

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

In the Matter of the Protest of )  
[Redacted], ) DOCKET NO. 21489  
 )  
 ) DECISION  
Petitioner. )  
\_\_\_\_\_ )

[Redacted] (petitioners) protest the Notice of Deficiency Determination issued by the auditor for the Idaho State Tax Commission (Commission) dated July 21, 2008. The Notice of Deficiency Determination asserted an additional liability for Idaho income tax and interest in the total amount of \$2,499 for 2005.

The petitioners were, at all times relevant to this docket, residents of the state of [Redacted]. They owned real property in [Redacted] which was given up in a like-kind exchange for real property in Idaho pursuant to Internal Revenue Code § 1031. In 2005, the petitioners sold the Idaho real property.

The petitioners reported a federal capital gain from the disposition of the property in the amount of \$248,904. They reported a capital gain on their Idaho income tax return from the disposition of the property in the amount of \$145,315.

The auditor asserted the additional liability by including in the computation of Idaho taxable income all of the capital gain from the disposition of the Idaho property and allowing the 60 percent Idaho capital gains deduction. In the auditor’s explanation, he provided that no provision in Idaho law provided for a different basis in the property than that determined pursuant to the Internal Revenue Code.

The petitioners contend that the basis used to compute the gain should be the cost of the Idaho property as opposed to being the federal basis which reflected, in part, gain from the holding

of the property in [Redacted]. The petitioners contend that the federal basis should not be used. They cite a brochure published by the Commission entitled, RESIDENCY STATUS AND IDAHO SOURCE INCOME HOW RESIDENCY AFFECTS YOUR IDAHO INCOME TAX which states, in part:

If the transaction or activity that created the income did not take place solely in Idaho, or if the property that generated the income was not located solely in Idaho, the income must be divided among the various states.

They also cited a portion of Idaho Code § 63-3026A as follows:

Computing Idaho taxable income of part-year or nonresident individuals, trusts and estates. -- (1) For nonresident individuals, trusts, or estates the term "Idaho taxable income" includes only those components of Idaho taxable income as computed for a resident which are derived from or related to sources within Idaho. (Emphasis in original.)

There are several problems with affording the publication published by the Commission the force of law. First, determination of the tax laws is the responsibility of the legislative branch of government. The brochure cited by the petitioner is composed by the staff of the Commission and is not subject to review by the legislative branch of the government. Accordingly, affording the brochure the effect of law would constitute the executive branch of the government changing the law as determined by the legislative branch. The Commission finds that the brochure is not to have the force and effect of law.

Secondly, the instructive brochures and other informal advice rendered by the staff of the Tax Commission is not intended to be an exhaustive treatment of the law. The tax laws are very voluminous. If the informal advice made available by the Commission was to be held to a standard of being an exhaustive treatment of the law, then the offering of such would, in all probability, be impracticable. The brochures, the instructions for the completion of the tax forms, and the taxpayer

assistance made available are intended to be a brief treatment of the issues which are intended to provide answers to many taxpayers while not being an exhaustive or perfect treatment of any tax matter.

The formulation of federal tax law takes place in a similar manner to the making of Idaho tax law. Therefore, federal courts' findings involving this issue are relevant. The Tax Court stated in their decision in Zimmermen v. Commissioner, 71 T.C. 367, 371 (1978), affd. 614 F.2d 1294 (2d Cir. 1979):

Petitioners have, on brief, engaged in an extensive semantical exercise based upon their analysis of certain statements contained in respondent's publication "Your Federal Income Tax." We find this analysis not only unpersuasive but beside the point, since the authoritative sources of Federal tax law are in the statutes, regulations, and judicial decisions and not in such informal publications. Adler v. Commissioner, 330 F.2d 91, 93 (9th Cir. 1964); Green v. Commissioner, 59 T.C. 456, 458 (1972); Aldridge v. Commissioner, 51 T.C. 475, 482 (1968).

The petitioners also cite Idaho Code § 63-3026A as authority for their position. Specifically, they cite the portion of this section stating, "For nonresident individuals, trusts, or estates the term "Idaho taxable income" includes only those components of Idaho taxable income as computed for a resident which are derived from or related to sources within Idaho." (Emphasis in original.) The sale of the property in Idaho would seem to clearly pass the test of being "related to sources within Idaho." Presumably, the question is the determination of the proper basis to be used in the calculation of the gain from the disposition of the Idaho property. In Idaho Code § 63-3002, the Idaho law addresses this issue:

Declaration of intent. -- It is the intent of the legislature by the adoption of this act, insofar as possible to make the provisions of the Idaho act identical to the provisions of the Federal Internal Revenue Code relating to the measurement of taxable income, to the end that the taxable income reported each taxable year by a taxpayer to the

internal revenue service shall be the identical sum reported to this state, subject only to modifications contained in the Idaho law; to achieve this result by the application of the various provisions of the Federal Internal Revenue Code relating to the definition of income, exceptions therefrom, deductions (personal and otherwise), accounting methods, taxation of trusts, estates, partnerships and corporations, basis and other pertinent provisions to gross income as defined therein, resulting in an amount called "taxable income" in the Internal Revenue Code, and then to impose the provisions of this act thereon to derive a sum called "Idaho taxable income"; to impose a tax on residents of this state measured by Idaho taxable income wherever derived and on the Idaho taxable income of nonresidents which is the result of activity within or derived from sources within this state. All of the foregoing is subject to modifications in Idaho law including, without limitation, modifications applicable to unitary groups of corporations, which include corporations incorporated outside the United States. (Underlining added.)

It is clear that the income resulted from “[t]he ownership or disposition of any interest in real or tangible personal property located in this state.” The declaration of intent specifically adopts the federal rules for “basis.” Nothing in Idaho Code § 63-3026A provides for a partition of the gain under the circumstances present in this docket. Idaho Code § 63-3002 states that the amount reported to Idaho should be the same as to the federal government, “subject only to modifications contained in the Idaho law.” No such *modification* has been cited by the petitioners. Accordingly, the Commission finds that the entire gain is includable in the computation of Idaho taxable income as asserted by the auditor.

WHEREFORE, the Notice of Deficiency Determination dated July 21, 2008, is hereby APPROVED, AFFIRMED, AND MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the petitioners pay the following tax, and interest (computed to April 30, 2009):

| <u>YEAR</u> | <u>TAX</u> | <u>INTEREST</u> | <u>TOTAL</u> |
|-------------|------------|-----------------|--------------|
| 2005        | \$2,148    | \$428           | \$2,576      |

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

An explanation of the petitioners' right 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]

Receipt No.

\_\_\_\_\_