BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of	)	
	)	DOCKET NO. 25968
[Redacted],	)	
	)	
Petitioners.	)	DECISION
	)	

[Redacted] and [Redacted] (petitioners) protest the Notice of Deficiency Determination issued by the auditor for the Idaho State Tax Commission (Commission) dated July 23, 2013. The Notice of Deficiency Determination asserted an additional liability for Idaho income tax, penalty, and interest in the total amount of $2,217 for 2010.

The petitioners were, at all times relevant to this matter, residents of Idaho. They filed their 2010 Idaho income tax return claiming a net operating loss (NOL) incurred in 2009. The auditor denied this loss, stating that the NOL should have been carried back to 2007 and 2008, since the petitioners had not elected to forego the carryback of the NOL. This produced the liability for 2010. The petitioners filed this administrative appeal.

The question addressed in determining the 2010 liability, is whether the petitioners are entitled to carry the loss forward, rather than carrying the loss to an earlier year. Idaho Code § 63-3022 stated [2009], 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 [Redacted]. 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.

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)
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> i. The name, address, and taxpayer's social security number or employer identification number; (3-20-97)
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> 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)
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> 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' 2009 Idaho income tax return was filed electronically on March 27, 2010. 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 of the return stated that something in their computer indicated that the box had been checked.

The petitioners could have carried the loss in question to the two prior years. The petitioners had sufficient income in the 2007 and 2008 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 2010.

After the filing of this administrative appeal, the petitioners raised quasi-estoppel as grounds for their position. In support of their quasi-estoppel argument, the petitioners set forth the following:

> Quasi-estoppel in this case is met based on these facts:
>
> a. 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.
>
> b. The Tax Commission has in the recent years advocated changing the effect of Section 63-3702(e). In fact, as of 2013, the forty month statute is no longer the current law. Ergo, 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 or the laws and the fact that the Commission is aware of the situation.
>
> c. The Commission's notice was issued June 24, 2013. Five years and one month after the effected [sic] 2007 was filed, <u>but just barely outside the 40 month window</u> to correct the 2009 NOL election (4/15/13). Had the Notice been issued March 24th, instead of June 24th, 2013, the taxpayer would have had notice and time to correct the account. The Commission had plenty of opportunity to notify the taxpayer that the 2010 tax return was incorrect (no valid carryover) but they waited until the taxpayer did not have an opportunity to mitigate the effect (40 months after 2009). They waited beyond 2 years to tell the taxpayers their 2010

was incorrect, yet they only waited ***70 days after the statute expired*** to make the assessment. (Emphasis in original.)

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 the forty month limitation expired to make notice to the taxpayers, and

3. the Commission accepted the 2010 tax return <u>with the NOL carryover</u> and did not promptly issue a Redetermination on that year (knowing that 2009 election was invalid) implies the Commission takes a position and expresses that the 2010 return is correct. It is not until after the forty months expiration that the Commission effectively reverses their position on the 2010 return and, says “That’s not correct. Gotcha!”

The petitioners cited <u>Schuster v. Commissioner</u>, 312 F.2d 311 (9th Cir. 1962) and <u>Grand Central Public Market v. United States</u>, 22 F. Supp. 119 (S.D.Cal. Jan 12, 1938), appeal dismissed, 9 Cir., 98 F.2d 1023.

In <u>Schuster</u>, the [Redacted]audited an estate and found that certain property held in a revocable trust was not includable in the estate in question. The audit report was relied upon by a bank that held the trust assets. Since there was no estate tax due on the trust assets (according to the audit report), the bank distributed the assets. The [Redacted] subsequently changed its position, holding that the trust assets were includable in the estate and that there was an estate tax deficiency. By this time, the statute of limitations had expired for imposing the liability on the estate. The [Redacted] accordingly asserted the liability against the surviving spouse, the bank (as trustee), and the transferee. In addressing the estoppel argument raised by the bank, the court stated, in part:

> The Commissioner takes the position that an estoppel cannot arise because he did not commit any act on which the Bank could have relied. But the Tax Court found that the Commissioner ‘audited the Federal estate tax return *** and determined

> that the trust was not taxable.' This involved a sufficiently affirmative act on the Commissioner's part. The determination was conveyed to the trust beneficiary, whose husband, a lawyer, relayed the information to the Bank. The Commissioner points out that the information reached the Bank indirectly, rather than directly, from the Commissioner. But he surely anticipated that the results of the audit would be communicated to the Bank. The Tax Court appropriately found that the Bank's reliance on the information was 'reasonable.' Therefore, we conclude that the Commissioner, although not precluded from asserting Schuster's liability, is estopped from asserting the liability of the Bank.

