BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of	)	
	)	DOCKET NO. 22828
[Redacted],	)	
	)	
Petitioners.	)	DECISION
	)	

[Redacted] (taxpayers) protested the Notice of Deficiency Determination issued by the staff of the Idaho State Tax Commission (Commission) dated February 16, 2010, asserting additional Idaho income tax, penalty, and interest for taxable year 2008 in the total amount of $2,695.

The issue in this case is whether the fraud penalty should be applied relating to the incorrect withholding amount claimed on the taxpayers' Idaho individual income tax return.

BACKGROUND FACTS

[Redacted] moved to Idaho in taxable year 2005. At that time, [Redacted] began working for [Redacted]. [Redacted] left employment with [Redacted] sometime in taxable year 2009.

The following wage and Idaho withholding from [Redacted] was reported on [Redacted] electronically filed Idaho income tax returns:

Year	Wages	Idaho Withholding
2008	$43,325	$2,680

[Redacted] reported the following for [Redacted]:

Year	Wages	Idaho Withholding
2008	$43,325	$942

On December 3, 2009, the Tax Discovery Bureau (TDB) sent a letter to the taxpayers requesting a copy of their 2008 W-2 form from [Redacted]. The taxpayers did not respond to this request.

On December 22, 2009, the TDB sent a billing letter to the taxpayers adjusting the withholding and imposing negligence penalties.

On December 24, 2009, [Redacted] came into the Commission and brought a copy of the 2008 W-2. It was apparent that the Idaho withholding and [Redacted] withholding had been altered. The type for these two amounts appeared darker and was in a different font than the rest of the information on the W-2 form. It also looked like the original amounts had been covered with some sort of correction ribbon or white-out product before the new amounts were typed in. The TDB informed [Redacted] of this concern and asked for a copy of the original W-2. [Redacted] informed the TDB that he had made a copy of the W-2 and sent the originals to his tax preparer in [Redacted]. The TDB made a copy of the W-2 [Redacted] had brought in.

On January 4, 2010, the taxpayers sent another copy of the W-2 to the TDB. This copy was identical to the copy TDB received on December 24, 2009, and showed the obvious change to [Redacted] and state tax withheld.

The TDB contacted [Redacted] and their independent bookkeeper requesting payroll records. The TDB received a copy of [Redacted] W-4, her W-2, a "Payroll Summary" report, and a copy of the pay stub from her final paycheck of the 2008 year. These documents showed a 2008 Idaho withholding amount of $942 for [Redacted].

The TDB reviewed the payroll records and found that the Idaho tax withheld was within the acceptable range of the Idaho withholding tables. For several pay periods, a little more was withheld than shown in the table. These were the amounts that would have been withheld before the withholding tables were updated. The amount withheld the last several pay periods was in accordance with the withholding tables.

The TDB contacted [Redacted] (who had been the owner of [Redacted]) and had him review the W-2 submitted by the taxpayers. [Redacted] denied ever providing [Redacted] with that W-2. The 2008 W-2s were prepared by [Redacted]. [Redacted] is an independent bookkeeper.

A Notice of Deficiency was issued on February 16, 2010, showing the tax due of $1,738 (the difference between the $2,680 of withholding reported and the correct withholding amount of $942). The fraud penalty was also imposed because the taxpayers claimed withholding in excess of what was actually withheld and they provided the Commission with an altered W-2. The taxpayers received a refund that exceeded the amount they should have received.

The taxpayers assert that the W-2 was delivered in an envelope placed on [Redacted] workstation at [Redacted] and that they did not alter the W-2 form. The taxpayers requested that the fraud penalty be removed asserting that they did not commit the fraud.

The taxpayers have not protested that the altered W-2 withholding amount is correct, but only that they should not have the fraud penalty applied to them.

LAW AND ANALYSIS

Idaho Code section 63-3046 addresses penalties and provides in part:

> (b) If any part of any deficiency is due to fraud with intent to evade tax, then fifty percent (50%) of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected and paid.

The Idaho Supreme Court has defined "tax fraud" as the "intentional wrongdoing on the part of the taxpayer with the specific intent to avoid taxes known to be owing." Idaho State Tax Com'n v. Hautzinger, 137 Idaho 401, 403, 49 P.3d 406, 408 (2002). The Idaho Supreme Court further instructed that "[t]his wrongdoing may be proven through strong circumstantial evidence." *Id.* The burden is on the Commission "to establish fraud by clear and convincing evidence, but intent can be inferred from strong circumstantial evidence." *Id.*

"Clear and convincing evidence is generally understood to be '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" In re Adoption of Doe, 143 Idaho 188, 191, 141 P.3d 1057, 1060 (2006) (quoting Black's Law Dictionary 577 (7th ed. 1999)).

The TDB acted correctly by applying the fraud penalty to this case. The taxpayers received a refund from the state that exceeded the amount they should have received because of the false Idaho withholding amount that was reported. Upon viewing the W-2, it is obvious that the withholding amounts were altered.

The facts in this case make it "highly probable or reasonably certain" that it was one of the taxpayers who altered the W-2. The alternative possibilities are quite far-fetched. There are no facts and no motive to suggest that the employer was the one who altered the W-2. The tax preparer could not have been the one who altered the W-2 because [Redacted] stated that the altered copy of the W-2 that he provided to the TDB was a copy he had made before sending the original W-2 to their tax preparer. There are no facts and no motive to suggest that any other unknown third-party somehow mysteriously altered the W-2 between the time it was issued by the employer and then received by the taxpayers.

It is also very hard to believe that someone else could have altered the W-2 without the taxpayers noticing that it had been altered. The W-2 has been altered in such a manner that it is clear to anyone viewing it that the withholding amounts have been "whited out" and then changed. If someone other than the taxpayers altered the W-2, it is unreasonable to believe that taxpayers would not have seen the alteration. Upon seeing such an obvious alteration it is unreasonable to believe that the taxpayers would not have been concerned that the altered Idaho withholding of $2,680 was in sharp contrast to the year-to-date Idaho withholding of $942 shown

on [Redacted] final paycheck stub of 2008 and also in sharp contrast to the $819 of Idaho withholding reported for [Redacted] in taxable year 2007.

The facts and circumstantial evidence in this case make it "highly probable or reasonably certain" that it was one of the taxpayers who altered the W-2. Therefore, application of the fraud penalty is appropriate.

CONCLUSION

WHEREFORE, the Notice of Deficiency Determination dated February 16, 2010, is hereby APPROVED, AFFIRMED, and MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the taxpayers pay the following tax, penalty, and interest (computed to April 5, 2011):

YEAR	TAX	INTEREST	PENALTY	TOTAL
2009	$1,738	$167.13	$869	$2774.13

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 _____ 2011.

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.

_____