

MINUTES
SENATE LOCAL GOVERNMENT & TAXATION COMMITTEE

DATE: Tuesday, January 16, 2018

TIME: 3:00 P.M.

PLACE: Room WW53

MEMBERS PRESENT: Chairman Johnson, Vice Chairman Bayer, Senators Hill, Siddoway, Rice, Vick, Patrick, Burgoyne, and Nye

ABSENT/ EXCUSED: None

NOTE: The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

CONVENED: **Chairman Johnson** called the meeting of the Local Government and Taxation Committee (Committee) to order at 3:00 p.m.

INTRODUCTION: **Chairman Johnson** welcomed Committee Page, Christine Peterson, and asked her to provide a personal introduction.

PASSED THE GAVEL: Chairman Johnson passed the gavel to Vice Chairman Bayer.

DOCKET NO. 35-0102-1701 **Idaho Sales and Use Tax Administrative Rules. Tom Shaner**, Tax Policy Manager, Idaho State Tax Commission (Commission), presented this docket of pending rules.

The proposed changes to Section 067 relate to fiber optic and communication cables. **Mr. Shaner** noted that changes were made to clarify that fiber optic and communication cabling installed in a building is presumed to be an improvement to real property rather than personal property. He noted that this was negotiated rulemaking with input from industry.

Senator Patrick asked for clarification regarding how tax is applied to fiber optic cabling. **Mr. Shaner** explained that this rule determines whether to apply sales tax or use tax when a contractor installs cabling.

MOTION: **Senator Patrick** moved to approve **Docket No. 35-0102-1701**. **Senator Siddoway** seconded the motion.

Senator Burgoyne asked if the Commission encountered opposition during the rulemaking process. **Mr. Shaner** replied that many questions were raised, but there was no opposition to the proposed changes.

The motion carried by **voice vote**.

DOCKET NO. 35-0102-1702 **Idaho Sales and Use Tax Administrative Rules. Mr. Shaner** presented the proposed changes to Section 013, which relate to road and paving contractors. The proposal adds examples to clarify when materials used by road and paving contractors are subject to sales and use tax. He noted that this was negotiated rulemaking and that the Commission encountered opposition during this process.

Senator Hill asked for clarification regarding the phrase "supervision of the person" in the context of this rule. **Mr. Shaner** provided an example that materials purchased by a highway district are tax exempt, and the contractor applying the materials under the supervision of the highway district is simply providing a service of labor. **Senator Hill** then asked if the materials would be subject to tax if a contractor was not under the supervision of a highway district or local entity. **Mr. Shaner** affirmed and explained that rulemaking was conducted to clarify these circumstances.

Senator Rice referenced Idaho Code § 63-3621(m) and observed that none of the proposed examples in Subsection 13.03 recognize the application of use tax when property, such as a gravel pit, is donated. **Mr. Shaner** stated that the Commission will need additional time to respond. **Senator Rice** then posited that the proposed examples appear to violate Article 7, Section 4 of the Idaho Constitution. He explained that the interpretation of the statutes may be reasonable if examined in isolation; however, if a subdivision of the state already owns property, and sales or use tax is being imposed on that property - regardless of who performs the labor - the application of tax in this instance would be violative of the Idaho Constitution. **Mr. Shaner** stated that the Commission will need additional time to respond.

MOTION: **Senator Rice** moved to hold **Docket No. 35-0102-1702** subject to the call of the Chair. **Senator Vick** seconded the motion.

Vice Chairman Bayer stated the Committee will hear public testimony before proceeding with the motion.

TESTIMONY: **Rick Smith**, representing Johnny B Transport and Idaho Asphalt Supply, spoke in opposition to the proposed changes to Section 013, specifically as applied to chip sealing companies. He identified two areas of objection: 1.) whether a chip sealer has sufficient control over asphalt to satisfy statutory use requirements, and 2.) if chip sealing constitutes an improvement to real property. **Mr. Smith** explained that litigation in 1984 directly addressed whether chip sealing activity represents a use by the service provider of the asphalt in question. That case held that the chip sealer did not have sufficient control over asphalt to satisfy statutory use requirements. **Mr. Smith** acknowledged a level of ambiguity in determining use in these circumstances but argued that legal precedent construes tax imposition in favor of the taxpayer. **Mr. Smith** then addressed the second point of objection. He argued that chip sealing does not constitute improvement to real property. Contractors are subject to use tax when they make improvements to real property. **Mr. Smith** contended that chip sealing is a maintenance activity; it constitutes road preservation rather than construction or improvement.

