

**CITY COUNCIL CALENDAR OF THE CITY OF KETCHUM, IDAHO**

**Monday, March 18, 2013, beginning at 5:30 p.m.**

**480 East Avenue, North, Ketchum, Idaho**

Approximate starting time for each agenda item is indicated at left.



- 5:30 1. CALL TO ORDER
- 5:30 2. COMMUNICATIONS FROM MAYOR AND COUNCILORS.  
a) Communications from Mayor and Councilors.  
b) Presentation of Certificates of Recognition - Mayor Hall Tab 1
- 5:50 3. COMMUNICATIONS FROM THE PUBLIC.  
a) Communications from the public.
- 6:05 4. COMMUNICATIONS FROM CITY STAFF.  
a) Report on proposed Memorandum of Understanding with the Idaho Tax Commission for enforcement of the Ketchum Local Option Tax - Cheresse McLain. Tab 2
- 7:00 5. COMMUNICATIONS FROM THE PRESS.
- 7:05 6. AGREEMENTS AND CONTRACTS.  
a) Broadband Strategic Plan Contract for Services with Magellan Advisors - Lisa Horowitz, Community and Economic Development Director. Tab 3
- 7:30 7. ORDINANCES AND RESOLUTIONS.  
a) Ordinance 1105: An ordinance enacting Chapter 8.10, under Title 8, Ketchum Municipal Code, entitled Smoke-Free Air Ordinance, Regulating smoking in public places; setting forth the statutory authority for local government regulation of smoking; Providing legislative findings; Providing definitions of key terms; Prohibiting smoking on all City owned property and in all City owned facilities and all places of employment and setting forth a nonexclusive list of enclosed places where smoking is prohibited; Prohibiting smoking outdoors on public and private school property, within twenty feet of public transportation facilities; Providing exemptions from the smoking prohibition for exclusive retail tobacconists, in residences, except for any portion that is used as a business with employees or customers, and for bona fide Native American religious practices; Permitting businesses where smoking is not prohibited to designate any or all of the business nonsmoking; Providing for a public education program prior to enforcement; Providing infraction penalties for violation; Setting forth a severability clause and providing an effective date. (Second Reading) - Stephanie Bonney, City Attorney. Tab 4
- 8:00 8. CONSENT CALENDAR. Tab 5  
a) Approval of minutes from the March 4, 2013 Council meeting.  
b) Recommendation to approve current bills and payroll summary.
9. EXECUTIVE SESSION to discuss personnel, litigation and land acquisition pursuant to Idaho Code §§67-2345 1(a) (b), (c) and (f).
10. ADJOURNMENT.

Any person needing special accommodations to participate in the above noticed meeting should contact the City of Ketchum three days prior to the meeting at (208) 726-3841.

This agenda is subject to revisions and additions. NOTE: Revised portions of the agenda are underlined in bold. Public information on agenda items is available in the Clerk's Office located at 480 East Ave. N in Ketchum or (208) 726-3841.

Check out our website: [www.ketchumidaho.org](http://www.ketchumidaho.org).

# City of Ketchum, Idaho

P.O. Box 2315 Ketchum, ID 83340 (208) 726-3841 Fax: (208) 726-8234



March 13, 2013

Mayor Hall and City Councilors  
City of Ketchum  
Ketchum, Idaho

Mayor Hall and City Councilors:

## March 18, 2013 City Council Agenda Report

The regular Council meeting will begin at **5:30 p.m.**

2. COMMUNICATIONS FROM MAYOR AND COUNCIL.
  - b) Presentation of Certificates of Recognition - Mayor Hall

Mayor Hall will recognize the following individuals and businesses for their service to the Ketchum community; Rachel Wayt, Community Service Officer; Juerg Stauffacher, Parks and Natural Resources Superintendent; and Michael Scullion, KDPI Radio. A staff report from Lisa Enourato has been provided in the packet for Council review.

RECOMMENDATION: This item is for presentational purposes only.

**RECOMMENDED MOTION: None.**

This is an executive presentation.

4. COMMUNICATIONS FROM CITY STAFF.
  - a) Report on proposed Memorandum of Understanding with the Idaho Tax Commission for enforcement of the Ketchum Local Option Tax - Cherese McLain.

In 2011, the City hired the accounting firm, Denning, Downey & Associates, P.C. to conduct a Local Option Tax (LOT) audit. The resulting audit report found a high rate of failure to report and errors in calculating LOT within the construction industry, internet based sales, vacation sales, and entities with large cash sales. The report concluded significant non-compliance and difficulty in collection and enforcement. As a result, the City is likely seeing significant underpayment of the LOT and a loss of tax revenue that would otherwise be collected. The City's ability to more effectively collect and enforce the LOT is limited by a lack of personnel with expertise and training in tax administration and lack of the necessary administrative structure (i.e. software and analytic systems and other tax-related resources). Over the

past several months Mayor Hall and staff have been meeting with members of the Idaho State Tax Commission to discuss a possible collection agreement that would enable the Tax Commission to collect the City's LOT. Staff is seeking Council authorization to develop a draft Memorandum of Understanding (MOU) for the Tax Commission to administer the LOT. The Council would need to review and approve the MOU at a subsequent Council meeting before a relationship would be established. A detailed staff report from Cherese McLain, City Attorney, has been provided in the packet for Council review.

**RECOMMENDATION:** Staff respectfully recommends the City Council authorize the development of a draft Memorandum of Understanding with the Idaho State Tax Commission regarding collection and enforcement of the LOT.

**RECOMMENDED MOTION:** *"I move to authorize the development of a draft Memorandum of Understanding with the Idaho State Tax Commission regarding the collection and enforcement of the LOT."*

This is a legislative matter.

6. AGREEMENTS AND CONTRACTS.

- a) Broadband Strategic Plan Contract for Services with Magellan Advisors - Lisa Horowitz, Community and Economic Development Director.

The Community and Economic Development Department is seeking approval of a Broadband Strategic Plan Contract for Services with Magellan Advisors in an amount not to exceed \$24,500. The contract furthers the City's efforts to address the need for planning for broadband technology which is a key policy direction designed to further public and private investments in technology and strengthen Ketchum's economic competitiveness. The FY2012-13 Budget appropriated \$20,000 toward the City's broadband efforts. The City's Broadband Committee and staff believe an additional allocation of up to \$4,500 from the General Fund Contingency is warranted to provide the funding level necessary to support the proposed contract. A detailed staff report from Lisa Horowitz and supporting documents have been provided in the packet for Council review.

