12-8-2016

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHANDLER'S-BOISE, LLC,

Plaintiff/Appellant,

vs.

IDAHO STATE TAX COMMISSION,

Defendant/Respondent.

Supreme Court Docket No. 44211
District Court No. CV-2015-17617

RESPONDENT IDAHO STATE TAX COMMISSION'S BRIEF

Appeal from the Fourth District Court, Ada County, State of Idaho
Honorable District Judge Melissa Moody, presiding.

Lawrence G. Wasden
Attorney General
Phil N Skinner, ISB No. 8527
Lead Deputy Attorney General
Idaho State Tax Commission
Erick Moss Shaner, ISB No. 5214
David B. Young, ISB No. 6380
Deputy Attorneys General
State of Idaho
P.O. Box 36
Boise, Idaho 83722-0410

Attorneys for Defendant/Respondent

Thomas E. Dvorak, ISB No. 5043
Clint R. Bolinder, ISB No. 5667
Melodie A. McQuade, ISB No. 9433
GIVENS PURSLEY, LLP
601 West Bannock Street
Boise, Idaho 83702

Attorneys for Plaintiff/Appellant

Addendum Document #1:

IDAPA 35.02.13,1.c. and d. (Amended 11/29/89)
(State of Idaho, Idaho Sales and Use Tax Regulations)

IDAPA 35.02.

State of Idaho

IDAHO SALES AND USE TAX REGULATIONS

By the

DEPARTMENT OF REVENUE AND TAXATION

State Tax Commission
700 W. State Street
P.O. Box 36
Boise, Idaho 83722

1989 EDITION
Effective November 29, 1989

ii. Linens, silverware, glassware, tablecloths, towels, and nondisposable napkins.

iii. Furniture, fixtures, and cookware.

iv. Menus.

v. Any tangible personal property available to the general public, such as restroom supplies and matches.

vi. Complementary candies, popcorn, drinks, or food, when patrons are not required to purchase other food, meals, or drinks in order to receive the complementary goods.

REGULATION 12,26. Price Labels.--
[Adopted 11/09/89]

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.

REGULATION 12A,1. Occasional Sales.--
[Repealed 12/05/88]

REGULATION 12A,2. Sale of a Business Asset.--
[Repealed 12/05/88]

REGULATION 12A,3. Boats, Trailers, Snowmobiles, ATV's, Camper Units, and Aircraft.--
[Repealed 12/05/88]

REGULATION 13,1. Sales Price or Purchase Price Defined.--
[Amended 11/09/89]

a. The term "sales price" and "purchase price" may be used interchangeably. Both mean the price paid by the consumer or user to the seller including:

i. the cost of transportation prior to sale (See Regulation 13,25);

ii. manufacturer's or importer's excise tax (See Regulation 13,23);

iii. services agreed to be rendered as part of the sale, such as handling charges and other separately stated expenses;

iv. separately stated labor charges to produce or fabricate made to order goods (See Regulation 12,4).

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.

i. 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.

ii. 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.

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.

iv. 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 section d. of this regulation.

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.

REGULATION 13,2. Trade-ins, Trade-downs and Barter.--
[Amended 10/16/84]

For purposes of clarity, this regulation will define trade-ins, trade-downs, and barter and will illustrate each by example.

Addendum Document #2:

Idaho Code § 63-3612 (1988 version)
(ID Session Laws C346 1988)

vice upon the director.

(4) Process served upon the director and copy thereof forwarded as in this section provided shall for all purposes constitute valid and binding service thereof upon the insurer.

Approved April 6, 1988.

CHAPTER 346
(H.B. No. 521, As Amended, As Amended in the Senate)

AN ACT

RELATING TO SALES TAX; AMENDING SECTION 63-3612, IDAHO CODE, TO FURTHER DEFINE THE SALE OF FOOD, MEALS OR DRINK, AND TO FURTHER DEFINE THE SALE OF HOTEL AND MOTEL ACCOMMODATIONS.

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

SECTION 1. That Section 63-3612, Idaho Code, be, and the same is hereby amended to read as follows:

63-3612. SALE. The term "sale" means and includes any transfer of title, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration and shall include any transfer of possession through incorporation or any other artifice found by the state tax commission to be in lieu of, or equivalent to, a transfer of title, an exchange or barter. "Sale" shall also include:

(a) Producing, fabricating, processing, printing, or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing, or imprinting.

(b) Furnishing, preparing, or serving for a consideration food, meals, or drinks and nondepreciable goods and services directly consumed by customers included in the charge thereof.

(c) A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price.

(d) A transfer for a consideration of the title or possession of tangible personal property which has been produced, fabricated, or printed to the special order of the customer, or of any publication.

(e) Admission charges.

(f) Receipts from the use of or the privilege of using tangible personal property or other facilities for recreational purposes.

(g) Providing hotel, motel, tourist home or trailer court accommodations and nondepreciable goods and services directly consumed by customers included in the charge thereof, except where residence is maintained continuously under the terms of a lease or similar agreement for a period in excess of thirty (30) days.

(h) Receipts from the lease or rental of tangible personal property.

(i) As used in subsections (b) and (g) of this section, goods "directly consumed by customers" shall not be interpreted to mean any linens, bedding, cloth napkins or similar nondisposable property.

Approved April 6, 1988.

CHAPTER 347
(H.B. No. 529, As Amended)

AN ACT

RELATING TO DESTRUCTION OF PROPERTY BY MEANS OF EXPLOSIVES; REPEALING SECTIONS 18-7006 AND 18-7007, IDAHO CODE; AMENDING CHAPTER 70, TITLE 18, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 18-7006, IDAHO CODE, TO PROVIDE ELEMENTS OF THE CRIME OF DESTRUCTION OF PROPERTY BY MEANS OF EXPLOSIVES; AND AMENDING CHAPTER 70, TITLE 18, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 18-7007, IDAHO CODE, TO PROVIDE DEGREES OF THE CRIME OF DESTRUCTION OF PROPERTY BY MEANS OF EXPLOSIVES, AND TO PROVIDE PENALTIES.

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

SECTION 1. That Sections 18-7006 and 18-7007, Idaho Code, be, and the same are hereby repealed.

SECTION 2. That Chapter 70, Title 18, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 18-7006, Idaho Code, and to read as follows:

18-7006. DESTRUCTION OF PROPERTY BY MEANS OF EXPLOSIVES. Every person who maliciously injures or destroys any property belonging to another, without authorization and without having reasonable grounds to believe that he has such authorization, by means of explosives, shall be guilty of a felony and shall be punished as provided in section 18-7007, Idaho Code.

SECTION 3. That Chapter 70, Title 18, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 18-7007, Idaho Code, and to read as follows:

18-7007. DEGREES AND PENALTIES -- DESTRUCTION OF PROPERTY BY MEANS OF EXPLOSIVES. (1) Every person who commits the crime of destruction of property by means of explosives, as defined in section 18-7006, Idaho Code, and who, in so doing, causes injury to another person, or creates a grave risk of death or great bodily harm to another person, shall be guilty of destruction of property by means of explosives in the first degree, and shall be punished by a term of imprisonment in the state penitentiary for up to twenty-five (25) years or by a fine of not more than twenty-five thousand dollars

Addendum Document #3:

House Revenue and Taxation Committee Report in Support of House Bill 222

H. Revenue and Taxation Comm., 38th Leg. Sess. (1965)

Intent of ... of Sales Tax Act

... y 4, 1965

Pete T. Cenarrusa, Speaker
House of Representatives
38th Legislative Session
Capitol Building
Boise, Idaho

SUBJECT: House Revenue and Taxation Committee Report in Support of House Bill 222.

Dear Mr. Speaker:

In this report your Committee on Revenue and Taxation has set forth the considerations which guided it in arriving at the conclusions which are expressed in various section of this Sales Tax Act. This report is intended to be a history of the Committee's efforts in this area and to function as a guide to the office of the Tax Collector in administration of this act. Many of these sections are self-explanatory and have no need for elaboration or discussion.

Section 1. Though this act encompasses a Sales Tax and a complementary Use Tax, your committee elected to designate the act for reference purposes as "The Idaho Sales Tax Act".

Section 2. Definitions - Self-explanatory.

Section 3. Farming - Self-explanatory.

Section 4. In this State - In the State. - Self-explanatory.

Section 5. Includes and Including - Self-explanatory.

Section 6. New Mobile Home - This definition is designed to set the stage for application of section 13 (c). Your committee intends by this term to include only those mobile homes which are sold for the first time at retail and have not previously been used, occupied or sold at retail in Idaho or any other state. Your committee has included within this definition the attachments and fixtures normally affixed to such vehicles at the time of sale. Some attention should be paid to these sales to insure that mobile homes are not being "loaded" for sale in an effort to avoid imposition of the tax on the full price of appliances which might not normally constitute a component part of such vehicles at the time of sale. If abuses are encountered, your committee would expect

determines that prescriptive glasses are necessary. These glasses are prepared by Optometrist or someone else according to this prescription. Tangible personal property, the glasses, has been sold and professional services rendered. A sales tax will be imposed upon that part of the total amount billed which represents the "sales price" of the glasses and will be collected from Patient.

Section 12 (a). This subsection insures that custom-made goods will be treated in a manner identical to ready-made products.

Where material which becomes a part of the custom-made article is furnished by the customer, a tax having been paid by him upon purchase of the materials, the effect of this section will be imposition of a sales tax upon the charge for services in preparation of the custom-made product.

Example 1. Owner purchases cabinets from Cabinet-maker to be made according to specifications furnished by Owner. Cabinet-maker delivers cabinets to Owner who installs them himself. A sales tax will be collected by Cabinet-maker from owner measured by the entire sales price.

Example 2. Owner employs Cabinet-maker to make and install cabinets in owner's home according to specifications furnished by Owner. Cabinet-maker will pay a tax on his purchases. No tax will be charged Owner. See section 9 (a).

Example 3. Owner purchases material (on which he pays a sales tax) which he delivers to Cabinet-maker. Cabinet-maker uses this material to manufacture cabinets for Owner according to specifications. These cabinets are delivered to owner and agreed price paid for the work done by Cabinet-maker. A sales tax will be collected from owner measured by the entire price charged by Cabinet-maker.

Section 12 (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. This section is not intended to

One dollar and eighty cents in sales tax is collected at the time the suit is laid away. After twenty dollars has been paid, Customer indicates he will be unable to make any further payments. Merchant returns the suit to stock, refunding the entire twenty dollars plus the sales tax to Customer. Merchant may deduct the one dollar and eighty cents from sales taxes he owes the state. If merchant does not refund the entire twenty dollars, no deduction, credit or refund will be permitted.

In the cases mentioned above, the retailer would deduct the amount of tax thus refunded to the purchaser from taxes he may owe the state. In proper cases a refund from the state could be obtained.

If, as a condition to the rescission of a sale of a $3,000.00 automobile, the customer was required to purchase another automobile and in fact purchased such automobile for $3,500.00, there would be no refund or credit of the sales tax on the original sale. The customer would be charged a sales tax on the differential, $500.00 upon execution of the subsequent contract of sale.

Section 13 (b) 4. 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.

Section 13 (b) 5. The sales price does not include any excise taxes levied by the United States. This principally affects the luxury items upon which a federal excise tax is currently imposed. This section does not exclude a manufacturer's or importer's excise tax, such as, for instance, the manufacturer's tax upon automobiles.

Section 13 (b) 6. 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.

Section 13 (b) 7. This is a converse of section 13 (a) 3 discussed above.

Section 13 (c).. The purpose of this section is to equate the sale of a mobile home with the sale of a home. In the case of home sales, the material which enters into construction will have a sales tax imposed upon it. The labor which enters into construction will not be taxed. To achieve this equation, a sales tax is imposed upon 40% of the sales price of a new mobile home, the assumption being the other 60% of the price represents the cost of labor. The 40% figure was tentatively accepted by this committee as representative of that portion of the total price of mobile homes attributable to cost of materials. If there is any indication that this ratio does not accurately reflect material cost or if the proportion should change with pricing patterns, a report should be made to the legislature together with suggestions for corrective action.

This exception only applies to "new" mobile homes. Any used trailer or mobile home which is sold in this fashion will be exposed to sales tax upon its full price.

Section 14. Seller. This term is here defined broadly and includes within its scope any person making sales to a buyer or consumer either as principal, agent or broker. In turn, the term is incorporated within the definition of "retailer" in section 10 (a). Thus,

Addendum Document #4:

1988 Legislative History on HB 520

LEGISLATURE OF THE STATE OF IDAHO

Forty-ninth Legislature — Second Regular Session — 1988

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 520

BY REVENUE AND TAXATION COMMITTEE

AN ACT

RELATING TO SALES TAX; AMENDING SECTION 63-3613, IDAHO CODE, TO FURTHER DEFINE SALES PRICE IN ORDER TO AVOID THE IMPOSITION OF SALES TAX ON TIPS AND GRATUITIES.

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 and regulations 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 refund coupons.

(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 part 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 <u>serving,</u> 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. Charges for transportation of tangible personal property after sale; 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.

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

(d) For sales made on and after January 1, 1967, taxes previously paid on amounts represented by accounts found to be worthless and actually charged off for income tax purposes may be credited upon a subsequent payment of the tax herein provided or, if no such tax is due, refunded; provided, however, that such credit or refund may be claimed only upon that sales tax returned for the month following the filing date of the taxpayer's state income tax return in which a deduction is claimed for such worthless accounts. 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 per cent (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.

STATEMENT OF PURPOSE

RS 21180

The State Tax Commission is presently requiring employers to collect, or pay, a five percent sales tax on mandatory gratuities charged for banquets, room service and similar services. This tax is being levied even though the monies are distributed to employees in place of tips that otherwise would have been given to these same employees by the guests.

The purpose of this legislation is to change the appropriate definition in the Idaho Sales and Use Tax Act to clarify legislative intent that such monies, given for serving, are not subject to the Idaho Sales and Use Tax Act.

FISCAL IMPACT

The interpretation concerning payment of sales tax on mandatory gratuities developed within the past two years. Little income has been realized by the State from this facet of industry operations. In addition, inflationary increases in food and other items have forced the costs of meals to increase somewhat each year.

For these reasons the fiscal impact of this measure will be minimal but a loss of some $20,000 might be experienced.

