

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)	
)	DOCKET NO. 22017
[Redacted],)	
)	DECISION
Petitioner.)	
_____)	

[Redacted] (petitioners) protest the Notice of Deficiency Determination issued by the auditor for the Idaho State Tax Commission (Commission) dated May 19, 2009, asserting an additional liability for Idaho income tax and interest in the total amount of \$6,172 for 2003.

During 2003, [Redacted] held a 50 percent interest in [Redacted], an S corporation. The corporation deducted, for [Redacted] income tax purposes, bonus depreciation pursuant to Internal Revenue Code § 168(k) in the amount of \$184,370. Half of this amount (\$92,185) was shown on the K-1 issued to [Redacted] as an Idaho addition to apportionable income. This addition was to comply with the provisions of Idaho Code § 63-3022O(1).

On the petitioners' 2003 Idaho income tax return, in addition to making the adjustment (addition) in the amount of \$92,185, the petitioners deducted \$59,405 as an Idaho subtraction. This amount was composed of two adjustments. The first was to deduct a loss, in the amount of \$23,905, from [Redacted] which was not deductible for federal purposes due to the petitioners not having sufficient basis in their stock. The second component was to deduct a distribution, in the amount of \$35,500, from [Redacted] which was in excess of the petitioners' [Redacted] basis in their S corporation stock. Both of these deductions were denied by the auditor.

The auditor cited Idaho Code §§ 63-3002 and 63-3022O(4)¹ as authority for her position. Idaho Code § 63-3002 stated (2003):

¹ This subsection was not enacted or effective until 2007.

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.

Idaho Code § 63-3022O stated (2003):

Adjustment for property acquired after September 10, 2001. -- For taxable years commencing on and after January 1, 2001, in computing Idaho taxable income:

(1) The adjusted basis of depreciable property, depreciation and capital gains and losses shall be computed without regard to subsection (k) of section 168 of the Internal Revenue Code, as amended by section 101 of the "Job Creation and Worker Assistance Act of 2002"; and

(2) No deduction shall be allowed relating to expenses of elementary and secondary teachers otherwise allowable under section 62(a)(2)(D) of the Internal Revenue Code, as amended by section 406 of the "Job Creation and Worker Assistance Act of 2002."

The petitioners contend that, due to the fact that less depreciation was allowed for Idaho purposes than for [Redacted] purposes, the basis in the corporate stock should be so adjusted as to raise their basis in the stock. It seems the sum of the petitioners' position is that there must be a separate Idaho computation of a limitation for the extent to which a shareholder of an S corporation may deduct losses similar to and in lieu of that set out in Internal Revenue Code § 1366(d)(1). If they could use such an elevated basis, then the limitation on the allowance of their loss would accordingly be adjustable and the distribution from the corporation would not

be in excess of this adjusted basis. The position is that Idaho Code § 63-3022O(1) allowed an adjustment to be made to the basis of their stock.

Idaho Code § 63-3002 set out the legislative intent regarding the income tax that, “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 [Redacted] shall be the identical sum reported to this state, subject only to modifications contained in the Idaho law.” Therefore, if the petitioners are to gain the deductions they seek in this matter, they must point to a “modification contained in the Idaho law” authorizing the deductions.

The Idaho Supreme Court has stated, regarding deductions:

When construing the provisions of the Idaho Income Tax Code, however, we must enforce the law as written. Potlatch Corp. v. Idaho State Tax Comm'n, 128 Idaho 387, 913 P.2d 1157 (1996). If there is any ambiguity in the law concerning tax deductions, the law is to be construed strongly against the taxpayer. *Id.* This Court has no authority to rewrite the tax code. Bogner v. State Dep't of Revenue and Taxation, 107 Idaho 854, 693 P.2d 1056 (1984). Any exemption from taxation must be created or conferred in clear and plain language and cannot be made out by inference or implication. Herndon v. West, 87 Idaho 335, 393 P.2d 35 (1964). This Court does not have the authority to create deductions, exemptions, or tax credits. If the provisions of the tax code are socially or economically unsound, the power to correct it is legislative, not judicial. *Id.*

Idaho State Tax Commission v. Stang, 135 Idaho 800, 802-803; 25 P.3d 113, 115-116 (2001).

Similarly, the U. S. Supreme Court has addressed the taxpayer’s burden as follows:

Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed.

* * *

Obviously, therefore, a taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms

New Colonial Ice Co., Inc. v. Helvering, 292 U.S. 435, 440 (1934).

It appears that the petitioners' argument must rise from Idaho Code § 63-3022O(1). The question before us is whether that statute allows the stockholder to deduct a greater loss for Idaho purposes than was allowable for [Redacted] purposes for the first part of the adjustment. That subsection authorized changes to three items:

1. basis of depreciable property,
2. depreciation, and
3. capital gains and losses

The taxpayer deducting the additional depreciation pursuant to Internal Revenue Code § 168(k) was [Redacted] There appears to be no question that the depreciation allowable to [Redacted] does not include the amount calculated pursuant to Internal Revenue Code § 168(k).

The petitioners' position appears to be that something in the Idaho law allows for a different limitation than that set out in the federal law for the determination of the allowable loss. However, the petitioners have cited no portion of the Idaho law setting forth such authority.

The Commission finds that Idaho Code § 63-3022O(1) does not provide for an adjustment to the basis of the petitioners' stock as it is not "depreciable property." Neither the loss passed through from the S corporation nor the distribution fall within one of the three items to be adjusted pursuant to Idaho Code § 63-3022O(1). Further, the Commission is not aware of any provision in the Idaho law supporting such an alternative calculation. Therefore, we further find that these deductions were properly denied by the auditor.

WHEREFORE, the Notice of Deficiency Determination dated May 19, 2009, 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 June 15, 2010):

<u>YEAR</u>	<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
2003	\$4,635	\$1,740	\$6,375

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

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.

COPY MAILED TO:

[Redacted]