

12-2495

TAX TYPE: SALES & USE TAX

TAX YEAR: 2006 through 2008

DATE SIGNED: 9-26-2014

COMMISSIONERS: B. JOHNSON, M. CRAGUN, R. PERO

CONCURS: COMMISSIONER D. DIXON

BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYER,</p> <p style="padding-left: 40px;">Petitioner,</p> <p>vs.</p> <p>TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="padding-left: 40px;">Respondent.</p>	<p>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</p> <p>Appeal No. 12-2495</p> <p>Account No. #####</p> <p>Tax Type: Sales & Use Tax</p> <p>Tax Year: 2006, 2008 and 2008</p> <p>Judge: Phan</p>
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Presiding:

Michael Cragun, Commissioner
Jane Phan, Administrative Judge

Appearances:

For Petitioner: REPRESENTATIVE FOR TAXPAYER, Owner
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General
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 May 5, 2014, in accordance with Utah Code §59-1-1410, Utah Code §59-1-401, 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. This matter involved two different claims on the part of Petitioner ("Taxpayer"). These were an appeal of a waiver decision and an appeal of a refund denial.
2. Regarding the waiver decision, the Taxpayer had on May 21, 2012 submitted to Respondent ("Division") a request for waiver of penalties and interest imposed for the second quarter of

2005 through the fourth quarter of 2011. This request was made by letter from NAME-1, Attorney with NAME-2.¹ The Division issued its waiver decision on June 18, 2012, in which it waived all of the penalties assessed for 2005 but not any of the subsequent periods. The Waiver Decision specifically informed Petitioner the deadline to appeal the decision was July 18, 2012.² Petitioner's appeal of this waiver decision was not filed until October 16, 2012, after the period to file an appeal had expired.

3. Regarding the issue of the refund, in August and September 2012, the Taxpayer filed amended returns for years 2006 through 2009, in which refunds were claimed.³ On September 17, 2012, the Division issued a Notice of Expired Refund or Credit, denying refunds for the periods from 2006 through 2008 as untimely. The Taxpayer timely appealed this refund denial.⁴

4. The reason for the refund was that the Taxpayer claimed that both she and the company she was contracting with as an independent contractor had paid sales tax for the rides that the Taxpayer had offered during this period. The Division did accept her amended returns for the periods in and after 2009 and issued the refunds for those periods.

5. Although the Taxpayer had not filed amended returns or a claim for refund until September 1, 2012, the Taxpayer did produce a letter she had written to Division employee NAME-3 on April 16, 2010⁵ and a November 22, 2011 email exchange with employees of the Taxpayer Services Division⁶ which appeared to be an attempt to resolve longstanding issues with the Taxpayer's account.

6. The longstanding issues on the account go back to 2004. In 2004 or early 2005 the Taxpayer closed out one sales tax account and opened a new sales tax account. She asserts that payments were not applied to the correct account for several periods and this took time to straighten out. Notices for Demand for Payment of Taxes along with a Notice of Warrant were mailed to the Taxpayer by the Division starting as early as February 25, 2005. In early 2005 there was correspondence from the Taxpayer regarding a payment and return filed for the 1st quarter of 2005. Also, the Taxpayer was trying to resolve outstanding balances for the 2004 tax year.⁷ In 2006 the Division started sending Notices of Lien for periods in 2005 that had been unpaid.⁸

7. However, much of the difficulty in getting the account resolved was due in large part to the fact that the Taxpayer did not file any Utah Sales Tax returns for several years and did not pay the taxes as they were due. She did not file the third quarter 2006 returns through the third quarter of 2009

1 Respondent's Exhibit 1.

2 Respondent's Exhibit 2.

3 Respondent's Exhibit 3.

4 Respondent's Exhibit 4.

5 Petitioner's Exhibit 7.

6 Petitioner's Exhibit 9.

7 Petitioner's Exhibit 1.

8 Petitioner's Exhibit 4.

until December 3, 2009. She did not file the fourth quarter 2009 or the first quarter of 2010 returns until April 14, 2010.⁹ Due to the non-filing, estimates had been assessed against the Taxpayer's account until the returns were accepted and posted.

8. On February 22, 2010, the Taxpayer sent a letter asking if an attached bill reflected the returns that had been filed and noting, "I ha[ve]s also requested a hearing to resolve the outstanding balance and have not received a reply."¹⁰ On April 26, 2010, the Taxpayer sent another correspondence to the Division in which she indicated the amounts showing as due on the account did not reflect the amounts from her Forms TC-61. The letter indicates that she was sending again the forms TC-61.¹¹ In this letter she goes on to state, "I have repeatedly corresponded for corrections to my account in writing, yet it still continues to be billed in error, as evidenced by this most recent billing. I have refused to make payment until corrections are made. The only responses I have received are a lien filing and billings of exorbitant penalty fees and interest charges."

