

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)	
)	DOCKET NO. 23033
[Redacted],)	
)	
Petitioners.)	DECISION
_____)	

[Redacted] (petitioners) protest the Notice of Deficiency Determination (NODD) issued by the auditor for the Idaho State Tax Commission (Commission) dated April 19, 2010, asserting an additional liability for Idaho income tax, penalty, and interest in the total amount of \$1,138 for 2008.

The sole issue in this docket is the extent, if any, of the tax that should be due from the gain from the sale of a house owned by the petitioners and sold during 2008. The petitioners claimed that the gain qualified for the exclusion of the gain pursuant to Internal Revenue Code § 121 as having been the personal residence of the petitioners for two of the five years preceding the date of the sale of the property. The auditor denied the exclusion of the gain asserting that the gain did not qualify for the exclusion.

The property was purchased by [Redacted] for \$123,900 on February 14, 2005. She reported \$6,000 of rental income from the property for 2005 and \$9,000 rental income from the property for 2006. [Redacted] filed her 2005 income tax return on February 3, 2006, using the address of [Redacted]. Her 2006 income tax return was filed from [Redacted], her current address. Treasury Regulation § 1.121-1(a) states, in pertinent part:

A taxpayer may exclude gain only if, during the 5-year period ending on the date of the sale or exchange, the taxpayer owned and used the property as the taxpayer's principal residence for periods aggregating 2 years or more.

The evidence in the file shows that the property was rented. It does not show that either of the petitioners used the property as their personal residence for two of the five years prior to the sale of the property.

The Idaho Supreme Court has stated of deductions and exemptions, the following:

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).

Idaho State Tax Commission v. Stang, 135 Idaho 800, 802-803 (2001).

Since the record does not establish that the property was used for two of the five years preceding the sale as the principal residence of either of the petitioners, the exclusion is not allowable. Accordingly, the auditor's determination must be sustained.

THEREFORE, the Notice of Deficiency Determination dated April 19, 2010, 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 November 30, 2011):

<u>YEAR</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
2008	\$1,025	\$51	\$131	\$1,207

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 _____ 2011.

IDAHO STATE TAX COMMISSION

COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____ 2011, 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.
