

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

In the Matter of the Protest of	)	
	)	DOCKET NO. 25575
[Redacted],	)	
	)	
Petitioners.	)	DECISION
_____	)	

[Redacted] (petitioners) protest the Notice of Deficiency Determination issued by the auditor for the Idaho State Tax Commission (Commission) dated February 12, 2013. The Notice of Deficiency Determination denied a requested refund in the amount of \$4,730 plus applicable interest for 2005.

The petitioners were, at all times relevant to this matter, residents of Idaho. They filed their 2008 Idaho income tax return claiming a net operating loss (NOL) incurred in 2007. The auditor denied this loss stating that the NOL should have been carried back to 2005, since the petitioners had not elected to forego the carryback of the NOL. This produced a liability for 2008. The petitioners filed an administrative appeal to that determination. The Commission affirmed the Notice of Deficiency Determination asserting the 2008 liability in a Decision dated May 21, 2012. The petitioners did not appeal the Decision of the Commission.

The question addressed in determining the 2008 liability, was whether the petitioners were entitled to carry the loss forward rather than carrying the loss to an earlier year. Idaho Code § 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' 2007 Idaho income tax return was filed electronically on April 11, 2008. In that return, as received by the Commission, no indication was present indicating that the petitioners

intended to forgo the carryback of the NOL. A box was provided on the return which could be checked indicating that the taxpayers elected to forgo the carryback of the NOL. This box was not checked. The preparers indicate that something in their computer indicated that an attached statement was sent in the electronic filing.

The petitioners could have carried the loss in question to the two prior years. The petitioners had sufficient income in the 2005 and 2006 to have absorbed the NOL. However, the petitioners did not file a claim for either of those years to claim this available loss prior to the issuance of the Notice of Deficiency Determination for 2008.

In December 2012, the petitioners filed an amended 2005 return requesting a refund from carrying the 2007 NOL back to 2005. In the amended return, the petitioners cited the federal mitigation statutes as authority for being entitled to the refund despite the expiration of the statute of limitations set forth in Idaho Code § 63-3072. The auditor denied this amended return stating that the statute of limitations as set forth in Idaho Code § 63-3072(e) had passed and that the petitioners were, therefore, not entitled to the requested refund. Idaho Code § 63-3072 stated [2007], in part:

(e) If a claim for credit or refund relates to an overpayment attributable to a net operating loss carryback or a capital loss carryback, in lieu of the period of limitations prescribed in subsection (b) of this section, the period shall be that period which ends with the expiration of the fifteenth day of the fortieth month following the end of the taxable year of the net operating loss or capital loss which results in such carryback.

After the filing of this administrative appeal, the petitioners raised equitable estoppel as grounds for their position. The petitioners also submitted a supplemental argument that quasi-estoppel should apply to this case to compel the Commission to issue the refund for 2005. In support of their quasi-estoppel argument, the petitioners set forth the following:

Quasi-estoppel in this case is met based on these facts:

1. The three year statute of limitation to audit a return allows the Commission and/or a taxpayer three years to change a return. This is well known in the tax law. A one sentence item Idaho Code 63-30729e [sic] allows the forty months to change the NOL election. These two statutes are at odds with each other. The forty month overrides the standard thirty six months. This one sentence is practically unknown – except to the party it benefits, the Tax Commission.
2. The Tax Commission has in the recent years advocated changing the effect of Section 63-3702e [sic]. In fact, as of 2013, the forty month statute is no longer the current law. The Commission effectively admits this was an unfair effect of the law, prior to 2012, and has made a positive change to eliminate the unfair treatment in the future. The recent case load of other taxpayer cases with this same issue is additional evidence of the inequity of the laws and the fact that the Commission is aware of the situation.
3. The Commission's notice was issued August 30, 2011 which was just outside the forty month window to correct the NOL election. The Commission had plenty of opportunity to notify the taxpayer that the 2008 tax return was incorrect (no valid carryover) but they waited until the taxpayer did not have an opportunity to mitigate the effect (forty months after year 2008). They waited to tell the taxpayer that their 2008 was incorrect to make the assessment.

We believe,

1. the Commission had knowledge that a significant amount of the taxpayers had this situation on their returns where an NOL election error existed in the electronic filing;
2. the Commission intentionally waited until this forty month limitation expired to make notice to the taxpayers, and
3. the Commission accepted the 2008 tax return with the NOL carryover and did not promptly issue a Redetermination on that year (knowing that 2007 election was invalid) implied the Commission takes a position and expresses that the 2008 return is correct. It is not until after the forty months expiration that the Commission effectively reverses their position on the 2008 return.