**RECOMMENDATION:** Staff respectfully recommends the City Council approve the Broadband Strategic Plan Contract for Services with Magellan Advisors in an amount not to exceed \$24,500 with authorization to utilize an additional \$4,500 from the General Fund Contingency to augment the \$20,000 appropriation provided in the FY2012-13 Budget.

**RECOMMENDED MOTION:** *"I move to approve the Broadband Strategic Plan Contract for Services with Magellan Advisors in an amount not to exceed \$24,500 with authorization to utilize an additional \$4,500 from*

***the General Fund Contingency to augment the \$20,000 appropriation provided in the FY2012-13 Budget.”***

This is a legislative matter.

7. ORDINANCES AND RESOLUTIONS.

- a) Ordinance 1105: An ordinance enacting Chapter 8.10, under Title 8, Ketchum Municipal Code, entitled Smoke-Free Air Ordinance, Regulating smoking in public places; setting forth the statutory authority for local government regulation of smoking; Providing legislative findings; Providing definitions of key terms; Prohibiting smoking on all City owned property and in all City owned facilities and all places of employment and setting forth a nonexclusive list of enclosed places where smoking is prohibited; Prohibiting smoking outdoors on public and private school property, within twenty feet of public transportation facilities; Providing exemptions from the smoking prohibition for exclusive retail tobacconists, in residences, except for any portion that is used as a business with employees or customers, and for bona fide Native American religious practices; Permitting businesses where smoking is not prohibited to designate any or all of the business nonsmoking; Providing for a public education program prior to enforcement; Providing infraction penalties for violation; Setting forth a severability clause and providing an effective date. (Second Reading) - Stephanie Bonney, City Attorney.

Ordinance 1105 proposes to prohibit smoking in public places. The Council approved the first reading of the ordinance at its March 4, 2013 Council meeting. Changes suggested by the City Council at the March 4<sup>th</sup> meeting have been incorporated into the revised ordinance and are indicated in strike-underline. A staff report from Lisa Horowitz have been included in the packet along with a copy of Ordinance 1105.

RECOMMENDATION: Staff respectfully recommends the City Council conduct the second reading of the ordinance and schedule its third reading and adoption at the April 1, 2013 City Council meeting.

**RECOMMENDED MOTION: *“I move to recognize the second reading of the Ketchum Smoke-Free Ordinance, Ordinance 1105 and to schedule its third reading and adoption at the April 1, 2013 City Council meeting.”***

This is a legislative matter.

8. CONSENT AGENDA.

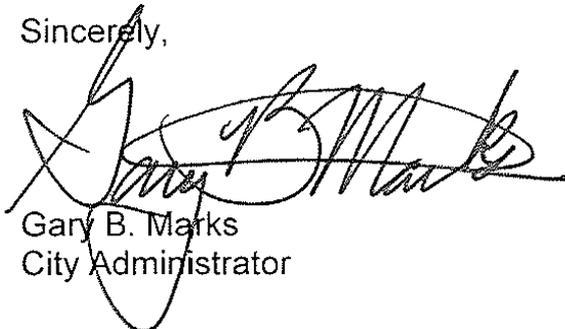
- a) Approval of minutes from the March 4, 2013 Council meeting.

Copies of the minutes from the March 4, 2013 Council meeting have been provided in the packet of Council review.

- b) Recommendation to approve current bills and payroll summary.

A list of bills for approval and the payroll summary have been included in the packet for Council review.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary B. Marks". The signature is written in a cursive style with a large, prominent initial "G" and "M".

Gary B. Marks  
City Administrator

# City of Ketchum, Idaho

P.O. Box 2315 Ketchum, ID 83340 (208) 726-3841 Fax: (208) 726-8234



March 12, 2013

Mayor Hall and City Councilors  
City of Ketchum  
Ketchum, Idaho

Mayor Hall and City Councilors:

## **Staff, Business and Community Highlights**

### Introduction/History

Each month, the City of Ketchum releases a newsletter that includes a Staff Highlight, Business Highlight and/or Community Highlight.

- January Staff Highlight – Rachel Wayt, Community Service Officer for the Blaine County Sheriff's Department/Ketchum Division
- March Staff Highlight – Juerg Stauffacher, Parks and Natural Resources Superintendent
- March Community Highlight – Michael Scullion, KDPI Radio

### Current Report

Rachel Wayt moved to Ketchum 2 ½ years ago with her husband. She is as passionate about her job and this community as any native and lives by the mantra, "always treat others with respect and be the best wife, friend, daughter, co-worker you can be".

Juerg Stauffacher has been an employee of the City of Ketchum for two years and has recently earned the International Society of Arboriculture Arborist certification. The City Arborist work includes the preservation, expansion, protection and proper maintenance of the community forest of Ketchum.

Michael Scullion's project, KDPI Radio, will provide commercial-free radio for the entire Wood River Valley, with unique, original and locally developed programming as their distinguishing trademark. KDPI wants "to tell the multifaceted stories that comprise the lives in our community and broadcast them through our live digital streams".

### Financial Requirement/Impact

There is no financial impact.

Recommendation

We respectfully recommend that the City Council and Mayor honor Rachel Wayt, Juerg Stauffacher and Michael Scullion of KDPI Radio for their service to the City of Ketchum.

Recommended Motion

There is no motion required.

Sincerely,

Lisa Enourato  
Special Projects Manager

# City of Ketchum, Idaho

P.O. Box 2315 Ketchum, ID 83340 (208) 726-3841 Fax: (208) 726-8234



March 12, 2013

Mayor Hall and City Councilors  
City of Ketchum  
Ketchum, Idaho

Mayor Hall and City Councilors:

## **Idaho State Tax Commission Enforcement of Ketchum local option tax**

### Introduction/History

Currently, the City of Ketchum has been collecting and administering its local option tax ("LOT") taxes in-house utilizing one staff member of the clerk's department. It is estimated she spends roughly 75% of her time carrying out these tasks. In 2011, the City hired the accounting firm, Denning, Downey & Associates, P.C. to conduct a LOT audit (attached hereto as "**Exhibit 1**"). The report found a high rate of failure to report and errors in calculating LOT in high risk entities such as the construction industry, internet based sales, vacation rentals, and entities with large cash sales. The report concluded significant non-compliance and difficulty in collection and enforcement.

