

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)	
)	DOCKET NO. 1-511-482-368
)	
)	
Petitioner.)	DECISION
)	

██████████ (Petitioner) protested the Notice of Deficiency Determination (Notice) for tax year 2021 dated April 1, 2024. The Tax Commission reviewed the matter and hereby issues its final decision to uphold the Notice.

Background

Petitioner electronically filed an Idaho S-corporation income tax return for tax year 2021 on March 15, 2022. Petitioner elected to be treated as an affected business entity (ABE) by attaching to the return Form ABE, *Affected Business Entity Election*, bearing the name of company president ██████████. This return resulted in an Idaho net operating loss (NOL) of \$205,929 which Petitioner passed through to the two owners, a married couple.

The Tax Commission’s Income Tax Audit Division (Audit) selected the return for examination and determined that Petitioner was not allowed to pass the Idaho NOL through to the owners because Petitioner had elected to be treated as an ABE. Instead, the Idaho NOL could be carried forward to succeeding tax years until the loss was fully absorbed by other income.

██████████ president of ██████████ protested the Notice, stating that the ABE election was made in error due to an oversight and the limited information that had been released about ABE elections at the time. He stated that all business was removed from Idaho in 2021, so there would be no return to carry the loss to. Mr. ██████████ requested that the ABE election be removed from Petitioner’s 2021 return.

Audit sent a letter acknowledging the protest and informing Petitioner's shareholders that the file would be transferred to the Tax Commission's Appeals unit (Appeals) to continue the redetermination process. Appeals sent Petitioner a letter outlining the options available for redetermining a protested Notice but did not receive a reply. Therefore, the Tax Commission renders its decision based on the information currently available.

Law & Analysis

Idaho Code dictates the manner and timing of making an election for a pass-through entity (PTE) to be treated as an ABE. Idaho Code section 63-3026B(2) states that an S-corporation (such as Petitioner) may elect to become an ABE for a given taxable year, and a separate election must be made each year. The election is made on a form and in the way the Tax Commission prescribes by rule or by instruction. The election is made by filing the election with a timely filed¹ return for the taxable year; this may be either an original or amended return. The election must be signed either by each member of the entity who is a member at the time the election is made or by any officer of the entity who is authorized to make the election. There is no specific election not to be an ABE; that is the default for a PTE. There is no extra box to check or form to file. Based on the return filed and the supplemental forms provided, the Tax Commission determined that the election to be an ABE for tax year 2021 was intentional and not accidental.

As mentioned above, the election to be an ABE must be made on a timely filed return, whether that return is an original return or an amended return. So, if a PTE filed a return before its deadline, not electing to be an ABE, and then determined that it wanted to be an ABE, it could do so by filing an amended return before the deadline and making the election. The question to answer

¹ "Timely filed" means filed on or before the 15th day of the fourth month following the end of the taxable year. Since Petitioner's taxable year ended December 31, 2021, a timely filed return is one filed on or before April 15, 2022.

now is whether the election to be an ABE can be revoked once made for a given taxable year. Idaho Code is silent on this situation.

Normally, the Tax Commission would look to Administrative Rules for clarification, but there are no Rules in place regarding ABE elections. Idaho Code section 63-3026B(2)(b) mentions making the ABE election as prescribed by rule or instruction. None of the instruction booklets for Forms 41S, ABE, or PTE-12 for tax year 2021 provide any additional guidance. There do not appear to be any written instructions regarding revoking an ABE election.

In the time between the passage of House Bill 317 in the 2021 Idaho legislative session and the filing period for Petitioner's 2021 tax return, the Idaho State Tax Commission met stakeholders for a discussion about ABEs. During this conversation, the question was asked whether the election to be an ABE can be revoked. The answer was that the election is irrevocable for the taxable year. Once the election is made with Form ABE, it cannot be revoked for that tax year. An entity may choose, however, not to be an ABE in any subsequent year.

Based on a review of all available information, the Tax Commission determined that Petitioner's request for the removal of the ABE election for tax year 2021 cannot be fulfilled.

Idaho Code section 63-3026B(4) states that if an ABE's return results in an Idaho NOL, that NOL may not be distributed to the ABE's members. Instead, the Idaho NOL may be carried forward by the ABE to subsequent taxable years. If the PTE does not make an election to be an ABE in a year following the taxable year when the Idaho NOL was incurred, then any unused Idaho NOL would flow to the members as normal. The Tax Commission determined that the Idaho NOL Petitioner passed through to the owners was passed through in error and that the NOL must remain with the ABE until a taxable year where Petitioner does not choose to be an ABE.

Petitioner's protest indicated that not being allowed to remove the ABE election from the 2021 tax return would cause great hardship through additional tax burden. Potential economic hardship does not constitute sufficient grounds to allow the removal of an ABE election from a return years after the return in question was timely filed. The PTE will not suffer any additional hardship, because there is no additional tax due at the entity level. If the owners encounter any difficulty, they would have other options available to seek relief.

Conclusion

Petitioner made a valid election to be an ABE for tax year 2021, and that election is irrevocable. The Idaho NOL incurred by the ABE in 2021 may not be passed through to the owners to claim on their 2021 income tax return.

THEREFORE, the Notice dated April 1, 2024, and directed to [REDACTED] [REDACTED] is hereby UPHeld and MADE FINAL.

As no additional tax is due from Petitioner, no demand for payment is made.

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

DATED this _____ day of _____ 2024.

IDAHO STATE TAX COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____ 2024,
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:



Receipt No.