3/21 2nd rdg - to 3rd rdg as amen
3/22 3rd rdg as amen - PASSED - 33-8-1
NAYS -- Batt, Beitelspacher, Blackbird, Bray, Calabretta, Herndon, McRoberts, Reed.
Absent and excused -- Gilbert.
Title apvd - to House
3/23 To enrol
Rpt enrol - Sp signed
Pres signed
3/24 To Governor
3/30 Governor VETOED
VETO sustained - 48-34-2
Note: 2/3 majority required for override
NAYS -- Adams, Bengson, Black(23), Braun, Brocksome, Fry, Giovanelli, Gould, Hartung, Hooper, Johnson, Jones(13), Jones(23), Judd, Lasuen, Lloyd, McCann, McDermott, Newcomb(23), Peters, Reid, Robbins, Robison, Smock, Steele, Steger, Stoicheff, Stone, Sutton, Tucker, Vickers, Vincent, White, Wilde.
Absent and excused -- Allan-Hodge, Gurnsey.
To Chief Clerk

H519.....By Judiciary, Rules & Administration
DRIVING UNDER INFLUENCE OF ALCOHOL, DRUGS (DUI) - Adds to existing law to provide when a court may mandate the use of ignition interlock systems, electronic monitoring devices or special license plates for a person convicted or found guilty of operating a motor vehicle under the influence of alcohol, drugs and other intoxicating substances.

2/8 House intro - 1st rdg - to printing
2/9 Rpt prt - to Jud

H520.....By Revenue & Taxation
TAX AND TAXATION - SALES TAX - Amends existing law to eliminate sales tax on tips and gratuities.

2/8 House intro - 1st rdg - to printing
2/9 Rpt prt - to Rev/Tax

H521aa,aaS.....By Revenue & Taxation
TAX AND TAXATION - SALES TAX - Amends existing law to further define the term sale to clarify the sale of meals and motel/hotel accommodations for purposes of the state sales tax.

2/8 House intro - 1st rdg - to printing
2/9 Rpt prt - to Rev/Tax
3/2 Rpt out - to Gen Ord
3/4 Rpt out amen - to engros
3/7 Rpt engros - 1st rdg - to 2nd rdg as amen
3/8 2nd rdg - to 3rd rdg as amen
3/10 3rd rdg as amen - PASSED - 69-12-3
NAYS -- Gould, Hale, Infanger, Judd, Mahoney, Martens, Parks, Sessions, Stone, Taylor, Wilde, Wood.
Absent and excused -- McCann, Slater, Tucker.
Title apvd - to Senate
3/11 Senate intro - 1st rdg as amen - to Loc Gov
3/21 Rpt out - rec d/p - to 2nd rdg as amen
3/22 2nd rdg - to 14th Ord
Rpt out amen - to 1st rdg as amen
3/23 1st rdg - to 2nd rdg as amen
3/24 2nd rdg - to 3rd rdg as amen
3/25 3rd rdg as amen - PASSED - 25-10-7
NAYS -- Batt, Fairchild, McRoberts, Noh, Ricks, Ringert, Smyser, Staker, Thorne, Twiggs.
Absent and excused -- Beck, Bilyeu, Calabretta, Hanson(18), Mackin, McLaughlin, Sverdsten.
Title apvd - to House
3/28 House concurred in Senate amens - to engros
Rpt engros - 1st rdg - to 2nd rdg as amen
Rls susp - 3rd rdg as amen - PASSED - 68-8-8
NAYS -- Callen, Crane, Gould, Mahoney, Martens,

--Continued--

Neibaur, Slater, Taylor.
Absent and excused -- Allan-Hodge, Fry, Hawkins, Hill, Jones(23), Newcomb(24), Parks, Robbins.
Title apvd - to enrol
Rpt enrol - Sp signed
Pres signed
3/29 To Governor
4/6 Governor signed
Session Law Chapter 346
Effective: 7-1-88

H522.....By Revenue & Taxation
ACCOUNTS - SEARCH AND RESCUE - Amends existing law to allow a transfer of moneys to the Search and Rescue Account from the Fish and Game Account, the Snowmobile Account, the Cross-Country Skiing Account, the Motorbike Recreation Account, the Waterways Improvement Account and the Off-Road Motor Vehicle Account.

2/8 House intro - 1st rdg - to printing
2/9 Rpt prt - to Rev/Tax

H523.....By Agricultural Affairs
IRRIGATION DISTRICTS - Adds to existing law to allow an irrigation district to trade in or exchange personal property.

2/9 House intro - 1st rdg - to printing
2/10 Rpt prt - to Agric Aff
2/17 Rpt out - rec d/p - to 2nd rdg
2/18 2nd rdg - to 3rd rdg
2/19 3rd rdg - PASSED - 71-0-13
NAYS -- None.
Absent and excused -- Brown, Clark, Crane, Hale, Hay, Hill, McDermott, Peters, Sessions, Simpson, Slater, Tucker, Wilde.
Title apvd - to Senate
2/22 Senate intro - 1st rdg - to Agric Aff
2/26 Rpt out - rec d/p - to 2nd rdg
2/29 2nd rdg - to 3rd rdg
3/18 3rd rdg - PASSED - 39-0-3
NAYS -- None.
Absent and excused -- Beck, Calabretta, Hanson(18).
Title apvd - to House
3/21 To enrol
Rpt enrol - Sp signed
Pres signed
3/22 To Governor
3/24 Governor signed
Session Law Chapter 160
Effective: 7-1-88

H524.....By Agricultural Affairs
DAIRY PRODUCTS - BUTTER - Amends existing law to include whey butter and whey cream butter within the definition of butter and to require grade designations on labels of such products.

2/9 House intro - 1st rdg - to printing
2/10 Rpt prt - to Agric Aff
2/17 Rpt out - rec d/p - to 2nd rdg
2/18 2nd rdg - to 3rd rdg
2/22 3rd rdg - PASSED - 71-0-13
NAYS -- None.
Absent and excused -- Callen, Geddes, Hansen, Hill, Loertscher, McCann, Montgomery, Parks, Peters, Scates, Simpson, Stone, Stucki.
Title apvd - to Senate
2/23 Senate intro - 1st rdg - to Agric Aff
2/26 Rpt out - rec d/p - to 2nd rdg
2/29 2nd rdg - to 3rd rdg
3/18 3rd rdg - PASSED - 39-0-3
NAYS -- None.

--Continued--

511 (RS 21052) Transp 2/4/88; 2/10/88.
Senate Transp 3/3/88.

512 (RS 21187) Transp 2/4/88; 2/10/88.
Senate Transp 3/3/88.

513 (RS 21086) H/W 2/4/88; 2/10/88.
Senate Loc Gov 2/29/88.

514 (RS 21226) H/W 2/4/88; 2/10/88.
Senate Jud 3/21/88.

515 (RS 21177) Rev/Tax 2/5/88; 2/18/88.
Senate Loc Gov 3/4/88.

516 (RS 20873) Jud 2/5/88; 2/11/88.
Senate Jud 3/14/88.

517 (RS 20961) Jud 2/5/88; St Aff 2/25/88.

518 (RS 21244) Jud 2/5/88; 2/9/88; 2/23/88; 2/29/88; Juvenile Justice Subcommittee 2.17.88.
Senate H/W 3/18/88.

519 (RS 21342) Jud 2/5/88; 2/9/88; 2/19/88.

520 (RS 21180) Rev/Tax 2/8/88; 2/23/88.

521 (RS 21259) Rev/Tax 2/8/88; 2/23/88; 2/26/88; 2/29/88.
Senate Loc Gov 3/18/88 (2:30pm).

522 (RS 21335) Rev/Tax 2/8/88; 2/15/88.

523 (RS 21049) Ag Aff 2/8/88; 2/16/88.
Senate Ag Aff 2/25/88.

524 (RS 21064) Ag Aff 2/8/88; 2/16/88.
Senate Ag. Aff 2/25/88.

525 (RS 21338) Rev/Tax 2/9/88; 2/24/88.
Senate Loc Gov 3/4/88.

526 (RS 21280) Educ 2/9/88; 2/17/88; 2/24/88.

527 (RS 21278) St Aff 2/9/88.

528 (RS 21332) St Aff 2/9/88; 2/16/88.
Senate Comm/Lab 3/17/88.

529 (RS 21315) Jud 2/9/88; 2/19/88; 2/25/88.
Senate Jud 3/21/88.

530 (RS 21118) Res/Con 2/9/88.

531 (RS 21219) CIT 2/9/88; Loc Gov 2/16/88.
Senate Loc Gov 3/11/88; Transp 3/10/88.

532 (RS 20901) Bus 2/9/88; 3/17/88; St Aff 3/21/88.

REVENUE AND TAXATION COMMITTEE

MINUTES

FEBRUARY 8, 1988

PLACE: Statehouse, Room 404

TIME: 9:30 a.m.

ROLL CALL: All members present

GUESTS: Mr. David Hand, Idaho Innkeepers Association; Representative Black

MOTION: It was moved by Representative Reid, seconded by Representative Horvath, that the minutes of the meeting held on February 5, 1988 be approved. Motion carried.

RS 21180 Chairman Antone said that the first item to be considered by the Committee would be RS 21180. Mr. Hand testified that the purpose of this legislation is to change the appropriate definition in the Idaho Sales and Use Tax Act to clarify legislative intent that such monies, given for serving, are not subject to sales tax. He stated that the Tax Commission is presently requiring employers to collect, or pay, five percent sales tax on mandatory gratuities charged for banquets, room service and similar services.

MOTION: It was moved by Representative Hill, seconded by Representative Childers, that RS 21180 be introduced. Motion carried.

RS 21259 The next item on the agenda was RS 21259. Mr. Hand testified that the purpose of this bill is to change definitions in portions of the Idaho Sales and Use Tax Act to clearly indicate that certain items provided with the sale of food and beverage or hotel and motel rooms are part of the sale for the purposes of the Act. He stated that the imposition of Idaho's use tax on hors d'oeuvres and other cocktail snacks included with the purchase of beverages, and application of the tax on the cost of food and beverage included in the sale of a hotel room are relatively new in Idaho.

MOTION: It was moved by Representative Loveland, seconded by Representative Childers, that RS 21259 be introduced. Motion carried.

RS 21335 Chairman Antone announced that the next item to be discussed would be RS 21335. He said that this bill takes 2% out of nonresident game tag fees, the snowmobile account, the motorbike recreation account, the cross country skiing recreation account and the waterways improvement account to adequately fund search and rescue operations. He said that search and rescue is in danger of losing volunteers because of lack of funds.

MOTION: It was moved by Representative Loveland, seconded by Representative Montgomery, that RS 21335 be introduced. Motion carried.

RS 21302 The last item on the agenda was RS 21302. Representative Black testified that this concurrent resolution amends a rule of the Tax Commission relating to the sale of tangible personal property relating to funeral services. The current law allows licensed funeral directors to sell vaults and burial receptacles without collecting a tax. He stated that cemeteries have to collect the tax if they sell the same item.

MOTION: It was moved by Representative Fry, seconded by Representative Loveland, that RS 21302 be returned to the sponsor. Motion carried.

There being no further business to come before the Committee, the meeting adjourned at 10:01 a.m.

Representative Steve Antone
Chairman

Kathryn L. Yost
Secretary

REVENUE AND TAXATION COMMITTEE

MINUTES

FEBRUARY 23, 1988

PLACE: Statehouse, Room 404

TIME: 8:47 a.m.

ROLL CALL: All members present except Representatives Hooper, Montgomery, Simpson and Hill who were absent and excused.

GUESTS: Mr. Jim Weatherby, Association of Idaho Cities; Representative Black; Mr. David Hand, Idaho Innkeepers Association; Mr. Ted Spangler, Tax Commission; Mr. McClure, Attorney for the Idaho Innkeepers Association and Mr. Wayne Mitteleider, Idaho Housing Agency.

MOTION: It was moved by Representative Reid, seconded by Representative Judd, that the minutes of the meeting held on February 22, 1988 be approved. Motion carried.

RS 21330C1 Chairman Antone announced that the first item on the agenda would be RS 21330C1. Mr. Weatherby testified that the purpose of this legislation is to allow a city or county to submit a proposal to its voters which would exceed the cap in the budget limitation law. If approved by a majority vote, the cap could be exceeded by up to two years. He stated that this authority is similar to that given to the school districts last year.

MOTION: It was moved by Representative Reid, seconded by Representative Robbins, that RS 21330C1 be introduced. Motion carried.

RS 21508 The next item on the agenda was RS 21508. Representative Black stated that this piece of legislation closes a loop hole that has allowed licensed funeral directors to sell burial vaults and receptacles without collecting sales tax. He said that this bill clarifies that only caskets are exempt, and are treated the same for tax purposes regardless of which entity sells them.

MOTION: It was moved by Representative Robbins, seconded by Representative Johnson, that RS 21508 be introduced. Motion carried.

HB 520 Chairman Antone said that the next business to come before the Committee would be HB520. Mr. Hand testified that the Tax Commission is presently requiring employers to collect, or pay, a five percent sales tax on mandatory gratuities charged for banquets, room service and similar services. He said that this tax is being levied even though the monies are distributed to employees in place of tips that otherwise would have been given to these same employees by the guests.

Mr. Spangler stated that mandatory gratuities are part of the purchase price when the contract includes the gratuity in the total bill. He said that this bill could possibly have a $3.3 million fiscal impact.

MOTION: It was moved by Representative Reid, seconded by Representative Burt, that HB 520 be held. Motion carried.

HB 521 The next item on the agenda was HB 521. Mr. Hand testified that the purpose of this legislation is to change definitions in portions of the Idaho Sales and Use Tax Act to clearly indicate that certain items provided with the sale of food and beverage or hotel and motel rooms are part of the sale for the purposes of the Act. He stated that currently, establishments supplying snacks, breakfast or beverages to their customers are including the cost these items in the total bill.

Mr. Spangler told the Committee that the Tax Commission is of the opinion that the courts need some guidance regarding legislative intent on the broad term "goods." He said that the section of the I.C. being addressed in this bill is the section dealing with the "term of sales" and should be the section on "exemptions."

Mr. McClure stated that he did not agree with the Tax Commission that this amendment belongs in the "exemption" section of the I.C. He said that it should not be taxed at all because the sales tax has already been paid resulting in double taxation.

MOTION: It was moved by Representative Judd that HB 521 be held. Motion died for lack of a second.

MOTION: It was moved by Representative Childers that HB 521 be sent to general orders. Motion died for lack of a second.

UNANIMOUS CONSENT Unanimous consent was given to hold HB 521 for two days.

HB 540 Chairman Antone announced that the last item on the agenda would be HB 540. Mr. Mittleleider testified that this legislation enables the creation of a voluntary program for school districts and local units of government to obtain the advantage of short-term cash flow financing. He stated that this bill enables the Idaho Housing Agency to engage in the pooling of local governments debt and extends the State's last recourse sales tax backing for Agency bonds to include this type of bond. He said it will further enchance cost savings through sharing of issuance costs and related expenses and lower interest rates.

MOTION: It was moved by Representative Robbins, seconded by Representative Loveland, that HB 540 be sent to the floor with a Do Pass recommendation. Motion carried. Representatives Fry and Reid will sponsor the bill on the floor.