Senator Burgoyne asked Mr. Smith to distinguish contractor ownership over materials used to improve real property from property owners' ownership over these materials in the context of Section 013. **Mr. Smith** conceded that ownership is not a consideration when applying use tax; chip sealing companies do not own the materials, they transport and apply them. **Senator Burgoyne** asked if double taxation would present an issue if two non-governmental entities engaged in the same activities. **Mr. Smith** replied that he was not aware of double taxation occurring in this context.

Senator Rice asked Mr. Smith to comment on the applicability of the 1984 district court case if proposed regulation had only prospective application. **Mr. Smith** explained that the court stated that a taxing authority, in this case the Commission, has the authority to develop regulations that define imposition of tax. In this case, a regulation could have been circulated to companies, such as Idaho Asphalt, who could then adjust their pricing to include the tax. **Mr. Smith** stated that a standard has been set by the court in this case that precludes the need to promulgate a rule. **Senator Rice** then asked if the 1984 court decision would merely be a *res judicata* decision or if the doctrine of *collateral estoppel* would apply to the Commission in its imposition of tax on other companies engaged in the same activity. **Mr. Smith** felt that both doctrines would apply in a litigation setting.

Senator Burgoyne asked, in reference to the issue of *res judicata* and *collateral estoppel*, if this decision could be applied more broadly. **Mr. Smith** stated that the doctrine of *collateral estoppel* would apply statewide and in his opinion, the 1984 court decision provided legal precedent on this issue for the past three decades. **Senator Burgoyne** inquired if a taxing entity is able to promulgate a rule that challenges this decision. **Mr. Smith** stated that the Commission litigated and lost on the issue of whether the spreading of asphalt represented a use subject to tax.

Senator Hill asked if the statute relating to sales and use tax is unclear, and if so, could a statute create a bright line exemption for chip sealing activities. **Mr. Smith** responded that the statute is ambiguous, but examples could be written to clearly delineate these activities.

Senator Nye asked if sodding or landscaping would be considered improvement to real property. **Mr. Smith** affirmed.

Wayne Hammond, representing Idaho Associated General Contractors, spoke in support of the proposed changes to Section 013. **Mr. Hammond** stated that if a county employee is supervising chip sealing work, the worker performing the work is not considered a contractor, he is merely providing the service of labor; however, if a contractor is supervising the chip sealing work or performing the labor, then use tax would apply. He asked for consistency in the application of this rule when contractors supervise and perform this type of work. **Mr. Hammond** commented that the distinction of chip sealing as a maintenance activity or improvement to real property is irrelevant - all contracting work should be subject to tax.

Ken Roberts, Chairman of the Commission, stated that the examples proposed to be added to Section 013 were provided to offer guidance to contractors in this arena due to irregularities in how tax code is applied. The Commission's intent behind this rule is to provide uniform application of tax law. **Chairman Roberts** commented that the Legislature could create an exemption that addresses this issue in Idaho Code § 63-3622, but the exemption would have a financial impact on state revenue.

Senator Rice asked if the Commission would consider a code clarification, rather than a rule, to provide clarity. **Chairman Roberts** stated that the Commission believes the statute is clear on this issue and that the 1984 district court decision is not consistent with sales tax law. **Senator Rice** asked if the Commission has the authority to promulgate rules that are inconsistent with legal precedent. **Chairman Roberts** responded that the Commission's intent is to provide uniform application of tax law.

Senator Burgoyne commented that he does not believe that taxpayers are being treated unfairly because the tax is ultimately being paid by some entity. In his opinion, the statute must be interpreted by rule unless the statute itself is changed; there is a sound basis for rulemaking, and the issue that needs to be resolved is the scope of the examples provided.

