

12-2029
TAX TYPE: SALES TAX
TAX YEAR: 4-08 through 10-11
DATE SIGNED: 11-29-2013
COMMISSIONERS: B. JOHNSON, M. CRAGUN, R. PERO
EXCUSED: D. DIXON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYER, Petitioners, vs. TAXPAYER SERVICES DIVISION, OF THE UTAH STATE TAX COMMISSION, Respondent.</p>	<p>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</p> <p>Appeal No. 12-2029</p> <p>Account No. ##### Tax Type: Sales Tax Tax Period: 4/08 through 10/11 Judge: Phan</p>
-----------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Presiding:

R. Bruce Johnson, Commission Chair
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE FOR TAXPAYER, President, TAXPAYER.
For Respondent: RESPONDENT-1, Taxpayer Services Division
RESPONDENT-2, Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on September 3, 2013, in accordance with Utah Code §59-1-501 and §63G-4-201 et seq. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. Petitioner ("Taxpayer") timely filed an appeal to the Utah State Tax Commission of the decision issued by Respondent ("Division") to deny waiver of penalties and interest assessed for the late filing of returns and late payment of sales tax.
2. The periods at issue in this appeal are April 2008 through October 2011.
3. The penalties assessed include both a failure to timely file and failure to time pay penalties for each quarter during the period at issue and total \$\$\$\$\$. Interest as of the date of the hearing was \$\$\$\$\$.

4. The Taxpayer's representative ("Representative") testified that he had purchased the building in which this business was operated and opened the business as TAXPAYER in 2005. SENTENCE REMOVED. He had operated this business from August 2005 until 2007. In 2007 he sold the business in a seller financed transaction and leased the building to the buyer ("Buyer"). The Buyer operated the business from February 2007 until August 2010.

5. The Buyer defaulted on payments owed to the Representative, failed to pay taxes and incurred other liabilities. The Representative testified that he took the business back in September 2010. At that time he did receive tax advice to the effect that he should close the old business down, open a new business and obtain new tax licenses which he thought might relieve him of some of the tax liability that had been incurred from February 2007 through August 2010. However, if he chose this option, the business would lose its liquor license. The Representative stated at that time new liquor licenses were not being issued. If the business closed and reopened that license would be lost and he could not obtain a new liquor license for the new business. He indicated that he chose to keep the old business and tax licenses so that there would be a liquor license for the business. This meant that the business would owe approximately \$\$\$\$\$ to the State of Utah in tax, penalties and interest incurred during the period that the Buyer had operated the business.

6. After the Representative took back control of the business, monthly payments were made toward the past due deficiency until the tax amount has been paid in full for the periods at issue in this appeal.

7. The Buyer had filed returns and paid sales tax late for periods prior to those at issue in this appeal. There had been penalties assessed for filing periods from July 2007 through March 2008. These deficiencies had eventually been paid by the Buyer, prior to the Representative taking the business back. It was beyond the statute of limitations to consider waiver for any of these periods.

8. The Division did not provide information that would refute any of the facts regarding the sale of the business by the Representative, the default by the Buyer and the Representative taking back the business in September 2010.

9. The Division did waive penalties and reinstated the seller discount for the April, June and July 2008 periods. The Division representatives stated that there had been no penalties prior to July 2007 on this account. The Division could not consider waiver of the first three periods where penalties were assessed beginning with the July 2007 period because it was beyond the statute of limitations for waiver. So the Division had waived the first three periods that could

be addressed by the Division based on compliance history. This was approximately \$\$\$\$ in penalties that had been waived. The Division also reinstated seller discounts for the periods July, August, October and November 2009 as well as August through December 2010.

10. The Division did provide information that after the Representative had taken over the account in September 2010, there had been one period for which a penalty had been assessed. That had been October 2011. For that period the return was filed timely, but the tax was paid 5 days late. In January 2011 the return had been filed three days late, and the vendor discount disallowed. But it was not counted as an error by the Division and no penalty was assessed for that period.

APPLICABLE LAW

The Commission may waive penalties under Utah Code Sec. 59-1-401(13) as follows:

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:

...

(h) Unobtainable Records: For reasons beyond the taxpayer's control, the taxpayer was unable to obtain records to determine the amount of tax due.

(i) Reliance on Competent Tax Advisor: (i) the taxpayer fails to file a return after furnishing all necessary and relevant information to a competent tax advisor, who incorrectly advised the taxpayer that a return was not required. (ii) the taxpayer is required, and has an obligation, to file the return. Reliance on a tax advisor to prepare a return does not automatically constitute reasonable cause for failure to file or pay. The taxpayer must demonstrate that ordinary business care, prudence, and diligence were exercised in determining whether to seek further advice.

...

(4) Other Considerations for Determining Reasonable Cause.

(a) The commission allows for equitable considerations in determining whether reasonable cause exists to waive a penalty. Equitable considerations include:

(i) whether the commission had to take legal means to collect the taxes; (ii) if the error is caught and corrected by the taxpayer; (iii) the length of time between the event cited and the filing date; (iv) typographical or other written errors; and (v) other factors the commission deems appropriate.