There being no further business to come before the Committee, the meeting adjourned at 10:32 a.m.

Representative Steve Antone
Chairman

Kathryn V. Yost
Secretary

Addendum Document #5:

Idaho State Tax Commission Decision, Docket No. 22967 (2011) (redacted)

2011 WL 7615993 (Id.St.Tax.Com.)

State Tax Commission
State of Idaho

IN THE MATTER OF THE PROTEST OF ***, PETITIONER

Docket No.
22967
2011

DECISION

*1 On March 31, 2010, the Sales Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination (Notice) to *** (taxpayer). The Notice proposed additional use tax, penalty, and interest in the total amount of $17,758 for taxable period September 1, 2006, through August 31, 2009. The taxpayer filed a timely appeal and petition for redetermination on June 1, 2010, and requested an informal conference, which was held on May 5, 2011.

The Commission, having reviewed the audit file and considered the information obtained at the informal conference, upholds the audit findings as explained below.

The taxpayer operates an *** business in the *** region of Idaho. In addition to providing meals, the taxpayer also offers related services such as a full-service ***. The customer is billed for the meal along with a separately stated service charge for any additional services provided with the meal.

In the course of a routine sales and use tax audit, the Bureau discovered that the taxpayer 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 taxation of these service charges is the only issue protested by the taxpayer.

In his protest, the taxpayer makes the assertion that the service charge is not an additional cost associated with the food, but rather a charge for the nontaxable services of "independent contractors" hired by the taxpayer. The taxpayer believes that he provides these "independent contractors" as a courtesy to the customer and the combined billing relieves the customer of the burden of hiring and paying multiple parties. The taxpayer agrees that the customer pays for services in addition to the catered meal; however, he believes it should be treated differently because most of the charge is passed through to the service providers.

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:
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 chargethereof.** (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 analogous to a restaurant meal in which the entire charge is subject to sales tax despite some portion of the charge that is attributable to other services provided such as the waitstaff, management, and valet parking.

*2 The definition of a sale makes no exception for particular payment arrangements between the caterer and hired service providers, whether they are employees or independent contractors. The Commission concedes that in an alternative scenario in which the individual service providers were hired and paid by the customer separately, most, and perhaps all, of the services would not be taxable. However, in this case, the sale of the meal and related services was billed by a single entity, the taxpayer, and thus all charges must be included as part of the taxable sale.

Finally, the Commission approves of the Bureau's imposition of interest as appropriate per Idaho Code § 63-3045(6). Under the authority of Idaho Code § 63-3047, the Commission removes the imposed negligence penalty.

THEREFORE, the Notice of Deficiency Determination dated March 31, 2010, and directed to ***, is AFFIRMED by this decision.

IT IS ORDERED that the taxpayer pay the following amount of tax, penalty, and interest:

TAX	PENALTY	INTEREST	TOTAL
$14,930	$0	$3,063	$18,740

Interest is calculated through November 30, 2011, and will continue to accrue until the entire liability has been paid.

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

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

DATED this _____ day of _____ 2011.

Commissioner

2011 WL 7615993 (Id.St.Tax.Com.)

End of Document

Addendum Document #6:

IDAPA 35.01.02 Rule 11 (2007)

bones or joints. (7-1-93)

15. Prescription or Work Order. The terms prescription or work order shall mean an order issued to, or on behalf of, a specific individual by a practitioner licensed by the state under Title 54, Idaho Code, to prescribe such items. (7-1-93)

16. Real Property. The term real property means land and improvements or fixtures to the land. (7-1-93)

011. RETAIL SALES - SALE AT RETAIL (RULE 011).
The Idaho Sales Tax is a tax on retail sales. Retail sales include all sales of tangible personal property except for property that will be resold, leased, or rented in the regular course of the buyer's business. (7-1-93)

01. Retail Sales. Retail sales also include: (7-1-93)

a. Sales to any person who constructs, alters, repairs or improves real property regardless of whether the person improving the property intends to resell it. See Rule 012 of these rules. (3-30-07)

b. Producing or fabricating property to the special order of the customer. See Rule 029 of these rules. (3-30-07)

c. Furnishing, preparing or serving food, meals or drinks for compensation. See Rule 041 of these rules. (3-30-07)

d. Admission charges. See Rule 030 of these rules. (3-30-07)

e. Charges for the use or privilege of using tangible personal property or facilities for recreation. See Rules 030 and 047 of these rules. (3-30-07)

f. Providing hotel, motel, tourist home and trailer court accommodations. See Rule 028 of these rules. (3-30-07)

g. Leasing or renting tangible personal property. See Rule 024 of these rules. (3-30-07)

h. For sales of air transportation services see Rule 037 of these rules. (3-30-07)

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. However, when a sale of tangible personal property includes incidental services, the tax applies to the total amount charged, including fees for any incidental services except separately stated transportation and installation fees. The fact that the charge for the tangible personal property results mainly from the labor or creativity of its maker does not turn a sale of tangible personal property into a sale of services. The cost of any product includes labor and manufacturing skill. To determine whether a transaction is a retail sale of tangible personal property or a sale of services, the following tests must be applied. (7-1-93)

a. To determine whether a transfer of tangible personal property is a taxable retail sale or is merely incidental to a service transaction, the proper test is to determine whether the transaction involves a consequential or inconsequential professional or personal service. If the service rendered is inconsequential, then the entire transaction is taxable. If a consequential service is rendered, then it must be determined whether the transfer of the tangible personal property is an inconsequential part of the transaction. If so, then none of the consideration paid is taxable. (7-1-93)

b. To determine whether a mixed transaction qualifies as a sale of services, the object of the transaction must be determined; that is, is the buyer seeking the service itself, or the property produced by the service. (7-1-93)

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. (7-1-93)

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. The attorney prepares the will, sees that it is properly executed and bills the client. The physical document, the will, is then transferred from the attorney to the client. This is a sale of services because the client's object is not to obtain the will itself, but to ensure that his estate is disposed of in a certain way when he dies. Since, the transaction between the attorney and the client is not a retail sale of tangible personal property, no sales or use tax applies. However, the attorney must pay sales or use tax when he buys stationery and other equipment to prepare the will. Compare Example 5. (7-1-93)

b. Example 2: The attorney in Example 1 prepares a form book of wills which he intends to sell to other attorneys. The will he prepared in Example 1 is included in the form book. The sale of the form book to other attorneys is a taxable retail sale of tangible personal property. From the buyer's point of view, the object of the sale is to obtain the book, which is tangible personal property. The fact that special skill or knowledge went into the preparation of the book and is reflected in the purchase price does not make the sale of the form book a service transaction. (7-1-93)

c. Example 3: An architect is hired to prepare construction plans for a house. He prepares the plans and delivers them to his client. As in the example of the attorney preparing the will, this is a sale of services and the transfer of the tangible personal property, the plans, is inconsequential the transaction. No sales or use tax is due on the sale of the plans. (7-1-93)

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. The architect copies the plans on a duplicating machine and sells them to the requesting party. This is a taxable retail sale of tangible personal property, since the buyer's object is to obtain the property, the plans. (7-1-93)

e. Example 5: An artist is commissioned to paint an oil portrait. When the portrait is completed, ownership is transferred to the client who pays the artist a lump-sum amount for the portrait. This is a taxable retail sale of tangible personal property because the buyer's object is to obtain the portrait. If the artist otherwise qualifies as a retailer, he is required to collect and remit sales tax on the sale of the portrait. (7-1-93)

f. Example 6: An automobile repair shop does repair work for a customer. To do the work, the shop must replace certain parts on the automobile. The repair shop bills its customer an amount for the repair parts and a separate amount for labor. This is a mixed transaction. As long as the sale of the tangible personal property, the parts, and the sale of services, the labor, are separately stated, sales tax is due only on the sale of the parts and not on the charge for labor. However, allocation of the total charge between parts and labor must be reasonable. If part of the charge for parts is unreasonably attributed to the cost of labor, the allocation may be adjusted by the Tax Commission. (7-1-93)

g. Example 7: A retail clothing store provides needed alterations to items purchased by customers. Even though the sale depends on the alterations being done, the service is incidental to the sale of the property. The entire transaction is a retail sale subject to tax on the total price paid by the buyer, even if the charge for the alteration labor is separately stated. (7-1-93)

04. Kinds of Services Incidental to the Sale. Two (2) kinds of services rendered incidental to a retail sale are specifically exempt from tax if the charge for the service is separately stated. They are: (7-1-93)

a. Charges for transportation after the sale. See Section 63-3613, Idaho Code, and Rule 061 of these rules; and (3-30-07)

b. Installation charges. See Section 63-3613, Idaho Code, and Rule 012 of these rules. (3-30-07)

05. Separately Stated Nontaxable Charges. Separately stated nontaxable charges for transportation or installation may not be used to avoid tax on the actual sales price of tangible personal property. If the allocation of the total price is unreasonable, the State Tax Commission may adjust it. (7-1-93)

06. Tangible Personal Property Used or Consumed by a Business. Tangible personal property used or consumed by a business in performing a nontaxable service is subject to sales or use tax. See Rule 072 of these rules. (3-30-07)

012. CONTRACTORS IMPROVING REAL PROPERTY (RULE 012).

01. In General. This rule applies to contractors who construct, alter, repair, or improve real property. Contractors are defined as consumers of materials they use, whether or not they resell the material. All sales of tangible personal property to contractors are taxable. (7-1-93)

a. Contractors include bricklayers, plumbers, heating specialists, painters, sheet metal workers, carpet layers, electricians, land levelers, well drillers, landscapers, and all others who do contract work on real property. Unless these persons are employees of a contractor, they are acting as contractors and are consumers just as other contractors. (7-1-93)

b. Persons doing residential repairs, such as plumbers and electricians, as well as those who both sell and install carpet, also are contractors improving real property. Such contractors are defined as the consumers of the materials they install and are required to pay sales or use tax on their cost for the materials. They do not charge sales tax to their customers unless they make a sale of materials only, with no installation. (7-1-93)

02. Contract. A contract to improve real property may be in any of the following forms. (7-1-93)

a. Lump Sum Contract. A lump sum contract is an agreement to furnish materials and services for a lump sum. (7-1-93)

b. Cost-plus Contract. A cost-plus contract is an agreement to furnish materials and services at the contractor's cost plus a fixed sum or percentage of the cost. (7-1-93)

c. Guaranteed Price Contract. A guaranteed price contract is an agreement to furnish materials and services with a guaranteed price which may not be exceeded. (7-1-93)

d. Time and Material Contract. A time and material contract is an agreement to sell a specific list of materials and supplies at retail or an agreed price and to complete the work for an additional agreed price or hourly rate for services rendered. (7-1-93)

03. Use. As used in this rule, the term use includes exercising any right or power over tangible personal property in performing a contract to improve real property, regardless of who owns the material or if the material is leased. (7-1-93)

04. Real Property. See Rules 010 and 067 of these rules. (3-15-02)

05. Use Tax Reporting Number. Contractors need a use tax number if they make purchases on which sales tax has not been charged. In this case, they are required to report and pay the Idaho use tax to the state. If a contractor pays sales tax to his vendors on ALL purchases, he does not have to obtain a use tax number. (7-1-93)

06. Purchases by Contractors. Contractors are consumers of equipment they use in their business such as trucks, tractors, road graders, scaffolding, pipe cutters, trowels, wrenches, tools in general, oxygen, acetylene, oil, and similar items. They must pay the sales or use tax on their purchase of equipment, tools, and supplies. They must also pay tax on their purchase of building materials and fixtures. Fixtures include items such as lighting fixtures, plumbing fixtures, furnaces, boilers, heating units, air-conditioning units, refrigeration units, elevators, hoists, conveying units, awnings, blinds, vaults, cabinets, counters, and lockers. (7-1-93)

Addendum Document #7:

IDAPA 35.01.02 Rule 41 (2007)

01. In General. The taxidermy profession is subject to Idaho sales and use tax under the category of custom made items. The underlying reason for the custom made section of Idaho Code is to equalize the tax on custom made items to those that could be purchased and sold in channels of trade. When buying an item fabricated from either a hide or fur pelt, the purchase price is based on the full cost of material and labor. In the instance of the taxidermy profession, the untanned pelt of hide would be the basic raw material from which the finished product was fabricated. (7-1-93)

02. Fabrication. A deerskin brought to the taxidermist for tanning should be taxed on the price charged by the taxidermist for tanning. If later that tanned skin is taken to a business that fabricates either gloves, moccasins, or jackets, again the fabricator should charge tax on the cost of fabricating the tanned hide making the total tax on the item fabricated comparable with the deerskin, gloves, etc., purchased from a retail store. This also would apply to the mounting of antlers, etc., and even to the making of full mounts of animals. At the time the taxidermist receives the head, the antlers, etc., of the animal from the customer, he has received only a basic piece of material that would be useless until he performs certain functions to place it in a usable or finished condition. (7-1-93)

03. Materials. All materials, such as mounting material, tanning material, and preservatives may be purchased by the taxidermist tax exempt since he will charge tax on the finished product. He may provide his supplier with a resale certificate. See Rule 128 of these rules. (3-15-02)

041. FOOD, MEALS, OR DRINKS (RULE 041).

01. In General. This rule covers the imposition of tax on sales of food, meals, or drinks by commercial establishments, college campuses, conventions, nonprofit organizations, private clubs, and similar organizations. (7-1-93)

02. 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)

03. Clubs and Organizations. Private clubs, country clubs, athletic clubs, fraternal, and other similar organizations are retailers of tangible personal property sold by them, even if they make sales only to members. Such organizations must obtain an Idaho seller's permit and report and pay retail sales tax on all sales. Taxability of membership dues depends upon the nature of the club. See Rule 030 of these rules. Special rules apply to religious organizations. See Rule 086 of these rules. (3-15-02)

a. When an organization holds a function in its own quarters, maintains its own kitchen facilities, and sells tickets which include items such as meals, dancing, drinks, entertainment, speakers, and registration fees (convention), the charges may be separated and tax collected on meals, drinks, and admission fees when the ticket is sold. For example:

Dinner, dancing, etc.	$ 8.00
Tax	.40
Registration, speakers, etc.	$ 6.60
Total Ticket	$15.00

Meals and the use of recreational facilities are taxable. Registration fees, speaker fees, and similar charges are not taxable. (4-11-06)

b. The organization holding the function or convention must obtain a seller's permit and remit tax to the state. When the charges are not separated, the total price of the ticket is taxable. (7-1-93)

c. When an organization holds a function in facilities operated by a restaurant or motel and sells

tickets for meals, drinks, and other services, no sales tax applies to these sales if the organization pays the restaurant or hotel sales tax on the meals and drinks furnished and all other services performed. The hotel, restaurant, or caterer will remit the tax to the state. (7-1-93)