### Current Report

Over the past several months our firm has been meeting with members of the Idaho State Tax Commission and staff to discuss a possible collection agreement with the Tax Commission and the City of Ketchum ("City") to collect its local option tax under Title 50, Chapter 10 Idaho Code. Specifically, I.C. § 50-1049 provides that any city authorized to impose a LOT, may contract with the state tax commission for the "collection and administration of such taxes". See I.C. § 50-1049(a)(attached hereto as "**Exhibit 2**"). Under this section, the city has a right to review and audit the records of collection maintained by the commission and taxpayer returns to the tax. *Id.* The city always retains the right to administer and collect the tax itself as well. *Id.*

City attorneys, Susan Buxton and Chereese McLain, along with City Administrator, Gary Marks, and Mayor Randy Hall have met with the state tax commission and/or its staff and legal counsel on the following dates: August 6, 2012, August 31, 2012, September 21, 2012, November 9, 2012, December 13, 2012, and January 18, 2013. While there are over a dozen cities that collect a local option tax under Title 50, Chapter 10 Idaho Code, the City of Ketchum is the first city to approach the tax commission to explore the option of utilizing the tax commission for the collection and administration under I.C. § 50-1049. Initially, members of the tax commission expressed some concerns about sales versus use tax and the city's ability under the LOT statutes to only collect sales tax. At the request of the commission, our firm issued a memo analyzing the authority to collect sales taxes as well as what constitutes a sales tax. It is attached hereto as "**Exhibit 3**". Based on our subsequent meetings with the commission and staff, it is our belief that any concerns regarding that matter were taken care of with that memo.

The following figures are based on the commission's best estimates of what the actual annual costs will be to perform: 1) initial set-up into our computerized systems and creation/modification of forms and processes; 2) process the estimated number of transactions from your expected taxpayer base; and 3) an additional audit premium to perform steps to identify City of Ketchum destination sales from taxpayers outside the city boundaries. The tax commission has estimated a start-up date of January 1, 2014, with the costs occurring as shown below with a further breakdown in a spreadsheet attached hereto as "**Exhibit 4**":

	FY2014	FY2015+
Set-up and design (one-time)	\$ 68,600	
Transaction based average cost (half year first year)	\$ 46,400	\$ 92,800
Audit premium sales destination steps (half year first year)	\$ 50,000	\$100,000
Total Administration Fees	\$165,000	\$192,800

The suggested timeline is to start in July 2013 with payment of \$68,600 to the tax commission, which is the one-time set-up and design in order for I.T. to make changes in their program software, etc. By August 2013, the tax commission is prepared to begin identifying the tax base and incorporating Ketchum information into their electronic filing system. They will have returns going out by January 2014 and begin educating the public and providing information. As part of the audit process, the tax commission will be able to identify taxpayers that are found in a "use tax" audit and then can identify the retailers and conduct a spin-off audit and find the retailers that may be subject to Ketchum's LOT. The tax commission auditor stated he believed that a large majority of the current missing LOT revenues from the construction industry will be identified once they identify the retailers and educate them. Further, the tax commission has recently finished an informational handout on VRBO's and will also work in identifying these entities as part of their audit effort. The handout is attached hereto as "**Exhibit 5**".

The remaining FY 2014 owing, \$96,400, would be paid out of the reimbursement from collected tax revenue. Thereafter, pursuant to terms of an MOU, the tax commission would reimburse their costs on a quarterly basis. The standard practice used by the tax commission for other entities (auditorium districts, county local option) is to withhold the fees from distributions on a quarterly basis in the months of July, October, January, and April.

The tax commission provided us with an additional breakdown of what the "audit premium sales destination steps" would include. As shown above, the transaction based average cost to implement the LOT is \$92,800 and results in an estimated 7,800 transactions. The additional audit efforts for \$100,000 annually can be seen in "**Exhibit 6**". It includes \$10,000 in estimated travel and an estimated additional 2,500 hours spent on sales/use audits statewide for Ketchum destination sales. All together, the proposal is for around 2.5 FTE's from the state tax commission staff; however, it would actually be several staffers from around the state that would be conducting these audits.

The tax commission strongly believes that in order for the tax commission to fully identify the full tax base, conduct enough audits to identify non-payers, etc. the commission would need around 3 years in order for the City of Ketchum to see the full

effect of the tax commission implementation. However, the MOU will provide the ability for the City to withdraw from the MOU each fiscal year.

The scope of services would be for the administration, audit, collection, and enforcement of Ketchum's LOT. We discussed options about a smaller scope of services but once we went through how their audit program and software works – there is little ability for the tax commission to do only part of the administration. However, the suggested scope of services will not completely nullify the current City employee. There are tasks for the current City employee to continue doing for LOT administration, including, the direct interface with taxpayers.

#### Financial Requirement/Impact

The estimated financial impact for FY 2014 is \$68,600, thereafter it would be \$192,800 annually to be paid directly from reimbursement of LOT taxes. Although the City anticipates increased collections due to administration and enforcement of the LOT by the Idaho Tax Commission, current projections developed by City Administrator Gary Marks show that existing revenue streams and fund reserves are adequate to support an MOU relationship with the Idaho Tax Commission.

#### Recommendation

I respectfully recommend the City Council approve moving forward with legal counsel to work with the deputy attorney general for the tax commission to draft an MOU for the tax commission to administer and collect Ketchum local option tax.

#### Suggested Motion

"I move to authorize the city attorney to work with the tax commission to draft an MOU for the City to enter into regarding the Idaho State Tax Commission to administer and collect City local option taxes."

Sincerely,

Cherese McLain  
City Attorney

Exhibit 1 Denning, Downey & Associates, P.C. report

Exhibit 2 I.C. § 50-1049

Exhibit 3 MSBT memo analyzing LOT tax

Exhibit 4 Excel sheet tax commission costs

Exhibit 5 VRBO Handout

Exhibit 6 Excel sheet Additional Audit Breakdown

**Denning, Downey & Associates, P.C.**  
**CERTIFIED PUBLIC ACCOUNTANTS**

P.O. Box 1957, Kalispell, MT 59903-1957  
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Kim M. Downey, CPA, CGFM, CFF, CITP

Robert K. Denning, CPA, CGFM, CFF, CITP

October 10, 2011

City of Ketchum  
Gary Marks – City Administrator

RE: Ketchum LOT tax audit

Dear Gary,

We were engaged to audit the City of Ketchum's Local Option Tax (LOT) as described in *City Sales Tax Ordinance No. 712* dated November 20, 1997 for the Months of April, May and June 2011. The purpose of our engagement was not to provide assurances on the City of Ketchum's financial statements but to review several of the local businesses for compliance with this ordinance.

