co-sponsors

H0213.....by REVENUE AND TAXATION COMMITTEE

SALES TAX - Amends existing law 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 for a meal.

03/01 House intro - 1st rdg - to printing
03/02 Rpt prt - to Rev/Tax
03/03 Rpt out - rec d/p - to 2nd rdg
03/04 2nd rdg - to 3rd rdg
03/10 3rd rdg - **PASSED - 65-0-5**
AYES -- Anderson, Andrus, Barbieri, Barrett, Bateman, Bayer, Bedke(Bedke), Bell, Bilbao, Black, Block, Bolz, Boyle, Buckner-Webb, Burgoyne, Chew, Collins, Crane, Cronin, DeMordaunt, Ellsworth, Eskridge, Gibbs(Wheeler), Guthrie, Hagedorn, Hart, Hartgen, Harwood, Higgins, Jaquet, Killen, King, Lacey, Lake, Loertscher, Luker, Marriott, McGeachin, McMillan, Moyle, Nesset, Nielsen, Palmer, Patrick, Pence, Perry, Raybould, Ringo, Roberts, Schaefer, Shepherd, Shirley, Simpson, Sims, Smith(30), Smith(24), Stevenson, Takasugi(Batt), Thayn, Thompson, Vander Woude, Wills, Wood(27), Wood(35), Mr. Speaker
NAYS -- None
Absent and excused -- Chadderdon(Chadderdon), Henderson, Nonini, Rusche, Trail
Floor Sponsors - Bayer & Jaquet
Title apvd - to Senate
03/11 Senate intro - 1st rdg - to Loc Gov
03/23 Rpt out - rec d/p - to 2nd rdg
03/24 2nd rdg - to 3rd rdg
03/31 3rd rdg - **PASSED - 31-0-4**
AYES -- Bair, Bilyeu, Bock, Brackett, Broadsword, Corder, Darrington, Davis, Fulcher, Goedde, Hammond, Heider, Hill, Keough, LeFavour, Lodge, Malepeai, McGee, McKenzie, Mortimer, Nuxoll, Schmidt, Siddoway, Smyser, Stegner, Stennett, Tippets, Toryanski, Vick, Werk, Winder
NAYS -- None
Absent and excused -- Andreason, Cameron, McKague, Pearce
Floor Sponsor - Werk
Title apvd - to House
04/01 To enrol

04/04 Rpt enrol - Sp signed
Pres signed
04/05 To Governor
04/06 Delivered to Governor on 04/05
Governor signed

Session Law Chapter 230
Effective: 01/01/11

STATEMENT OF PURPOSE

RS20489C1

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.

FISCAL NOTE

Approximately $90,000 to the general fund.

Contact:
Name: Representative Clifford R. Bayer
Office:
Phone: (208) 332-1000

LEGISLATURE OF THE STATE OF IDAHO

Sixty-first Legislature **First Regular Session - 2011**

Legislative Co-sponsors

RS20489C1

Senator Diane Bilyeu
Senator James Hammond
Senator Jeff Siddoway

Representative Clifford Bayer
Representative Wendy Jaquet
Representative Ken Roberts
Representative John Vander Woude

(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

AGENDA
HOUSE REVENUE & TAXATION COMMITTEE
9:00 A.M.
Room EW42
Tuesday, March 01, 2011

SUBJECT	DESCRIPTION	PRESENTER
H 197	School district budget stabilization levies	Chairman Lake
RS20456C1	Motor vehicle use fees - non-resident students	Rep. Bedke
RS20489C1	Gratuities - sales tax exemption	Rep. Bayer

If you have written testimony, please provide a copy of it to the committee secretary to ensure accuracy of records.