04. Colleges, Universities, and Schools. A cafeteria operated by a state university, junior college district, public school district, or any other public body is treated the same as a cafeteria operated by a private enterprise. Purchases of food for resale are not taxable; meals sold are taxable. (7-1-93)

a. If a meal is paid for by cash or a meal ticket is sold to the student, tax is computed on the total sales price of the meal. If meals are sold as part of a room and board fee, the amount paid for board must be separated from the amount paid for the room. Tax is calculated and collected on that part of the total fee allocated to the purchase of meals. (7-1-93)

b. Sales of meals by public or private schools under the Federal School Lunch Program are exempted by Section 63-3622J, Idaho Code. (7-1-93)

05. Fraternities, Sororities, and Cooperative Living Group. Fraternities and sororities generally purchase and prepare food for their own consumption. The food is prepared and served in a cooperative manner by members of the fraternity or by employees hired by the group for this purpose. Purchases made by the fraternity or sorority are for consumptive use and subject to sales tax. There is no sale of meals to fraternity or sorority members and no sales tax imposed on any allocated charge for them whether stated separately or included as part of a lump sum charge for board and room. (7-1-93)

a. If a concessionaire is retained by the fraternity or sorority to furnish meals, the concessionaire is a retailer engaged in the business of selling meals; food purchases are for resale and meals supplied by the concessionaire to members of the fraternity or sorority are subject to sales tax. (7-1-93)

b. If the fraternity or sorority regularly furnishes meals for a consideration to nonmembers, these meals become subject to tax and the fraternity or sorority must obtain an Idaho seller's permit. (7-1-93)

c. Cooperative living groups are normally managed in much the same manner as fraternities and sororities. Food is purchased and meals are prepared and served by members of the group or their employees. The same conditions outlined above for fraternities and sororities apply to cooperative living groups. (4-11-06)

06. Boarding Houses. Sales of meals furnished by boarding houses are subject to tax, when they are charged separately. This applies whether or not the meals are served exclusively to regular boarders. Where no separate charge or specific amount is paid for meals furnished, but is included in the regular board and room charges, the boarding house or other place is not considered to be selling meals, but is the consumer of the items used in preparing such meals. (7-1-93)

07. Honor System Snack Sales. Honor system snack sales are those items of individually sized prepackaged snack foods, such as candy, gum, chips, cookies or crackers, which customers may purchase by depositing the purchase price into a collection receptacle. Displays containing these snacks are generally placed in work or office areas and are unattended. Customers are on their honor to pay the posted price for the article removed from the display. Purchases from these snack displays are subject to sales tax. (7-1-93)

a. Sales tax applies to the gross receipts. The posted price must include a statement that sales tax is included. (7-1-93)

b. The formula for computing the taxable amount is: (Gross Receipts) / (one hundred five percent (105%)) = Taxable Sales. (Taxable Sales) x (five percent (5%)) = Tax Due. (4-11-06)

08. Church Organizations. Special rules apply to religious organizations. See Rule 086 of these rules. (4-11-06)

09. Senior Citizens. Meals sold under programs that provide nutritional meals for the aging under Title III-C of the Older Americans Act, Public Law 93-29, are exempted from the sales tax by Section 63-3622J, Idaho

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

Addendum Document #8:

IDAPA 35.01.02 Rule 43 (2012)

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 in 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. When a gratuity is paid in addition to the price of a meal, no sales tax applies to the gratuity. A gratuity can be paid voluntarily by the customer or be required by the seller. A gratuity is also commonly known as a tip. (3-29-12)

a. If a gratuity does not meet all of the following requirements, the gratuity will be subject to sales tax: (3-29-12)

i. A gratuity must be paid to the service provider of the meal as additional income to the base wages of the service provider; (3-29-12)

ii. A gratuity must be separately stated on the receipt or be voluntarily paid by the customer; and (3-29-12)

iii. A gratuity must not be used to avoid sales tax on the actual price of the meal. (3-29-12)

b. For the purposes of Subsection 043.04 of this rule, the following definitions apply: (3-29-12)

i. Meal. Food or drink prepared for or provided to a customer. (3-29-12)

ii. Service provider. An individual directly involved in preparing or providing a meal to a customer. This includes, but is not limited to, the server, the busser, the cook and the bartender. This does not include individuals who manage or own the company if they are not directly involved in preparing and providing a meal. (3-29-12)

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 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)

TABLE OF CONTENTS

Page

Table of Contents i

Table of Cases and Authorities iv

Statement of the Case 1

I. Nature of the Case 1

II. Course of Proceedings 2

III. Statement of Facts 2

Issues on Appeal 3

Additional Issues on Appeal 4

Argument 4

I. Standard of Review 4

II. The District Court correctly applied the tax statutes in this case, and the Commission's Pre-2012 Rule is consistent with those statutes. 5

A. The District Court correctly held that the Idaho Sales Tax Act taxes the restaurant-related tips, fees, or service charges at issue in this matter 5

B. The District Court properly held that the exemptions in Idaho Code § 63-3613(b) do not apply to this case 7

C. The District Court's Order is supported by the legislative history and other Commission rules 12

D. The Court should give the Pre-2012 Rule deference and considerable weight in this matter 14

1. Idaho Code § 63-105(2) shows Legislative approval of the Pre-2012 Rule 14

Page

2. Application of this Court's deference analysis shows that the Pre-2012 Rule should be given considerable weight 15

a. The Commission is responsible for administering the Pre-2012 Rule 15

b. The Commission's construction of the Pre-2012 Rule is reasonable 16

c. The Statute does not expressly treat the technical matter at issue 18

d. All of the rationales underlying the rule of deference are present 19

E. The District Court correctly rejected Chandler's mixed transaction argument 22

F. Tax exemptions are strictly construed against the taxpayer 25

III. The plain wording of the Statute's Retroactivity Clause applies the exemption in Idaho Code § 63-3613(f) only from January 1, 2011 forward 25

A. The 2011 Amendment is unambiguous and is retroactive only to January 1, 2011 26

B. Chandler's arguments regarding the 2011 Amendment's Committee Minutes, secondary source, and court cases do not support their argument 30

1. The 2011 Amendment is narrowly crafted and has a distinct meaning that did not exist in the law previously 30

2. The Pre-2012 Rule was a longstanding rule prior to its revision due to the passage of the 2011 Amendment 31

3. Services to the extent provided by the Legislature are taxable in Idaho 33

Page

4. Chandler's' secondary source does not apply to the 2011 Amendment 34

5. Chandler's' reliance on the four Idaho cases it cites is misplaced and instead the cases reinforce the District Court's Order 35

6. The Legislature's approval of the Post-2012 Rule shows that the 2011 Amendment changed the law 36

C. The 2011 Amendment is an exemption and should be narrowly construed against Chandler's 37

Costs and Attorney Fees 38

Conclusion 39

Certificate of Service 40

Addendum 41

TABLE OF CASES AND AUTHORITIES

Cases: **Page**

A & B Irr. Dist. v. Idaho Dep't Of Water Res.,
153 Idaho 500, 284 P.3d 225 (2012).....26
Asarco, Inc. v. State, 138 Idaho 719, 69 P.3d 139 (2003).....15
Athay v. Stacey, 146 Idaho 407, 196 P.3d 325 (2008).....39
Canty v. Idaho State Tax Comm'n, 138 Idaho 178, 59 P.3d 983 (2002).....18, 19, 20, 21
Duncan v. State Bd. of Accountancy, 149 Idaho 1, 232 P.3d 322 (2010).....15, 19
Engen v. James, 92 Idaho 690, 448 P.2d 977 (1969).....29
Family Fin. Servs., Inc. v. Spencer, 41 Conn. App. 754, 677 A.2d 479 (1996).....34
Farmers Nat. Bank v. Green River Dairy, LLC,
155 Idaho 853, 318 P.3d 622 (2014).....11
George W. Watkins Family v. Messenger,
118 Idaho 537, 797 P.2d 1385 (1990).....32
Gooding Cty. v. Wybenga, 137 Idaho 201, 46 P.3d 18 (2002).....10
Gracie, LLC v. Idaho State Tax Comm'n,
149 Idaho 570, 237 P.3d 1196 (2010).....4
Hamilton ex rel. Hamilton v. Reeder Flying Serv.,
135 Idaho 568, 21 P.3d 890 (2001).....18
Hagy v. State, 137 Idaho 618, 51 P.3d 432 (Ct. App. 2002).....38
Hart v. Idaho State Tax Comm'n, 154 Idaho 621, 301 P.3d 627 (2012).....38
Hillside Landscape Const., Inc. v. City of Lewiston,
151 Idaho 749, 264 P.3d 388 (2011).....11
In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170,
148 Idaho 200, 220 P.3d 318 (2009).....11
Intermountain Health Care, Inc. v. Bd. of Cty. Comm'rs of Madison Cty.,
109 Idaho 685, 710 P.2d 595 (1985).....29
J.R. Simplot Co. v. Idaho State Tax Comm'n,
120 Idaho 849, 820 P.2d 1206 (1991).....19
Jayo Dev., Inc. v. Ada Cty. Bd. of Equalization,
158 Idaho 148, 345 P.3d 207 (2015)..... 5, *passim*
Kelso & Irwin, P.A. v. State Ins. Fund, 134 Idaho 130, 997 P.2d 591 (2000).....28
Lockheed Martin Corp. v. Idaho State Tax Comm'n,
142 Idaho 790, 134 P.3d 641 (2006).....4
Nebeker v. Piper Aircraft Corp., 113 Idaho 609, 747 P.2d 18 (1987).....26
Old W. Realty, Inc. v. Idaho State Tax Comm'n,
110 Idaho 546, 716 P.2d 1318 (1986).....25, 37

Page

Peterson v. Peterson, 156 Idaho 85, 320 P.3d 1244 (2014) 28
Purco Fleet Servs., Inc. v. Idaho State Dep't of Fin.,
140 Idaho 121, 90 P.3d 346 (2004) 10
Sanchez v. State, Dep't of Correction,
143 Idaho 239, 141 P.3d 1108 (2006) 9
State v. Browning, 123 Idaho 748, 852 P.2d 500 (Ct. App. 1993) 28
State v. Casselman, 69 Idaho 237, 205 P.2d 1131 (1949) 11
State v. Evans, 134 Idaho 560, 6 P.3d 416 (Ct. App. 2000) 11
State v. Horejs, 143 Idaho 260, 141 P.3d 1129 (Ct. App. 2006) 12
State v. Peterson, 141 Idaho 473, 111 P.3d 158 (Ct. App. 2004) 28
State v. Schulz, 151 Idaho 863, 264 P.3d 970 (2011) 28
State v. Williston, 159 Idaho 215, 358 P.3d 776 (Ct. App. 2015) 28
United Pac. Ins. Co. v. Bakes, 57 Idaho 537, 67 P.2d 1024, 1029 (1937) 29
Verska v. Saint Alphonsus Regional Medical Center,
151 Idaho 889, 265 P.3d 502 (2011) 32
Wilson v. State, 133 Idaho 874, 993 P.2d 1205 (Ct. App. 2000) 32
Zattiero v. Homedale Sch. Dist. No. 370, 137 Idaho 568, 51 P.3d 382 (2002) 15

Statutes and Rules: **Page**

2011 Idaho Sess. Laws 628 ..... 2, 28
2011 Idaho Sess. Laws 629 26
2011 Idaho Sess. Laws 630 ..... 26, 27
Idaho Code § 12-117(1) 4, 38
Idaho Code § 12-117(2) 4, 38
Idaho Code § 12-121 ..... 4, 38
Idaho Code § 63-105(2) 14, 15, 21, 22
Idaho Code § 63-3049(d) 4, 38
Idaho Code § 63-3612 ..... 6, 7, 18, 20, 25
Idaho Code § 63-3612(1) 6
Idaho Code § 63-3612(2) 6
Idaho Code § 63-3612(2)(b) ..... 7, *passim*
Idaho Code § 63-3613 ..... 12, 26, 27, 33
Idaho Code § 63-3613(a) 7, 16, 30
Idaho Code § 63-3613(a)(2) 7, 16

Page

Idaho Code § 63-3613(b) 7, 12, 13, 17
Idaho Code § 63-3613(b)(4) ..... 7, *passim*
Idaho Code § 63-3613(b)(6) 9, 10, 13
Idaho Code § 63-3613(f) ..... 2, *passim*
Idaho Code § 63-3619 ..... 6, 34
Idaho Code § 63-3635 38
Idaho Code § 63–602W 27
Idaho Code § 73-101 26
IDAPA 35.01.02.011.01 23
IDAPA 35.01.02.011.01.c 23
IDAPA 35.01.02.011.02 ..... 22, 23, 24, 25
IDAPA 35.01.02.011.02.c 22
IDAPA 35.01.02.011.03 ..... 23, 24
IDAPA 35.01.02.014.05 8
IDAPA 35.01.02.041.02 23
IDAPA 35.01.02.043.03 14
IDAPA 35.01.02.043.04 36
IDAPA 35.01.02.043.04.c 1
IDAPA 35.01.02.043.05 ..... 22, 32
IDAPA 35.01.02.043.04 and .05 ..... 1, 5
IDAPA 35.02.13,1.c.and d. 5
I.A.R. 35, 40, 41 ..... 4, 38
Idaho Rule of Civil Procedure 54(e) 4, 38
Idaho Rule of Civil Procedure 56(a) 4
Idaho Rule of Civil Procedure 56(c) 4

Other Authorities: **Page**

Black's Law Dictionary, 517 (6th ed. 1990) 9
House Revenue and Taxation Committee Report in Support of House Bill 222, May 14, 1965, p. 10 12
Tax Commission Decision in Docket No. 22967 (issued 2011) 21, 32, 33

STATEMENT OF THE CASE

I. Nature of the Case

This is a sales and use tax case. Chandler's-Boise, LLC ("Chandler's") steak and seafood restaurant located within Hotel 43 in downtown Boise, Idaho, was audited by the Idaho State Tax Commission ("Commission") for the period of May 1, 2007, through May 31, 2010 ("Audit Period"). Chandler's' point of sale system automatically added tips, fees, or service charges to banquet meals, restaurant dining services for groups having six or more persons, and room service meals. The check (or bill) Chandler's gave to its customers did not indicate that the tips, fees, or service charges could be declined or paid, all or in part. The applicable statutes unambiguously allowed taxation of the tips, fees, or service charges. Also, the Commission's rule in force during the audit period provided that: "[w]hen 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 35.01.02.043.04.c. and .05 (2007) (emphasis added). R., pp. 72-73. The District Court correctly held that sales tax was due on these tips, fees, or service charges and that the statutes are consistent with the Pre-2012 Rule. IDAPA 35.01.02.043.04 and .05 (2007) (emphasis added) ("Pre-2012 Rule"). R., pp. 72-73. Legislative history from 1965 shows that the Legislature wanted a presumption that services would be taxed in this context.

