

12-1866
TAX TYPE: INCOME TAX
TAX YEAR: 2009
DATE SIGNED: 5-28-2013
COMMISSIONERS: B. JOHNSON, D. DIXON, M. CRAGUN, R. PERO
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER,

Petitioner,

v.

AUDITING DIVISION OF THE
UTAH STATE TAX COMMISSION

Respondent.

INITIAL HEARING ORDER

Appeal No. 12-1866

Account No. #####

Tax Type: Income Tax

Tax Year: 2009

Judge: Nielson-Larios

Presiding:

Aimee Nielson-Larios, Administrative Judge

Appearances:

For Petitioner: TAXPAYER, in person
REPRESENTATIVE FOR TAXPAYER, Representative, in person

For Respondent: RESPONDENT-1, Auditing Division, in person
RESPONDENT-2, Auditing Division, in person

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on November 20, 2012 for an Initial Hearing in accordance with Utah Code Ann. § 59-1-502.5. Petitioner ("Taxpayer") challenges Respondent's ("Division's") Notice of Deficiency and Audit Change ("Statutory Notice") issued on May 24, 2012 for the 2009 tax year, which provides the following amounts:

<u>Tax Year</u>	<u>Audit Tax</u>	<u>Interest</u>	<u>Penalties</u>	<u>Audit Total Due</u>
2009	\$\$\$\$	\$\$\$\$	\$\$\$\$	\$\$\$\$

The Audit Tax Due resulted from the Division's disallowance of the Health Benefit Plan Credit ("Credit"). Interest was calculated through June 23, 2012 and continues to accrue on the unpaid balance. The Taxpayer requests a waiver of the tax and interest assessed.

APPLICABLE LAW

Utah Code § 59-1-1417 (2012) provides that the burden of proof is upon the petitioner (the taxpayer) in income tax matters before the Commission as follows:

In a proceeding before the commission, the burden of proof is on the petitioner except for determining the following . . . [The statute then provides three exceptions; none of which apply to this case.]

For the Credit, Utah Code § 59-10-1023(4) (2009) states:

A claimant may not claim a tax credit under this section if the claimant is eligible to participate in insurance offered under a health benefit plan maintained and funded in whole or in part by:

- (a) the claimant's employer; or
- (b) another person's employer.

Utah Code § 59-10-103(1)(d) (2009) defines “employer” for purposes of Title 59 Chapter 10 as the same as employer is defined in Utah Code § 59-10-401 (2009). Section 59-10-401(2) (2009) defines employer as follows:

"Employer" means a person or organization transacting business in or deriving any income from sources within the state of Utah for whom an individual performs or performed any services, of whatever nature, and who has control of the payment of wages for such services, or is the officer, agent, or employee of the person or organization having control of the payment of wages. It includes any officer or department of state or federal government, or any political subdivision or agency of the federal or state government, or any city organized under a charter, or any political body not a subdivision or agency of the state.

The Commission has been granted the discretion to waive penalties and interest. Utah Code § 59-1-401(13) (2012) states:

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 (2012) 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.

....

DISCUSSION

At issue for this appeal is meaning of “employer” as used in § 59-10-1023(4) for the Health Benefit Plan Credit (“Credit”) for the 2009 tax year. The Taxpayer asserts that for the 2009 tax year employer should not include former employers based on the information provided by the Tax Commission during the 2009 filing season. The Taxpayer requests that she be allowed the Credit and that

the audit tax and interest be reversed. On the other hand, the Division believes it correctly disallowed the Credit and asks that the assessed audit tax be sustained. However, the Division agrees that the interest assessed should be reversed.

During 2009, the Taxpayer received subsidized health insurance through the U.S. Office of Personnel Management (“OPM”) because she is a retired federal employee.

At the initial hearing, REPRESENTATIVE FOR TAXPAYER, the Taxpayer’s representative and tax preparer, explained why she believes “employer” should be interpreted for the 2009 tax year to include only current employers and exclude former employers. REPRESENTATIVE FOR TAXPAYER described how she attended two Utah State Tax Commission training sessions, consulted the Tax Commission’s website, and reviewed the 2009 TC-40 instructions prior to preparing the Taxpayer’s return. REPRESENTATIVE FOR TAXPAYER stated that the training sessions, the training materials, and the website information all showed that the Taxpayer qualified for the Credit because employer would include only current employers and not former ones. REPRESENTATIVE FOR TAXPAYER submitted copies of the Tax Commission’s website information, which included a web page “[r]evised March 10, 2010” that specifically addressed the Credit, used “current employer” to determine eligibility, and stated in an example that “NAME [a retired federal employee] can claim his portion of the OPM health insurance premiums.” REPRESENTATIVE FOR TAXPAYER explained how she relied on the information from the Tax Commission when she prepared the Taxpayer’s return and many other returns for AARP Tax-Aide, a free, volunteer-run tax preparation program for low-to moderate income taxpayers.

