

11-2938  
PENALTY AND INTEREST  
TAX YEAR: 2010  
SIGNED: 06-01-2012  
COMMISSIONERS: M. JOHNSON, D. DIXON, M. CRAGUN  
EXCUSED: R. JOHNSON

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BEFORE THE UTAH STATE TAX COMMISSION

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<p>PETITIONER,</p> <p>Petitioner,</p> <p>v.</p> <p>TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p>Respondent.</p>	<p><b>INITIAL HEARING ORDER</b></p> <p>Appeal No. 11-2938</p> <p>Account No. #####</p> <p>Tax Type: Withholding Taxes</p> <p>Tax Year: 2010</p> <p>Judge: Phan</p>
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**Presiding:**

Jane Phan, Administrative Law Judge

**Appearing:**

For Petitioner: PETITIONER REP.  
For Respondent: RESPONDENT REP. 1, Tax Compliance Agent  
RESPONDENT REP. 2, Tax Compliance Agent

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on March 20, 2012, for an Initial Hearing in accordance with Utah Code §59-1-502.5. Petitioner (“Taxpayer”) requested a waiver of the interest assessed regarding a withholding tax filing for the 2010 tax year. The amount of the interest was \$\$\$\$.

APPLICABLE LAW

Utah Code §59-10-1403.2(5) provides when the Commission may not collect withholding from a pass through entity for the waiver of penalties and interest if the following circumstances are met:

Notwithstanding section 59-1-401 or 59-1-402, the commission may not collect an amount under this section for a taxable year from a pass-through entity and shall waive a penalty or interest on that amount if:

- (a) The pass-through entity fails to pay or withhold the tax on the amount as required by this section on behalf of the pass-through entity taxpayer;

- (b) The pass-through entity taxpayer: (i) files a return on or before the due date for filing the pass-through entity's return, including extensions: and (ii) on or before the due date including extensions described in Subsection (5)(b)(i), pays the tax on the amount for the taxable year . . . ; and
- (c) the pass-through entity applies to the commission.

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

DISCUSSION

The issues in this appeal stem from the tax obligations of two related companies. Petitioner, PETITIONER (“PETITIONER”), is the pass-through entity and COMPANY 1 (“COMPANY 1”), is the pass-through entity taxpayer. PETITIONER’s return for its fiscal year of September 2009 through August 2010 was due December 15, 2010. PETITIONER failed to calculate withholding for the pass-through entity taxpayer COMPANY 1 by the December 15 due date of the return. It did subsequently calculate the amount of tax to be \$\$\$\$\$, which was paid April 14, 2011. Interest was calculated on the \$\$\$\$\$ from December 15, 2010, the due date of the return, until April 14, 2011 when it was paid. The interest for this period was \$\$\$\$\$. Interest has continued to accrue on this unpaid balance and was \$\$\$\$\$ as of the hearing date.

PETITIONER stated that it could not calculate the amount of the withholding earlier because of the differences in the fiscal year end for the related companies. The COMPANY 1 return was not due until June 15, 2011. However, when COMPANY 1, filed its return, the tax amount owed was only \$\$\$\$\$. And, in fact there had been \$\$\$\$\$ in prepayments on the consolidated return so that the actual tax remitted was overpaid. It was PETITIONER’s contention that it should not be charged interest because the actual tax amount owed by COMPANY 1, the pass-through entity taxpayer, had been only the \$\$\$\$\$, which was more than paid by prepayments.

The \$\$\$\$\$ paid by PETITIONER was eventually refunded on November 1, 2011, plus interest in the amount of \$\$\$\$\$.

PETITIONER argues that it should not have had to pay the withholding for COMPANY 1 in the first place under the provisions of Utah Code 59-10-1403.2(5) and, therefore, the interest it was charged should be waived. Additionally it argues that the tax owed by COMPANY 1 had been prepaid prior to the date it was due and owing on the return.

Concerning the first argument that PETITIONER would not have been required to pay withholding for COMPANY 1 under the provisions of Utah Code 59-10-1403.2(5), PETITIONER did not technically meet the requirements set out in the code, a fact that it

acknowledged. Under that section, COMPANY 1 would have had to file a return and pay the tax on or before the due date for filing PETITIONER's return. This did not occur as the due dates of the returns were reversed. PETITIONER's return was due December 15, 2010 and COMPANY 1's was filed June 7, 2011. There are additional requirements set out in that section which arguably were not met as well. Under the provisions of Utah Code §59-10-1403.2, Subsection (5)(a), states that the pass through entity (PETITIONER) must fail to withhold and pay the tax and Subsection (5)(c) requires PETITIONER to apply to the Tax Commission for a waiver.

PETITIONER's representatives state that they have now made changes to fiscal year end dates and filed the application form so that they are no longer required to withhold for COMPANY 1 going forward. They argue that had they simply not paid the tax they would have met these other requirements of the statute. However, for the period at issue PETITIONER did not technically comply with this section because the due date of its return was prior to when COMPANY 1 filed its return and, therefore, the basis for waiver of interest set out therein does not apply.

PETITIONER also argued that the interest should be waived on the basis that COMPANY 1 did not actually owe any additional taxes when it had filed its consolidated return. At the time the return was filed there was \$\$\$\$ paid by prepayment and only \$\$\$\$ owed.

Upon review of the evidence presented by the parties in this matter, PETITIONER does not fully meet the requirements for waiver of interest set out in Utah Code § 59-10-1403.2 (5), nor did it technically meet the provisions that would have made it so it would not have had to collect and remit withholding for COMPANY 1. As it did not meet these provisions, PETITIONER was required to remit the withholding to the Tax Commission by the due date December 15, 2010 but did not do so until April 14, 2011. The fact that the taxes were taken care of by COMPANY 1, the pass-through entity taxpayer, does not release PETITIONER of its statutory obligation in this matter.<sup>1</sup> The interest should be sustained.

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Jane Phan  
Administrative Law Judge

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<sup>1</sup> The Commission recognizes that the taxes for a pass-through entity may be greater than the final tax owed by the owner. Charging interest when the estimated withholding is less than the final tax obligation may seem inherently unfair. Interest, however, is not based on the ultimate tax obligation. The situation with PETITIONER, as well as for other nonresident pass-through entities is not comparable to withholding for individual income taxes. In the present instance, the only provision for waiving interest is under the specific provisions of § 59-10-1403.2(5), which provides for a waiver of interest for non-withholding by pass-through entities.

DECISION AND ORDER

Based on the foregoing, the Commission denies Petitioner's request for a waiver of interest assessed on its fiscal year end August 2010 tax filing. 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 \_\_\_\_\_, 2012.

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.