

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37759

DAVID D. KESSEL and KIMBERLIE L. KESSEL,	)	2011 Unpublished Opinion No. 531
	)	
	)	Filed: June 22, 2011
Petitioners-Appellants,	)	
	)	Stephen W. Kenyon, Clerk
v.	)	
	)	THIS IS AN UNPUBLISHED
IDAHO STATE TAX COMMISSION,	)	OPINION AND SHALL NOT
	)	BE CITED AS AUTHORITY
Respondent.	)	
	)	

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Appeal from the District Court of the Sixth Judicial District, State of Idaho, Bannock County. Hon. Robert C. Naftz, District Judge.

Order and judgment of the district court, affirmed.

David D. Kessel, Pocatello, pro se appellant.

Kimberlie L. Kessel, Pocatello, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Brian D. Nicholas, Deputy Attorney General, Boise, for respondent.

GRATTON, Chief Judge

David D. Kessel and Kimberlie L. Kessel appeal from the district court’s order and judgment in favor of the Idaho State Tax Commission. We affirm.

**I.**

**FACTUAL AND PROCEDURAL BACKGROUND**

The tax commission issued three notices of deficiency to the Kessels claiming state taxes for the years 1998 and 2000 through 2006. Under these three notices, the combined tax, penalty, and interest, amounted to \$17,248 for tax years 1998 and 2000 through 2006. The Kessels timely protested each notice. The tax commission, after an administrative proceeding, issued three final decisions upholding the notices. The Kessels timely appealed to the Idaho Board of Tax Appeals which issued three final decisions in favor of the tax commission. The Kessels filed petitions for review. The tax commission filed motions to consolidate and for summary

judgment. The Kessels did not respond to either motion or attend the hearing on the motions. The district court granted the motion to consolidate and the motion for summary judgment. The Kessels appeal.

## II. ANALYSIS

The crux of the issue on this appeal is the Kessels' contention that "any and all wages received from private businesses do not qualify as 'taxable income.'"<sup>1</sup> The Kessels rely on comparing and contrasting of various code and statute sections, including 26 U.S.C. §§ 61, 3121 and 3401, 20 U.S.C. § 6103 and 27 C.F.R. § 72.11. Ultimately, the Kessels assert that 26 U.S.C. § 3401(c) defines "employee" in such a way as to exclude private employment, and wages therefrom, in identifying taxable income. 26 U.S.C. § 3401(c) provides:

For purposes of this chapter, the term "employee" includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term "employee" also includes an officer of a corporation.

However, 26 U.S.C. § 3401(c) is part of a withholding statute and expands the definition of employees for which withholding is required. It does not determine whether an employee must file or pay income taxes. Even if it could be read to narrow the class of employees, it would only mean that employers would not have to withhold taxes from earnings.

The argument made here by the Kessels has been rejected by several courts. *Peth v. Breitzmann*, 611 F. Supp. 50 (E.D. Wisc. 1985) (the definition in § 3401(c) does not exclude all other wage earners); *Sullivan v. United States*, 788 F.2d 813 (1st Cir. 1986) (contention that Sullivan was not an employee within § 3401(c) deemed "meritless"); *United States v. Latham*, 754 F.2d 747 (7th Cir. 1985) (claim that under § 3401(c) the category of "employee" does not include privately employed wage earners is "preposterous"). The Kessels' attempt to distinguish these cases is unavailing. In *Idaho State Tax Commission v. Payton*, 107 Idaho 258, 688 P.2d 1163 (1984), the Idaho Supreme Court held that wages from a private employer, in that case Payless Drugs, were income. Wages from a private employer fall within the federal law

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<sup>1</sup> State of Idaho taxable income is defined to mean federal taxable income under the Internal Revenue Code. Idaho Code § 63-3611B.

definition of taxable income. *See* 26 U.S.C. §§ 61 and 63. The district court correctly granted summary judgment to the tax commission.

The tax commission requests an award of attorney fees pursuant to I.C. § 63-3049(d)(2) asserting that the Kessels' position is frivolous or groundless. We agree that the Kessels' position is frivolous and groundless and, therefore, award attorney fees to the tax commission.

### **III.**

#### **CONCLUSION**

The district court properly granted summary judgment to the tax commission. Therefore, the judgment of the district court is affirmed. Attorney fees on appeal are awarded to the tax commission.

Judge GUTIERREZ and Judge MELANSON **CONCUR.**