Additionally at the initial hearing, REPRESENTATIVE FOR TAXPAYER asserted that the definition of “employer,” found in § 59-10-401(2), should be interpreted to only include current employers based on the following language:

"Employer" means a person or organization . . . for whom an individual performs or performed any services, of whatever nature, **and who has control of the payment of wages for such services . . .**

(Emphasis added.)

REPRESENTATIVE FOR TAXPAYER noted that “has control” is in the present tense, and she contended that this language likewise suggests that employer should only include current employers, not former ones.

Finally, both the Taxpayer and REPRESENTATIVE FOR TAXPAYER commented on the negative emotional and economic effects that have been and will be experienced by seniors who claimed the Credit because they relied on the Tax Commission’s training and website information and are now being audited. On behalf of all Utah seniors, REPRESENTATIVE FOR TAXPAYER asks the

Commission not to continue to audit this area of the Credit for the 2009 tax year; REPRESENTATIVE FOR TAXPAYER asserts the Tax Commission should honor what it said about the Credit for that year.

The Division does not dispute granting a waiver of interest in this case because of the information REPRESENTATIVE FOR TAXPAYER received from the Tax Commission about the Credit. However, the Division disagrees with the Taxpayer that “employer” excludes former employers for the 2009 tax year. The Division explained that it noticed similar, verbal misinformation about the Credit being provided to unrelated taxpayers in November 2009 and that it immediately sought to correct the misinformation. The Division further explained that, unfortunately, the Division was unaware of the misinformation on the Tax Commission’s website, which was not corrected until the end of the 2009 filing season.

The Division explained that the meaning of “employer” includes former employers and that this meaning has not changed from how the term was previously interpreted by the Commission. The Division cited to the Commission’s prior decisions for Appeal No. 01-1359, available at <http://tax.utah.gov/commission/decision/01-1359sanqc.htm>, and Appeal No. 11-296, available at <http://tax.utah.gov/commission/decision/11-296.intsanqc.pdf>.

Generally, tax statutes providing exemptions or credits are strictly construed against the taxpayer. This is according to a well recognized principle of law requiring narrow interpretation in such cases.¹ Likewise in this case, the statutory language of the Credit should be interpreted narrowly.

For purposes of the Credit, “employer” includes former employers. Utah Code § 59-10-103(1) (1987–present) defines employer for purposes of Title 59 Chapter 10 to be the same as employer is defined in § 59-10-401(1987-present). Over many years, these definitions have remained unchanged and the Commission has consistently interpreted them to include former employers. The Commission’s prior decisions for Appeal Nos. 01-1359 and 11-296 show how the Commission interpreted employer for the 1999 and 2007 tax years to include former employers. Although these orders addressed the Health Care Insurance Premiums Deduction (“Deduction”) found in § 59-10-114(2)(g) (2006-2007) and § 59-10-114(2)(h) (1999-2005), these decisions still relied on the meaning of employer as defined in § 59-10-103(1) and § 59-10-401 to determine the taxpayers’ eligibility for the Deduction. In these decisions, the Commission interpreted employer to include former employers and denied the Deduction to taxpayers who were retired federal employees eligible to participate in health insurance plans funded in part by their

¹ See *Parson Asphalt Prods., Inc. v. State Tax Comm’n*, 617 P.2d 397, 398 (Utah 1980) (“[s]tatutes which provide for exemptions should be strictly construed, and one who so claims has the burden of showing his entitlement to the exemption”). Tax credit statutes, like tax exemptions, “are to be strictly construed against the taxpayer.” *MacFarlane v. State Tax Comm’n*, 2006 UT 18, ¶11. However, the court did explain in that case, “While we recognize the general rule that statutes granting credits must be strictly construed against the taxpayer, the construction must not defeat the purposes of the statute. The best evidence of that intent is the plain language of the statute.” (Citations omitted.) See *id.* at ¶19.

former employer, the federal government. Lastly, the phrase “and who has control of the payment of wages for such services,” which was noted by REPRESENTATIVE FOR TAXPAYER, does not exclude former employers from the definition of employer.

The evidence presented by the Taxpayer does not show the meaning of “employer” changed for the 2009 tax year. The Legislature has made no recent changes to the statutory definition of employer found in § 59-10-103(1) and § 59-10-401. Instead, the Tax Commission’s training and website information were, unfortunately, incorrect during the 2009 filing season, and this misinformation caused the Taxpayer to incorrectly claim the Credit for that tax year.

The Taxpayer has shown reasonable cause for a waiver of interest under § 59-1-401(13) based on the misinformation from the Tax Commission. However, the Taxpayer cannot receive a waiver of the correctly assessed audit tax based on misinformation; there is no section in the Utah Code authorizing the Commission to waive correctly assessed tax based on misinformation from the Tax Commission.

Aimee Nielson-Larios
Administrative Law Judge

DECISION AND ORDER

Based upon the foregoing, the Commission waives the audit interest assessed but sustains the Division’s assessment of audit tax. 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

Appeal No. 12-1866

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

DATED this _____ day of _____, 2013.

R. Bruce Johnson
Commission Chair

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

Robert P. Pero
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.