Prior Audit

In the previous audit dated February 11, 2011 I established my audit sample by first stratifying the population into the following categories:

Possible High Risk Entities

- Entities with large cash sales
- Construction industry
- Internet based sales
- Vacation rentals

Possible Low Risk Entities

- Random sample of low risk entities

As noted in that report 30% of the High Risk Entities tested did not have an adequate accounting system to support the amounts reported to the City and 56% had not properly calculated and or paid their LOT tax.

Current Audit

This audit covered the period April, May and June 2011. I changed my focus on this audit based on the results of the previous engagement. This audit was more specific and targeted the higher risk entities as follows:

High Risk Entities

- Entities that were not in compliance in the previous audit.
- Entities that were identified by the City because they either
  - o Failed to comply with previous attempts by the City to bring them into compliance.
  - o Known to operate in the City and not registered with the City.
- Entities in the construction industry. The previous audit concluded that this type of business had a higher noncompliance rate.

Unregistered businesses with the City



Once suggestion might be to collect the LOT tax revenue from the general contractor at the beginning of the project and then give the general a "waiver of LOT tax certificate". This waiver would exempt them from having to pay any LOT tax on the materials for the project. This approach would increase LOT tax revenues, provide fair bidding for subcontractors and significantly reduce the collection points of the City Clerk.

Another idea would be to require all contractors and subcontractors to be registered with the City prior to the Building Code Inspector's sign off on the final completion of the project. While this approach would get more contractors registered with the City, one possible drawback is that it doesn't address the first argument by contractors, "The tax was already paid when they purchased the materials".

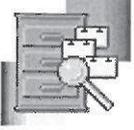
Clearly there is no easy answer to tax collection.

As always, the personnel that I worked with at the City of Ketchum were very helpful during this audit and it could not have been performed as efficiently without them. Thank you.

Thank you for the opportunity to assist the City of Ketchum.

Sincerely,

Robert K Denning CPA, CGFM, CITP, CFF



# Idaho Statutes

## TITLE 50 MUNICIPAL CORPORATIONS

### CHAPTER 10 FINANCES

50-1049. COLLECTION AND ADMINISTRATION OF LOCAL-OPTION NONPROPERTY TAXES BY STATE TAX COMMISSION -- DISTRIBUTION. (a) A city which has levied a tax pursuant to section 50-1044, Idaho Code, may contract with the state tax commission for the collection and administration of such taxes in like manner and under the definitions, rules and regulations of the tax commission for the collection and administration of the state sales tax under chapter 36, title 63, Idaho Code. A city which levies such tax shall have the right to review and audit the records of collection thereof maintained by the commission and the returns of taxpayers relating to such tax. Alternatively, such city shall have authority to administer and collect such tax.

(b) All revenues collected by the tax commission pursuant to section 50-1044, Idaho Code, shall be distributed as follows:

(1) An amount of money shall be distributed to the state refund account sufficient to pay current refund claims. All refunds authorized by the commission to be paid shall be paid through the state refund account and those moneys are continuously appropriated;

(2) An amount of money equal to such fee as may be agreed upon between the commission and such city for the actual cost of the collection and administration of the tax. The amount retained by the commission shall not exceed the amount authorized to be expended by appropriation by the legislature. Any unencumbered balance in excess of the actual cost at the end of each fiscal year shall be distributed as provided in paragraph (3) of this subsection;

(3) All remaining moneys received pursuant to this chapter shall be placed in an account designated by the state controller and remitted monthly to the city levying such tax.

#### History:

[50-1049, added 1979, ch. 221, sec. 2, p. 616; am. 1986, ch. 73, sec. 7, p. 207; am. 1994, ch. 180, sec. 93, p. 488.]

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# MOORE SMITH BUXTON & TURCKE, CHARTERED

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‡ Also admitted in South Dakota  
≈ Also admitted in Utah  
‡ Also admitted in Washington

To: City of Ketchum  
From: Cherese McLain, Moore Smith Buxton & Turcke, Chtd. *OM*  
Re: Local Option Tax Collection on Building Supplies  
Date: November 7, 2012

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Our firm has recently met with members of the Idaho State Tax Commission and staff to discuss a possible collection agreement with the Tax Commission and the City of Ketchum ("City") to collect its local option tax ("LOT") under Title 50, Chapter 10 Idaho Code. During these discussions, some issues were raised about whether the City could impose its LOT on building materials coming into the City from retailers located within other parts of the state but outside of the City. The issue is whether the tax collected would be a "sales" tax or a "use" tax under Idaho law. Based on our review of applicable statutes and case law, we conclude that the tax applicable to such transactions is appropriately identified as a "sales" tax. Further, if the sale of building materials occurs within the City of Ketchum, the City may apply its LOT to the sale.

## Discussion

The issue presented for discussion is fairly narrow. The question is whether building materials coming from outside of Ketchum City limits and being delivered to contractors in Ketchum are subject to the Ketchum LOT. In answering this question, the first issue is whether building materials in general are subject to sales tax.

### 1) Sales v. Use Tax

The Idaho Sales Tax Act, H.B. 222, codified at Title 63, Chapter 36, Idaho Code was enacted in 1965. The Sales Tax Act covers both sales tax and its complementary use tax. At the time the Sales Tax Act was under consideration by the Idaho Legislature, the House Revenue and Taxation Committee ("Committee") submitted a report dated May 4, 1965, "House Revenue and Taxation Committee Report in Support of House Bill 222" ("Report"), summarizing each section of the Act as guidance to understanding the legislative intent and meaning of the Act's provisions. Section 9(a) of the Report discusses taxation of building materials. The Report, in part, states:



Section 9(a) is intended to insure that there will be a tax imposed on the sale of building materials and other items that will be used to erect buildings or otherwise improve real property. The process of construction is regarded as a service, and sale of materials to the contractor is taxed without regard to resale intentions. This insures that a tax will be collected. Since the sale of the building or other real property will not be taxed, sale of the materials which are used to erect or improve it must be taxed if a tax is to be imposed on consumption of this property.