The petitioners cited no authority for their position.

## OPINION

In addressing the mitigation provisions, the petitioners have failed to demonstrate that the state of Idaho has adopted the federal mitigation provisions. The Commission is not aware of any such adoption. Therefore, the Commission finds that Idaho Code § 63-3072(e), as cited by the auditor is the controlling provision of law.

Quite similar situations arise under federal law. In considering such a matter, the United States Court of Claims stated, in part:

This congressional mandate cannot be disregarded by the Commissioner of Internal Revenue nor by the courts. United States v. Garbutt Oil Co., 302 U.S. 528, 58 S.Ct. 320, 82 L.Ed. 405. In that opinion, 302 U.S. on pages 533 to 534, 58 S.Ct. on page 323, the Supreme Court said: “\* \* \* The argument confuses the power of the Commissioner to disregard a statutory mandate with his undoubted power to waive the requirements of the Treasury regulations. The distinction was pointed out in United States v. Memphis Cotton Oil Co., 288 U.S. 62, 71, 53 S.Ct. 278, 281, 77 L.Ed. 619, wherein it was said: ‘The line of division must be kept a sharp one between the function of a statute requiring the presentation of a claim within a given period of time, and the function of a regulation making provision as to form. The function of the statute, like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research.’ In the cited case, and others decided at about the same time, we held that, while the Commissioner might have enforced the regulation and rejected a claim for failure to comply with it in omitting to state with particularity the grounds on which the claim was based, he was not bound to do so, but might waive the requirement of the regulation and consider a general claim on its merits. This was far from holding that after the period set by the statute for the filing of claims he had power to accept and act upon claims that complied with or violated his regulations. Tucker v. Alexander, 275 U.S. 228, 48 S.Ct. 45, 46, 72 L.Ed. 253, cited by the respondent, is clearly distinguishable. \* \* \* The opinion expressly recognized that no officer of the government has power to waive the statute of limitations and cited, in support of the proposition, Finn v. United States, 123 U.S. 227, 8 S.Ct. 82, 31 L.Ed. 128, saying: ‘Such waivers if allowed would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not exist—consequences which do not attach to the waiver here.’” Tucker v. Alexander, 275 U.S. 228, 232, 48 S.Ct. 45, 72 L.Ed 619.

Byron Weston Co. v. United States, 87 F.Supp. 955, 956-957 (1950).

The Idaho Supreme Court stated, with regard to asserting equitable estoppel against a governmental agency:

Although estoppel is generally not applicable to state agencies acting in a sovereign or governmental capacity, Sagewillow, Inc. v. Idaho Dep't of Water Res., 138 Idaho 831, 845, 70 P.3d 669, 683 (2003), it may apply where required by notions of justice and fair play. Brandt v. State, 126 Idaho 101, 105, 878 P.2d 800, 805 (Ct.App.1994).. *See also* City of Sandpoint v. Sandpoint Ind. Hwy. Dist., 126 Idaho 145, 151, 879 P.2d 1078, 1084 (1994) (holding that estoppel may apply against a highway district “in order to prevent manifest injustice”). Still, in order to state a claim for promissory, equitable, and quasi-estoppel, a plaintiff must at least allege, among other things, a promise or representation by the party to be estopped. Brown v. City of Pocatello, 148 Idaho 802, 807–08, 229 P.3d 1164, 1169–70 (2010) (Promissory estoppel requires a promise inducing reasonable and detrimental reliance.); Ogden v. Griffith, 149 Idaho 489, 495, 236 P.3d 1249, 1255 (2010) (Equitable estoppel requires “a false representation or concealment of a material fact.”); Mortensen v. Stewart Title Guar. Co., 149 Idaho 437, 443, 235 P.3d 387, 393 (2010) (Quasi-estoppel involves a party taking “a different position than his or her original position.”).

Idaho Wool Growers Association, Inc. v. State of Idaho, 302 P.3d 341, 348 (2012).