COMMITTEE MEMBERS

Chairman Lake
Vice Chair Collins
Rep Barrett
Rep Moyle
Rep Raybould
Rep Roberts
Rep Schaefer
Rep Smith(24)
Rep Wood(35)
Rep Bedke
Rep Harwood
Rep Barbieri
Rep Bayer
Rep Ellsworth
Rep Gibbs
Rep Killen
Rep Burgoyne
Rep Rusche

COMMITTEE SECRETARY

Bev Bean
Room: EW53
Phone: (208) 332-1125
email: bbean@house.idaho.gov

MINUTES

HOUSE REVENUE & TAXATION COMMITTEE

DATE:	Tuesday, March 01, 2011
TIME:	9:00 A.M.
PLACE:	Room EW42
MEMBERS:	Chairman Lake, Vice Chairman Collins, Representative(s) Barrett, Moyle, Raybould, Roberts, Schaefer, Smith(24), Wood(35), Bedke, Harwood, Barbieri, Bayer, Ellsworth, Gibbs (Wheeler), Killen, Burgoyne, Rusche
ABSENT/ EXCUSED:	None
GUESTS:	Rep. Jaquet; Tom Archie, MD; Wayne Hoffman, Idaho Freedom Foundation; Robert Crosby, Sun Valley Board of Realtors; Russ Hendricks, Farm Bureau; Lonnie Barber, Blaine Co. School District; Julie Dahlgren, John Blackman and Mike Chatterton, Blaine Co. School District; Jim Leski; Dan Krahn, Owner, Krahns McCall; Bill Weida, McCall Donnelly School District; Lyle Nelson, City of McCall; Rick Fereday, May Hardware, McCall; Rory Veal, Zack Morrow and John Fronk, Students at McCall Donnelly High School; Jim Foudy, Principal, Barbara Morgan Elementary, McCall; David Carey, Hotel McCall & Jug Mtn. Ranch; Glen Szymoniak, McCall Donnelly School District; Kent Lauer, Idaho Farm Bureau

The meeting was called to order at 9:00 am by **Chairman Lake.**

MOTION: **Rep. Collins** moved to approve the minutes of the February 23, 2011 meeting; **motion carried on voice vote.**

MOTION: **Rep. Collins** moved to approve the minutes of the February 24, 2011 meeting; **motion carried on voice vote.**

Chairman Lake turned the gavel over to **Vice Chairman** Collins.

H 197: **Chairman Lake** presented **H 197**. This legislation restores the right to vote on local supplemental tax levies for four school districts (McCall/Donnelly, Blaine, Swan Valley and Avery). He explained that in 2006 when **HB 1** was passed, these districts were allowed to continue collecting budget stabilization levies without voter approval since they were collecting more money through their property tax levy than was being allocated through the state equalization formula. In retrospect, this was not a good decision. This bill will require these four districts to get voter approval to continue the additional funding as all other school districts do. To require some districts to get voter approval and not others could also be a possible violation of Title 9 of the Idaho Constitution. He stated that the only purpose of this legislation is to require a vote on supplemental local tax levies.

Rep. Jaquet spoke in opposition to this legislation. She indicated that this goes against the agreement that was made in 2006 upon the passage of **HB 1.** The requirement that these school districts go to their electorate every two years to approve this funding introduces an instability in the school budgeting process that was not there before. In response to questions from the committee, **Rep. Jaquet** estimated that in her community approximately 45% of the homes are owned by non-residents, but she felt that the resident voters would be supportive of these tax levies. Her objection stems from the fact that this bill reneges on an agreement that was reached in 2006.

The following persons gave testimony **in opposition to H 197** citing the following objections: (1) it will detract from the desirability of moving to these areas, (2) it will negatively affect the ability of these school districts to recruit teachers; (3) it will destabilize the school budgeting process, (4) the School Board already has the power to reduce levies and they are elected to office; and (5) the decline in the quality of education will negatively affect property values in these communities: **Tom Archie, Robert Crosby, Lonnie Barber, Julie Dahlgren, Mike Chatterton, Jim Leski, John Blackman, Dan Krahn, Bill Weida, Lyle Nelson, Rick Feredy, Rory Veal, Zack Morrow, John Fronk, Jim Foudy, David Carey and Glen Szymoniak.**

Russ Hendricks and Wayne Hoffman spoke **in support of H 197** stating that it was a matter of fairness in that this legislation would require these four districts to put their school district budget stabilization levy to a vote of the people every two years just as every other district in the state.