In 1988, the Legislature analyzed the exact issue being addressed in this case. House Bill 520 proposed to amend the sales tax act so that mandatory tips added to bills for banquets, room service, and similar services would not be included in the sales price and not have sales tax imposed on them. Testimony was presented explaining that the Commission was interpreting the statute in a way that included mandatory tips in the sales price. Ultimately the Legislature chose

not to pass House Bill 520. The next year the Commission passed a rule to clearly communicate to taxpayers that mandatory tips included on a restaurant bill would be included in the sales price and sales tax would continue to be imposed on those amounts. That 1989 rule is the same rule that is at the center of the controversy in this case now before the Court. The rule was enacted after the Legislature made a conscious decision to continue imposing sales tax on mandatory tips added on meals such as are at issue in this matter.

During the 2011 session, the Legislature added an exemption that narrowly exempts the automatically added tips, fees, or service charges in question here, however, the effective date of the new section only extends back to January 1, 2011 - - which is after the Chandler's' audit period. 2011 Idaho Sess. Laws 628 (codified as amended at Idaho Code § 63-3613(f) ("2011 Amendment"). R., pp. 74-76. The District Court correctly held that the new section does not apply to the transactions in this case.

In spite of unambiguous statutes, and a clear rule during the Audit Period in question that taxes the tips, fees, or service charges at issue, and a retroactivity clause in a statutory amendment that clearly does not apply to the Audit Period in question, Chandler's argues the transactions in issue are nontaxable. Chandler's arguments are frivolous and/or groundless.

II. Course of Proceedings

The Commission substantially agrees with the "Course of Proceedings" set out by the Chandler's. Chandler's Opening Brief, p. 2. The Commission will refrain from repeating substantially agreed-upon facts here, consistent with Rule 35, Idaho Appellate Rules.

III. Statement of Facts

The Commission substantially agrees with the facts set out by Chandler's in its opening brief on appeal. Chandler's Opening Brief, p. 2. However, the Commission disagrees with a

possible inference that could be drawn from the facts set out by Chandler's. *Id.* Chandler's asserts that, "[a]fter the audit, the Bureau determined that the Gratuities were mandatory service charges subject to the sales tax and issued a Notice of Deficiency . . . ." *Id.* The Commission makes it clear that the determination of whether charges added to a customer's bill, when the bill does not indicate that the charges may be declined in all or in part, were taxable before, during, and after the audit, not just "after the audit" per the Pre-2012 Rule. Only after the Legislature narrowly changed the law and then provided a retroactive date were such charges no longer taxable.

The parties agreed on the relevant facts in this case below by submitting a Joint Stipulation of Facts and accompanying Exhibits. R., pp. 34 - 53. The Commission respectfully asks the Court to refer to the Joint Stipulations of Fact and accompanying Exhibits, along with the Affidavit of Rex Chandler for the complete Statement of Facts in this matter. R., pp. 34 – 53 and 95 – 97.

Finally, during the District Court proceedings the parties used a catch-all word "Gratuity" (with a capital "G") as a reference to tips, fees or service charges that fit into the definition of the Pre-2012 Rule prior to its amendment in 2012. R., p. 36. In this brief, instead of using the term "Gratuities" as the parties did in the District Court below, the Commission will use the terms "tips, fees or services charges" and their taxability will depend on their context.

ISSUES ON APPEAL

Chandler's presents six (6) issues on appeal. The Commission asserts that the issues may be framed as follows:

1. The District Court correctly applied the tax statutes in this case and the Commission's Pre-2012 Rule is consistent with those statutes.

2. The plain wording of the statute's Retroactivity Clause applies the exemption in Idaho Code § 63-3613(f) only from January 1, 2011 forward.

ADDITIONAL ISSUES ON APPEAL

The Commission requests costs and attorney fees in the District Court below and also on appeal pursuant to Idaho Rule of Civil Procedure 54(e), Idaho Code § 63-3049(d), I.A.R. 35, 40, 41, Idaho Code § 12-117(1) and (2), and/or Idaho Code § 12-121. For the reasons discussed below, such an award should be granted to the Commission in this matter.

ARGUMENT

I. Standard of Review

This Court's review of an appeal from the District Court's grant of summary judgment is upon the same standard as employed by the District Court. *Gracie, LLC v. Idaho State Tax Comm'n*, 149 Idaho 570, 572, 237 P.3d 1196, 1198 (2010). Pursuant to Rule 56(c), Idaho Rules of Civil Procedure, 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." Idaho R. Civ. P. 56(c). *See also* Idaho Rule of Civil Procedure 56(a), effective July 1, 2016, which provides similar guidance ("The court must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

This Court "freely reviews" the record before the District Court "to determine whether either side was entitled to judgment as a matter of law." *Gracie*, 149 Idaho at 572, 237 P.3d at 1198. "If the evidence reveals no disputed issues of material fact, then only a question of law remains, over which this Court exercises free review." *Lockheed Martin Corp. v. Idaho State Tax Comm'n*, 142 Idaho 790, 793, 134 P.3d 641, 644 (2006) (internal citation omitted).

II. The District Court correctly applied the tax statutes in this case, and the Commission's Pre-2012 Rule is consistent with those statutes.

The District Court correctly held that the tax statutes and rule at issue here supported the Commission's position. As the Supreme Court stated in *Jayo Dev., Inc. v. Ada Cty. Bd. of Equalization*, 158 Idaho 148, 152, 345 P.3d 207, 211 (2015), "If the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect . . . ." (internal citations omitted). Both the Commission and the District Court held that the Commission's Pre-2012 Rule in effect during the Audit Period applies to the stipulated facts and correctly taxes the transactions at issue. R., pp. 42 - 47 and 126 - 132 ("Commission Decision" and "District Court Order," respectively).

A. The District Court correctly held that the Idaho Sales Tax Act taxes the restaurant-related tips, fees, or service charges at issue in this matter.

The Commission's longstanding Pre-2012 Rule reads in pertinent part as follows:

> 04. Gratuities. A gratuity is defined as something given voluntarily or beyond obligation. Gratuities may sometimes be referred to as tips.
>
> . . . .
>
> 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, 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.c. and d. (Addendum Document No. 1) (emphasis in the original) (as amended November 11, 1989, subsequently becoming IDAPA 35.01.02.043.04 and .05 with the cumulative statewide publication of the administrative code in 1993) (Pre-2012 Rule). R., pp. 70-71.

No one contends that the Pre-2012 Rule is ambiguous. As written and as held by the District Court, the Pre-2012 Rule taxed the tips, fees, or service charges at issue in this matter during the Audit Period. R., pp. 127 -128 (District Court Order).

Further, Idaho Code §§ 63-3612, 3613, and 3619 unambiguously fit neatly together to tax the tips at issue. Idaho Code § 63-3619 provides that, "[a]n 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 . . ." So, what is a "sale?" Idaho Code § 63-3612(1) answers that "[t]he term "sale" means any transfer of title, exchange or barter, conditional or otherwise, of tangible personal property for a consideration and shall include any similar transfer of possession found by the state tax commission to be in lieu of, or equivalent to, a transfer of title, exchange or barter."

In this matter, the sale of a restaurant meal would be taxable under Idaho Code § 63-3612(1). Idaho Code § 63-3612(2), further provides that: "'[s]ale' 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).

Based upon the statutory language, tips, fees, or service charges are taxable when included in the price of the meal. The tips, fees, or service charges at issue were included in the price that was automatically added to the customers' bills for banquet dining service (occurring when a group reaches a certain size and requires more than one server), large parties (six or more), and room service customers. R., p. 36 (Stipulation ¶ 12).

Next, Idaho Code § 63-3613(a) defines "sales price" as "the total amount for which tangible personal property, including services agreed to be rendered as a part of the sale, is sold,. . . ." *Id.* (emphasis added). The statute then provides no deduction or exemption for the "cost of materials used, labor or service cost." Idaho Code § 63-3613(a)(2). The statutory analysis is clear and unambiguous that "furnishing, preparing, or serving food, meals, or drinks and nondepreciable goods and services directly consumed by customers included in the charge thereof" are taxable and includes tips, fees, or service charges automatically charged on the bill of the customer when the customer was not advised on the bill that he or she could decline them in all or in part. Idaho Code § 63-3612(2)(b) and Pre-2012 Rule. Idaho Code §§ 63-3612 and 3613 unambiguously fit neatly together to tax the tips, fees, or service charges at issue. The Pre-2012 Rule and statutes are consistent. The Pre-2012 Rule and statute do not tax cash tips left at the table or tips voluntarily written in by the customer as shown on Chandler's' checks (or bills), but the Pre-2012 Rule and statutes do tax tips, fees, or service charges included automatically on the bill by Chandler's that are part of the sale and sales price of the meal. R., p. 48 (Stipulation, Ex. D (copy of Chandler's' checks (or bills)).

B. The District Court properly held that the exemptions in Idaho Code § 63-3613(b) do not apply to this case.

Idaho Code § 63-3613(b) provides for specific deductions or exemptions to be excluded from what is included in the "sales price." Chandler's goes to Idaho Code 63-3613(b)(4) and (6) for their support to exempt the tips, fees, or service charges in question. However, as the District Court held, none of the provisions of Idaho Code 63-3613(b) apply to the facts of this case. R., pp. 128 – 130 (District Court Order).

Idaho Code § 63-3613(b)(4), deducts or exempts from what is included in "sales price" the following 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.

Id. (emphasis added).

Chandler's tips, fees, or service charges at issue in this matter 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. *See* IDAPA 35.01.02.014.05 (Commission's rule relating to installing property such as not built-in microwave ovens, freestanding stoves, refrigerators, etc.).

Per Idaho Code § 63-3613(b)(4) a restaurant server would not normally describe their job in terms of "installing or applying" food. R., p. 129 (District Court Order). Such a usage is nonsensical. Petitioner's interpretation stifles the true meaning of this section. *Jayo*, 158 Idaho at 152, 345 P.3d at 211 ("The objective of statutory interpretation is to give effect to legislative intent. Such intent should be derived from a reading of the whole act at issue.") (citations omitted). Idaho Code § 63-3613(b)(4), has no applicability to restaurants or restaurant tips, fees, or service charges.[1]

---

[1] *See discussion infra* part II.D.2.b. (The Legislature rejected a proposed change per HB 520 in 1988 to Idaho Code § 63-3613(b)(4) to change the language to "serving, installing or applying" in order to exempt the same tips, fees, or service at issue in this matter.) Addendum Document No. 4, p. 1.

Chandler's also incorrectly argues the tips, fees, or service charges in this matter are exempted from "sales price" because of Idaho Code § 63-3613(b)(6). Idaho Code § 63-3613(b)(6), only deducts or exempts financial industry related "service charges":

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

(emphasis added).

When Chandler's asks the Court to interpret Idaho Code § 63-3613(b)(6), to deduct or exempt the tips or related services from taxation it does so by focusing only on the two words "service charges" and ignoring the rest. However, as with most statutes, these two words must be read along with the whole statute. *Jayo*, 158 Idaho at 152, 345 P.3d at 211.

Also, when encountering the phrase "service charges" in a list of phrases referring to finance or bank related charges that are "finance charges, carrying charges, service charges, time-price differential, or interest on deferred payment sales," the meaning of "service charges" is clear. The District Court correctly noted in the conclusion of its Order on p. 5:

> 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.

R., p. 130 (District Court Order).

Alternatively, the maxim *ejusdem generis* or "[o]f the same kind, class, or nature" also applies. *Black's Law Dictionary*, 517 (6th ed. 1990). As the Idaho Supreme Court stated in *Sanchez v. State, Dep't of Correction*, 143 Idaho 239, 244, 141 P.3d 1108, 1113 (2006), "[w]here 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." *Id.* (citations omitted). The "service charges" in Idaho Code § 63-3613(b)(6), do not have application in the context of tips, fees or service charges at issue here for restaurants.

In *Purco Fleet Servs., Inc. v. Idaho State Dep't of Fin.*, 140 Idaho 121, 124–25, 90 P.3d 346, 349–50 (2004), the Court held that "[w]hen the language of the statute is unambiguous, the Court will give the language its plain meaning and . . . . if the words are in common use, they should be given the same meaning in a statute as they have among the people who rely on and uphold the statute." (internal citations omitted). As the District Court held, Chandler's' arguments are incorrect. R., pp. 128 – 130 (District Court Order). The Commission also 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 services.

Chandler's also asks the Court to ignore the Legislature. The Legislature put the words "[f]urnishing, preparing, or serving food, meals, or drinks and nondepreciable goods and services directly consumed by customers included in the charge thereof," in Idaho Code §63-3612(2)(b). By arguing that it applies to what is a sale rather than what is included in the "sales price" Chandler's asks the Court to ignore this section of the Code, which would make the entire section in Idaho Code §63-3612(2)(b) null or superfluous.

The District Court also stated that even if Idaho Code §§ 63-3613(b)(4) and (b)(6) did apply as Chandler's argues, then Idaho Code § 63-3612(2)(b) would control. R., p. 130. (District Court Order). The Idaho Supreme Court noted in *Gooding Cty. v. Wybenga*, 137 Idaho 201, 204, 46 P.3d 18, 21 (2002), in a case involving the approval process for Confined Animal Feeding Operations (CAFOS) and denying the County's argument that two statutes should be read together to clarify what constituted a conflict of interest stated, "[s]tatutes are *in pari*

materia if they relate to the same subject. Such statutes are construed together to effect legislative intent. Where two statutes appear to apply to the same case or subject matter, the specific statute will control over the more general statute." *Id.* (internal citations omitted); *see also State v. Evans*, 134 Idaho 560, 564, 6 P.3d 416, 420 (Ct. App. 2000).

This line of reasoning applies especially to statutes passed at the same session of the Legislature. The statutes in question were part of the original Sales Tax Act passed in 1965. *State v. Casselman*, 69 Idaho 237, 244, 205 P.2d 1131, 1134 (1949). The Commission notes that Idaho Code 63-3612(2)(b) was amended in 1988, and added the terms, "included in the charge thereof" at the end of the sentence. Addendum Document No. 2. This language strengthens the interpretation given to the statutes by the District Court and also strengthens the District Court's support of the Pre-2012 Rule that went into effect the next year in 1989.