312 F.2d at 318.

In <u>Grand Central</u>, the petitioner was receiving deposits for providing future market space which it was not currently reporting. In 1929, the petitioner reported all such deposits yet on its books which had been received, but not reported. Auditors from the [Redacted] had reviewed the petitioner's books and records. The audits had been for the taxable years of 1926, 1928, and 1929. In preparing its 1931 income tax return, the petitioner reported all such income in the year received. Another auditor from the [Redacted] advised the petitioner that the income which was for space in the future should not be currently reported. Accordingly, the petitioner was sent a check for the overpaid tax. The petitioner refused the check and filed suit to recover overpaid taxes paid for taxable year 1929. The income in question was received in 1925 – 1928. The statute of limitations for the collection of taxes due in those years had expired. Accordingly, if the [Redacted] could not compel the petitioner to pay tax on those amounts on their 1929 income tax return, the taxes, once due to the government, would be lost. The [Redacted] raised estoppel as an argument for their position. The court found that the statute of limitations should control, as opposed to granting relief to the [Redacted] due to the estoppel argument.

The petitioners also make the following allegation:

> 2. There is shared responsibility in this case. The Tax Commission approves and accepts all tax software used to e-file with the Commission. The software used to prepare our return, *** Software, has an inherent inadequacy that the Commission has effectively approved. When an e-file account is prepared the data entry

process “check a box” to “elect to forgo the carryback”. *** A taxpayer and their tax preparer do not know exactly what gets transmitted to the Tax Commission. <u>Your e-file department does know</u> what is included. We put a lot of faith into the software programs that the Commission approves. Perhaps a court or the media would view the commission has some culpability in such cases where they promote electronically filing but do not work out all the bugs in the various software programs being used and “approved” by the Commission. (Emphasis in original.)

Five things appear to be alleged:

1. That the preparer properly used the *** software to elect to forgo the carryback of the net operating loss,
2. That the Commission approved the portion of the software that would cause the box to be checked to forgo the carryback of the net operating loss,
3. That the box was not checked on the Idaho return because of an error in the software which the Commission approved, and
4. That the Commission staff knew or should have known from the filing of the 2009 Idaho income tax return that the taxpayers wished to forgo the carryback of the net operating loss.
5. That the Commission had a responsibility to monitor the petitioners’ tax filings and to advise them of any shortcomings in their returns.

OPINION

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 acts. 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 Schuster v. Commissioner, cited by the petitioners, estoppel was upheld against the [Redacted] as against the bank. The [Redacted] had taken an inconsistent position in determining whether the trust assets were to be included in the estate. This is clearly distinguishable on the facts from the case at hand.

In Grand Central Public Market v. United States, cited by the petitioners, estoppel was denied to the government and the statute of limitations was enforced against the government. This allowed an inequity since the taxpayer was able to escape taxation on income clearly taxable in a year different from that which the [Redacted] was attempting to impose the tax. Since the estoppel was denied and the statute of limitations was enforced, this case does not support the petitioners' position.

Similar situations to the one at hand 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 [Redacted] 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).

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:
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> 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).

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. (Italics added.)

Hartford Fire Insurance Company v. City of Mont Belvieu, Texas, 611 F.3d 289, 298 (5th Cir. 2010).

The requirement of inconsistency referred to in Hartford was also echoed by the Idaho Supreme Court. Sagewillow, Inc. v. Idaho Dep't of Water Res., 138 Idaho 831, 845 (2003). The Commission has maintained a substantially identical position for over three decades. 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. 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. The auditor for the Commission denied the refund claim for the year to which the NOL was carried forward 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).

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 petitioners that they needed to carry the 2009 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., 137 Idaho 352, 357, 48 P.3d 1241, 1246 (2002) silence generally cannot be relied on to support estoppel. As in Hartford Fire Insurance Company case, 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 quasi-estoppel argument.

The Commission has reviewed the 2009 filings of Idaho individual returns and has found that numerous returns were filed using software from the same vendor as was used in the preparation of the returns here in question which had the box checked electing to forgo the carryback of the net operating loss. Accordingly, it appears that the software functioned correctly for other preparers. The petitioners have not provided proof from the software vendor confirming that there was the error in the software that the petitioners allege. The Commission is under no obligation to introduce evidence to rebut a fact alleged but not proven by petitioners. Short v. Philadelphia B. & W. R. Co., 23 Del. 108; 76 Atl. 363 (1908), Wichita Terminal Elevator Co. v. C. I. R., 6 T.C. 1158, 1165 (1946). Accordingly, the Notice of Deficiency must be affirmed.

THEREFORE, the Notice of Deficiency Determination dated July 23, 2013, is hereby APPROVED, AFFIRMED, and MADE FINAL.

YEAR	TAX	PENALTY	INTEREST	TOTAL
2010	$1,944	$97	$262	$2303

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 ___________________ 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.

____