Rep. Lake summarized the intent of this legislation which is to require voter approval on tax levies. Responding to a comment made during testimony that perhaps every two years is too often to require electorate approval, **Rep. Lake** stated that the Committee could take that issue up but it is not a part of this legislation.

MOTION: **Rep. Raybould** moved to send **H 197** to the floor with a **DO PASS** recommendation.

Rep. Rusche spoke in opposition to this proposal as he felt that to change this now would not allow for a reasonable transition and would threaten the school budgeting process. He would like to see this legislation held in committee. **Rep. Barbieri and Rep. Harwood** explained they would **support H 197** as they believe it is important for the electorate to approve these levies. **Rep. Burgoyne** spoke **in opposition** to this bill because he felt every two years is too often to take these matters to the electorate and would prefer to see a five year requirement instead. **Rep. Killen** spoke **in opposition** because it would undermine the stability of the school districts. He has heard from a lot of people who are opposed but very few who support. **Rep. Roberts** voiced his **support** indicating that he disagrees with those who state this is a non-issue with the patrons in these school districts. He believes the patrons are beginning to understand this issue, and he has received feedback from his constituents supporting this bill. He noted that about 65% of the homes in Valley County are owned by non-residents, but they have a strong history of supporting supplemental levies in the McCall/Donnelly school district.

ROLL CALL VOTE: A **roll call vote** was requested. **Motion passed, 15 aye and 3 nay. Voting in favor** of the motion: Chairman Lake, Reps. Collins, Barrett, Moyle, Raybould, Roberts, Schaefer, Smith(24), Wood (35), Bedke, Harwood, Barbieri, Bayer, Ellsworth and Gibbs (Wheeler). **Voting in opposition** to the motion: Reps. Killen, Burgoyne and Rusche. **Rep. Lake** will sponsor the bill on the floor.

RS 20456C1: **Rep. Bedke** presented **RS 20456C1** to the committee. This proposed legislation would exempt all full-time, non-resident students from use fees on their motor vehicle as long as the student has registered or licensed the vehicle in their home state. Currently, students are liable for this use fee after their vehicle is in the state for 90 days of cumulative use in any one 12-month period.

MOTION: **Rep. Ellsworth** moved to introduce **RS 20456C1. Motion carried on voice vote.**

RS 20489C1: **Rep. Bayer** introduced **Pam Eaton,** President of the Idaho Retailers and Idaho Restaurant and Lodging Association to present **RS 20489C1**to the committee. She explained that this legislation adds language to the statute to clarify that the sales price does not include a gratuity or a tip when serving meals, and therefore, is not taxed. This language is consistent with the rule which exempts services from sales tax. In the past, when a gratuity was added to the bill it was taxed but if a cash tip was left, it was not taxed. This bill resolves that discrepancy.

MOTION: **Rep. Bayer** moved to introduce **RS 20489C1. Motion carried on voice vote.**

Vice Chairman Collins turned the gavel back over to **Chairman Lake.**

ADJOURN: There being no further business to come before the committee, the meeting was adjourned at 11:59 a.m.

Representative Dennis Lake
Chairman

Bev Bean
Secretary

AGENDA
HOUSE REVENUE & TAXATION COMMITTEE
9:00 A.M.
Room EW42
Thursday, March 03, 2011

SUBJECT	DESCRIPTION	PRESENTER
H 213	Gratuities - sales tax exemption	Pam Eaton Idaho Retailers; Idaho Lodging & Restaurant Assn.
H 214	Motor vehicle use fees - non-resident students	Rep. Bedke

If you have written testimony, please provide a copy of it to the committee secretary to ensure accuracy of records.