House Revenue and Taxation Committee Report in Support of House Bill 222, p.1 (May 4, 1965); see also Bunker Hill Co. v. State ex rel. State Tax Com'n, 111 Idaho 457, 459-60, 725 P.2d 162 (1986), overruled on other grounds by Idaho State Tax Com'n v. Haener Bros., Inc., 121 Idaho 741 (1992)(The rationale for imposing the sales tax on tangible personal property used to construct or improve real estate is well stated in the report of the House Revenue and Taxation Committee on House Bill 222, which implemented the tax). It is therefore clear that the legislative intent was to apply sales tax to building materials purchased by contractors.

The definitions within the Act also support the conclusion that building materials purchased by contractors are subject to sales tax. Section 9 of the Act is entitled "Retail Sale" and covers transactions subject to the sales tax. See I.C. § 63-3609. In the Report, the Committee states that the definition of retail sale "is intended to apply only to sales to ultimate customers." As defined in the Act, the terms "retail sale" or "sale at retail" mean "a sale for any purpose other than resale in the regular course of business..." Idaho Code §63-3609. By its definition, a retail sale is the transaction ending with the consumer. Retail sale would thus not include a manufacturer to its retailer but would apply from retailer to consumer.

The Supreme Court of Connecticut made this distinction in Steelcase, Inc. v. Crystal, 238 Conn. 571, 680 A.2d 289 (1996). Steelcase manufactured office furniture in Michigan and sold its products to a variety of office furniture retailers in Connecticut. Id. at 573. In some instances, the Connecticut retailers would place orders for furniture with Steelcase but directed Steelcase to ship the furniture directly to the retailer's customers. Id. at 574. Connecticut tried to assess a sales tax on Steelcase for those transactions. Id. Steelcase challenged the assessment and the court agreed with Steelcase. Id. at 584. The court looked at Section 12-407(3) of the Connecticut Sales and Use Tax Act's definition of "retail sale" which "means and includes a sale for any purpose other than the resale in the regular course of business of tangible personal property."<sup>1</sup> Id. at 580. Interpreting that statutory language, the court determined that sales for resale were not subject to tax and Steelcase had demonstrated that its transaction with the retailers were sales for resale. Id. at 581-82. The court held that Steelcase did not make a retail sale and was not liable for sales tax.<sup>2</sup> Id. at 588. A retail sale triggering sales tax occurs between the seller and ultimate consumer of goods. See also, infra, Material Service Corp. v. Isaacs, 25 Ill.2d 137 (1962).

With respect to the question of whether the sale of building materials to contractors constitutes a "sale at retail," the Supreme Court of Illinois addressed this issue in Material

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<sup>1</sup> Connecticut's definition is substantially similar to Idaho's definition of "retail sale."

<sup>2</sup> Steelcase was not a party to the sales contracts between the retailers and their customers. The customers made no payment to Steelcase and it did not know what amounts were owed by the customers to the retailers or whether any payments were made by the customers to the retailers. Id. at 574-75.

Service Corp. v. Isaacs, 25 Ill.2d 137 (1962). The Illinois statute defining “sale at retail” is substantially similar to Idaho’s definition; most importantly, it requires sales be “for use or consumption and not for resale in any form as tangible personal property.” See Ill.Rev.Stat.1961, chap. 120, par. 440 (emphasis added). The Illinois Supreme Court held that sales of building materials to a contractor were taxable as sales at retail since not made for resale as tangible personal property, but were for use or consumption by the contractor. 25 Ill.2d 137, 140-41. Given the similarity in the definitions of “sale at retail” under Illinois and Idaho law, it is reasonable to conclude, as the court did in Material Service, that the purchase of building materials by contractors is a retail sale under Idaho law.

The follow-up question is whether the City of Ketchum has the authority to impose its LOT on building materials. The City of Ketchum and the City of Sun Valley both have local option taxes under Title 50, Chapter 10, Idaho Code. The relevant substantive language of both ordinances is similar and comparable for this discussion. In 1991, the City of Sun Valley asked the Attorney General to render an opinion regarding whether the city could impose its LOT on building materials. See Idaho Op. Atty. Gen. No. Op. 91-6. The question presented to the Attorney General by the City of Sun Valley was:

Does the City of Sun Valley have the power under both the tax code and state law to require the collection of local option tax for building materials not purchased within the city limits of Sun Valley, but delivered in Sun Valley for use in construction of real property improvements located within Sun Valley?

The Attorney General concluded as follows:

The City of Sun Valley may impose its sales tax on sales made in the city. For the sale of goods, a sale is in the city when title passes in the city. Under the Uniform Commercial Code, title passes either when provided by contract between the parties or, if there is no express contractual provision, when the seller completes his responsibilities regarding delivery of the product sold. In no case does title pass before identification of specific goods to the sale. When delivery of building materials occurs in the City of Sun Valley, and there is no specific provision in the sales contract to the contrary, title passes at the time of delivery. That is the time of sale. If the seller is a retailer required to have a city sales tax permit, the city may require the seller to collect city sales tax on the sale and remit the tax to the city.

Idaho Op. Atty. Gen. No. Op. 91-6. The opinion discussed the difference between a “sales” tax and a “use” tax, both of which are set forth in the Idaho Sales Tax Act. In order for building materials to be taxable under a LOT, it would have to be a sales tax. Under the local option tax statutes, the cities may only tax “sales.”

Sun Valley imposes only a sales tax. As observed earlier regarding the sale of lift tickets, the city's ordinance imposes the tax “upon each retail sale within the city.” For its tax to apply to building materials, the sale of the materials must occur within the city. Although the State of Idaho can and does require an out-of-state

seller to collect Idaho use tax on property sold to an Idaho customer for delivery into Idaho (see Idaho Code § 63-3621), there is no statutory basis for the City of Sun Valley to require the collection of a city use tax on property delivered in the City of Sun Valley. *It can only require collection of its sales tax on sales transactions that occur in the city.*

Idaho Op. Atty. Gen. No. Op. 91-6 at 6 (emphasis added).

The opinion went on to examine the Idaho Code definition of “retail sale” and how the city’s sales tax ordinance defined “retail sale.” Id. at 6. The Attorney General concluded the definition was the same and was consistent with the Uniform Commercial Code. See Idaho Code § 63-3609 and Sun Valley tax ordinance § 3-1-2. Because the city LOT tax is limited to sales tax, the Attorney General examined the difference between a sales tax and use tax.

Use taxes are a usual complement to sales taxes. They are imposed upon the privilege of using tangible personal property within the taxing jurisdiction. Their primary purpose is to avoid economic disadvantage to merchants within the taxing jurisdiction. Without use taxes, goods can be purchased outside the taxing jurisdiction and used in the jurisdiction without payment of the tax that would be required if the same goods were purchased from a merchant within the jurisdiction.

