

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

In the Matter of the Protest of )  
[Redacted], ) DOCKET NO. 25749  
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 )  
Petitioner. ) DECISION  
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\_\_\_\_\_ )

BACKGROUND

On March 25, 2013, the Audit Division (Audit) of the Idaho State Tax Commission (Commission) issued a Notice of Deficiency Determination (NODD) to [Redacted](Petitioners) proposing income tax, penalty, and interest for taxable years 2009 through 2011, in the total amount of \$59,399. On May 24, 2013, the Petitioner filed a timely protest. On June 13, 2013, the file was transferred to the Legal/Tax Policy Division for resolution. On October 16, 2013, the Commission sent the taxpayer a letter that explained the methods available for redetermining an NODD.

A telephonic hearing was held on November 14, 2013. A Commissioner, one of the Deputy Attorneys General, the Multistate Audit Manager and the original Multistate Auditor were in attendance. Two members of the Petitioner’s tax department represented the Petitioner.

ISSUES

Whether the Petitioner can utilize a Net Operating Loss carryover (NOL), created by a wholly-owned subsidiary corporation that was merged into the parent corporation after the loss was created.

DISCUSSION

[Redacted] merged into [Redacted] on December 20, 2005. Prior to this merger, [Redacted] filed their Idaho corporation income tax returns on a separate company basis and

showed large Idaho NOLs. During the telephonic hearing, the Petitioner was asked how long [Redacted] was owned by [Redacted]. The answer was that [Redacted] first acquired [Redacted] in the year 2000. The [Redacted] representatives were then asked why this subsidiary was filing on a separate basis. They did not have a ready answer since they were not the ones that made that decision. There can be situations where a separate filing would be appropriate, however, in this case there are a couple of the elements that would indicate unity which would require using the combined method.

### LAW AND ANALYSIS

There are two important legal issues to consider in this case. First, is the correct calculation of the NOL carryover. Idaho uses the combined reporting method for a group of companies that have more than fifty percent common ownership if they are in a “unitary” operation.

Idaho Code § 63-3027 (t) For purposes of this section and sections 63-3027B through 63-3027E, Idaho Code, the income of two (2) or more corporations, wherever incorporated, the voting stock of which is more than fifty percent (50%) owned directly or indirectly by a common owner or owners, when necessary to accurately reflect income, shall be allocated or apportioned as if the group of corporations were a single corporation, in which event:

(1) The Idaho taxable income of any corporation subject to taxation in this state shall be determined by use of a combined report which includes the income, determined under subparagraph (2) of this subsection, of all corporations which are members of a unitary business, allocated and apportioned using apportionment factors for all corporations included in the combined report and methods set out in this section. The use of a combined report does not disregard the separate corporate identities of the members of the unitary group. Each corporation which is transacting business in this state is responsible for its apportioned share of the combined business income plus its nonbusiness income or loss allocated to Idaho, minus its net operating loss carryover or carryback.

Idaho Income Tax Administrative Rule 201.03 says:

“a. Adjustments to income, including modifications pursuant to Section 63-3021, Idaho Code, in a carryback or carryover year must be made for purposes of

determining, how much, if any, of the net operating loss may be carried over to subsequent years. (4-5-00)

b. Adjustments are made pursuant to the law applicable to the carryback or carryover year. (4-5-00)

c. Adjustments may be made even though the year is closed due to the statute of limitations.”

Rule 201.3 allows the Commission to go back into tax years otherwise closed by the statute of limitations in order to determine the correct amount of NOL being carried over into an open year.

Idaho Income Tax Administrative rules 340-344 outline the principles for determining the existence of a unitary group. Rule 343 lists the same type of business as being one of the indicators of unity. Rule 344 says that to be unitary, corporations must be part of a controlled group which is defined by common ownership. [Redacted] was wholly-owned by [Redacted].

If [Redacted] had been included in a combined return with [Redacted] and others in the unitary group, there would have been a different answer in calculating the NOL carryover for the years 2000 through 2005. Exactly what the NOL should be, or even if there is an NOL, is not something that can be determined with the information available to the Commission. The Idaho losses suffered by [Redacted] would have been added into the income or loss of the total group. The Idaho property, payroll, and sales amounts would have been divided by the everywhere amounts of the group to get the apportionment factor. Therefore, both the factor and the Idaho Taxable income would have been different. Any years between 2000 and 2005 that had a positive amount of income would have reduced or eliminated the NOL. Without the information to calculate the correct Idaho taxable income, there is no way to know what, if any, NOL should be carried over into the 2009 tax year.

The second legal issue to consider is whether the NOL survives a merger.

Idaho Code § 63-3021(c) says, “Subject to the provisions of sections 381 and 382, Internal Revenue Code (IRC), Idaho net operating losses incurred by a corporation will survive a merger.”

IRC § 382(c)(1) requires the continuity of the business enterprise of the loss company after the merger in order to be able to use the losses.

“(1) Except as provided in paragraph (2), if the new loss corporation does not continue the business enterprise of the old loss corporation at all times during the 2-year period beginning on the change date, the section 382 limitation for any post-change year shall be zero. Underline added.

(2) Exception for certain gains.

The section 382 limitation for any post-change year shall not be less than the sum of— (A) any increase in such limitation under—

(i) subsection (h)(1)(A) for recognized built-in gains for such year, and

(ii) subsection (h)(1)(C) for gain recognized by reason of an election under section 338, plus (B) any increase in such limitation under subsection (b)(2) for amounts described in subparagraph (A) which are carried forward to such year.”

Underline added.

During the taxable years prior to that, from 2000 through 2006, [Redacted] reported no Idaho activity. On the Idaho returns filed by [Redacted] in 2006, 2007, and 2008, they wrote “No activity in Idaho” on the returns and just paid the minimum tax plus the permanent building fund tax.

### CONCLUSION

The Commission has concluded that the Petitioner is not allowed to utilize the NOL carryover of [Redacted] There is strong evidence that the Petitioner did not correctly calculate and file their Idaho corporation income taxes for the years 2000 through 2005. Without recalculating all the returns for those years, there is no way to know what the correct NOL is, or whether it should have been utilized in prior years. Also, based on the returns filed, the Petitioner did not continuously operate the business enterprise of the old loss corporation. Based on IRC § 382, the Petitioner cannot carry the loss forward after the merger.

A Notice of Deficiency Determination issued by the Idaho State Tax Commission is presumed to be accurate. Parsons v. Idaho State Tax Com'n, 110 Idaho 572 (Ct. App. 1986). The burden is on the taxpayer to show the deficiency is erroneous. Albertson's, Inc. v. State, Dept. of Revenue, 106 Idaho 810 (1984).

The Commission agrees with Audit's denial of the NOL as filed.

THEREFORE, the NODD dated March 25, 2013, and directed to [Redacted] is hereby AFFIRMED.

<u>YEAR</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
12/31/09	\$ 80	\$ 0	\$ 12	\$ 92
12/31/10	1,593	0	177	1,770
12/31/11	55,352	0	3,951	<u>59,303</u>
			TOTAL	<u>\$61,165</u>

Interest is calculated through August 15, 2014, and will continue to accrue at the rate set forth in Idaho Code section 63-3045.

DEMAND for immediate payment of the foregoing amount is hereby made and given.

An explanation of the petitioner's right to appeal this decision is enclosed.

DATED this \_\_\_\_\_ day of \_\_\_\_\_ 2014.

IDAHO STATE TAX COMMISSION

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COMMISSIONER

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_\_ day of \_\_\_\_\_ 2014, 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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