COMMITTEE MEMBERS

Chairman Lake
Vice Chair Collins
Rep Barrett
Rep Moyle
Rep Raybould
Rep Roberts
Rep Schaefer
Rep Smith(24)
Rep Wood(35)
Rep Bedke
Rep Harwood
Rep Barbieri
Rep Bayer
Rep Ellsworth
Rep Gibbs (Wheeler)
Rep Killen
Rep Burgoyne
Rep Rusche

COMMITTEE SECRETARY

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MINUTES

HOUSE REVENUE & TAXATION COMMITTEE

DATE:	Thursday, March 03, 2011
TIME:	9:00 A.M.
PLACE:	Room EW42
MEMBERS:	Chairman Lake, Vice Chairman Collins, Representative(s) Barrett, Moyle, Raybould, Roberts, Schaefer, Smith(24), Wood(35), Bedke, Harwood, Barbieri, Bayer, Ellsworth, Gibbs (Wheeler), Killen, Burgoyne, Rusche
ABSENT/ EXCUSED:	Representative(s) Moyle, Harwood, Ellsworth
GUESTS:	Pam Eaton, Idaho Lodging & Restaurant Assn.; Kevin Settles, Bardenay Restaurant; Ray Amaya, 670 KBOI FM

The meeting was called to order at 9:07 a.m. by **Chairman Lake.**

H 213: **Pam Eaton,** appearing as spokesman for Idaho Restaurant & Lodging Association and the Idaho Retailers Association, presented **H 213,** which adds language to Idaho statute to clarify that sales price shall not include a gratuity or tip when serving meals, and therefore, is not taxed. This bill corrects a tax discrepancy in the statute and makes it clear that services are exempt from sales tax. She explained that since a gratuity goes entirely to the servers, who in turn pay taxes on those tips, this legislation corrects a double taxation issue. Ms. Eaton stated she felt that this legislation is good public policy and good tax policy and requested the Committee's favorable consideration of this bill.

MOTION: **Rep. Burgoyne** moved to send **H 213** to the floor with a **DO PASS** recommendation. **Motion carried on voice vote. Rep. Bayer** will sponsor the bill on the floor.

H 214: **Rep. Bedke** presented **H 214**. This legislation would exempt all full-time, non-resident students from use fees on their motor vehicle as long as the student has registered or licensed the vehicle in their home state. Rep. Bedke explained that use tax applies to vehicles when they are in the state for 90 days in any consecutive 12 month period. Out-of-state, full-time students are reported by vigilante auditors or neighbors and the use tax then becomes due on their vehicle. He noted that he does not believe this is in the spirit of the law and this legislation would correct this problem by exempting these tuition-paying students from that tax.

MOTION: **Rep. Roberts** moved to send **H 214** to the floor with a **DO PASS** recommendation. **Motion carried on voice vote. Rep. Bedke** will sponsor the bill on the floor.

ADJOURN: There being no further business to come before the committee, **Chairman Lake** adjourned the meeting at 9:19 am.

Representative Dennis Lake
Chairman

Bev Bean
Secretary

AGENDA
SENATE LOCAL GOVERNMENT & TAXATION COMMITTEE
3:00 P.M.
Room WW53
Tuesday, March 22, 2011

SUBJECT	DESCRIPTION	PRESENTER
VOTE GUBERNATORIAL APPOINTMENT:	Vote on Appointment of Tom Katsilometes as Commissioner to State Tax Commission	
H0194	**RELATING TO A SALES AND USE TAX REBATE** to extend the sunset for a rebate of sales or use tax on personal tangible property used by a media production company to July 1, 2016,	Tom Williamson, SOA Entertainment, Idaho Film Producer
H0213	**RELATING TO SALES TAX** to add language to clarify that sales price shall not include a gratuity or tip when serving meals and is not taxed to be consistent that services are exempt from sales tax.	Representative Cliff Bayer
H0214	**RELATING TO USE TAX** to amend Idaho law to exempt non-resident students from paying use tax on their motor vehicles registered or licensed in their home state while attending an institution of higher education accredited and located in Idaho.	Representative Scott Bedke

If you have written testimony, please provide a copy of it to the committee secretary to ensure accuracy of records.

