

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

|                                 |   |                  |
|---------------------------------|---|------------------|
| In the Matter of the Protest of | ) |                  |
|                                 | ) | DOCKET NO. 25057 |
| [Redacted],                     | ) |                  |
|                                 | ) |                  |
| Petitioners.                    | ) | DECISION         |
| _____                           | ) |                  |

The petitioners protest the Notice of Deficiency Determination issued by the auditor for the Idaho State Tax Commission (Commission) dated March 27, 2012. The Notice of Deficiency Determination (NODD) asserted additional liability for Idaho income tax, penalty, and interest in the total amount of \$8,118 for 2008.

The only issue in this docket is whether the petitioners are entitled to deduct net operating losses incurred in 2006 and 2007 on their 2008 Idaho income tax return. The petitioners timely filed their 2008 Idaho income tax return. The auditor disallowed the net operating loss deduction on the 2008 return since the petitioners did not elect to forgo the carryback of the net operating loss. Accordingly, the auditor determined that the loss should have been carried back to 2004 and 2005 where the losses would have been fully absorbed, leaving none of the net operating loss to have been carried forward to 2008. At the time that the NODD was issued to the petitioners, the statute of limitations had expired for the filing of a claim to carry the net operating loss back to 2004 or 2005. The adjustment reflected in the NODD also included a small adjustment to the itemized deductions claimed by the petitioners. However, in a modified report sent to the petitioners after the issuance of the NODD, this adjustment was reversed.

The petitioners protested the NODD raising the following objection:

Our election to carryforward losses from tax years 2006 & 2007 are valid as we complied with Idaho Section 63-3022(c)(05.b). We attached an Idaho election (63-3022(c)(05.a) to both returns. Additionally, we attached a complete copy of our federal returns including the federal election as per (63-3022(c)(05.b) to both

returns. For both years they were both attached as the very last two pages following the federal return. By definition, the federal election is part of the federal return and per Idaho rules the federal return must be attached to our state return(s).

That the petitioners incurred the losses is not in question. The question to be addressed is whether the petitioners are entitled to carry the loss forward rather than carrying the loss to an earlier year. Idaho Code Section 63-3022 stated [2007], in pertinent part:

(c) (1) A net operating loss for any taxable year commencing on and after January 1, 2000, shall be a net operating loss carryback not to exceed a total of one hundred thousand dollars (\$100,000) to the two (2) immediately preceding taxable years. Any portion of the net operating loss not subtracted in the two (2) preceding years may be subtracted in the next twenty (20) years succeeding the taxable year in which the loss arises in order until exhausted. The sum of the deductions may not exceed the amount of the net operating loss deduction incurred. At the election of the taxpayer, the two (2) year carryback may be foregone and the loss subtracted from income received in taxable years arising in the next twenty (20) years succeeding the taxable year in which the loss arises in order until exhausted. The election shall be made as under section 172(b)(3) of the Internal Revenue Code. An election under this subsection must be in the manner prescribed in the rules of the state tax commission and once made is irrevocable for the year in which it is made. (Underlining added.)

Rule 201 set forth the manner prescribed for the making of the election to forego the carryback of the net operating loss. It stated, in part:

05. Timing and Method of Electing to Forego Carryback. (3-30-01)

a. Net operating losses incurred in taxable years beginning prior to January 1, 2001. The election must be made by the due date of the loss year return, including extensions. Once the completed return is filed, the extension period expires. Unless otherwise provided in the Idaho return or in an Idaho form accompanying a return for the taxable year, the election referred to in this Subsection shall be made by attaching a statement to the taxpayer's income tax return for the taxable year of the loss. The statement must contain the following information: (3-30-01)

i. The name, address, and taxpayer's social security number or employer identification number; (3-20-97)

ii. A statement that the taxpayer makes the election pursuant to Section 63-3022(c)(1), Idaho Code, to forego the carryback provision; and (7-1-99)

iii. The amount of the net operating loss. (3-20-97)

b. Net operating losses incurred in taxable years beginning on or after January 1, 2001. The election must be made by the due date of the Idaho loss year return, including extensions. Once the completed Idaho return is filed, the extension period expires. The election shall be made by either attaching a copy of the federal election to forego the federal net operating loss carryback to the Idaho income tax return for the taxable year of the loss or following the requirements of Subsection 201.05.a. (3-30-01)

c. If the election is made on an amended or original return filed subsequent to the time allowed in Subsections 201.05.a. and 201.05.b., it is considered untimely and the net operating loss shall be applied as provided in Subsection 201.04.b. (3-30-01)