In another case, the Idaho Supreme Court addressed the application of equitable estoppel as follows:

The Naranjos assert that reasonable reliance may constitute good cause, but have failed to demonstrate that their reliance was reasonable. In our view, it is not reasonable to rely on an opposing attorney’s representation or statement of the law when both attorneys have readily accessible means to read, interpret, and apply it. See Campbell, 144 Idaho at 257–58, 159 P.3d at 894–95 (no good cause when service was late because one attorney accepted in good faith that the other attorney would remind him to serve process); Regjovich v. First Western Investments, Inc., 134 Idaho 154, 157–58, 997 P.2d 615, 618–19 (2000) (denying claim of equitable estoppel because party had readily accessible means to discover the truth, and finding no good cause on other grounds). Cf. Veal v. United States, 84 Fed.Appx. 253, 255–56 (3d Cir.2004) (reliance upon the clerk’s advice did not constitute good cause because clerk’s office has no duty to provide step-by-step guidance). The Naranjos were able to follow other procedural requirements set forth in ITCA without the aid of the attorney general’s office. With nothing to indicate that the Naranjos’ trial attorney could not have independently ascertained or verified the proper service procedures, we conclude that their reliance on the advice of a deputy attorney general was not reasonable, and does not constitute good cause.

Naranjo v. Idaho Department of Correction, 265 P.3d 529, 535 (2011).

The U. S. Tax Court addressed the estoppel matter as follows:

Petitioners also argue that the doctrines of laches and estoppel should apply here. The defense of laches, a purely equitable doctrine, is not available where a period of time in which an action may be brought is fixed by statute. We have previously held that this Court is not at liberty to modify a fixed period prescribed by the statute of limitations in which the Commissioner is authorized to act. Saigh v. Commissioner, 36 T.C. 395, 424-425 (1961). Here, the record clearly establishes that the issuance of the notices of deficiency for the years in issue was timely under the statute. Nor do we believe that the defense of estoppel applies under the circumstances here present. Initially, we note that the doctrine of estoppel should be applied against the Commissioner with the utmost restraint. Schuster v. Commissioner, 312 F.2d 311 (9th Cir. 1962), affg. 32 T.C. 998 (1959). In any event, the essential elements of estoppel are not present here. These elements are (1) there must be a false representation or a wrongful misleading silence; (2) the error must be in a statement of fact and not in an opinion or statement of law; (3) the person claiming estoppel must be ignorant of the true facts; and (4) he must be adversely effected by the acts or statements of the person against whom an estoppel is claimed. Underwood v. Commissioner, 63 T.C. 468, 477-478 (1975), affd. 535 F.2d 309 (5th Cir. 1976). There is no evidence in this case to establish these elements and, consequently, we must conclude the defense of estoppel is not applicable.

Martin's Inc. of Moberly, Et Al. v. Commissioner, T.C. Memo 1987-419.

In discussing the various types of estoppel and their application to tax cases, the Tax Court stated, in part:

Estoppel and its various counterparts, such as quasi-estoppel, equitable estoppel, laches, election, and staleness of claim, are affirmative defenses which must be pleaded and proved. In his amendment to amended answer, filed May 18, 1976, respondent raised estoppel as a defense. While, on brief, respondent discusses only quasi-estoppel (duty of consistency), the language of respondent's pleading appears broad enough to encompass all of the above counterparts of estoppel. [footnote omitted] We recognize that these various species of estoppel are distinct conceptions but they are similar enough in purpose to at times make attachment of the correct label difficult. Since one of the principal purposes of all of these doctrines is to discourage repetitious litigation and litigation of stale claims, the courts have at least an indirect interest in the application of the doctrines, and we think this issue is very suitable for their application. Compare Blonder-Tongue Labs Inc v University Foundation, 402 U.S. 313 (1971). We also recognize that these doctrines are based on equitable principles, but they have been applied by the courts in tax cases. See Sangers Home for Chronic Patients v Commissioner 72 T.C. 105, 114-115 (1979); Mayfair Minerals Inc v Commissioner, 56 T.C. 82 (1971), affd. 456 F.2d 622 (5th Cir. 1972); Bartel v Commissioner 54 T.C. 25

(1970); United States v Matheson 532 F.2d 809, 820-821 (2d Cir. 1976); Beltzer v United States 495 F.2d 211 (8th Cir. 1974).

Martin's Inc. of Moberly, et al v. Commissioner, T.C. Memo 1987-419.