COMMITTEE MEMBERS

Chairman Stegner
Vice Chair Siddoway
Sen Hill
Sen McKenzie
Sen Corder
Sen McGee
Sen Hammond
Sen Werk
Sen Bilyeu

COMMITTEE SECRETARY

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MINUTES

SENATE LOCAL GOVERNMENT & TAXATION COMMITTEE

DATE:	Tuesday, March 22, 2011
TIME:	3:00 P.M.
PLACE:	Room WW53
MEMBERS PRESENT:	Chairman Stegner, Vice Chairman Siddoway, Senators Hill, McKenzie, Corder, McGee, Werk, and Bilyeu
ABSENT/EXCUSED:	Senator Hammond
NOTE:	The sign-in sheet, testimonies, and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

Chairman Stegner called the meeting to order at 3:04 p.m. with a quorum present. **Senator Hammond** has an excused absence.

MOTION: GUBERNATORIAL APPOINTMENT VOTE: **Senator Bilyeu** moved, seconded by **Senator Corder**, to send the gubernatorial appointment of Tom Katsilometes as Commissioner to the Idaho State Tax Commission to the Senate floor with a do pass recommendation that it be confirmed by the Senate. The motion carried by voice vote. **Senator Bilyeu** will be the sponsor.

Chairman Stegner welcomed **Tom Williamson** to present H0194.

H0194 **RELATING TO SALES AND USE TAX REBATE** extends the sunset for a rebate of sales or use tax on personal tangible property used by a media production company to July 1, 2016.

Mr. Williamson, SOA Entertainment & Idaho Film Producer, opened his discussion by providing some history on this legislation. A task force was organized in 2005 (handout enclosed) two legislative actions resulted from that organization: 1) Media Production Sales Tax Rebate which was approved with the attachment of a sunset clause; and, 2) Media Production Income Tax Credit/Rebate which was not approved. A second handout on H194, prepared by **Mr. Williamson**, provided a full outline of why this legislation should be extended and what this niche of the film industry could do for Idaho, mostly in small communities. Fifteen years ago, Dante's Peak filmed in Northern Idaho, created an economic stimulus of $11.0 million and was probably the biggest film to come into the state as far as an economic impact. Since then, a shift in the industry resulted in legislation created in 2006 when incentives became standard. The original legislation was a mechanism to attract industry and maintain the Idaho indigenous industry.

The mechanics of this bill are based on the tangible personal property portion of a media production expenditure, not the full budget. The portion of the budget this applies to is pretty standard to neighboring states although some of those states do not have sales tax and this brings Idaho some equality in that area. Since that time, $6.0-$7.0 million has been brought into the state. Not everyone has applied for that rebate. The incentive allows a producer to look at this state and know there will be something coming back on the 20% of the budget that is spent on purchases. There is also a cash infusion into the state and community. Extending the sunset for the next five years keeps Idaho on the website saying that there is an active, working incentive. **Mr. Williamson** outlined the activities of the film industry within the state, both historically and those that are current, as

well as possibilities for the future. He reviewed what other states are doing as far as incentives and the kinds of films that are going to those states.

Senator Werk remembered that the incentive was set up to guarantee that it would bring in more economic benefit and tax monies than what would ever be paid out. A minimum of $200,000 spent for a media production project was set to qualify for the incentive. Has the income to the state and communities been in excess of the amount of the incentives paid out? **Mr. Williamson** stated that was the intent.

