

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

In the Matter of the Protest of	)	
	)	DOCKET NO 0-038-350-848
<b>[Redacted]</b>	)	
	)	
Petitioners.	)	DECISION
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The petitioners protest the Notice of Deficiency Determination issued by the auditor for the Idaho State Tax Commission (Commission) dated February 11, 2016. The Notice of Deficiency Determination asserted additional liability for Idaho income tax and interest in the total amount of \$1,194 for 2012.

The petitioners were, at all times relevant to this matter, residents of Idaho. They filed their 2012 Idaho income tax return claiming a net operating loss incurred in 2011. The auditor reduced the claimed loss, thereby producing the asserted liability referred to above.

That the petitioners incurred the loss is not in question. The question to be addressed is what amount, if any, the petitioners are entitled to claim on their 2012 income tax return.

Idaho net operating losses are to be carried back unless a taxpayer elects to forgo the carryback and carry the net operating loss only forward. There is a box on the 2011 Idaho Form 40 that taxpayers may check if they desire to forego the carryback of their Idaho net operating loss. It is agreed that this box was not checked. The election may also be made by attaching a statement to the return.

Idaho Code § 63-3022 stated [2011], 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.

Rule 201 sets forth the manner prescribed for the making of the election to forego the carryback of the net operating loss. As in effect for 2010, 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 on or after January 1, 2010. 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: (3-29-10)
- 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. 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 shall not constitute an election for Idaho purposes. (3-29-10)
- (Underlining added.)

As in effect for 2011, Rule 201 stated, in part:

05. Timing and Method of Electing to Forego Carryback. (3-30-01)
- a. Net operating losses incurred in taxable years beginning on or after January 1, 2010. 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 may 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: (4-7-11)
- 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. 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 does not constitute an election for Idaho purposes. (4-7-11)

c. If the election is made on an amended or original return filed subsequent to the time allowed in Paragraph 201.05.a., it is considered untimely and the net operating loss is applied as provided in Paragraph 201.04.b. (4-7-11)  
(Underlining added.)

The petitioners' 2011 Idaho income tax return was filed electronically on March 10, 2012. In that return, as received by the Commission, no indication was present that the petitioners intended to forgo the carryback of the *Idaho* net operating loss. An election to forgo the *federal* net operating loss was included in the petitioners' 2011 return. The petitioners could have applied 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 2012 return, the representative for the petitioners advised the auditor that it had been their clients' intent to forego the carryback of the net operating loss. The representative for the petitioners contends that the petitioners' intent should be sufficiently clear from the filing of the federal election for the Commission to allow the loss on the 2013 return.

The petitioners' letter of protest stated, in part (verbatim):

Prior to January of 2001 an NOL was required to be carried back unless an election to forego the carry back was made by specific statement as stated in Idaho Administrative Rule 201.05.a. Starting in the tax year 2001 and continuing through the tax year 2010 the taxpayer could make this same election to forego the carry back as defined above or by "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", per Rule 201.05.b. Starting in the year 2002 the taxpayer also had the option of marking the box on Line 13 of the Form 40 to make the election to forego the carry back, as stated in the instructions for Form 40. This option was in effect from 2002 through 2012 and is so stated in the instructions. It is not spelled out in the Idaho Administrative Rule 201.

It has been our policy since 2002 to check this box. We also always elect the same for the federal and state with respect to the decision whether to carry an NOL back or elect out and carry it forward. With that in mind, we knew that if

we did not happen to mark the box we were still in compliance as we always e-file our tax returns and automatically include a complete copy of the federal tax return with the state, including the “EF Election Statement” pursuant to IRC Section 172(b)(3) as stated in Idaho Code 63-3022(c).

Effective April 7, 2011 the above method was no longer in compliance because the ISTC changed Rule 201.05.b to read “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 does not constitute an election for Idaho purposes”. However, this change was not effectively communicated to the taxpaying public or tax professionals.

