

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

In the Matter of the Protest of	)	
	)	DOCKET NO. 24486
[Redacted],	)	
	)	
Petitioners.	)	DECISION
_____	)	

[Redacted] (petitioners) protest the Notice of Deficiency Determination issued by the auditor for the Idaho State Tax Commission (Commission) dated September 2, 2011. The Notice of Deficiency Determination asserted additional liability for Idaho income tax and interest in the total amount of \$3,746 for 2008.

The only issue in this docket is whether the petitioners are entitled to the Idaho capital gains deduction with regard to a gain from the disposition of [Redacted]. The [Redacted] was owned by an S corporation which was wholly-owned by Mr. [Redacted].

Idaho Code § 63-3022H sets out the authority for the allowance of the Idaho capital gains deduction. It stated, in pertinent part:

Deduction of capital gains. (1) If an individual taxpayer reports capital gain net income in determining taxable income, eighty percent (80%) in taxable year 2001 and sixty percent (60%) in taxable years thereafter of the capital gain net income from the sale or exchange of qualified property shall be a deduction in determining Idaho taxable income.

(2) The deduction provided in this section is limited to the amount of the capital gain net income from all property included in taxable income. Gains treated as ordinary income by the Internal Revenue Code do not qualify for the deduction allowed in this section. The deduction otherwise allowable under this section shall be reduced by the amount of any federal capital gains deduction relating to such property, but not below zero.

(3) Property held by an estate, trust, S corporation, partnership, limited liability company or an individual is "qualified property" under this section if the property had an Idaho situs at the time of sale and is:

- (a) Real property held at least twelve (12) months;
- (b) Tangible personal property used in Idaho for at least twelve (12) months by a revenue-producing enterprise;

\* \* \*

- (4) As used in this section "revenue-producing enterprise" means:
  - (a) The production, assembly, fabrication, manufacture, or processing of any agricultural, mineral or manufactured product;
  - (b) The storage, warehousing, distribution, or sale at wholesale of any products of agriculture, mining or manufacturing;
  - (c) The feeding of livestock at a feedlot;
  - (d) The operation of laboratories or other facilities for scientific, agricultural, animal husbandry, or industrial research, development, or testing.

Rule 172 stated the following with regard to what constitutes a "revenue producing enterprise:"

Idaho Capital Gains Deduction -- Revenue-Producing Enterprise -

Section 63-3022H, Idaho Code. (3-20-97)

01. In General. Only the activities listed in Section 63-3022H(4), Idaho Code, qualify as a revenue-producing enterprise. A revenue-producing enterprise does not include retail sales, professional, managerial, or repair services. (3-20-97)

The S corporation, [Redacted]., was a sandwich shop. The petitioners contend, that they are entitled to the deduction:

[Redacted] takes various agriculture [sic] products and processes them into one product for final consumption. They take agricultural products and produce bread, they also processes [sic] lettuce, meat, and other sandwich items so they can be used in the final product. [Redacted]. is different then [sic] going to a retail store where an [sic] person purchases individual items and takes them home.

[Redacted]. should be allowed the Idaho Capital Gains Deduction because it meets the requirements of having tangible personal property used in Idaho for at least twelve months by a revenue producing enterprise.

For the proposition that the S corporation was engaged in the processing of agricultural products, the petitioners cite from 7 USC 6502 Definitions:

- (1) Agricultural product The term "agricultural product" means any agricultural commodity or product, whether raw or processed, including any commodity or product derived from livestock that is marketed in the United States for human or livestock consumption.

\* \* \*

(17) Processing The term “processing” means cooking, baking, heating, drying, mixing, grinding, churning, separating, extracting, cutting, fermenting, eviscerating, preserving, dehydrating, freezing, or otherwise manufacturing, and includes the packaging, canning, jarring, or otherwise enclosing food in a container.

While the petitioners appear to contend that the sandwich shop is not “retail,” they have cited no authority to support this contention. They have not supplied any factual argument to indicate that there is a significant wholesale side to the business. The Commission finds that the business is a “retail” business.

Although the [Redacted] was owned by the S corporation, it is less than clear that it was used in that business. If [Redacted] is used in a business, the owner is allowed a depreciation deduction with regard to that asset. But no depreciation is allowed for the portion of the [Redacted] personal use by the corporations president. Noyce v. Commissioner, 97 TC 670 (1991); Clymer and Denison Poultry & Egg Co., T. C. Memo 1984-203. In the reporting of the sale of the airplane, the cost or other basis is shown as \$88,597. The petitioner indicated that no depreciation had been claimed on [Redacted], thereby also claiming an adjusted basis in the amount of \$88,507. It would appear that there is, at a minimum, a significant question as to whether the [Redacted] was used in the business of the S corporation.

What the petitioners seek, in this matter, is a deduction. The Idaho Supreme Court has addressed the allowance of deductions, in part, as follows:

The Stangs urge this Court to "construe" the Idaho Income Tax Code in a manner that would permit the Stangs 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 Stangs 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.

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

Pursuant to the Commission's finding that the business is a "retail" business and, therefore, not a "revenue producing enterprise" as set out in Idaho Code § 63-3022H(4), and to the question as to whether the [Redacted] was used in the business of the S corporation, the liability asserted by the auditor is affirmed

THEREFORE, the Notice of Deficiency Determination dated September 2, 2011, 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 August 15, 2012):

<u>YEAR</u>	<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
2008	\$3,343	\$503	\$3,846

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 \_\_\_\_\_ 2012.

IDAHO STATE TAX COMMISSION

\_\_\_\_\_  
COMMISSIONER

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_\_ day of \_\_\_\_\_ 2012, 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.

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