Idaho Op. Atty. Gen. No. Op. 91-6 at 8-9. As stated above, and in conjunction with the U.S. Supreme Court in McLeod v. J.E. Dilworth Co., 322 U.S. 327, 330 (1923), sales tax and use tax are different in concept and are assessments upon different transactions. For example, a department of revenue or commission could not collect both a sales and a use tax on the same transaction. Steelcase, supra, 238 Conn. at 578.

Under Idaho law, building materials purchased by contractors are subject to sales tax. The City of Ketchum has authority to impose an additional local option sales tax. In order for building materials to be subject to the City of Ketchum’s LOT, the City must have taxable jurisdiction over the transaction. The transaction must have occurred within City limits. Building materials are goods and are subject to the Uniform Commercial Code incorporated in the Idaho Code under Title 28. The Uniform Commercial Code and Idaho Law provides that a “sale” of goods occurs when title passes.

2) *“Sale” occurs when title passes under the Uniform Commercial Code and Idaho Law.*

The 1991 Idaho Attorney General Opinion analyzed and concluded that the purchase of building materials constitutes a “sale” pursuant to the Uniform Commercial Code which is complete upon delivery. Under this provision of the Uniform Commercial Code, title passes, and thus the sale occurs, at the time the seller delivers the building materials to a building site in the City of Sun Valley “unless otherwise explicitly agreed” between the buyer and seller. Idaho Op. Atty. Gen. No. Op. 91-6 at 11. Section 28-2-401 of the Idaho Commercial Code states, in part:

...

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading.

(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) if the contract requires delivery at destination, title passes on tender there.

The opinion went on to find that when title passes at a place of delivery in Sun Valley, the sale is “within the City” under § 3-1-3 of the city's sales tax ordinance. Idaho Op. Atty. 91-6, at 11. The seller is required to collect and remit the city's sales tax on such a sale. Id.; see also Dial Corporation v. Iowa Department of Revenue and Finance, 643 N.W.2d 643, 649-50 (Iowa 2001)(Holding that Dial Corporation was obligated to pay local option taxes when the delivery was taken in the local option taxing district).

Unless otherwise explicitly agreed the place of “delivery” is the place where the taxable event occurs. Delivery is presumptively affected by the actual or constructive transfer of possession of goods at the place agreed upon by the parties. Steelcase, supra, 238 Conn. at 584. As discussed above, Steelcase was located in Michigan and sold office furniture to retailers in Connecticut. As directed by the retailers, Steelcase would ship the product directly to the retailer’s customer. The contract agreement was “F.O.B. factory,” which under UCC principles means that the delivery was completed at the factory at the time Steelcase provided the goods to an independent common carrier. Id. at 598. By specifying “F.O.B. factory” the parties agreed that Steelcase provided the product and completed the sale at the factory’s loading dock.

However, the contract specifying F.O.B. may not always be dispositive if the circumstances are different. Other state courts have gone beyond that and found that mere transfer of goods can constitute a taxable event. See Leggett & Platt, Inc. v. Ostrom, 251 P.3d 1135, 1143 (Col. Ct. App. 2010). In Leggett, the Colorado Court of Appeals held that the transfer of possession of goods is not necessarily dependent upon F.O.B. terms. Transfer of physical possession of goods is a constitutionally permissible taxable event, regardless of technical consideration regarding the time and place of passage of title which might turn on a degree of control short of transfer of physical possession. Id. In Leggett, the master vendor agreement held that the F.O.B. was upon “destination” but the bills of lading and invoices showed that all sales were actually F.O.B. “shipping point” and it was at shipping point that the retailer’s contractors took possession and the sale occurred for sales tax purposes. Id.

For purposes of this analysis, the main focus is on general UCC principles regarding place of delivery. For building materials, unless otherwise agreed, the transfer of title passes upon delivery from supplier to contractor. In the majority of the cases in Ketchum, the contractor is ordering from large building supply stores and having them deliver loads to Ketchum. In those situations, the sale would occur at the place of delivery within the boundaries of Ketchum and would therefore be subject to the LOT.

## Conclusion

Building materials sold to contractors are a retail sale and subject to sales tax. Under the Idaho Uniform Commercial Code, the delivery of building materials is where the "sale" occurred unless the parties have agreed to a different point of sale. The City of Ketchum can apply its local option sales tax to sales that occur within City limits.

Idaho State Tax Commission  
 General Estimate of Costs per Transaction  
 FY2014 Budget Request  
 City of Ketchum Proposal

	Actual FY2009	Actual FY2010	Actual FY2011	Actual FY2012	Budget FY2013	3 Year Average	5 Year Average
Total Agency Spending	\$33,088,600	\$32,415,400	\$31,809,300	\$34,829,200	\$35,865,100	\$34,167,867	\$33,601,520
Less: Property Tax Division	(\$3,555,300)	(\$3,181,300)	(\$2,962,300)	(\$2,963,500)	(\$3,059,200)	(\$2,995,000)	(\$3,144,320)
Less: Fuels Fund activity	(\$3,611,900)	(\$3,794,600)	(\$3,554,100)	(\$3,695,800)	(\$3,796,200)	(\$3,682,033)	(\$3,690,520)
Adjusted Agency Spending	<u>\$25,921,400</u>	<u>\$25,439,500</u>	<u>\$25,292,900</u>	<u>\$28,169,900</u>	<u>\$29,009,700</u>	<u>\$27,490,833</u>	<u>\$26,766,680</u>
Total Estimated Number of Transactions*	2,217,000	2,226,000	2,260,000	2,315,600	2,350,000	2,308,533	2,273,720
Less: Fuels or IFTA transactions	(24,544)	(24,379)	(23,456)	(24,543)	(25,000)	(24,333)	(24,384)
Adjusted Estimated Number of Transactions	<u>2,192,456</u>	<u>2,201,621</u>	<u>2,236,544</u>	<u>2,291,057</u>	<u>2,325,000</u>	<u>2,284,200</u>	<u>2,249,336</u>
Average Cost per Transaction (weighting factor 1 -- 100%)	<u>\$11.82</u>	<u>\$11.55</u>	<u>\$11.31</u>	<u>\$12.30</u>	<u>\$12.48</u>	<u>\$12.04</u>	<u>\$11.90</u>
Average Cost per Transaction (weighting factor 2 -- 80%)	<u>\$9.46</u>	<u>\$9.24</u>	<u>\$9.05</u>	<u>\$9.84</u>	<u>\$9.98</u>	<u>\$9.63</u>	<u>\$9.52</u>
Average Cost per Transaction (weighting factor 3 -- 60%)	<u>\$7.09</u>	<u>\$6.93</u>	<u>\$6.79</u>	<u>\$7.38</u>	<u>\$7.49</u>	<u>\$7.22</u>	<u>\$7.14</u>

Weighting factor 1 = complex income and fuels tax returns, or local sales/use with special rules  
 Weighting factor 2 = other "state" tax returns including audit function  
 Weighting factor 3 = sales tax type returns without audit function

Note \* : A transaction is generally a return plus it's related payment received together.  
 But a return or payment received separately would also count as a transaction.