In addressing the application of laches to a portion of the law in which Congress specifically prescribed a time period, the Tax Court opined:

Petitioners appear also to raise the defense of laches. Section 276 (a), I.R.C. 1939, provides as follows:

SEC. 276. SAME— EXCEPTIONS.

(a) FALSE RETURN OR NO RETURN.— In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

In so legislating, Congress has fixed the limitation time which applies in the case where no return was filed. No personal holding company return for 1946 was filed by Investment. The statute of limitations did not commence to run and the assessment of the personal holding surtax was not barred. Commissioner v. Lane-Wells Co., 321 U.S. 219. The prescribed time in which the Commissioner could act having been fixed, we are not at liberty to shorten or lengthen that time for any reason, including any theory of laches. Cf. Phillips v. Commissioner, 283 U.S. 589; United States v. Summerlin, 310 U.S. 414; Tobacco and Allied Stocks v. Transamerica Corp., 143 F.Supp. 323 (D. Del.), affd. 244 F.2d 902 (C.A. 3).

Saigh v. Commissioner, 36 T.C. 395, 424-425 (1961).

Equitable estoppel requires detrimental reliance. Johnson v. McPhee, 147 Idaho 455, 461, 210 P.3d 563, 569 (2009). See Wing v. Munns, 123 Idaho 493, 500–01, 849 P.2d 954, 961–62 (Ct.App.1992); Mikesell v. Newworld Dev. Corp., 122 Idaho 868, 874, 840 P.2d 1090, 1096 (Ct.App.1992); Frantz, 111 Idaho at 1010, 729 P.2d at 1073. The petitioners have failed to allege any action, promise, or representation on behalf of the Commission upon which they relied to their

detriment. Silence usually is not sufficient to compel a finding of estoppel. The Idaho Supreme Court has addressed this:

Silence generally cannot be relied on to support estoppel. *See French v. Sorensen*, 113 Idaho 950, 958, 751 P.2d 98, 106 (1988) overruled on other grounds by *Cardenas v. Kurpjuweit*, 116 Idaho 739, 779 P.2d 414 (1989).

*Thomas v. Arkoosh Produce, Inc.*, 48 P.3d 1241, 1247; 137 Idaho 352, 358 (2002).

Unlike equitable estoppel, quasi-estoppel does not require detrimental reliance. *Long v. Turner*, 134 F.3d 312, 318 (5<sup>th</sup> Cir. 1998); *Addicks Services, Inc. v. GGP-Bridgeland, LP*, 596 F.3d 286, 300 (5<sup>th</sup> Cir. 2010); *Kritt v. Kritt* (In re Kritt), 190 B.R. 382, 388 (9th Cir. BAP 1995).

In addressing the standards for the application of quasi-estoppel, the Fifth Circuit Court of Appeals stated, in part:

Unlike other species of estoppel, quasi-estoppel “requires no showing of misrepresentation or detrimental reliance.” *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 240 (Tex.App.—Corpus Christie 1994, writ denied). It does, however, assume detriment and requires the inconsistency to be a cause of that detriment. *Cook Composites, Inc. v. Westlake Styrene Corp.*, 15 S.W.3d 124, 136 (Tex.App.—Houston 2000, writ denied) (testimony of the defendant’s executive was not a cause of the plaintiff’s pre-litigation detriment); *Maguire Oil Co. v. City of Houston*, 69 S.W.3d 350, 367 (Tex.App.—Texarkana 2002, writ denied) (a party “should not be permitted to adopt an inconsistent position and thereby cause loss or injury to the other”). Reliance is therefore relevant where it speaks strongly to causation and unconscionability. Consequently, where a party asserts quasi-estoppel as an excuse for its failure to file a claim in a timely fashion, unconscionability “necessarily requires a reliance component.” *Douglas v. Moody Gardens, Inc.*, No. 14–07–00016–CV, 2007 WL 4442617, \*4 (Tex.App.—Houston Dec. 20, 2007, no writ) (unpublished). In *Douglas*, when an employee failed to file a worker’s compensation claim within the applicable time limit, quasi-estoppel could not lie in her employer’s changed position as to whether her injury had occurred within the course of employment. The plaintiff “had her own attorney to advise regarding her rights and responsibilities” under the law, “including the need to timely file a workers’ compensation claim.” *Id.* She was “not denied recovery for her injury based on Moody’s inconsistent positions,” but “because she elected not to timely pursue a workers’ compensation claim.” *Id.* In these circumstances, there was neither causation nor unconscionability.