The words in Idaho Code § 63-3612(2)(b) have meaning and must be given effect. *Hillside Landscape Const., Inc. v. City of Lewiston*, 151 Idaho 749, 753, 264 P.3d 388, 392 (2011) ("We must construe a statute as a whole, and consider all sections of applicable statutes together to determine the intent of the legislature.") (internal quotations and cites omitted); *In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 211, 220 P.3d 318, 329 (2009) ("This Court will construe a statute so that effect is given to [all of] its provisions, and no part is rendered superfluous or insignificant.") (internal citations and quotes omitted).

Chandler's may have invented a new way to read the statutes. However, that does not make the statutes ambiguous and open the statute to Chandler's' interpretation. *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.") *Id.* (citations omitted).

Idaho Code §§ 63-3612(2)(b) and 63-3613 fit neatly together and to not read them together would be error. *State v. Horejs*, 143 Idaho 260, 266, 141 P.3d 1129, 1135 (Ct. App. 2006) ("In construing statutes it is our obligation, where possible, to adopt a construction that will harmonize and reconcile statutory provisions and to avoid an interpretation that will render a statute a nullity.") *Id.* (internal citations and quotes omitted). Furnishing food and all charges included therein are taxable as a sale. The tax is collected on services rendered incident to that sale without a deduction for labor costs in providing the meal. None of the deductions or exemptions for services incidental to the sale or labor costs apply to this scenario from the list in Idaho Code § 63-3613(b).

C. The District Court's Order is supported by the legislative history and other Commission rules.

The plain words of the statute need no further interpretation. In the event the Court believes that we need to look at legislative history, the Sales Tax Act initially became law in Idaho in 1965, and the then House Revenue and Taxation Committee (Committee) issued the House Revenue and Taxation Committee Report in Support of House Bill 222 on May 14, 1965, to guide the interpretation of the new Act. Addendum Document No. 3. The following guidance was given for Idaho Code § 63-3612(2)(b): "[i]n 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." Addendum Document No. 3, p. 10.

This guidance specifically speaks to the facts here, where the tips, fees, or service charges were automatically added to the customer's bill and the customer was not notified the charges

could be declined in all or in part, they were part of the "sales price" and therefore taxable. It is not logical that the Committee would have taken the effort to explain its position here on restaurant services and then exclude them from taxation in Idaho Code § 63-3613(b).

The Committee's guidance also makes it clear that Idaho Code § 63-3613(b)(4), relates to building related contexts and not food:

> 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.

Addendum Document No. 3, p. 16.

Chandler's argues that Idaho Code § 63-3616(b)(6) should also be read to support exempting the tips, fees, or service charges at issue in this matter. The Committee's guidance regarding Idaho Code § 63-3613(b)(6), shows that it only pertains to financial transactions: "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." Addendum Document No. 3, p. 17. The tips, fees, or service charges that arise when serving food in a restaurant are not exempted by neither Idaho Code §§ 63-3613(b)(4) or (b)(6).

Additionally, a Commission rule in the same section as the Pre-2012 rule also makes it clear that Idaho Code § 63-3613(b)(6), only relates to financial transactions:

> **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)

IDAPA 35.01.02.043.03. R., p. 71.

In conclusion, legislative history in 1965 and Commission Rule IDAPA 35.01.02.043 clearly support the District Court's Order and show that Idaho Code §§ 63-3613(b)(4) and (b)(6), do not exempt the tips, fees, or service charges in this matter.

D. The Court should give the Pre-2012 Rule deference and considerable weight in this matter.

Chandler's also argues that the Pre-2012 Rule is arbitrary and unreasonable and should not be afforded deference. First, the statutes clearly tax services related to furnishing a meal. Per the legislative history to HB 520 in 1988 the Commission was applying the law to tax manadatory tips, fees, or service charges prior to the enactment of the Pre-2012 Rule. The Pre-2012 Rule merely reinforced its current practice at the time. However, even if the Pre-2012 Rule is analyzed, it is supported by law. The Pre-2012 Rule was approved by the Idaho Legislature per Idaho Code § 63-105(2) and strongly meets every part of this Court's four pronged rule deference test.

1. Idaho Code § 63-105(2) shows Legislative approval of the Pre-2012 Rule.

Chandler's argument that the Pre-2012 Rule is arbitrary and unreasonable is unfounded. First, the Legislature provided that, "all rules adopted by the state tax commission prior to the effective date [January 1, 1997] of this 1996 amendatory act shall remain in full force and effect until such time as they may be rescinded or revised by the commission." Idaho Code § 63-105(2) (words added). The Pre-2012 Rule was in effect beginning in 1989 and thus would have been in effect prior to January 1, 1997.

The Legislature, through Idaho Code § 63-105(2), approved the Pre-2012 Rule, and because of that, the Pre-2012 Rule should be upheld. *See Zattiero v. Homedale Sch. Dist. No. 370*, 137 Idaho 568, 571, 51 P.3d 382, 385 (2002); *Asarco, Inc. v. State*, 138 Idaho 719, 723, 69 P.3d 139, 143 (2003).

2. Application of this Court's deference analysis shows that the Pre-2012 Rule should be given considerable weight.

If the Court believes more analysis of the rule is necessary, application of this Court's rule deference analysis shows that the District Court's upholding of the Pre-2012 Rule should be affirmed. Under this analysis the Court should give deference and considerable weight to the Commission's Pre-2012 Rule. An agency such as the Commission is afforded a strong presumption of validity in construing statutes. *Duncan v. State Bd. of Accountancy*, 149 Idaho 1, 3, 232 P.3d 322, 324 (2010).

This Court's rule deference analysis is as follows:

> Where an agency interprets a statute or rule, this Court applies a four-pronged test to determine the appropriate level of deference to the agency interpretation. This Court must determine whether: (1) the agency is responsible for administration of the rule in issue; (2) the agency's construction is reasonable; (3) the language of the rule does not expressly treat the matter at issue; and (4) any of the rationales underlying the rule of agency deference are present. There are five rationales underlying the rule of deference: (1) that a practical interpretation of the rule exists; (2) the presumption of legislative acquiescence; (3) reliance on the agency's expertise in interpretation of the rule; (4) the rationale of repose; and (5) the requirement of contemporaneous agency interpretation.

Duncan v. State Bd. of Accountancy, 149 Idaho 1, 3, 232 P.3d 322, 324 (2010) (internal citations omitted).

a. The Commission is responsible for administering the Pre-2012 Rule.

The Commission has authority to promulgate rules per Idaho Code 63-105(2). Neither party disputes this and neither party disputes that the Commission meets the first prong of the

test and is responsible for administration of the Pre-2012 Rule. Chandler's Opening Brief, pp. 11-12.

b. The Commission's construction of the Pre-2012 Rule is reasonable.

The Commission's construction of the rule is reasonable and meets the second prong of the test. The Legislature verified the rule is reasonable when it provided that, "all rules adopted by the state tax commission prior to the effective date [January 1, 1997] of this 1996 amendatory act shall remain in full force and effect until such time as they may be rescinded or revised by the commission." Idaho Code § 63-105(2) (words added).

The Pre-2012 Rule provides a bright line of taxability under which restaurants functioned prior to the 2011 Amendment. It drew a line between what tips were part of the price of the meal and those that were not. Businesses could easily understand how to apply the law efficiently and effectively. It neatly fits into the provisions of Idaho Code § 63-3612(2)(b) in that the automatic tips, fees, or service charges are a part of "[f]urnishing, preparing, or serving food, meals, or drinks and nondepreciable goods and services directly consumed by customers included in the charge thereof." It also squarely fits into the provisions of Idaho Code § 63-3613(a) because these tips, fees, or service charges "includes services agreed to be rendered as a part of the sale" and without deduction for "labor or service cost" in Idaho Code § 63-3613(a)(2).

The Pre-2012 Rule was put into effect in 1989 following the 1988 Idaho Legislative Session where the issues in this matter were addressed. House Bill No. 520 proposed to amend Idaho Code § 63-3613(b)(4), to read as follows: "[t]he amount charged for labor or service rendered in serving, installing or applying the property sold. . . ." Addendum Document No. 4, p. 1. The purpose stated for the amendment was as follows:

> The State Tax Commission is presently requiring employers to collect, or pay, a five percent sales tax on mandatory gratuities charged for banquets, room

> service and similar services. This tax is being levied even though the monies are distributed to employees in place of tips that otherwise would have been given to these same employees by the guests.
>
> The purpose of this legislation is to change the appropriate definition in the Idaho Sales and Use Tax Act to clarify legislative intent that such monies, given for serving are not subject to the Idaho Sales and Use Tax Act.

Addendum Document No. 4, p. 3. Explanation for HB 520 continues under the fiscal impact heading:

> The interpretation concerning payment of sales tax on mandatory gratuities developed within the past two years. Little income has been realized by the State from this facet of industry operations. In addition, inflationary increases in food and other items have forced the costs of meals to increase somewhat each year.
>
> For these reasons the fiscal impact of this measure will be minimal but a loss of some $20,000 might be experienced.

Addendum Document No. 4, p. 3. A discussion on the proposed bill was had in the House Revenue and Taxation Committee as well by long time Commission Lead Deputy Attorney General Theodore V. Spangler, Jr. as follows: "Mr. Spangler stated that mandatory gratuities are part of the purchase price when the contract includes the gratuity in the total bill. He said that this bill could possibly have a $3.3 million fiscal impact." Addendum Document No. 4, p. 8. (emphasis added).

After considering HB 520, the Legislature chose not to pass it. Thus, consciously making a decision to impose sales tax on mandatory or automatic tips, fees, or service charges included in the check (or bill) as the Commission imposed upon Chandler's in this matter. Chandler's argues that the Legislature always intended for the tips, fees, or service charges mandatorily or automatically added to "banquet meals, restaurant dining services for groups having six (6) or more persons, and room service meals" to be exempt under Idaho Code § 63-3613(b). Chandler's Opening Brief, p. 13. The legislative history associated with HB 520 in 1988 and the Pre-2012 Rule convincingly shows their argument to be groundless. Furthermore, the Pre-2012

Rule was put in place the next year in 1989 after the Legislature had rejected amending the statute to exempt the tips, fees, or service charges at issue in this matter, clearly showing the way the law should be applied and interpreted.

Lastly, "the statute concerning an . . . . [exemption] should be construed in favor of the state." *Canty v. Idaho State Tax Comm'n*, 138 Idaho 178, 183, 59 P.3d 983, 988 (2002) (word added).

The Commission's rule is entirely reasonable in light of its practical application, the legislative history, and that it is a tax exemption statute and should be construed in favor of the taxing authority. Chandler's arguments otherwise are without merit and are frivolous and/or groundless.

c. The statute does not expressly treat the technical matter at issue.

Idaho Code §§ 63-3612 and 3613 clearly impose tax on the meals in question in this matter. The Commission's practice from at least 1988 of taxing the type of tips in question, as shown by the legislative history to HB 520 in 1988, shows that the statute gave sufficient guidance. In any event, the Pre-2012 Rule takes away any question that the Commission's practice was consistent with the statute and did not "contradict[s] the clear expression of the legislature." *Hamilton ex rel. Hamilton v. Reeder Flying Serv.*, 135 Idaho 568, 572, 21 P.3d 890, 894 (2001). The Pre-2012 Rule provides guidance on a technical issue regarding mandatory or automatic tips, fees, or service charges. *Canty, 1*38 Idaho at 183-84, 59 P.3d at 988-89 (2002).

The Pre-2012 Rule distinguishes between tips, fees, or service charges included in the contract or automatically on the bill and those that are not. The Pre-2012 Rule does not tax cash tips left at the table or tips voluntarily written in by the customer as shown on Chandler's' bills,

the Pre-2012 Rule does tax tips, fees, or service charges that are mandatory or are included automatically in the price of the meal. Addendum Document No. 4, p. 8.

d. All of the rationales underlying the Rule of Deference are present.

The Commission provided guidance on a technical tax issue. Having "made a reasonable construction of a statute on a question without a precise statutory answer" the next prong reviews whether any of the rationales underlying the rule of agency deference are present. *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991). "There are five rationales underlying the rule of deference: (1) that a practical interpretation of the rule exists; (2) the presumption of legislative acquiescence; (3) reliance on the agency's expertise in interpretation of the rule; (4) the rationale of repose; and (5) the requirement of contemporaneous agency interpretation." *Duncan v. State Bd. of Accountancy*, 149 Idaho 1, 3, 232 P.3d 322, 324 (2010).

The Idaho Supreme Court explained the reasons it deferred to a different Commission rule in *Canty* as follows:

> If the underlying rationales are absent then their absence may present 'cogent reasons' justifying the court in adopting a statutory construction which differs from that of the agency. When only some of the rationales are present, the court must balance the supporting rationales, as all are not weighted equally. If one or more of the rationales underlying the rule are present, and no 'cogent reason' exists for denying the agency some deference, the court should afford 'considerable weight' to the agency's statutory interpretation.

Canty, 138 Idaho at 184, 59 P.3d at 989 (internal quotations and citations omitted).

Rationale No. 1: The Commission made a practical interpretation of the statute.

The first rationale is whether a practical interpretation of the rule exists. As reviewed above in the second prong as to reasonableness, the rule has a practical interpretation of the statute and was put in place after the attempt to amend the law in 1988 by HB 520. Addendum

Document No. 4. The Supreme Court stated, "The first rationale is that the agency interpretation is practical. This rationale apparently refers to the fact that statutory language is often of necessity general and therefore cannot address all of the details necessary for its effective implementation." *Canty,* 138 Idaho at 184, 59 P.3d at 989 (internal citations omitted).

The rule provides for a bright line of taxability all restaurants could function under prior to the 2011 Amendment. The Pre-2012 Rule distinguishes between tips, fees, or service charges included in the price of the meal and those that are not. In other words, the Pre-2012 Rule does not tax cash tips left at the table or tips voluntarily written in by the customer as shown on Chandler's' bills, the Pre-2012 Rule did tax tips, fees, or service charges included automatically in the price of the meal on the bill by Chandler's. R., p. 48 (Stipulation, Ex. D).

On Chandler's bills the automatic or mandatory tip, fee, or service charge is inserted by the restaurant and nothing indicates that such may be declined in all or in part. *Id.* Then, lower on the bill, is yet another or additional line for a tip, fee, or service charge that is voluntary on the part of the customer to add in an additional amount. *Id.*

Again, the relevant issue is that Chandler's check (or bill) failed to state that the tip, fee, or service charge could be declined in all or in part and, thus, per the Pre-2012 Rule, was considered part of the contract or "sale price." By looking at the check (or bill) it is clear that one charge is mandatory or included in the charge of the meal and pays for services incidental to the sale of the meal, including labor costs and the lower line that may be filled in by the customer is distinctly voluntary or beyond obligation. *Id.*

Idaho Code §§ 63-3612 and 3613 generally provide that the waiter and waitress services are taxable as part of the labor costs of the business in providing a customer with a restaurant meal. The Pre-2012 rule gave businesses clear rules as to when tips, fees, or services charges

would not fit into the "sales price" of a meal. The Pre-2012 dealt with a specific scenario and gave practical guidance. Restaurants and any other applicable food service businesses knew that if they automatically added a tip, fee, or service charge on a bill, it was taxable unless they indicated in writing on the bill that it could be declined in all or in part.

