

**BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO**

In the Matter of the Protest of	)	
	)	DOCKET NO. 15272
[REDACTED],	)	
	)	DECISION
Petitioner.	)	
_____	)	

On November 22, 2000, the Idaho State Tax Commission (Tax Commission) issued a Notice of Deficiency Determination (NODD) to [Redacted] (petitioner) proposing additional income tax and interest for the taxable year 1999 in the total amount of \$7,240. Additionally, on November 22, 2000, the Tax Commission issued an NODD on petitioner’s taxable years 1993 through 1994 that, (1) recalculated the available Idaho net operating loss carryforward into taxable year 1999, (2) required the petitioner to carryback and apply in taxable year 1994, \$100,000 of his 1996 Idaho net operating loss, and (3) denied a refund of \$8,151 of tax from the carryback of the 1996 Idaho net operating loss. The petitioner filed a timely protest and petition for redetermination. A hearing was held on April 18, 2001. The Tax Commission, having reviewed the file, hereby issues its decision.

The only issue before the Tax Commission is the proper application of the petitioner’s Idaho net operating loss (hereafter “NOL”) for the taxable year 1996.

On the petitioner’s timely filed 1996 Idaho income tax return, the petitioner reported a current year NOL plus a NOL carryforward from 1995. The petitioner carried the 1996 and 1995 NOL forward and claimed them as a deduction in arriving at the petitioner’s 1997 Idaho taxable income. Included in the 1996 NOL was a \$54,407 loss from petitioner’s investment in an S-corporation.

On April 6, 2000, the petitioner filed amended Idaho income tax returns for 1996, 1997, and 1998. The reason provided for the filing of the 1996 amended income tax return was that

“[a]dditional losses sustained in 1996 were not properly taken during original preparation.” The increase in the 1996 NOL was due to the S-corporation’s loss increasing from \$54,407 to \$174,151, an increase of \$119,744. The 1997 Idaho income tax return was amended to reflect the additional loss claimed in 1996. The tax year 1998 was amended to claim a deduction for that portion of the 1996 loss that was not deducted in arriving at the petitioner’s 1997 Idaho taxable income. Finally, the petitioner, when filing his 1999 Idaho income tax return, claimed as a deduction that portion of the 1996 NOL not previously deducted. After reviewing the petitioner’s amended income tax returns, the Tax Commission issued two determinations.

The NODD relating to 1993 through 1998 recalculated the amount of the Idaho NOL to be applied in each of these years. Additionally, the NODD reflected the disallowance of the 1994 refund, which would have been due to the petitioner for the tax year 1994 from the carryback of \$100,000 of the 1996 NOL, because of the expiration of the statute of limitations. The NODD relating to 1999 disallowed petitioner’s NOL carryforward deduction of \$93,988.

The following chart shows the differences in the application of the 1995 and 1996 Idaho NOL:

Tax Year Ending	Petitioner's Calculation		Auditor's Calculation	
	Dec-95	Dec-96	Dec-95	Dec-96
Idaho Loss per Petitioner	(\$133,241)	(\$32,735)	(\$133,241)	(\$32,735)
Auditor Adjustment				3,000
Increase per Amended Return		(119,744)		(119,744)
Amount Available	(\$133,241)	(\$152,479)	(\$133,241)	(\$149,479)
Amount deducted in 1994				100,000
Amount deducted in 1997	133,241	4,310	133,241	4,310
Amount deducted in 1998		54,181		45,169
Amount deducted in 1999		93,988		
Amount Remaining	\$0	\$0	\$0	\$0

The differences between the auditor's calculation and the petitioner's calculation is that the auditor decreased the petitioner's 1996 NOL calculation by \$3,000 and required the petitioner to carryback \$100,000 of the 1996 NOL to 1994. Any refund as a result of the \$100,000 carryback to 1994 was disallowed since the statute-of-limitation for the filing of a refund claim under Idaho Code Section 63-3072(e) had expired. The only year that actually resulted in a tax deficiency as a result of the auditor's reduction in the amount of NOL available for carryforward was 1999.

