

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)	
)	DOCKET NO. 22631
[Redacted],)	
)	
Petitioners.)	DECISION
_____)	

[Redacted] (petitioners) protest the Notice of Deficiency Determination (NODD) issued by the auditor for the Idaho State Tax Commission (Commission) dated August 28, 2009, asserting additional liabilities for Idaho income tax and interest in the total amounts of \$29,175, \$51,864, \$26,521, and \$35,053 for 2004, 2005, 2006, and 2007, respectively.

The petitioners were residents of [Redacted] during the years in question. Mr. [Redacted] was a partner in [Redacted]. [Redacted] was filing as a partnership with an Idaho apportionment factor of 100 percent. The K-1s issued to [Redacted] showed the following totals of his share of the ordinary income and interest income from [Redacted]:

2004	\$294,344
2005	556,815
2006	413,225
2007	475,592

The petitioners did not file Idaho income tax returns for these years. They did not file Idaho returns after having been requested to do so by the Commission. Therefore, the NODD referred to above was issued.

The petitioners filed a protest to the NODD indicating that the income in question was due to services performed by Mr. [Redacted]. They contend that the LLC return should have been modified in a variety of ways. They also contend that the payments should have been treated as guaranteed payments or that the apportionment factor of [Redacted] should have been modified in some way.

Idaho Code § 63-3026A sets forth the authority for the determination of Idaho source income. It stated, in pertinent part:

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. This is to be computed without the deductions for either the standard deduction or itemized deductions or personal exemptions except as provided in subsection (4) of this section.

* * *

- (3) For the purposes of subsections (1) and (2) of this section:
 - (a) Income shall be considered derived from or relating to sources within Idaho when such income is attributable to or resulting from:
 - (i) Any business, trade, profession or occupation conducted or carried on in this state, including the distributive share of partnership income and deductions, and the pro rata share of S corporation income and deductions;

According to this portion of the Idaho Code, so long as the apportionment factor of [Redacted] remains at 100 percent, it appears that the auditor's position is correct. The apportionment factor of [Redacted] is composed of their Idaho portion of the sales, payroll, and property. The income of Mr. [Redacted] was not paid as compensation but as his distributive share (as a partner) of the income of [Redacted].

It is entirely possible that the business involved in this matter might have been structured differently to avoid the result reached by the auditor. In addressing such alternatives, the U.S.

Supreme Court stated:

This Court has observed repeatedly that, while a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice, whether contemplated or not, Higgins v. Smith, 308 U.S. 473, 477, 60 S.Ct. 355, 357, 84 L.Ed. 406 (1940); Old Mission Portland Cement Co. v. Helvering, 293 U.S. 289, 293, 55 S.Ct. 158, 160, 79 L.Ed. 367 (1934); Gregory v. Helvering, 293 U.S. 465, 469, 55 S.Ct. 266, 267, 79 L.Ed. 596 (1935), and may not enjoy the benefit of some other route he might have chosen to follow but did not. 'To make the taxability of the transaction depend upon the determination whether there existed an alternative form which the statute did not tax would create burden and uncertainty.' Founders General Corp. v. Hoey, 300 U.S. 268, 275, 57 S.Ct. 457, 460, 81 L.Ed. 639 (1937); Television Industries, Inc. v. Commissioner of Internal Revenue, 284 F.2d 322, 325 (C.A.2 1960); Interlochen Co. v. Commissioner of Internal Revenue, 232 F.2d 873, 877 (C.A.4 1956). See Gray v. Powell, 314 U.S. 402, 414, 62 S.Ct. 326, 333, 86 L.Ed. 301 (1941).

Commissioner v. National Alfalfa Dehydrating & Milling Co., 417 U.S. 134, 149, 94 S.Ct. 2129, 2137 (1974).

The Idaho income tax returns filed by [Redacted] are not the ones currently before the Commission. The Idaho Code clearly sets out that a partner is to include his distributive share of the income of the partnership. The petitioners have presented equitable arguments that may have merit. In addressing such equitable arguments, the Idaho Supreme Court stated:

The [Redacted] admit that no provision of the Idaho Income Tax Code specifically provides that the \$8,000 can be deducted or exempted from Idaho taxable income. Therefore, the \$8,000 distribution is "Idaho taxable income" under the Idaho Income Tax Code.

The [Redacted] urge this Court to "construe" the Idaho Income Tax Code in a manner that would permit the [Redacted] to avoid paying Idaho income tax on the \$8,000 distribution. They argue that because the Idaho Income Tax Code does not expressly address this situation, this Court should be free to construe the tax code in a manner that would prevent the [Redacted] from having to pay taxes to both California and Idaho on the same monies. 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).

The Commission finds that the petitioners have failed to present a compelling argument that the auditor's position is unsound.

WHEREFORE, the Notice of Deficiency Determination dated August 28, 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 March 15, 2011):

<u>YEAR</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
2004	\$19,013	\$4,753	\$6,614	\$ 30,380
2005	35,183	8,796	10,125	54,104
2006	18,791	4,698	4,227	27,716
2007	26,132	6,533	4,049	36,714
				<u>\$148,914</u>

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

An explanation of the taxpayers' 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.