Senator Hill asked why this would make a difference when other states, and even countries, have huge incentives. In his answer, **Mr. Williamson** said that this keeps Idaho on the website showing there are at least some incentives–its that extra step to say Idaho is interested.

Chairman Stegner noted that the Japanese film company that made "Three of a Kind" has not made an application as yet. **Mr. Williamson** said they have not.

Senator Corder asked why is 20% a subsidy and less than 20% not–do you have data? **Mr. Williamson** responded that the major programs in neighboring states pay back 20% on those purchases. Idaho's incentive is based on only a part of that budget–about 20% of the operating budget within the state. There is economic data based on California but by looking at budgets and using conservative multipliers, economists extrapolate where the dollars go.

The following people testified in support of H0194:
Karen Ballard, Administrator for the Division of Business-Department of Film, Department of Commerce
Norris Krueger, PhD, Boise State University and member of the Idaho Film Industry Task Force

Mr. Williamson showed a short film clip on "Saving Council" and closed his presentation.

Chairman Stegner stated that H0194 is before the Committee; is there discussion?

Senator Hill commented that he is really conflicted on this bill. If we were ever to apply a sales tax rebate, this meets the requirements we have asked for. It requires a minimum investment of $200,000, they have to apply for the rebate, it can be tracked to see how much it is costing the state, it has a sunset, it requires very few government services, and he is impressed with **Mr. Williamson's** efforts. It is a small investment for the return to small communities. It goes against some things he believes in but in this case he supports this bill.

MOTION: **Senator Hill** moved, seconded by **Senator Bilyeu**, to send H0194 to the Senate floor with a do pass recommendation.

Senator Werk acknowledged that he is conflicted as well. We have done the right thing, we have a bill with a sunset back for review and it seems to have been useful and it doesn't seem to cost us anything so he will support the bill despite that angst and resistance in terms of exemptions.

Senator McKenzie stated he voted against this in 2006 and he understands all the points that Senator Hill brings up but he will stand with his "no" vote. This is nice to have but it doesn't drive people to move their production here.

Senator Bilyeu said that she is not conflicted at all. She loves theatre and movies and is intrigued with the project "Saving Council" and if they get going they truly can save Council, Idaho. It is such a small investment that we can be making as a state and it is important so she supports the bill.

VOTE: The motion carried by voice vote. **Senator Bilyeu** will be the sponsor.

H0213 **RELATING TO SALES TAX** clarifies that sales price shall not include a gratuity or tip when serving meals.

Pam Eaton, Representative, Idaho Retailers and Idaho Restaurant Association, distributed copies of the Idaho Administrative Code IDAPA 35.01.01 (04) "Gratuities" and asked for the Committee's support of H0213. This bill adds language to clarify and make consistent that the sales price should not include gratuity for serving meals and therefore is not subjective to sales tax. For background, the Tax Commission (ISTC) had a little known rule that in situations (a) and (b) on the handout, are not subject to sales tax but in situations (c) and (d), the gratuity is subjected to sales tax. In all four situations, the gratuity goes into the servers pocket, it does not go to the restaurant. The server then pays federal and state income taxes. The rule has been in place since 1993 and recently it came to light through the audits. After much discussion between ISTC, attorneys, and restaurants, H0213 was crafted. This explicit exemption says tips or gratuities on a meal will not be subject to sales tax except when the service charge is added in by banquets, hotels, or convention centers.

Chairman Stegner voiced his concern that the language may allow an establishment to manipulate charges between the amount charged as product which is eligible for sales tax and the amount allocated to gratuity which is exempt from sales tax by adding a higher, mandatory tip to the bill. **Ms. Eaton** replied that those actions would be bad business practice and customers would walk out. If there were mandatory gratuities, people would stop coming to that business. This language was suggested by the Tax Commission to reduce the likelihood of fraud. The bill is clear that it is gratuity going into the servers pocket and if it starts going into the business it is something else which is covered under other sections in code . Stated gratuities are not mandatory, the customer can always negotiate or pay the amount he wants to pay.