Notification was not adequately provided to the public of this change. As tax preparers, we rely heavily on the “What’s New” section of the instruction booklets to inform us of changes in Idaho Tax Code or Administrative Rules. We, in turn, use this as part of our training to ensure that our staff is made aware of these changes. In the Idaho Instruction booklet (for Form 40) for the tax year 2011, the only mention of a difference between Internal Revenue Code and the state as of January 1, 2011, is the fact that “Idaho does not conform to bonus depreciation”. The only reference to the Idaho NOL in the “What’s New” section of a booklet is in 2009, in which it states that Idaho has its own provisions. If because of this statement you checked the Idaho rules you would have found the then existing Rule 201.05.b which allowed attachment of the federal election. The next major change to the handling of a NOL was made March 20, 2014, and is effective for tax years beginning with 2013. The NOL now automatically carries forward unless the taxpayer amends a prior year return to carry the loss back as per Rule 201.04. **This change is clearly stated in the “What’s New for 2013”** page of the Instruction Booklet for Form 40. This would indicate the ISTC felt this change related to NOLs was important enough to highlight it to taxpayers. Yet the 2011 change, which has an inherently (although I’m sure unintentional) built in trap for taxpayers was not given this same level of importance. Also, through all these years including 2011 and 2012 the instructions allowed you to mark the box (Form 40, Ln 11) to make this election. This is not spelled out in any Code or Rule, just in the instructions. The fact that this specific line instruction did not change until 2013 is another indication to a preparer that there had been no other changes. The 2013 change is very sensible and can in no way cause a taxpayer to not handle the NOL as intended. In fact as tax preparers we have always felt this method is the common sense approach to handling of the NOL anyway. If you make the decision to carry back an NOL, no matter what the method of election, you have to amend earlier years to do so.

In addition to the above lack of adequate communication to the taxpayer public, Instruction for Idaho Form 56 “Idaho Net Operating Loss Carryforward/Carryback”, (revised 8-05-05) states that you can attach a statement or “attach a copy of the federal election to forego the federal NOL carryback to the Idaho loss year return”. The next revision is 08-21-13 and as of the 2013 year the NOL can only be carried back by amending the prior years’ returns, otherwise

it automatically carries forward. Once again the new rules in place in 2013 per Rule 201.04 are detailed by the ITC in the instructions for this Form 56. No mention of the 2011 change was ever indicated in a revision for the instructions for Form 56. (Bolding in original.)

While the petitioners contend that the change in the method of making the election took place in 2011, it actually changed in 2010. Prior to 2010, the election could be made by attaching a copy of the taxpayer's federal election to forgo the election to the Idaho return. Beginning in 2010, this changed so that attaching the copy of the federal election was no longer effective to elect to forgo the carryback of the Idaho net operating loss deduction. The petitioners' argument is that, due to inadequate disclosure by the Tax Commission, the change in method was missed and, accordingly, the NOL carried to 2012 should be allowed as claimed. The protest correctly stated that this change was not in the "What's New" section of the instructions for the Idaho Form 40. Although the change was not in the "What's New" section of the instructions, both the 2010 and 2011 Form 40 instructions contained the following under "NET OPERATING LOSS (NOL)":

To make the election, check the box on Form 40, line 11, or Form 43, line 27 or include a statement to the loss year tax return clearly indicating that you elect to forego the carryback. Include your name, address, Social Security Number, and the amount of the loss. You can't make the Idaho election by attaching a copy of your federal election to forego the federal net operating loss carry back. (Underlining added.)

The petitioners' letter of protest further stated that "[t]he instructions for Idaho Form 56, 'Idaho Net Operating Loss Carryforward/Carryback,' (revised 8-05-05) states that you can attach a statement or 'attach a copy of the federal election to forego the federal NOL carryback to the Idaho loss year return.' The next revision is 08-21-13 and as of the 2013 year the NOL can only be carried back by amending the prior years' return, otherwise it automatically carries forward."

Contrary to the petitioners' letter of protest, the instructions for the Form 56 were revised after the version dated 08-05-05 on 8-24-06, 9-6-07, and 6-16-10. The version dated June 16, 2010 did not have the statement referred to in the petitioners' letter of protest.

Since it is agreed that the box on the return indicating that the petitioners wished to forego the net operating loss carryback was not checked and since no adequate indication was present in the petitioners' 2011 Idaho income tax return, the Commission cannot deem there to have been a proper election filed. Accordingly, the 2011 net operating loss allowable on the petitioners' 2012 Idaho income tax return was properly reduced by the auditor.

THEREFORE, the Notice of Deficiency Determination dated February 11, 2016, 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 November 30, 2016):

YEAR	TAX	INTEREST	TOTAL
2012	\$1,072	\$148	\$1,220

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 \_\_\_\_\_ 2016.

IDAHO STATE TAX COMMISSION

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COMMISSIONER

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_\_ day of \_\_\_\_\_ 2016, 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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