Rationale No. 2: Legislative acquiescence in the Pre-2012 Rule exists.

The second rationale is the presumption of legislative acquiescence. The Legislature in 1996, per Idaho Code § 63-105(2) provided that, "all rules adopted by the state tax commission prior to the effective date of this 1996 amendatory act shall remain in full force and effect until such time as they may be rescinded or revised by the commission." Additionally, the Legislature's rejection of HB 520 in 1988 to amend the law to tax the tips, fees, or service charges at issue here and the subsequent Pre-2012 Rule being put in place in 1989 show that this rationale is met. Addendum Document Nos. 1 and 4.

Rationale No. 3: The Commission has the expertise to interpret the statute by rule.

The third rationale is reliance on the agency's expertise in interpreting the rule. This is met. The Commission is expert in the Idaho Sales Tax Act as the agency responsible for its administration and having done so since 1965 with sales tax auditors and staff applying it every working day. The Supreme Court has recognized the Commission as having expertise in taxation issues. *Canty v. Idaho State Tax Comm'n*, 138 Idaho 178, 184, 59 P.3d 983, 989 (2002). The Commission used this expertise to formulate the Pre-2012 Rule at issue in this matter.

Rationale No. 4: The Rationale of Repose Is Met By the Longstanding Pre-2012 Rule.

The fourth rationale of repose is met. The 1989 rule was a longstanding rule in place for almost 20 years when applied to Chandler's. *See* Addendum Document Nos. 1 and 4, p. 3. *See also* Tax Commission Decision No. 22967 concerning audit periods September 1, 2006, through

August 31, 2009 ("Based on this law and IDAPA 35.01.02.043.05 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."). Addendum Document No. 5, p. 1.

Rationale No. 5: Contemporaneous agency interpretation rationale is met.

The fifth rationale of the requirement of contemporaneous agency interpretation is also met. The Pre-2012 Rule was put into effect immediately after the Legislature declined to exempt similar tips, fees, or service charges in 1988. *See discussion supra* parts II.D.2.b.

In conclusion, Chandler's arguments regarding Idaho Code 63-3613(b)(4) and (b)6) are without merit. The related statutes unambiguously do not exempt the tips, fees, or service charges at issue in this matter during the Audit Period. The Legislature also approved the Pre-2012 Rule by its rejection of HB 520 in 1988 and by Idaho Code § 63-105(2) and so a deference analysis is unnecessary. However, if the Court does find a deference analysis is necessary, the Commission's Pre-2012 Rule should be given deference and considerable weight. The four-pronged test of this Court's deference analysis have been met, as well as five out of the five rationales underlying the rule of deference.

E. The District Court correctly rejected Chandler's' mixed transaction argument.

Chandler's argues that the "mixed transaction" test in IDAPA 35.01.02.011.02.c. applies to this matter. Addendum Document No. 6. Chandler's' argument is incorrect and misreads the Commission's rules. IDAPA 35.01.02.011.02 provides that, "[t]he sales tax applies to retail sales of tangible personal property. It does not apply to the sale of services except as stated above . . . ."

So, per the rule, sales tax applies to services as "stated above." Above in IDAPA 35.01.02.011.01.c, Idaho Code § 63-3612(2)(b) is essentially restated as the rule specifically notes that services such as "[f]urnishing, preparing or serving food, meals or drinks for compensation. *See* Rule 041 for these rules[.]" are taxable. IDAPA 35.01.02.011.01, Addendum Document No. 6. (Idaho Code § 63-3612(2)(b) reads, "[f]urnishing, preparing, or serving food, meals, or drinks and nondepreciable goods and services directly consumed by customers included in the charge thereof.").

IDAPA 35.01.02.041.02 referred to in IDAPA 35.01.02.011.01.c also provides that:

> **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 35.01.02.041.02, Addendum Document No. 7. Therefore, IDAPA 35.01.02.011.02 by its own plain terms notes that services for providing a restaurant meal are taxable.

Further, the examples of mixed transactions provided by IDAPA 35.01.02.011.03 demonstrate that the mixed transactions contemplated under this rule do not apply to restaurants or meal services:

> 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. . . .

IDAPA 35.01.02.011.03, Addendum Document No. 6. (emphasis added).

Chandler's' argument related to this rule also goes against a basic Idaho sales and use tax principle. It is a basic principle of sales tax law that labor costs involved in the fabrication of a good are included in its taxable price. IDAPA 35.01.02.011.02 explains the principle well:

> . . . . when a sale of tangible personal property includes incidental services, the tax applies to the total amount charged, including fees for any incidental services except separately stated transportation and installation fees. The fact that the charge for the tangible personal property results mainly from the labor or creativity of its maker does not turn a sale of tangible personal property into a sale of services. The cost of any product includes labor and manufacturing skill.

IDAPA 35.01.02.011.02, Addendum Document No.6 (emphasis added).

If a restaurant was able to exempt any "service" by merely separately stating it, then it could do so for every service that occurs in the process of serving a meal to a customer. It could separately state the wages for managers, janitors, dishwashers, cooks and chefs, and any other facet of providing a restaurant meal. It would only leave the cost of rent, kitchen fixtures and appliances, and food to calculate the sales price for sales tax purposes. This is not the way sales tax works. Chandler's' mixed transaction argument is unworkable because it could be applied to any sale and by any seller in any industry and if so applied would gut collections and remittances of sales and use tax in Idaho.

The District Court correctly rejected Chandler's mixed transaction argument by upholding the Commission's Decision. The mixed transaction test, by the express wording of the rule does not apply to restaurant meals. The mixed transaction test as applied by Chandler's would also violate the basic principle of sales tax law in Idaho that "the labor or creativity" of

Chandler's restaurant employees do not turn a sale of a meal into a sale of services. IDAPA 35.01.02.011.02, Addendum Document No. 6.

F. Tax exemptions are strictly construed against the taxpayer.

Idaho Code §§ 63-3613(b)(4) and (b)(6), and the statutory amendment which is now Idaho Code § 63-3613(f) are exemptions from sales tax. It is Chandler's' burden to show that the tips, fees, or service charges prior to the 2011 Amendment were not part of the sales price of the meal. *See Old W. Realty, Inc. v. Idaho State Tax Comm'n*, 110 Idaho 546, 549, 716 P.2d 1318, 1321 (1986) ("Old West as a taxpayer had the burden of establishing that these services were *not* services such as would be included within the definition of "sale price." It is by now axiomatic that one claiming an exemption to the general taxing authority must establish his entitlement to such an exemption.") (internal citations omitted); *Jayo,* 158 Idaho at 154, 345 P.3d at 210.

Chandler's is claiming an exemption and the exemption statutes should be construed against them. This is yet another reason to uphold the District Court.

III. The plain wording of the Statute's Retroactivity Clause applies the exemption in Idaho Code § 63-3613(f) only from January 1, 2011 forward.

Chandler's argues that the District Court failed to fully address its issue that the law all along exempted the tips, fees, and service charges in question. Chandler's also argues that the 2011 Amendment clarifies or strengthens their interpretation of the pertinent parts of Idaho Code §§ 63-3612, 3613, and 3619.

The District Court did address these issues when it held on p. 6 of its Order:

> 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 Order).

Chandler's also attempts to use the 2011 Amendment's Title, legislative history, a secondary source, and case law to support its argument. The District Court should be upheld.

A. The 2011 Amendment is unambiguous and is retroactive only to January 1, 2011.

The Idaho Supreme Court succinctly held pursuant to Idaho Code § 73-101 that,

> '[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).

A & B Irr. Dist. v. Idaho Dep't Of Water Res., 153 Idaho 500, 508, 284 P.3d 225, 233 (2012).

In 2011, the Idaho Legislature added a new exemption or subsection (f) to Idaho Code 63-3613 ("2011 Amendment"). R., pp. 74-76. As a direct result of the 2011 Amendment, tips, fees, or service charges were narrowly exempted from January 1, 2011 forward as follows:

> (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 629 (codified as amended at Idaho Code § 63-3613(f).), R., p. 75.

The Idaho Legislature provided an effective retroactive date in the 2011 Amendment to January 1, 2011 as follows:

> 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.

2011 Idaho Sess. Laws 630 (codified as amended at Idaho Code § 63-3613(f)), R., p. 76.

In *Jayo Dev., Inc. v. Ada Cty. Bd. of Equalization*, 158 Idaho 148, 153, 345 P.3d 207, 212 (2015), a statutory amendment to Idaho Code § 63–602W became law on April 4, 2013, and the Legislature expressly stated that it was to be applied "retroactively to January 1, 2013." Developers wanting the tax advantages of the 2013 amendment applied to earlier years sought relief. 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 in *Jayo* 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. In *Jayo*, the Court not only addressed that the statute in question was retroactive, but also how far back in time the statute applied. *Id.* Both were expressly set forth.

The Legislature also expressly declared in Idaho Code § 63-3613(f) that the statute in this matter was retroactive and how far back in time it was retroactive to the specific date of January 1, 2011. *Jayo,* 158 Idaho at 154, 345 P.3d at 213 and 2011 Idaho Sess. Laws 630.

Chandler's argues that the Title's inclusion of the word "clarify" in the 2011 Amendment makes it retroactive past the Legislature's clearly worded Retroactive Clause, probably all the way back to 1965.

The Title to the 2011 Amendment, reads:

> AN ACT
> RELATING TO SALES TAX; AMENDING SECTION 63-3613, IDAHO CODE, TO DEFINE "SALES PRICE" FOR SALES AND USE TAX PURPOSES <u>TO CLARIFY THAT SALES PRICE SHALL NOT INCLUDE A</u>

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.

2011 Idaho Sess. Laws 628 (emphasis added).

The word "clarify" in the Title does not indicate an express intent by the Legislature to make the 2011 Amendment retroactive to the audit period in question. In fact, the Title also includes the words, "[p]roviding retroactive application." *Id.* This links the Title to the body of the statute and shows that the Legislature intended the 2011 Amendment to be retroactive only to January 1, 2011 as provided in the plain and unambiguous wording of the body of the statute.

According to *State v. Peterson*, 141 Idaho 473, 476, 111 P.3d 158, 161 (Ct. App. 2004), "[a]lthough the title is part of the act, it may not be used as a means of creating an ambiguity when the body of the act itself is clear." *State v. Browning,* 123 Idaho 748, 750, 852 P.2d 500, 502 (Ct. App. 1993) (*quoting* 2A Sands, Sutherland Statutory Construction § 47.03 (5th ed.1992)." *See also Kelso & Irwin, P.A. v. State Ins. Fund*, 134 Idaho 130, 134, 997 P.2d 591, 595 (2000) (endnote 2); and *State v. Williston*, 159 Idaho 215, 219, 358 P.3d 776, 780 (Ct. App. 2015), *review denied* (Nov. 2, 2015).

The fact that the Legislature in 1988 did not pass HB 520 into law, shows that the Legislature did not intend the 2011 Amendment to be, as Chandler's argues, the way the law was all along. To the contrary, HB 520's failure showed that the Legislature intended the law to be exactly the way the Commission was administering it prior to 1988 and as shown by the1989 amendment of the Pre-2012 Rule. Addendum Document Nos.1 and 4.

The 2011 Amendment's Retroactivity Clause is an important part of this law. *Peterson v. Peterson*, 156 Idaho 85, 88, 320 P.3d 1244, 1247 (2014). Through the Retroactivity Clause the Legislature plainly and unambiguously expressed a clear intent to the make the 2011

Amendment retroactive only back to January 1, 2011. Chandler's had this Court's decision in *Jayo* available when it argued this case at the District Court. It knew that its argument as to retroactivity had been squarely addressed by the Supreme Court and continued to pursue the case.

In a case regarding a policeman's retirement benefits, the Court stated that, "a statute is not retroactive unless it changes the 'legal effect' of previous transactions or events." *Engen v. James*, 92 Idaho 690, 695, 448 P.2d 977, 982 (1969) (citations omitted). The Legislature did not strengthen the law by the 2011 Amendment, it changed the law.[2] The Legislature made the law retroactive only to January 1, 2011. Chandler's asks this Court to make it retroactive to January 1, 2011. But, then Chandler's asks this Court to disregard the retroactive date of January 1, 2011 because the Legislature "clarified" things and the law as read in the 2011 Amendment is how it was to read and be understood all along. The Legislature expressly made the law retroactive. In doing so, it expressly manifested that the law was changing and not staying the same. And, the changes were only to be effective from January 1, 2011 forward. Chandler's misreads the word "clarify" in the Title of the 2011 Amendment. The District Court understood this argument was a nonstarter; the District Court should be upheld.

[2] A statutory amendment is assumed to change existing law rather than strengthen it. 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, "[w]hen 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 United Pac. Ins. Co. v. Bakes*, 57 Idaho 537, 67 P.2d 1024, 1029 (1937) ("The rule being 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.") (citations omitted). Such is the case here with the 2011 Amendment. It did not strengthen the law, but instead changed it.

B. Chandler's arguments regarding the 2011 Amendment's Committee Minutes, secondary source, and court cases do not support their argument.

Chandler's uses Committee Minutes, a secondary source and court cases to argue its point that the 2011 Amendment strengthened the law and that all along it exempted the tips, fees, or service charges at issue.

1. The 2011 Amendment is narrowly crafted and has a distinct meaning that did not exist in the law previously.

The legislative history shows that one of the concerns that existed was that a restaurant might lower the amount charged for a meal and then charge a higher amount for a tip, fee or service charge that is nontaxable and thereby not pay the correct sales tax. On this point, "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." Addendum to Chandler's Opening Brief, p. 17. The minutes note that, "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." *Id.* (comments by Pam Eaton).

The 2011 amendment narrowly crafts an exemption for tips, fees, or service charges only when it is a "supplement to the service provider's income." Idaho Code § 63-3613(f). This distinction did not exist in this context in the statute before the amendment and no such distinction is provided for in Idaho Code §§ 63-3613(a) and (a)(2) where "services agreed to be rendered as part of the sale" and "labor or service cost," or in Idaho Code § 63-3613(2)(b), where "[f]urnishing, preparing, or serving food, meals, or drinks and nondepreciable goods and services directly consumed by customers included in the charge thereof."