The \$3,000 difference between the auditor's calculation and the petitioner's calculation is the amount of the 1996 capital losses in excess of capital gains deducted on the petitioner's 1996 income tax return. Idaho Code Section 63-3021(b)(2)(i) requires that in the case of an individual the NOL will be adjusted for "[a]ny amount deducted due to losses in excess of gains from sales or exchanges of capital assets." Since the petitioner has not raised issue with this adjustment, no further analysis will be conducted on this issue. The Tax Commission now turns its attention to the auditor's adjustment requiring the petitioner to carryback \$100,000 of the 1996 NOL to 1994.

Idaho Code Section 63-3022(d) (as in effect in 1995 and 1996) required that an Idaho net operating loss deduction be carried back to the three years prior to the year of the loss, and, only if there was a remaining loss, was it to be applied to the years following the year of the loss unless the taxpayer filed an election to forego the carryback. Idaho Code Section 63-3022 stated, in pertinent part:

- (d) (1) A net operating loss for any taxable year commencing on and after January 1, 1990, shall be a net operating loss carryback not to exceed a total of one hundred thousand dollars (\$100,000) to the three (3) immediately preceding taxable years. Any portion of the net operating loss not subtracted in the three (3) preceding years may be subtracted in the next fifteen (15) years succeeding the taxable year in which the loss arises in order until exhausted. The sum of the deductions may not exceed the amount of the net operating loss deduction incurred. At the election of the taxpayer, the three (3) year carryback may be foregone and the loss subtracted from income received in

taxable years arising in the next fifteen (15) years succeeding the taxable year in which the loss arises in order until exhausted. The election shall be made as under section 172(b)(3) of the Internal Revenue Code. An election under this subsection must be in the manner prescribed in the rules of the state tax commission and once made is irrevocable for the year in which it is made. . . .

Idaho Code Section 63-3022(d)(1) requires that the election to forego the carryback period “shall be made as under section 172(b)(3) of the Internal Revenue Code. An election under this subsection must be in the manner prescribed in the rules of the state tax commission and once made is irrevocable for the year in which it is made.” Idaho Income Tax Rule 018.6(d) stated, in pertinent part:

d. Timing and Method of Electing to Forego Carryback. The election must be made by the due date, including extensions, of the loss year return. Once the completed return is filed, the extension period expires. See Idaho Income Tax Administrative Rule 100.01.b. The election referred to in this section shall be made by attaching a statement to the taxpayer's income tax return for the taxable year of such loss. The statement must contain the following information: the name, address, and taxpayer's social security number or employer identification number; a statement that the taxpayer makes the election under Section 63-3022(d)(1), Idaho Code, to forego the carryback provision; and the amount of the net operating loss.

It is the auditor's position that the petitioner failed to make the election to forego the Idaho carryback period for 1996. The reason that none of the petitioner's 1995 Idaho NOL was required to be carried back and applied in the carryback period is because the petitioner made a valid election in his 1995 return to forego the carryback period. The auditor determined that no such election was made for 1996.

The primary argument presented by the petitioner is that, under his interpretation of Idaho Code Section 63-3022(d)(1) and the related rules, the election to forego the carryback period was properly made “with the filing of the amended return for 1996, and the *simultaneous* filing of the amended 1997 and 1998 income tax returns reflecting the carryforward.” Even though the petitioner did not comply with all of the requirements as stated in Rule 018(d), the petitioner

believes that he “has reflected an unequivocal agreement to take either the benefits or the burdens of foregoing any carryback period through the simultaneous filing of the 1997 and 1998 amended income tax returns and the originally filed 1999 income tax return.” As authority for this position, the petitioner cites Santi v. Commissioner, TC Memo.1990-137, 59 TCM 110, in which the court stated, “... that the tax return preparer in preparing the return and petitioners when they signed it intended to relinquish the right to carry the loss back to prior years.” (emphasis added).<sup>1</sup> The petitioner also cites a variety of other federal cases where it was basically determined that a taxpayer substantially complied with the applicable regulation on how an election is to be made even though not all of the directions of the regulation were followed.

