

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

In the Matter of the Protest of	)	
	)	DOCKET NO. 21721
[Redacted],	)	
	)	DECISION
Petitioners.	)	
_____	)	

[Redacted] (petitioners) protest the Notice of Deficiency Determination issued by the auditor for the Idaho State Tax Commission (Commission) dated January 16, 2009, asserting an additional liability for Idaho income tax, penalty, and interest in the total amount of \$386 for 2005.

The petitioners were issued the Notice of Deficiency Determination by the Commission pursuant to [Redacted] which the petitioners had received. We find that the auditor’s computations properly reflect [Redacted].

The petitioners contend that the income received was not compensation, but rather was from the sale of a fully depreciated asset. Since the petitioners had a capital loss which was carried forward from 2004, they contend that the income from the sale should be offset against the capital loss carried forward, thereby negating the additional amount asserted by the Notice of Deficiency Determination.

The Commission requested additional information concerning the fully depreciated asset, including the original purchase price. The petitioners did not supply this information. Therefore, the Commission now renders its determination in this matter based upon the information in the file.

The accountant for the petitioners prepared an amended return stating that the property sold was “[Redacted].” The accountant did not supply the Form 4797.

It appears that the asset in question is “section 1245 property.” Internal Revenue Code § 1245 states, in pertinent part:

Gain from dispositions of certain depreciable property.

(a) General rule.

(1) Ordinary income. Except as otherwise provided in this section, if section 1245 property is disposed of the amount by which the lower of -

(A) the recomputed basis of the property, or

(B) (i) in the case of a sale, exchange, or involuntary conversion, the amount realized, or

(ii) in the case of any other disposition, the fair market value of such property, exceeds the adjusted basis of such property shall be treated as ordinary income. Such gain shall be recognized notwithstanding any other provision of this subtitle.

It appears clear that at least some of the sales price should be classified as ordinary income which could not be offset against the petitioners’ capital loss which was carried forward. The petitioners have failed to supply sufficient information for the Commission to compute this amount with certainty.

In addressing a similar situation, the Tax Court stated, in part:

Petitioner has not established the factual allegations in its petition which are material and essential. Respondent was under no obligation to introduce evidence to rebut a fact alleged but not proven by petitioner. Short v. Philadelphia B. & W. R. Co., 23 Del. 108; 76 Atl. 363. The rule is well established that the failure of a party to introduce evidence within his possession and which, if true, would be favorable to him, gives rise to the presumption that if produced it would be unfavorable. Walz v. Fidelity-Phoenix Fire Ins. Co. of New York, 10 Fed.(2d) 22; certiorari denied, 271 U.S. 665; Equipment Acceptance Corporation v. Arwood Can Mfg. Co., 117 Fed. (2d) 442; Hann v. Venetian Blind Corporation, 111 Fed.(2d) 455; Bomeisler v. Jacobson & Sons Trust, 118 Fed.(2d) 261; Sears, Roebuck & Co. v. Peterson, 76 Fed.(2d) 243. This is especially true where, as here, the party failing to produce the evidence has the burden of proof or the other party to the proceeding has established a prima facie case. Moore v. Giffen, 110 Cal.A. 659; 294 Pac. 730; Indianapolis & Cincinnati Traction Co. v. Montfort, 80 Ind.A. 639; 139 N.E. 677.

The Wichita Terminal Elevator Company v. Commissioner, 6 T.C. 1158 (1946), affd. 162 F.2d 513 (10th Cir.1947).

The Commission finds that the petitioners have not carried their burden of establishing that they are entitled to use their capital loss carried forward to offset the income here in question.

WHEREFORE, the Notice of Deficiency Determination dated January 16, 2009, is hereby APPROVED, AFFIRMED, and MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the petitioners pay the following tax, penalty, and interest (computed to June 30, 2010):

<u>YEAR</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
2005	\$310	\$ 16	\$ 80	\$ 406

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 \_\_\_\_\_ 2010.

IDAHO STATE TAX COMMISSION

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COMMISSIONER

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_\_ day of \_\_\_\_\_ 2010, 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.