BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of	)	
	)	DOCKET NO. 2-083-008-512
[Redacted] ,	)	
	)	
Petitioners.	)	DECISION
	)	

The petitioners protest the Notice of Deficiency Determination issued by the auditor for the Idaho State Tax Commission (Commission) dated September 1, 2015. The Notice of Deficiency Determination asserted additional liability for Idaho income tax and interest in the total amount of $5,968 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 incurred in 2011. The auditor denied this 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 whether the petitioners are entitled to carry the loss forward rather than carrying the loss to an earlier year. There is a box on the Idaho Form 40 which was filed 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 petitioners protest, in part, as follows:

> A net operating loss of $131,817 was generated in 2011. The federal election to forgo the carryback as well as Idaho Form 56 was [sic] filed with the 2011 tax return to notify the agencies the taxpayer fully intended to carry the loss forward. In 2012, $22,938 of this loss was used on the Idaho tax return leaving $108,879 available for future years. An additional Form 56 was filed with the 2012 return showing the current year absorption and the $108,879 carryforward to future years. The application of the loss to the 2012 return was allowed by the tax commission and the taxpayer did not receive notice of any issue to this filing.
>
> In 2013, the loss carryover was denied because of a “check the box” technicality on the 2011 Idaho Form 40 to forgo the NOL carryback, even though the federal

election and the Idaho Form 56 were filed. The auditor determined that $100,000 of the 2011 loss must be carried back to 2009 and 2010. The statute of limitation on the 2009 and 2010 income tax return refunds were closed and the $100,000 net operating loss could not be carried back and is therefore unusable.

The instructions for filing Form 56 do not indicate the federal election is not acceptable, and specifically allows the federal election when filing Form 56.

Per Instructions for Idaho Form 56, 08-11-09; if you are filing Form 40, 43, or 41, make the election by checking the box on the loss year electing to forego the carryback period. If you check the box, you do not need to attach a separate statement electing to forego the Idaho carryback period[1]. This wording shows it is an either/or option. By filing the federal election to forgo the carryback, which is attached to the Idaho return, and filing the Idaho Form 56 indicating the NOL not carried back to prior years and was available for future years, we feel the taxpayers fulfilled this requirement.

Per the Idaho Code Sec. 63-3022(c)(1); 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 in original.)

Idaho Code Section 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)

[1] The same statement was present in the Form 56 Instructions for 2011 returns.

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 August 27, 2012. In that return, as received by the Commission, no indication was present

indicating 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 2013 return, the representatives for the petitioners advised the auditor that it had been their clients' intent to forego the carryback and that they had a note in their computer indicating this. The representatives for the petitioners contend 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 representatives also contend that they filed an Idaho Form 56 (IDAHO NET OPERATING LOSS CARRYFORWARD/CARRYBACK) with the 2011 (loss year) Idaho income tax return. In examining the information received with the e-filed return, there is also no indication that a Form 56 was included in that filing.

The Commission finds that the requirements for the making of the election to forego the carryback of the net operating loss must have been made on the original Idaho income tax return for the year of the loss. The petitioners' representatives' argument is that they sent the necessary information (the Form 56) the filing of which should be considered to be an effective election to carry the net operating loss only forward. It appears that a part of the problem encountered by the petitioners is that, while the Form 56 was a part of the Idaho return in their paid preparer's computer, the form was not entered into the software in a manner which would cause the form to be forwarded to the Commission. The law is clear that the Commission must be notified of the taxpayer's intent. This was not done.

The election to forgo the federal net operating loss included in the 2011 Idaho income tax return identified the taxpayers both by name and by taxpayer identification number. It further stated:

> Description: ELECTION TO WAIVE THE NET OPERATING LOSS CARRYBACK PERIOD
> Attachment Information: **[Redacted]** HEREBY ELECT, PURSUANT TO EC. 172(B)(3) OF THE INTERNAL REVENUE CODE, TO RELINQUISH THE ENTIRE CARRYBACK PERIOD WITH RESPECT TO THE NET OPERATING LOSS INCURRED FOR THE TAX YEAR ENDED DECEMBER 31, 2011, AND WILL HAVE SUCH LOSS AVAILABLE FOR CARRYFORD ONLY.

While the federal election properly identifies the taxpayers, it does not state that is an election pursuant to Section 63-3022(c)(1), Idaho Code. Further, it does not state the amount of the Idaho net operating loss as required by Rule 201. In addition, the filing of an election to treat the federal net operating loss in a particular fashion doesn't mean that the taxpayer has the same intent with regard to the Idaho net operating loss. Accordingly, it does not fulfill the requirements for an election to forgo the carryback of the Idaho net operating loss.

The petitioners also argue that the instructions for the Idaho Form 56 support their position. The instructions state, in pertinent part:

> If you are filing Form 40, 43, or 41, make the election by checking the box on the loss year return electing to forego the carryback period. If you check the box, you do not need to include a separate statement electing to forego the Idaho carryback period.

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 other indication was present in the petitioners' 2011 Idaho income tax return, the Commission cannot deem there to have been a proper election filed. Authoritative sources of tax law are found in the statutes, the administrative rules, and judicial decisions. Richmond v. Commissioner, T.C. Memo 2009-207.

see State v. Adams, 90 Idaho 195. Accordingly, the 2011 net operating loss is not an allowable deduction on the petitioners' 2013 Idaho income tax return.

THEREFORE, the Notice of Deficiency Determination dated September 1, 2015, 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 September 30, 2016):

YEAR	TAX	INTEREST	TOTAL
2013	$5,615	$553	$6,168

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.

[Redacted]

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