

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)	
)	DOCKET NO. 1-441-640-448
[Redacted])	DECISION
)	
Petitioners.)	
_____)	

[Redacted] (petitioners) protest the Notice of Deficiency Determination (NODD) issued by the auditor for the Idaho State Tax Commission (Commission) dated February 19, 2016. The NODD asserted an additional liability for Idaho income tax, penalty, and interest in the total amount \$6,073 for 2013.

The petitioners were, at all times relevant to this matter, residents of Idaho. They filed their 2013 Idaho income tax return claiming a net operating loss (NOL) incurred in 2011. The auditor denied this loss stating that the NOL should have been carried back to 2009 and 2010, since the petitioners had not elected to forego the carryback of the NOL. This produced the liability for 2013. The petitioners filed this administrative appeal.

The question addressed in determining the 2013 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 [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 set forth the manner prescribed for the making of the election to forego the carryback of the net operating loss. It stated [2011] 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)

The petitioners' 2011 Idaho income tax return was timely filed electronically. In that return, as received by the Commission, no indication was present indicating that the petitioners intended to forego the carryback of the NOL. A box was provided on the return which could be checked indicating that the taxpayers elected to forego the carryback of the NOL. This box was not checked.

The petitioners could have carried the loss in question to the two prior years. However, the petitioners had no Idaho taxable income in either 2009 or 2010. Accordingly, the best advantage (maybe the only advantage) for the petitioners would have been to have elected to forego the carryback of the NOL (because they had nothing to gain) and to have carried the NOL

forward. By not electing to forgo the carryback of the NOL, the net operating loss which would have been available to be carried forward was absorbed in 2009, 2010, and 2012, leaving none to be applied to the petitioners' 2013 Idaho income tax return.

The petitioners contend that they intended to carry the loss forward and that such treatment should be afforded them in spite of the petitioners having failed to file the election to forgo the carryback of the NOL. As was stated in Rule 201.05 (Id), the election to forgo the carryback of the NOL must be made by the due date of the loss year return, including extensions. Nothing in the file indicates that this was done.

The Idaho Supreme Court has addressed a matter in which the taxpayer argued that the law should be construed in such a manner as to benefit the taxpayer. In addressing such a matter, the court stated, in part:

The Stangs urge this Court to “construe” the Idaho Income Tax Code in a manner that would permit the Stangs to avoid paying Idaho income tax on the \$8,000 distribution. They argue that because the Idaho Income Tax Code does not expressly address this situation, this Court should be free to construe the tax code in a manner that would prevent the Stangs from having to pay taxes to both California and Idaho on the same monies. When construing the provisions of the Idaho Income Tax Code, however, we must enforce the law as written. Potlatch Corp. v. Idaho State Tax Comm’n, 128 Idaho 387, 913 P. 2d 1157 (1996). If there is any ambiguity in the law concerning tax deductions, the law is to be construed strongly against the taxpayer. Id. This Court has no authority to rewrite the tax code. Bogner v. State Dep’t of Revenue and Taxation, 107 Idaho 854, 693 P. 2d 1056 (1984). Any exemption from taxation must be created or conferred in clear and plain language and cannot be made out by inference or implication. Herndon v. West, 87 Idaho 335, 393 P.2d 35 (1964). This Court does not have the authority to create deductions, exemptions, or tax credits. If the provisions of the tax code are socially or economically unsound, the power to correct it is legislative, not judicial. Idaho State Tax Commission v. Stang, 135 Idaho 800, 802-803 (2001.)

The law appears to be clear. Accordingly, the NODD must be affirmed.

THEREFORE, the NODD dated February 19, 2016, is hereby APPROVED, AFFIRMED, AND MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the petitioners pay the following tax, penalty, and interest (computed to August 15, 2016):

<u>YEAR</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
2013	\$5,367	\$268	\$502	\$6,137

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

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.