**Preliminary Estimate of City of Ketchum Administrative Fee**

Approximate Number of Accounts:	# of Annual Transactions	Total Transactions
Monthly	400	4,800
Quarterly	700	2,800
Annual / Other	200	200
	<u>1,300</u>	<u>7,800</u>
Multiply by Weighting factor 1	X	\$11.90
Subtotal		<u>\$92,800</u>
Additional Annual Audit Effort to Identify Use Tax		100,000
Estimated Annual Cost of City of Ketchum Transactions		<u>\$192,800</u>
Multiply by 1/2 year for estimated January 1 start-up	0.5	1.0
Estimated First Year Cost of City of Ketchum Transactions		<u>\$96,400</u>
Add One-Time set up fees		\$68,600
<b>Total First Year Estimated Expenses</b>		<u>\$165,000</u>
<b>Second Year</b>		<u>\$192,800</u>



Rec'd 1/13/18

## LODGING, FOOD & DRINK

### An Educational Guide to Sales Tax in the State of Idaho

This publication is intended to assist restaurants, bars, and those selling lodging accommodations to understand the sales tax laws that apply to them. This information is based on the laws and rules in effect on July 1, 2012. For a list of state tax rates, visit our web site at [tax.idaho.gov](http://tax.idaho.gov).

#### SALES

What taxes apply to sales by lodging, food, and drink providers?

**Rooms rented for *sleeping accommodations*:** Throughout Idaho, fees for sleeping accommodations are subject to the state sales tax plus travel and convention tax.

**Rooms rented for purposes *other than sleeping*:** When a lodging provider rents a room for non-sleeping purposes, such as for a business meeting, the travel and convention tax doesn't apply. Only the state sales tax applies.

**Bed and breakfast:** If a single fee is charged for a bed and breakfast accommodation, the entire fee is subject to the state sales tax and the travel and convention tax. If the price for the meal is charged separately to the customer, then only the room fee is subject to the two taxes. The meal is subject only to the state sales tax.

**Campground spaces for overnight accommodations:** Campground operators renting spaces for overnight accommodations must collect state sales tax plus travel and convention tax. Only the state sales tax applies to campgrounds operated by the state of Idaho or its political subdivisions.

**Campground spaces for day use only:** If the fee charged for using a campground doesn't include the right to stay overnight, only the state sales tax applies.

**Other Lodging Accommodations:** Rentals of a home, vacation home, cabin, lodge, condominium, townhouse, or any other structure meant to provide sleeping accommodations, for periods of less than thirty-one days, are subject to the state sales tax and travel and convention tax. The price subject to tax includes separately stated fees for credit card processing and separately stated cleaning fees.

"Hotel/Motel" means an establishment which provides lodging to members of the public for a fee, and shall include condominiums, townhouses or any other establishment which provides lodging accommodations.



**Local option tax:** Some Idaho counties, cities, and auditorium districts add a separate tax to the state sales tax. The Tax Commission administers the Greater Boise Auditorium District tax in the Boise area. This tax applies to hotel/motel rooms rented for sleeping accommodations and for non-sleeping purposes, such as for a business meeting. For more information on local sales taxes, contact the county, city, or auditorium district in your area. You can also visit our web site for a list of local sales taxes in Idaho.

**Food and drink:** The state sales tax must be charged on the price of food or drinks furnished by any restaurant, cafeteria, hotel, diner, club, or any other place serving meals or drinks. Private clubs, country clubs, athletic clubs, fraternal and similar organizations also must charge sales tax when they sell food and drinks, even if they make sales only to members. Charges for preparing and serving customer-supplied food are also taxable.

Do lodging providers use one return to pay all the different taxes they collect?

No. Lodging providers must file separate tax returns even though they can lump all the taxes into one line on the sales invoice. To apply for permits to collect state sales tax, travel and convention tax, and Greater Boise Auditorium District tax, go online at [business.idaho.gov](http://business.idaho.gov) or complete the Idaho Business Registration form available on our web site or at any Tax Commission office.

When a lodging provider adds laundry, phone charges, or parking fees to a bill, are these fees taxable?

No. They aren't taxable if they're listed separately on the customer's bill.

Are gratuities taxable?

When gratuities are paid to a server they aren't taxable as long as the gratuity is meant to supplement the server's income. Service charges that are meant to cover credit card fees or something other than the server's income are taxable as part of the purchase price.

Are government employees exempt from paying room or lodging taxes?

No. If the employee pays for the room or lodging and is reimbursed by his employer, tax applies. An exemption applies only when the government agency pays the room or lodging charges directly. Here are ways the lodging provider can document exempt sales to a government agency:

- **Checks issued by government agencies:** If the charges are directly billed to the U.S. government or an Idaho government agency (state, city, or county) and paid for by the agency's check, the taxes don't apply. The lodging provider must keep a copy of the check or the remittance advice from the government check to document the exempt sale. Idaho

state, city, and county government agencies must give the lodging provider a completed form ST-101 for his records.

- **Credit card charges directly paid by government agencies:**
  - The U. S. Government Smart Pay **Purchasing Card**. All purchases made with this card are billed directly to the agency and are exempt from sales tax. To document the exempt purchase, the lodging provider should have the employee complete form ST-104-HM, Sales Tax Exemption on Lodging Accommodations.
  - The U. S. Government Smart Pay **Travel Card**. This card is used by federal employees for official travel expenses. Unlike the purchasing card, purchases with this card may or may not be tax exempt. If the purchase is billed to the employee, the sale is taxable. If the purchase is directly billed to the government agency, the sale is exempt from sales tax. To document the exempt purchase, the lodging provider should have the employee complete form ST-104-HM.
  - Some Idaho government agencies issue tax exempt **purchasing cards** to employees. This Bank of America Visa has the name of the state agency and, in most cases, the name of the state employee using the card imprinted on the bottom. The card reads: "State of Idaho — Tax Exempt." Charges to the card are directly billed to the state agency and paid for by the agency. To document the exempt purchase, the lodging provider should have the employee complete form ST-104-HM.
- **Other Credit Cards:** If the charges are to a U. S. government or Idaho (state, county, or city) government employee using any other credit card the employee claims is directly paid by his employer, he must make this claim on form ST-104-HM. The lodging provider must make sure the form is completed and keep it to document the exempt sale.

