

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)	
)	DOCKET NO. 21052
[REDACTED])	
Petitioners.)	DECISION
)	
)	

On February 1, 2008, the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination to [Redacted] (petitioners) proposing additional income tax, penalty, and interest for the taxable year 2004 in the total amount of \$8,324. The petitioners filed a timely protest and petition for redetermination. A hearing was held on August 19, 2008. The Commission, having reviewed the file, hereby issues its decision.

The petitioners started a [Redacted] business in October 1998 operating the [Redacted] business through a closely held Idaho S corporation. The land and well associated with the [Redacted] business was owned by the petitioners not their S corporation. In March 2004, the S corporation sold the assets of the [Redacted] business. The S corporation was not liquidated in 2004. The petitioners retained ownership of the real property until March 2008. During the informal hearing, the petitioners indicated that the land and well had been sold [Redacted].

In January 2004, prior to the sale of the [Redacted] business, the petitioners entered into an Exclusive Use Agreement (see attached) [Redacted]. [Redacted].

Audit reviewed the petitioners' 2004 Idaho income tax return and that of the S corporation. As a result of Audit's review, Audit issued an NODD proposing several adjustments to the petitioners' Idaho taxable income. The petitioners did not protest any of the proposed adjustments and instead argued that they should be entitled to an abandonment loss not claimed on the return as filed. More specifically, the petitioners argued in a letter dated December 26, 2007, that:

[Redacted]

Internal Revenue Code (IRC) Sec. 165 allows a deduction for a loss sustained during the taxable year and not compensated for by insurance or otherwise. To be allowable, a loss must be evidenced by closed and completed transactions which are fixed by identifiable events and actually sustained during the taxable year. Treas. Reg. sec. 1.165-1(b) and (d). Such events include a sale, abandonment, or other acts or events which reflect the fact that the property is worthless. Treas. Reg. sec. 1.165-1(d) and 1.165-2(a); Gordon v. Commissioner, 46 B.T.A. 1201, 1210 (1942), affd. sub nom. Helvering v. Gordon, 134 F.2d 685 (4th Cir. 1943). Treas. Reg. sec. 1.165-2 provides, in pertinent part:

(a) *Allowance of deduction.* A loss incurred in a business or in a transaction entered into for profit and arising from the sudden termination of the usefulness in such business or transaction of any nondepreciable property, in a case where such business or transaction is discontinued or where such property is permanently discarded from use therein, shall be allowed as a deduction under section 165(a) for the taxable year in which the loss is actually sustained. For this purpose, the taxable year in which the loss is sustained is not necessarily the taxable year in which the overt act of abandonment, or the loss of title to the property, occurs.

(b) *Exceptions.* This section does not apply to . . . losses sustained upon the obsolescence or worthlessness of depreciable property, . . .

(c) *Cross references.* For the allowance under section 165(a) of losses arising from the permanent withdrawal of depreciable property from use in the trade or business or in the production of income, see § 1.167(a)-8. . . .

Thus, the petitioners may be entitled to an abandonment or worthlessness loss under Treas. Reg. sec. 1.165-2(a) if it was a nondepreciable asset or Treas. Reg. sec. 1.167(a)-8(a)(4) if the asset was a depreciable asset. See Scott v. Commissioner, T.C. Memo. 1979-29.

Treas. Reg. sec. 1.167(a)-8 provides, in pertinent part:

(a) *Gains and losses on retirements.* For the purposes of this section the term “retirement” means the permanent withdrawal of depreciable property from use in the trade or business or in the production of income. The withdrawal may be made in one of several ways. For example, the withdrawal may be made by selling or exchanging the asset, or by actual abandonment. In addition, the asset may be withdrawn from such productive use without disposition as, for example, by being placed in a supplies or scrap account. The tax consequences of a retirement depend upon the form of the transaction, the reason therefor, the timing of the retirement,

. . .

(4) Where an asset is retired by actual physical abandonment (as, for example, in the case of a building condemned as unfit for further occupancy

It has been held that, where the taxpayer has not relinquished possession of an item, the taxpayer must prove ‘abandonment,’ i.e., a concurrence of the act of abandonment and the intent to abandon, both of which must be shown from the surrounding circumstances of such item in order to determine that a loss has occurred in the year of deducting. Neither mere intention alone nor mere non-use alone is sufficient to accomplish abandonment. Burke v. C.I.R., 32 T.C. 775, 780 (1959) affirmed, 283 F.2d 487 (9th Cir. 1960).

It has also been held in these cases of claimed loss and abandonment that a deduction is permissible only where there is a complete elimination of all value coupled with recognition by the owner that the item no longer has any utility or worth to him. Commissioner v. McCarthy, 129 F.2d 84, 87 (7th Cir. 1942).

The burden of proving loss is upon the taxpayer. Burnet v. Huston, 283 U.S. 223 (1931). In the present case, the petitioners rely upon the liquidation, [Redacted], [Redacted] coupled with the restriction in perpetuity placed [Redacted] prohibiting any subsequent purchaser of the real property [Redacted] as an effective abandonment sufficient to support a tax deduction of the cost [Redacted]. However, where the petitioners have retained title to the property, offering the

property for sale at a substantial price, coupled with the retention of the right under the Exclusive Use Agreement [Redacted], the Commission does not believe that the petitioners have met their burden of showing that the land and well no longer had any utility or worth to the petitioners as of the end of 2004.

WHEREFORE, the Notice of Deficiency Determination dated February 1, 2008, is hereby APPROVED, AFFIRMED, and MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the petitioners pay the following tax, penalty, and interest:

<u>YEAR</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
2004	\$5,785	\$1,429	\$1,499	<u>\$8,713</u>
			TOTAL DUE	<u>\$8,713</u>

Interest is calculated through April 30, 2009, and will continue to accrue at the rate set forth in Idaho Code section 63-3045.

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

An explanation of the petitioners' rights to appeal this decision is enclosed.

DATED this ____ day of _____, 2009.

IDAHO STATE TAX COMMISSION

COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____, 2009, 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]
[REDACTED]

Certified Mail No.