The statute allowed taxation of services in providing a meal. The Pre-2012 Rule made a distinction to not tax all tips, fees, or services charges, but only the automatically added or mandatory ones. This distinction was not based on wages for the server. As far as the statute goes, the owner's income from service is not distinguished from the server's. Only the 2011 Amendment makes this distinction. The 2011 Amendment does not clarify existing law, but creates a new and narrowly crafted exemption that applies from January 1, 2011 forward only. Tips, fees, or service charges remain taxable unless they fit the requirements of the new exemption.

2. The Pre-2012 rule was a longstanding rule prior to its revision due to the passage of the 2011 Amendment.

Chandler's cites to the comments of a restaurant industry representative during legislative committee meetings regarding the Commission's Pre-2012 Rule. Addendum to Chandler's Opening Brief, pp. 11, 13, 17-18 (comments by Pam Eaton). The representative at one hearing commented that the rule was little known. Addendum to Chandler's Opening Brief, p. 17. However, the same representative at the same meeting said that, "[t]he 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." Addendum to Chandler's Opening Brief, p. 17 (comments by Pam Eaton). The same representative in earlier comments before another legislative committee said, "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." Addendum to Chandler's Opening Brief, p. 11 (comments by Pam Eaton). These comments recognize the longstanding nature of the Pre-2012 Rule as well as its consistent application of taxing automatic or mandatory tips, fees, or services charges according to law.

The Pre-2012 Rule had been in effect since at least 1989. The Commission's practice of taxing automatic tips, fees, or service charges had been developed prior to 1989 per the legislative history to HB 520 in 1988. Addendum Document No. 4, p. 3. The legislative history to HB 520 in 1988 shows that the Pre-2012 Rule and the Commission's practice in enforcing it were known to the Legislature. Additionally, a 2011 Tax Commission Decision No. 22967 concerning audit periods September 1, 2006, through August 31, 2009 also shows that the practice had consistently been in place. In that decision the Commission stated, "[b]ased on this law and IDAPA 35.01.02.043.05 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." Addendum Document No. 5, p. 1.

Courts have provided that:

> . . . . it is axiomatic that citizens are presumptively charged with knowledge of the law once such laws are passed. Ignorance of the law is not a defense. The entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny.

Wilson v. State, 133 Idaho 874, 880, 993 P.2d 1205, 1211 (Ct. App. 2000) (internal quotations and citations omitted). However, based upon the legislative history and Commission Decision 22967, the Pre-2012 Rule was a longstanding rule that had been consistently applied and "[t]he 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)) (citations omitted).

The discussion of the legislative history and Commission Decision No. 22967 show that the 2011 Amendment did not strengthen existing law, but instead completely changed it.

3. Services, to the extent provided by the Legislature, are taxable in Idaho.

Chandler's contends that "in the course of amending Idaho Code Section 63-3613, the Legislature considered how these separate transactions (referring to the waiter's tip v. the meal) had become conflated as a result of the Commission's Rules." Chandler's Opening Brief, p. 10. Chandler's continues by contending that 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." *Id.* Chandler's refers to minutes reflecting that "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 to Chandler's Opening Brief, p. 18. (Senator Hill, March 22, 2011).

It is true that "generally speaking" services are not subject to sales tax in Title 63, Chapter 36 of the Idaho Sales Tax Act. However, it is also true, that some services are taxable pursuant to the Idaho Sales Tax Act. As discussed above, the statutes prior to January 1, 2011 allowed the taxation of tips, fees, or service charges and the Pre-2012 Rule was consistent with taxation of such services. Thereafter, the narrowly crafted exemption in Idaho Code § 63-3613(f) provided that some tips, fees, and service charges were no longer taxable. The 2011 Amendment had to be passed to change longstanding law that taxed services related to "[f]urnishing, preparing, or serving food, meals, or drinks and nondepreciable goods and services directly consumed by customers included in the charge thereof." Idaho Code § 63-3612(2)(b).

Nevertheless, regardless of legislative history discussion about what tips "should or should not" be taxed, that somehow any taxation of a service is a discrepancy in the statute, or that such taxation is double taxation (the Commission notes that it knows of no prohibition for a sales tax to apply to a restaurant server's tip included in the price of a meal and also that the server's gross income, including wages and tips, be included in the server's gross income for determining U.S. and Idaho income taxes), the plain language of Idaho Code §§ 63-3619, 3612, and 3613 prior to the 2011 Amendment allowed the taxation of the tips, fees, or service charges in question in this matter.

Also, the comments in the legislative history to HO213 in 2011 referenced by Chandler's reflect significant changes in the law and also fail to reflect any express intent of the Legislature to apply the law retroactively beyond January 1, 2011.

4. Chandler's secondary source does not apply to the 2011 Amendment.

In its brief, Chandler's cites to 1A Sutherland on Stat. Const. § 22:31 (2015) for the proposition that the 2011 Amendment clarified instead of changed existing law. Chandler's Opening Brief, p. 23. However, in 1A Sutherland Statutory Construction § 22:30 (7th ed.), it is discussed that, "[a]n amendment of an unambiguous statute indicates an intent to change the law." In this matter the Legislature specifically provided the 2011 Amendment to be retroactive or to change the law as provided by the 2011 Amendment from January 1, 2011 forward.

One of the cases cited in Chandler's 1A Sutherland on Stat. Const. § 22:31 (2015) in the supporting footnotes is *Family Fin. Servs., Inc. v. Spencer*, 41 Conn. App. 754, 765, 677 A.2d 479, 486 (1996). In that case although a statutory change was deemed to apply retrospectively, it could not be retroactively applied because it would abrogate vested rights. The Connecticut Court correctly ruled that:

> In determining the intended effect of an enactment on earlier legislation, two questions must be asked. First, was the act intended to clarify existing law or change it? Second, if the act was intended to make a change, was the change intended to operate retroactively?

Id. (citations and internal quotations omitted).

Therefore, when determining retroactivity, one must look to see how the law was "intended to operate retroactively." *Id.* Here, retroactivity was clearly stated by the Idaho Legislature from only January 1, 2011 forward. The District Court's Order should be affirmed.

5. Chandler's' reliance on the four Idaho cases it cites is misplaced and instead the cases reinforce the District Court's Order.

Chandler's refers to four cases. All the scenarios in these cases involve statutory amendments that strengthen the originally enacted law to which the amendments relate. Also, none of the statutes in the cases provided have a retroactivity clause similar to those found in *Jayo* and the 2011 Amendment. Idaho Code § 63-3613(f) does not strengthen pre-existing law, but instead changes pre-existing law and takes it in an opposite direction. Chandler's' cases do not assist the Court in addressing the facts and law in this matter. Also, the legislative history related to HB 520 in 1988 is very instructive relative to these cases. The legislative history shows that the practice of the Commission based upon the rejection of HB 520 and the creation of the Pre-2012 Rule in at least 1989 was to tax the transactions or automatic tips, fees, or service charges at issue in this matter. Thus, the 2011 Amendment changed the law rather than strengthened it. These cases fail to support Chandler's argument. A more in depth discussion of the Commission's arguments related to Chandler's interpretation of the cited cases can be found in the Commission's District Court briefing. R., pp. 117-121.

6. The Legislature's approval of the Post-2012 Rule shows that the 2011 Amendment changed the law.

The Commission's new rule shows that the 2011 Amendment changed the law instead of strengthened existing law. Following the 2011 Amendment, the Commission promulgated changes to the Pre-2012 Rule. Revised IDAPA 35.01.02.043.04 ("Post-2012 Rule") after review and approval by the Legislature was made final on March 29, 2012. Addendum Document No. 8. The amended rule reflected the significant change caused by the 2011 Amendment:

> **04. Gratuities.** When a gratuity is paid in addition to the price of a meal, no sales tax applies to the gratuity. A gratuity can be paid voluntarily by the customer or be required by the seller. A gratuity is also commonly known as a tip. (3-29-12)
>
> **a.** If a gratuity does not meet all of the following requirements, the gratuity will be subject to sales tax: (3-29-12)
>
> i. A gratuity must be paid to the service provider of the meal as additional income to the base wages of the service provider; (3-29-12)
>
> ii. A gratuity must be separately stated on the receipt or be voluntarily paid by the customer; and (3-29-12)
>
> iii. A gratuity must not be used to avoid sales tax on the actual price of the meal. (3-29-12)
>
> **b.** For the purposes of Subsection 043.04 of this rule, the following definitions apply: (3-29-12)
>
> i. Meal. Food or drink prepared for or provided to a customer. (3-29-12)
>
> ii.Service provider. An individual directly involved in preparing or providing a meal to a customer. This includes, but is not limited to, the server, the busser, the cook and the bartender. This does not include individuals who manage or own the company if they are not directly involved in preparing and providing a meal. (3-29-12)

Addendum Document No. 8 (Post-2012 Rule) (emphasis added).

The Post-2012 Rule is opposite to the Pre-2012 Rule in that a tip, fee, or service charge is not taxable regardless of whether it is automatically included on the bill provided to the customer. However, it also adds new requirements for the tips, fees, or service charges to be

nontaxable that were not present in the statutes prior to 2011 or the Pre-2012 Rule such as: tips must be additional income to the base wages of the server; tips cannot be used to artificially lower the cost of the meal to avoid sales tax; and tips cannot go to managers or owners unless they are directly involved with providing the meal.

The 2011 Amendment uniquely changed the law to not tax labor or service related costs in the context of serving restaurant meals and created specific requirements to meet the exemption. The 2011 Amendment does not mirror the law as it existed prior to January 1, 2011, or strengthen it.

C. The 2011 Amendment is an exemption and should be narrowly construed against Chandler's.

The 2011 Amendment is an exemption. Idaho Code § 63-3613(f) must be narrowly construed against the taxpayer. To interpret Idaho Code § 63-3613(f) in a way that applies it to an earlier time period than its concrete retroactivity date of January 1, 2011, is contrary to the plain words of the statute and is certainly not a narrow interpretation strictly construed against the taxpayer.

It is Chandler's' burden to show that the tips, fees, or service charges prior to the 2011 Amendment were not part of the sales price of the meal. *See Old W. Realty, Inc. v. Idaho State Tax Comm'n*, 110 Idaho 546, 549, 716 P.2d 1318, 1321 (1986) ("Old West as a taxpayer had the burden of establishing that these services were *not* services such as would be included within the definition of "sale price." It is by now axiomatic that one claiming an exemption to the general taxing authority must establish his entitlement to such an exemption.") (internal citations omitted); *Jayo, Dev., Inc. v. Ada Cty. Bd. of Equalization*, 158 Idaho 148, 154, 345 P.3d 207, 210 (2015) (exemption statutes are strictly construed against the taxpayer). The District Court should be upheld.

COSTS AND ATTORNEY FEES

The Commission requests costs and attorney fees pursuant to I.R.C.P. 54(e) in the District Court and pursuant to I.A.R. 41 on appeal. R., p. 123 (in the Commission's Reply Memorandum In Support of Idaho State Commission's Motion for Summary Judgment the Commission requests attorney fees and costs as requested in the Commission's Answer). Under the standard of Idaho Code § 63-3049(d), the Commission is awarded attorney fees:

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

See Hart v. Idaho State Tax Comm'n, 154 Idaho 621, 625, 301 P.3d 627, 631 (2012); and Idaho Code § 63-3635. The Commission also requests attorney fees and costs under I.A.R. 35, 40, 41 (*see Hagy v. State*, 137 Idaho 618, 624, 51 P.3d 432, 438 (Ct. App. 2002)); Idaho Code § 12-117(1) and (2), and/or Idaho Code § 12-121.

Chandler's arguments regarding Idaho Code § 63-3614(b)(4) and (6) to the Commission's knowledge have never been argued before and are entirely inconsistent with the interpretation and application of the law in place at the time of the transactions in question. Chandler's creates completely new readings of the statutes in question and asks this Court to rule in their favor contrary to the longstanding application of those statutes by the Commission and the ruling by the District Court.

Chandler's arguments make Idaho Code § 63-3612(2)(b) a nullity. The legislative history to HB 520 in 1988 clearly shows that the law was not as Chandler's argues all along. The Pre-2012 Rule put into effect in 1989 was contemporaneous with the rejection of HB 520 in

1988. Chandler's 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*, where costs and attorney's fees were awarded. Similar to the statute in *Jayo,* Idaho Code § 63-3613(f)'s retroactivity is specific and precise to January 1, 2011.

Chandler's takes the word "clarify" out of the Title in Idaho Code § 63-3613(f) and interprets it inconsistently with other wording in the Title regarding retroactivity as well as the plain words in the text of the statute that make it retroactive only to January 1, 2011. Chandler's had the benefit of *Jayo* and still persisted in pursuing this action. Hopefully the Court finds that an attorney reading *Jayo* would understand that following similar logic with similar facts would also result in attorney fees being awarded against them.

Unambiguous statutes, a longstanding rule, and a statutory amendment with a specific retroactivity clause make this a simple case. However, Chandler's has spent considerable resources in challenging this matter like the taxpayer in *Jayo* and attorney fees should be awarded to the Commission. At a minimum, the Commission requests costs under I.A.R. 40. *Athay v. Stacey*, 146 Idaho 407, 422-423, 196 P.3d 325, 340-341 (2008).

CONCLUSION

For these reasons, the Commission respectfully asks that the order of the District Court granting summary judgment to the Commission, be affirmed and attorney fees and costs awarded in both District Court and on appeal.

DATED this 7th day of December, 2016.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

Erick Moss Shaner
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December 2016, I caused to be served two (2) true and correct copies of the foregoing **RESPONDENT IDAHO STATE TAX COMMISSION'S BRIEF** by the method indicated below:

Thomas E. Dvorak
Clint R. Bolinder
Melodie A. McQuade
GIVENS PURSELY LLP
601 W. Bannock Street
P.O. Box 2720
Boise, ID 83701
[Attorneys for Plaintiff/Appellant]

___ U.S. Mail
✓ Hand Delivery
___ Certified Mail, Return Receipt Requested
___ Overnight Mail
___ Facsimile: _____

Erick Moss Shaner
Deputy Attorney General

ADDENDUM

Document # 1	IDAPA 35.02.13,1.c. and d. (Amended 11/29/89) (State of Idaho, Idaho Sales and Use Tax Regulations)
Document # 2	Idaho Code § 63-3612 (1988 version) (ID Session Laws C346 1988)
Document # 3	House Revenue and Taxation Committee Report in Support of House Bill 222 H. Revenue and Taxation Comm., 38th Leg. Sess. (1965)
Document # 4	1988 Legislative History on HB 520
Document # 5	Idaho State Tax Commission Decision, Docket No. 22967 (2011) (redacted)
Document # 6	IDAPA 35.01.02 Rule 11 (2007)
Document # 7	IDAPA 35.01.02 Rule 41 (2007)
Document # 8	IDAPA 35.01.02 Rule 43 (2012)