Vice Chairman Bayer asked Senator Rice to clarify his original motion.

MOTION: **Senator Rice** moved that **Rule 013** of **Docket No. 35-0102-1702** be held subject to the call of the Chair. **Senator Vick** seconded the motion. The motion carried by **voice vote**.

Mr. Shaner presented the proposed changes to Section 044, amended consistent with 2017 HB 156, which will add related terminology and statute references.

The proposed changes to Section 061, amended consistent with 2017 HB 156, will add statute references. These references will include transportation, freight, and handling charges in the purchase price of a park model recreational vehicle and thus subject to sales tax.

The proposed change to Section 079, amended consistent 2017 HB 156, will add a code reference to the production exemption to clarify that park model recreational vehicles are not eligible for the production exemption.

The proposed change to Section 099, amended consistent with 2017 HB 156, will add a statute reference to the title.

The proposed changes to Section 107 will add or change definitions to make these provisions consistent with 2017 HB 156.

The proposed changes to Section 128, amended consistent with 2017 HB 156, will add statute references and delete form references.

MOTION: **Senator Rice** moved to approve **Docket No. 35-0102-1702**, with the exception of Section 013 to be held subject to the call of the Chair. **Senator Burgoyne** seconded the motion. The motion carried by **voice vote**.

DOCKET NO. 35-0102-1703 **Idaho Sale and Use Tax Administrative Rules.** **Mr. Shaner** presented the proposed changes to Section 028, amended consistent with 2017 HB 216, which will add language within the sales tax rules section to reflect changes made to Idaho Code § 63-3612(2).

Section 103 has become obsolete, and **Mr. Shaner** explained that it is being removed to align with the passage of legislation removing the exemption for hand tools under \$100.

MOTION: **Senator Rice** moved to approve **Docket No. 35-0102-1703**. **Senator Nye** seconded the motion. The motion carried by **voice vote**.

DOCKET NO. 35-0106-1701 **Hotel/Motel Room and Campground Sales Tax Administrative Rules.** **Mr. Shaner** presented the proposed changes to Section 001, amended consistent with 2017 HB 216, which will add language to clearly identify that short-term rentals are subject to sales tax and the Greater Boise Auditorium Tax. It will also introduce the term "short-term rental marketplace."

Senator Nye asked if there are other tax classifications similar to the Greater Boise Auditorium Tax. **Mr. Shaner** replied that short-term rentals are subject to any travel and convention tax in their respective district.

The proposed changes to Section 018, amended consistent with 2017 HB 216, pertain to filing returns. **Mr. Shaner** explained that because of the short-term rental marketplace and funds expected from additional travel and convention districts, the hotel tax was redesigned to allow for reporting by county. The requirement to obtain a separate permit for each location will be removed, which will facilitate more efficient reporting procedures.

Senator Hill asked why Subsection 18.02 will be deleted. **Mr. Shaner** explained that a more specific identification system of rentals locations will be implemented to ensure accurate reporting.

Proposed changes to Section 019 add terms introduced in 2017 HB 216.

MOTION: **Senator Hill** moved to approve **Docket No. 35-0106-1701**. **Chairman Johnson** seconded the motion. The motion carried by **voice vote**.

DOCKET NO. 35-0106-1702 **Hotel/Motel Room and Campground Sales Tax Administrative Rules**. **Mr. Shaner** presented proposed changes to Section 006, which will promulgate a new rule to add reference statutes created in 2017 HB 216. The new rule indicates the Commission deemed it necessary, due to the nature of electronic transactions of short-term rental marketplaces. He noted that a short-term rental marketplace will have 45 days from the completion of their first lodging in Idaho to obtain a sale tax permit.

CONFLICT OF INTEREST: Pursuant to Senate Rule 39(H), **Senator Vick** disclosed a possible conflict of interest under applicable law.

MOTION: **Senator Siddoway** moved to approve **Docket No. 35-0106-1702**. **Senator Rice** seconded the motion. The motion carried by **voice vote**.

ADJOURNED: There being no further business at this time, **Vice Chairman Bayer** adjourned the meeting at 4:32 p.m.

Senator Johnson
Chair

Jennifer Carr
Secretary