The petitioners' 2006 and 2007 Idaho income tax returns were filed in paper form (as opposed to having been e-filed). The 2006 Idaho income tax return was received on or about October 11, 2007. The petitioners' 2007 Idaho income tax return was received by the Tax Commission on or about February 27, 2008. Both returns were prepared by the same preparer, [Redacted], CPA. In those returns, as held by the Tax Commission, no indications were present indicating that the petitioners intended to forgo the carryback of the net operating loss. The petitioners could have elected to forgo the carryback of the net operating loss by checking a box on the face of the Idaho Form 40. The petitioners concede that this was not done. The other method of forgoing the carryback of the net operating loss was to attach a statement to the return stating their wishes. The petitioners contend that this was done on both the 2006 and 2007 returns. However, the Commission has no record of receiving such a statement for either year.

The petitioners could have carried the loss in question to the two prior years. However, the petitioners did not file a claim for either of those years to claim this available loss. Upon receiving the notice from the auditor that the net operating loss was going to be disallowed on

the 2008 return, the representatives for the petitioners advised the auditor that it had been their clients' intent to forego the carryback of the net operating loss and that an election had been attached to the back of both returns stating that they intended to forego the carryback of the net operating losses. The petitioners' contention is that the Tax Commission lost the attached schedule from both the 2006 and 2007 returns.

The petitioners cite as authority for their position the Tax Court decision in Conill v. Commissioner, T. C. Memo 1975-98 which stated, in part:

We heard testimony presented by some four witnesses who swore that they met in the office of petitioners' lawyer late in November or early in December of 1965, that Guido filled out two election forms (prepared by the lawyer), one for himself and one for his mother, that each signed his or her respective form, that both forms were placed in a single stamped envelope addressed to the district director at Jacksonville, that the envelope was sealed, and that upon leaving the lawyer's office the envelope was deposited in a mail box outside the building in which the office was located. The Government presented evidence as to the manner in which such elections were processed in the office of the district director at Jacksonville, and that a search of the files at the Jacksonville office of the district director failed to reveal that any such election had been received by that office.

As indicated above, the matter is purely one of fact, and upon the basis of the evidence before us, taking into account our evaluation of the credibility of the witnesses and the strength of their testimony, we have concluded (although without strong conviction) that petitioners in fact timely made the elections required by section 172(b)(3)(C)(iii). We so find as a fact.

The federal courts have dealt with similar issues in which the allegation was that the Internal Revenue Service had lost in multiple mailings as is here the case. From the Tax Court's decision in Jackson v. Commissioner, T.C. Memo 1999-203 we find:

Petitioner contends that she mailed her returns for 1993 and 1994 on September 10, 1994, and August 10, 1995, respectively. She states that she "can only speculate that her returns were improperly credited under a previous name, mis-filed, or lost by the IRS." In her posttrial memorandum, petitioner asserts for the first time that the statute of limitations bars the notice for 1993 and that, therefore, all issues for that year are "moot". Her statute of limitations claim is not timely. See Rule 39. In any event, we are not persuaded that petitioner's returns were filed as she asserts.

Petitioner's testimony provided neither details nor corroboration that she mailed her returns on the dates that she claims to have mailed them. Her speculation as to possible misfiling or loss by the IRS does not identify any alternative name that she has ever used or any reason to believe that returns for 2 consecutive years, filed 11 months apart, would have been misplaced. Petitioner presented no reliable evidence that she secured an extension of time to file her 1994 return or that she had reasonable cause for belated filing of either return. Even by petitioner's account, her returns were late.

From the Tax Court's decision in Boone v. Commissioner, T.C. Memo. 1997-102, we find:

Petitioner testified that he mailed their 1985, 1986, and 1987 tax returns on May 26, 1986, May 30, 1987, and May 24, 1988, respectively. He contends that the returns were timely filed because they were deposited with proper postage in a mailbox outside the main post office in Perrine, Florida, each year within the extended filing periods allowed. He then argues that once the returns were placed in the U.S. Postal Service mailbox, petitioners' responsibility for their delivery ended. As to what may have happened to the returns, petitioner speculates that: (1) The mailbox was tampered with by vandals or thieves; (2) vandals unbolted the mailbox from its base and took the mail; (3) postal employees stole the mail; or (4) the IRS lost or misfiled the returns because of its ineptitude. To say the least, we regard such speculations as farfetched and unreliable. Moreover, we think it is highly improbable that the returns allegedly deposited with the U.S. Postal Service in late May for 3 successive years would not have been delivered to the IRS or that each return was lost or misplaced by the IRS.