Senator Corder asked how the Tax Commission discerns the difference. What evidence is there that would indicate which part was food and which part was a gratuity for service when it is printed on the bill? Does this occur during an audit? **Ms. Eaton** said the auditor goes back and looks at sales receipts that show if the tip was written in or if it was left blank. If a large party goes into a restaurant, there could be a gratuity amount written in based on the total bill before sales tax. The percentage for large parties is generally written somewhere on the menu. When the sales receipt is printed, the gratuity is printed on a separate line and identified as such – there is nothing handwritten.

Mr. John interjected some further explanation. The only time that this is an issue is if the gratuity is mandatory. If a tip or gratuity is given voluntarily it is not a problem. It is only when it is mandatory and must have been included in the price on the sales slip.

Senator Hill commented that for this to qualify, it must be the same standard as other invoices and the gratuity has to be separately stated in order to be exempt from the tax. Is that correct? **Mr. John** agreed – if it is separately stated, it is usually not mandatory. **Senator Hill** said that when he goes into an establishment and it says 18% gratuity for eight or more, I know exactly what the bill is because the orders came off the menu and then the 18% gratuity is added as a separate line item. It is not built into the menu. That would meet that requirement. **Mr. John** stated that if the gratuity is broken out separately and if it is mandatory, not voluntary, under current rule it would be taxable.

Senator Hill addressed a question to **Ms. Eaton**. Where, in this bill, does it say it only applies to restaurants and not to certain other establishments? **Ms. Eaton** replied that is doesn't specifically say that it only applies to restaurants. But, it doesn't apply to those other establishments like hotels and conference centers because when a banquet is served at those places, the bill doesn't say gratuity, it says service charge. That service charge goes into the banquet facility and not necessarily into the servers pocket.

Ms. Eaton closed by asking for the Committee's support. It is an inaccuracy in a little known rule that causes a lot of confusion.

Chairman Stegner stated that H0213 is before the Committee.

MOTION: **Senator Werk** moved, seconded by **Senator Hill**, to send H0213 to the Senate floor with a do pass recommendation.

Senator Hill said that, generally speaking, services are not subject to sales tax. It shouldn't make any difference whether the gratuity is written in voluntarily or added as a certain percent for larger groups. This is a matter of equity and this should be fixed.

VOTE: The motion carried by voice vote. **Senator Werk** will be the sponsor.

H0214 **RELATING TO USE TAX** to exempt nonresident students from paying use tax on their motor vehicles.

Representative Scott Bedke introduced H0214 to the Committee saying that it makes a minor change to the Use Tax Statute. Current statute requires the assessment and application of a use tax to all vehicles that are within the state for more than 90 days in any 12 consecutive months. As such, those resident students attending colleges and universities in the state of Idaho, both private and public, are subject to this fee. This is erratically enforced over the state. The amount of use tax is based on Idaho's 6% but it is offset by whatever the tax rate is in the student's home state. There are several qualifications to meet this exemption: the student must be full time; the vehicle must be registered and licensed in the student's state of residence; the institution must be postsecondary education and both physically located and accredited in the state of Idaho.

Representative Bedke stated that the current rule is not universally enforced and could create a hardship to that student.

Senator McGee stated that he supports this idea but do all the secondary education schools, both private and public, go through the same accreditation through the Idaho State Board of Education? **Representative Bedke** said that they do.

MOTION: **Senator Siddoway** moved, seconded by **Senator McGee**, to send H0214 to the Senate floor with a do pass recommendation. The motion carried by voice vote. **Senator McGee** will be the sponsor.

ADJOURNMENT: **Chairman Stegner** assigned sponsors at this time. This completes the work for today and there will be a meeting tomorrow. There being no further business, the meeting adjourned at 4:32 p.m. until Wednesday, March 23rd at 3:00 p.m.

Senator Stegner
Chairman

Twyla Melton
Secretary