

10-2519
TAX TYPE: SALES TAX
TAX YEARS: 2007, 2008, 2009 AND 2010
DATE SIGNED: 4-25-2012
COMMISSIONERS: B. JOHNSON, D. DIXON, M. CRAGUN
EXCUSED: M. JOHNSON

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,
Petitioner,

v.

TAXPAYER SERVICES DIVISION OF
THE UTAH STATE TAX COMMISSION,

Respondent.

INITIAL HEARING ORDER

Appeal No. 10-2519

Account No. #####

Tax Type: Sales Tax

Tax Year: 10/07 – 3/10

Judge: Marshall

Presiding:

Jan Marshall, Administrative Law Judge

Appearing:

For Petitioner: REPRESENTATIVE FOR PETITIONER

For Respondent: RESPONDENT REPRESENTATIVE-1, Taxpayer Services Division
RESPONDENT REPRESENTATIVE-2, Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on November 17, 2011 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. Petitioner (“Taxpayer”) requested a waiver of the penalties assessed on its Sales Tax filings for the periods ending December 2007, March 2008, June 2008, December 2008, March 2009, June 2009, September 2009, December 2009, and March 2010. Taxpayers were assessed late filing and late payment penalties totaling \$\$\$\$ and interest in the amount of \$\$\$\$ for the periods at issue. The Division waived the penalties for the periods ending December 2007 and March 2008. The Division denied the waiver request for penalties for the remaining periods, and denied the waiver request for interest for all periods. Taxpayer is no longer requesting a waiver of interest, which continues to accrue on any unpaid balance.

APPLICABLE LAW

The Commission has been granted the discretion to waive penalties and interest. Section 59-1-401(13) of the Utah Code provides, “Upon making a record of its actions, and upon reasonable cause shown, the commission may waive, reduce, or compromise any of the penalties or interest imposed under this part.”

The Commission has promulgated Administrative Rule R861-1A-42 to provide additional guidance on the waiver of penalties and interest, as follows in pertinent part:

- (2) Reasonable Cause for Waiver of Interest. Grounds for waiving interest are more stringent than for penalty. To be granted a waiver of interest, the taxpayer must prove that the commission gave the taxpayer erroneous information or took inappropriate action that contributed to the error.
- (3) Reasonable Cause for Waiver of Penalty. The following clearly documented circumstances may constitute reasonable cause for a waiver of penalty:
 - (a) Timely Mailing...
 - (b) Wrong Filing Place...
 - (c) Death or Serious Illness...
 - (d) Unavoidable Absence...
 - (e) Disaster Relief...
 - (f) Reliance on Erroneous Tax Commission Information...
 - (g) Tax Commission Office Visit...
 - (h) Unobtainable Records...
 - (i) Reliance on Competent Tax Advisor...
 - (j) First Time Filer...
 - (k) Bank Error...
 - (l) Compliance History...
 - (m) Employee Embezzlement...
 - (n) Recent Tax Law Change...

Utah Code Ann. §59-1-1417 provides, “[i]n a proceeding before the commission, the burden of proof is on the petitioner...”

DISCUSSION

In April 2010, Taxpayer received three certified letters indicating that liens had been issued for sales tax. He stated that he has been in business since 2000, and went to the Tax Commission office in (X) County with his tax records, which included copies of returns with check numbers written on them. He stated that they contacted NAME who told them that the checks had not been applied. He requested bank records, and the checks had not cleared. He testified they have an accountant review the returns he had prepared, he personally signed the checks, and they were given to the bookkeeper to mail them in. He stated that the checks never made it to the post office. He stated that upon reviewing records, he discovered the bookkeeper was deceitful. He testified that he had the same bookkeeper since 2000, and had a clean record through December 2007.

The Taxpayer stated that he wished he would have caught the deceit sooner, but does not believe six months is a sufficient time period for that discovery. He stated that once he learned what had happened, he did everything he could to pay the balance owed. He drained his savings and retirement accounts, sold assets, and put the business in jeopardy so that he could pay the tax liability. He takes responsibility, even though he had an employee handling it. The Taxpayer stated that he does not believe the Tax Commission was in error, and stated he has been treated very fairly and has received a lot of help.

The Taxpayer stated that he is troubled because he receives all of the mail for the business, and he had not seen any tax notices until he received the certified letters notifying him of the liens. The Taxpayer stated that he understands he is obligated to pay the interest, but out of good faith shown by his actions, he is asking for a waiver of the remaining penalties. He stated that he has never fully recovered cash-flow wise, and the business ceased to exist in 2011. Since that time he has been trying to put things back together financially. He has no savings, no retirement, and is now starting from scratch.

When questioned about the “deceit” of the bookkeeper, the Taxpayer stated that the bookkeeper had done a cover-up in QuickBooks. He stated further that the accountant did not do a proper check and balance, and had not been verifying that bank statements matched the QuickBooks records. He stated that the business underwent an intense audit, and he was confident afterwards that everything was as it should be. He believed the funds were in the bank, and that the bookkeeper was shuffling funds around. He stated that whenever they made a deposit the funds were put into the checking account, they would do their sales tax calculation, and the funds were supposed to be transferred into a separate sales tax account. The Taxpayer believes the bookkeeper was embezzling funds, but has not been able to prove it. He stated that the bookkeeper was let go after his discovery. The Taxpayer now believes that he personally should have micromanaged the reconciliation of the bank statements and QuickBooks accounts.

The Division’s representative stated that when they reviewed the request, they looked at the account history. She noted there were prior errors in the first three quarters of 2007. She stated that they reviewed the circumstances described by the Taxpayer, and found reasonable cause to waive the penalties for a six month period. It is the Division’s opinion that six months would be sufficient to discover the error, if there were proper checks and balances in place. She stated that the Division initially decided to waive the first three periods, but due to dollar amounts were required to take the decision to the Commission, who felt it was more appropriate to waive only six months. The Division’s representative stated that they sent proper notification to the

address they have on record for the Taxpayer, and that there has been no contention or evidence that they were mailing the decision to an incorrect address.

The Commission has promulgated Administrative Rule R861-1A-42 and Publication 17 to outline the circumstances the Commission may consider “reasonable cause” justifying a waiver of penalties. One of the circumstances outlined in subsection (3)(m) of Rule R861-1A-42 is for employee embezzlement. The rule specifically provides, “[t]he taxpayer shows that failure to pay was due to employee embezzlement of the tax funds and the taxpayer was unable to obtain replacement funds from any other source.” The Taxpayer testified that he believes his former bookkeeper was embezzling funds, but was not able to prove it. He also has not shown that he was unable to obtain replacement funds from another source. Notices for the periods at issue were sent to the Taxpayer’s last known address, although he claims he did not receive them. A six month time period seems reasonable to discover the errors if there were checks and balances in place and ordinary care, prudence and diligence were exercised. There is not reasonable cause to waive additional penalties.

Jan Marshall
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division’s waiver of penalties for the periods ending December 2007 and March 2008, but denies the Taxpayer’s request for a waiver of additional penalties. It is so ordered.

This decision does not limit a party’s right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed to the address listed below and must include the Petitioner’s name, address, and appeal number:

Utah State Tax Commission
Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2011.

Appeal No. 10-2519

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

NOTICE: Failure to pay the balance due as a result of this order within thirty days from the date hereon may result in an additional penalty.