Petitioner also offered his son's testimony in an effort to corroborate his own to show that petitioners timely filed their returns for each year. Petitioner and his son testified that petitioners' Federal income tax return for each of the years in issue was mailed during their drive home from work. But the son later testified that the returns were mailed late at night. When asked by the Court to reconcile the two seemingly conflicting statements, the son admitted that he did not remember the specific circumstances surrounding the mailing of petitioners' returns. However, the son testified that his returns for 1985 through 1987, which he thought were mailed at the same time petitioners' returns for these years were mailed, were timely received by the IRS.

Respondent's position is that petitioners have failed to prove that their returns for the years in issue were timely filed. We agree.

Section 7502(a) provides that the date of the U.S. postmark stamped on the cover in which a return is filed is deemed the date the return was filed if the postmark date is within the period for filing the return and the return is delivered after the

date it was required to be filed. If no evidence establishes the postmark date of a return, the date the return was delivered is the date the return was filed. Here petitioners provided no evidence of a U.S. postmark. Consequently, section 7502 is not applicable.

It has been held, however, that section 7502 does not displace the common law presumption of delivery (the mailbox rule). Anderson v. United States, 966 F.2d 487, 491 (9th Cir. 1992); cf. Konst v. Florida E. Coast Ry., 71 F.3d 850, 854 (11th Cir. 1996). Under the common law mailbox rule, the proper mailing of a return gives rise to a rebuttable presumption of delivery. Anderson v. United States, supra at 491. When a taxpayer is unable to produce documentary evidence that a return was mailed, we have allowed indirect, credible evidence to prove the date of postmark. See Estate of Wood v. Commissioner, 92 T.C. 793, 798 (1989) (accepting testimony of a postmistress who affixed the postmark to the envelope containing the return), affd. 909 F.2d 1155 (8th Cir. 1990). By contrast, petitioners in this case have not produced credible evidence that their returns were timely mailed and postmarked. We are not persuaded by petitioner's self-serving testimony. We think it is significant that petitioner failed to inquire about the refunds claimed on the returns. It seems improbable to us that if petitioners had filed returns showing refunds due for 1985 through 1987, petitioner, an income tax return preparer, would not have made certain that the refunds were received.

In addition, we do not find the testimony of petitioners' son credible as to whether, or when, they mailed their returns for the years in issue. His testimony was contradictory and uncertain. It is unlikely that petitioners' returns were mailed at the same time as, and along with, their son's returns for 1985 through 1987 because their son's returns were apparently received by the IRS.

The petitioners contend that it was never their intent to carry their net operating losses back to the prior years. In addressing a somewhat similar argument, the Fifth Circuit Court of Appeals stated, in part:

Taxpayers claim that when they filed their 1976 federal income tax return, it was obvious they would receive little or no benefit from carrying the 1976 net operating loss back to prior years, allegedly because their gross income in 1973 and 1974 consisted primarily of capital gains that would have consumed the 1976 net operating loss without any significant tax benefit. Furthermore, taxpayers argue, by the time the 1976 return was filed they knew that 1977 was going to be a highly profitable year. Their accountant testified at trial that taxpayers intended to make the election, and taxpayers introduced his workpapers at trial to corroborate his testimony that only a carryforward of the 1976 net operating loss was intended and that a carryback was never considered.

But nineteen bishops swearing as to taxpayers' subjective intent would not carry this argument, because it contends for an irrelevant fact. The Commissioner did not have access to the taxpayers' workpapers and was not otherwise informed of their state of mind. The Line 11 entry on Form 4625 indicated only ambiguous intentions at best because taxpayers remained free to amend their 1976 return to redistribute their net operating loss over previous years. As stated in Valdes v. Commissioner, 60 T.C. at 915, a case with facts analogous to those here, taxpayers "filed nothing which, if the tables were turned ... would show that they were committed to that election and its statutory consequences." The irrevocable election necessary to fulfill the essence of the statute was simply never made.

Young v. Commissioner, 783 F.2d 1201, 1206 (CA 5, 1986).

The Commission finds that the petitioners have failed to carry their burden of proof that they are entitled to the deduction sought. Accordingly, the Commission finds that the only appropriate adjustment to the NODD is that made in the auditor's modified report.

THEREFORE, the NODD dated March 27, 2012 is hereby MODIFIED, and as so MODIFIED is APPROVED, AFFIRMED, and MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the petitioners pay the following tax, penalty, and interest (computed to February 28, 2013):

| <u>YEAR</u> | <u>TAX</u> | <u>PENALTY</u> | <u>INTEREST</u> | <u>TOTAL</u> |
|-------------|------------|----------------|-----------------|--------------|
| 2008        | \$6,799    | \$340          | \$1,160         | \$8,299      |

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 \_\_\_\_\_ 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.  
  
\_\_\_\_\_