After reviewing the applicable Idaho law and court cases, the Tax Commission is not persuaded by the petitioner’s argument. Rule 018(d) specifically requires that “[t]he election must be made by the due date, including extensions, of the loss year return.” Idaho Rule 018(e) states that the election is considered untimely if made on an amended return.

Rule 018(e) states, in pertinent part:

e. If the election is made on **an amended** or original return filed subsequent to the time allowed in subsection 06.d., it **will be considered untimely** . . . (emphasis added).

It is undisputed that the petitioner had a current year NOL for 1996. Given that fact, Idaho law requires that the taxpayer make an “irrevocable” election to forego the carryback period by the due date, including extensions, of the loss year. The petitioner did not file an “irrevocable” election within that time frame required under Idaho law. The fact that the

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<sup>1</sup> A review of the Santi v. Commissioner, TC Memo. 1990-137, case reveals that the issue was whether or not the taxpayer had made a valid election on their *timely filed return* to forego the federal carryback period. The Court held that “taking the tax return as a whole, the language on the bottom of page 2 together with the language on the handwritten schedule sufficiently complies with the requirement that there be a separate statement and an indication of the Code section under which the election is being made, i.e., Code section 172(b).” No such statement or indication was made on the 1996 Idaho income tax return as originally filed.

petitioner received information in 2000 which resulted in the filing of an amended 1996 Idaho income tax return increasing the petitioner's loss for 1996, does not relieve the petitioner of the requirement of having to have made the election within the time frame required under Idaho law. Therefore, the petitioner's argument that the petitioner had reflected an unequivocal agreement to take either the benefits or the burdens of foregoing any carryback period through the simultaneous filing of the 1996, 1997 and 1998 *amended income* tax returns and the originally filed 1999 income tax return is without merit.

As previously discussed, Idaho Code Section 63-3022(d)(1) requires a taxpayer to make an "irrevocable" election to forego the carryback period of an Idaho NOL and that the election is to be made in the manner prescribed in the rules of the State Tax Commission. Idaho Rule 018 requires that the election be made by the due date of the return including extensions and that an election made on an amended return is not timely. The federal courts, in dealing with a similar law regarding an election to forego the federal net operating loss carryback period, found that the essence of the federal statute was that a "taxpayer unequivocally communicates his election" to forego the carryback period. Santi v. Commissioner, TC Memo.1990-137, 59 TCM 110, citing Young v. Commissioner, 783 F.2d 1201, 1206 (5<sup>th</sup> Cir. 1986), Affg. 83 T.C. 831 (1984). The Tax Commission believes that the essence of Idaho Code Section 63-3022(d)(1) is that a "taxpayer unequivocally communicate his election" to forego the carryback period and, based upon the facts and circumstances in this case, the petitioner did not comply with Idaho law and did not "unequivocally communicate his election" to forego the Idaho carryback period within the time frame prescribed by Idaho law for tax year 1996.

WHEREFORE, the Notice of Deficiency Determination dated November 22, 2000, are APPROVED AFFIRMED, and MADE FINAL.

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

<u>YEAR</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
1999	\$6,852	\$0	\$571	\$7,423
	Payment received from petitioner			(\$7,423)
		REMAINING AMOUNT DUE		<u><u>\$0</u></u>

An explanation of the petitioner's rights to appeal this decision is enclosed with this decision.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2001.

IDAHO STATE TAX COMMISSION

\_\_\_\_\_  
COMMISSIONER

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_ day of \_\_\_\_\_, 2001, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

[REDACTED]

Receipt No. [Redacted]

[REDACTED]

\_\_\_\_\_  
ADMINISTRATIVE ASSISTANT 1