### Can employees from other states claim these exemptions?

No. Governments of other states aren't exempt from Idaho sales taxes. Only charges to Idaho governments (such as state agencies, cities, or counties) and U. S. government agencies are exempt from Idaho tax.

### Are any other customers exempt from these taxes?

Yes. Some of the most common exemptions you'll encounter are:

- **Persons who continually occupy** a room or campground space for 31 or more days are exempt from room taxes. However, if a corporation rents a room for 31 or more days to be used by more than one traveling employee, room taxes must be charged. The exemption applies only when the same person rents the lodging for 31 days or more. The

vendor must keep records (such as the guest registration card and invoice) to show that the exemption applies.

- **Nonprofit hospitals and nonprofit schools** (both in-state and out of state) are exempt from paying sales tax on direct billing for meals and lodging. They must provide a completed form ST-101 for direct billing or ST-104-HM for credit card payment.

If a customer other than those listed here claims to be exempt from sales tax, he must qualify for an exemption listed on form ST-101 or ST-104-HM and complete the form for your records.

## PURCHASES

What can a lodging provider or campground operator buy exempt from tax?

Hotels, motels, and campgrounds and other lodging providers can buy goods without paying tax if the items are:

- Consumed by their customers in such a way that they can't be reused, *and*
- Part of the price the customer pays for the lodging or camping space.

Here are some *examples* of items that can be purchased exempt from tax if they're placed in lodging accommodations or provided to campground patrons:

- Facial tissue, toilet tissue, disposable laundry bags, and paper napkins
- Soap, lotion, shampoo, and conditioner
- Disposable drinking glasses, utensils, shoe shine cloths, and shower caps
- Candy, beverages, food, and newspapers
- Stationery, envelopes, notepads, and matches

To buy these goods without paying sales tax to the vendor, the lodging provider or campground operator must complete a form ST-101 for the supplier's records.

What purchases by a lodging provider or campground operator are taxable?

You must pay tax on any items that are:

- *not* included in the lodging or campground charge, or
- *not* directly consumed by the customer, or
- *not* disposable

*Examples* of items you should pay tax on include:

- Bath towels, bath mats, garbage can liners, linens, and bedding
- Glassware, silverware, and china
- Furniture and fixtures
- Bibles, books, magazines, and directories
- Any items available to the general public

### What can a restaurant or bar buy exempt from tax?

Sellers of food, meals, or drinks may buy goods for resale without paying tax if the items are:

- For resale to their customers,
- Included in the fee charged to the customer, and
- Directly consumed by the customer in such a way that they can't be reused.

Here are some *examples*:

- Food and drink ingredients
- Disposable containers (paper cups and plates, "to-go" containers and sacks, pizza cartons, chicken buckets, etc.)
- Disposable supplies that are used by the customer and are included in the price of the meal or drink (drinking straws, stir sticks, paper napkins, paper placemats, plastic eating utensils, toothpicks, etc.)
- Candy, popcorn, drinks, or food included in the price of other food, meals, and drinks (such as hors d'oeuvres served to patrons in a lounge)

To buy these goods without paying sales tax to the vendor, the lodging provider, restaurant, or campground must complete a form ST-101 for the supplier's records.

### What purchases by a restaurant or bar are taxable?

Items that aren't included in the fee charged to the customer and aren't directly consumed by the customer are taxable when purchased by a restaurant, bar, or similar establishment.

*Examples* of taxable goods include:

- Waxed paper, plastic wrap, foil, paper towels, dish soap, garbage can liners, or other products consumed by the retailer
- Linens, silverware, glassware, tablecloths, towels, and non-disposable napkins and cookware
- Furniture, fixtures, and other depreciable property
- Menus
- Any item available to the general public or employees, such as restroom supplies and matches
- Complimentary candy, popcorn, drinks, or food, when patrons aren't required to buy other food, meals, or drinks in order to receive the complimentary goods

For more information, read:

Use Tax Publication

Retailers Publication

Retailers and Wholesalers: Making Exempt Sales Publication

Sales Tax Administrative Rule #28 Hotels, Motels, and Campgrounds

Sales Tax Administrative Rule #41 Food, Meals, or Drinks

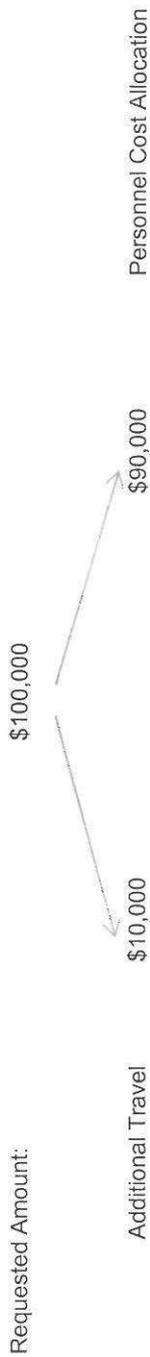
Idaho Code 67-4711 Idaho Hotel/Motel Room and Campground Sales Tax Code and Administrative Rules

**For more information, contact:**

- Idaho State Tax Commission: In the Boise area, 334-7660; Toll free, (800) 972-7660
- Hearing impaired: TDD (800) 377-3529
- **tax.idaho.gov**

This information was prepared by the Idaho State Tax Commission. It does not provide comprehensive explanations of Idaho tax laws or rules. Specific questions should be addressed to the Tax Commission or a qualified tax practitioner.

Idaho State Tax Commission  
 Calculation of Audit Premium  
 FY2014 Budget Request  
 City of Ketchum Proposal



Basis:				
Estimate per trip:	\$1,000		1250	Estimated number of sales/use audits statewide
X		X		Extra hours spent looking for Ketchum destination sales
Additional trips	10	X	\$35	Benefited cost per audit hour
			\$87,500	
	<b>\$10,000</b>		<b>\$90,000</b>	Rounded