*Hartford Fire Insurance Company v. City of Mont Belvieu, Texas*, *supra* at 298.

The petitioners also allege that the Commission reversed its position regarding the treatment of the NOL. No notice of an election to forgo the carryback was delivered to the Commission. Therefore, the staff of the Commission was not on notice from the filing of the 2007 Idaho income tax return that the petitioners wished to carry the NOL forward as opposed to carrying it back. The position of the Commission has been that if no election is filed electing to forgo the carryback of the NOL that the NOL must be carried back before it can be carried forward. This position has not changed. In fact, the position was similar in 1978, 1979, and 1980. At that time, there was no available election to forgo the carryback but, as in this docket, a claim for a refund due to carrying the NOL back was filed after the fifteenth day of the fortieth month after the close of the loss year. In a similar case, the auditor for the Commission denied the refund claim and the case found its way to the Idaho Supreme Court. The court upheld the denial of the refund. Harmans of Idaho, Inc. v. Idaho State Tax Commission, 114 Idaho 740 (1988).

The petitioners contend that there is a conflict in the Idaho law between the language setting out the time for the election to be made to forgo the carryback of the NOL and the period prescribed for the filing of the claim to carry the NOL back to the prior years. As was stated in Rule 201.05 (above), the election to forgo the carryback of the NOL is the due date of the loss year return, including extensions. The due date for the filing of the claim for refund from carrying the NOL back is the fifteenth day of the fortieth month following the end of the loss year. As the petitioners point out, these dates are different. However these two deadlines are for two different events. One such event is the time for the filing of the election to forgo the carryback of the NOL. The other is the deadline for the filing of a claim to carry the NOL back to previous years. Therefore, the Commission finds no inherent conflict between these provisions.

In discussing the interaction between equitable theories such as estoppel versus a statute of limitations, one Tax Court judge stated, in part:

*Secondly*, the Supreme Court has recently indicated that, as to the Tax Court, the statute of limitations (the major impediment that equitable recoupment is designed to circumvent) must be given a strict application, and the equities are unavailing. See Commissioner v. Lundy, 516 U.S. 235 (1996). Thus, this Court was barred from holding that Lundy overpaid his income taxes even if his claim for refund would have been timely in a District Court. See *id.* at 251–253 (majority op.), 253–254, 263 (Thomas, J., dissenting). Also, Lundy lost even though it was clear that Lundy and his wife had substantially overpaid their income taxes. See *id.* at 237. Lundy did not involve the staleness, missing documents, and faded memories that statutes of limitations are generally established to guard against. The majority of the Supreme Court determined that there was no room for legal fictions suggested by Justices Thomas and Stevens, the Court of Appeals for the Fourth Circuit, or Lundy’s counsel, to correct this obvious injustice, and the Government was permitted to hold onto the Lundys’ overpaid taxes solely because of the text of the then-applicable statute of limitations. Of course, Lundy’s situation does not fit into the current mold of equitable recoupment. The relevance of Lundy to our discussion is the Supreme Court’s focus on the details of statutory grants and limitations of power and jurisdiction, and that Court’s reluctance to modify the strictness of the statute even to correct an obvious injustice.

The dissent in Estate of Branson v. Commissioner, 113 T.C. 6, 46-47 (1999) (Chabot, J. dissenting).

Essentially, the petitioners’ argument is that the auditor for the Commission had a duty to advise the petitioner that they needed to carry the 2007 NOL back. The auditor bears no duty to advise taxpayers. Montgomery v. Commissioner, 65 T.C. 511, 521 (1975). Also, as stated in Thomas v. Arkoosh Produce, Inc., silence generally cannot be relied on to support estoppel. As in Hartford Fire Insurance Company case, *supra*, the failure to file a timely claim, as in the instant case, the court found that there was neither causation nor unconscionability. The Commission finds that the petitioners have failed to set forth a compelling case for their estoppel or quasi-estoppel arguments. Accordingly, the Notice of Deficiency must be affirmed.

THEREFORE, the Notice of Deficiency Determination dated February 12, 2013, is hereby APPROVED, AFFIRMED, AND MADE FINAL.

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 \_\_\_\_\_ 2013.

IDAHO STATE TAX COMMISSION

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COMMISSIONER

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_\_ day of \_\_\_\_\_ 2013, 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.