(b) Other clearly supported extraordinary and unanticipated reasons for late filing or payment, which demonstrates reasonable cause and the inability to comply, may justify a waiver of the penalty.

(c) In most cases, ignorance of the law, carelessness, or forgetfulness does not constitute reasonable cause for waiver. Nonetheless, other supporting circumstances may indicate that reasonable cause for waiver exists.

(d) Intentional disregard, evasion, or fraud does not constitute reasonable cause for waiver under any circumstance.

The applicable statutes specifically provide that the taxpayer bears the burden of proof in proceedings before the Tax Commission. Utah Code Sec. 59-1-1417 provides:

In a proceeding before the commission, the burden of proof is on the petitioner. . .

CONCLUSIONS OF LAW

1. The Tax Commission may waive penalties or interest if reasonable cause is shown under Utah Code Sec. 59-1-401(13). What constitutes reasonable cause is set out at Administrative Rule R861-1A-42. The facts in this case are unique and do not clearly fall within any of the common criteria for waiver set out at Administrative Rule R861-1A-42(3), beyond the compliance history criteria for which the Division has already waived three periods. The Representative explained that he had to choose between closing the old business and reopening with new tax licenses¹ or retaining the liquor licenses. He had made the determination that the liquor license was too important for the business, thereby the business retained the tax liability incurred while it was being operated by the Buyer. The Representative argued that he had no real choice in the matter. The Representative has now seen to the payment of tax accrued during the period at issue.

2. The Division argued that the Representative did have a choice; he chose to continue operating the old business rather than close it down, or close it down and open a new business at the location. The Utah Supreme Court has held in *Ivory Homes v Utah State Tax Commission*, 2011 UT 54 (2011), prg.16, that “[w]hen a taxpayer has chosen to conduct business under a particular arrangement, it cannot disregard the consequence of that arrangement when it would otherwise be the taxpayer’s disadvantage.” (Citing *Institutional Laundry, Inc. v Utah*

¹ As this was not an issue at this hearing, not argued or addressed by the parties, the Commission has no factual basis to make a conclusion either way regarding successor to business liability. The Commission does note that had the Representative closed the old business, opened a new one and obtained new tax licenses the liability from the prior business may still have transferred to or become a lien on the assets of the new business under the successor in business provisions at Utah Code Sec. 59-12-112. See also *Utah State Tax Commission, Findings of Fact, Conclusions of Law and Final Decision, Appeal No. 02-0899* (2003). Many prior Tax Commission decisions are posted in a redacted format to the Commission’s website at tax.utah.gov/commission-office/decisions.

State Tax Commission, 706 P.2d 1066 (Utah 1985).) The Representative may not structure the arrangement in a manner that favors retaining the liquor license, but then disregard that arrangement for purposes of the sales tax license.

3. However, the Commission notes that there is a provision at Utah Admin. Rule R861-1A-42(4) that allows the Commission to consider waiver of penalties for equitable considerations.² In this case the Representative has come forward and paid the tax and interest amount for a debt that he did not incur and may have otherwise been difficult for the Division to collect against the assets or property of the business, the Buyer, or under successor liability provisions. The tax and interest amount that has now been paid by the Representative was substantial. Considerations under Sec. 42(4) include whether or not the Commission had to take legal means to collect the tax or if the error was caught and corrected by the taxpayer and the length of time between the event and the filing date. In this case billings would have been generated regarding the deficiency, but the Representative had made arrangements to pay before the Division started successor liability proceedings. The error was not caught by the Taxpayer, but the Representative did make payment arrangements and began to pay the balance within a reasonable period of time after taking over the business. Given the large amount of the deficiency it was reasonable that it needed to be paid based over time with installments. There is reasonable cause under the provisions of equitable consideration to waive all penalties assessed for the period of April 2008 through October 2011.

4. No basis was shown for waiver or reduction of the interest. Utah Admin. Rule R861-1A-42(2) provides that interest would be waived only if the taxpayer proves that the commission gave the taxpayer erroneous information or took inappropriate action that contributed to the error. There was no assertion made by the Taxpayer of a Tax Commission or Tax Commission employee error.

² The Commission has previously reduced penalties based on Utah Admin. Rule R861-1A-42(4) for equitable considerations in *Utah State Tax Commission, Findings of Fact, Conclusions of Law and Final Decisions, Appeal Nos. 11-2348 and 09-1203*. Equitable considerations were also cited in *Utah State Tax Commission, Initial Hearing Decision, Appeal No. 08-0013*.

DECISION AND ORDER

Based on the foregoing, the Commission waives the late payment and late filing penalties assessed for the period from April 2008 through October 2011. The interest is upheld. It is so ordered.

DATED this _____ day of _____, 2013.

R. Bruce Johnson
Commission Chair

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §59-1-601 et seq. and §63G-4-401 et seq.