9. In November 2011, there was some email correspondence between the Taxpayer and NAME-4 of the Division.¹² An email from NAME-4 dated November 15, 2011, documented receipt of a change to the Taxpayer's application, which changed the tax rate to the RURAL COUNTY rate. NAME-4 emailed, "This changed the tax due on the account from \$\$\$\$\$ to \$\$\$\$\$. This balance i[s] on periods where you filed the returns but didn't make the payments. The reduced amounts in tax were applied to the oldest period forward." On November 22, 2011 there was another email from NAME-4 to the Taxpayer which indicated, "I have reviewed all of the returns you sent me today and they all match what is on the system. The only one that is slightly different is the one you had listed as October-November 2005. You were on a quarterly payment basis then, but had filed a monthly return.¹³ It was added to the return for December to create a proper quarterly amount." It also states that he attached a current balance due letter. The Taxpayer responded to this email also on November 22, 2011. In the response regarding the issue with the October – December 2005 period she states, "How come no one would ever answer that question in the past? All of this would have been easily averted from the get go if I could have gotten such a response *6 years ago*, . . ." She goes on to state in the letter, "There are other charges from other quarters different from what I submitted. I will gather those and send to you (again) under a separate email. So I am not sure why "what is on the systems matches what was sent in." On December 7, 2011, the Taxpayer emailed that saying she was waiting for a response from the prior email and asking about a Notice of

9 Petitioner's Exhibits 5 & 8.

10 Petitioner's Exhibit 6.

11 Petitioner's Exhibit 7.

12 Petitioner's Exhibit 9.

13 It would be improper for a quarterly filer to change her filing status in this manner.

Requirement Letter for her March 2006 and September 2007 returns. On December 19, 2011 the Taxpayer emailed that she was not able to open the attached current balance letter.

10. It was a nine months later before the Taxpayer filed amended returns which were on a basis not discussed in the above emails. The basis for the amended returns was that some portion of the sales tax had been remitted to the state by COMPANY, the company that she had worked for as an independent contractor. For the second quarter of 2006 through the fourth quarter of 2006, the refund was requested on August 31, 2012. For the first through fourth quarters of 2007 the request for refund was filed on September 5, 2012. For the first through fourth quarters of 2008 the request for refund was filed on August 24, 2012.

11. For all the refund request periods at issue, the taxes had been paid on July 15, 2010. Based on Utah Code 59-1-1410(8), the date the statute of limitations had expired for all periods was July 15, 2012.

12. The letter from the Taxpayer's Attorney dated May 21, 2012, was submitted prior to the expiration of the refund period.¹⁴ As noted above, this letter was processed as the waiver request which the Division granted for 2005 but denied for subsequent years by the Waiver Decision issued June 18, 2012.¹⁵

13. In the letter NAME-1 states, "We are requesting that the State of Utah abate the \$\$\$\$ in penalties that have been assessed on the sales tax account listed above." NAME-1 goes on to explain he felt reasonable cause existed because there were "several factors that have made the assessment of the taxes difficult in this case." NAME-1 notes that there was trouble with closing out the 2004 account, and not having payments credited to the proper account in early 2005. He also notes that the Commission had issued estimates for a period from December 2005 to February 2006 when no business had been conducted and that the sales tax rate originally applied had been too high as it had been the city rate instead of the RURAL COUNTY rate.

14. In his letter, NAME-1 goes on to explain a possible refund issue, but it does not appear to be the same issue for which the amended returns were filed and refund paid for the 2009 through 2012 periods. He states:

Fourth, it appears that REPRESENTATIVE FOR TAXPAYER erroneously included total sales on her sales tax returns, which included sales taxes that were collected. During the November 2011 sales tax review, REPRESENTATIVE FOR TAXPAYER learned that she has been over reporting her gross sales. This error was due to her reporting her total sales, which included the amount she charged clients for sales tax. This resulted in REPRESENTATIVE FOR TAXPAYER paying \$\$\$\$ more in sales taxes than she was required to pay.

14 Respondent's Exhibit 1.

15 Respondent 's Exhibit 2.

Rather than having to go through the process of filing claims with the USTC, we would request that this amount be considered in the USTC's penalty abatement determination as a reason to abate the penalties.

APPLICABLE LAW

The time limit for making a claim for refund is set forth in Utah Code §59-1-1410, below in pertinent part:

- (8) (a) Except as provided in Subsection (8)(b) or Section 19-2-124, 59-7-522, 59-10-529, or 59-12-110, the commission may not make a credit or refund unless a person files a claim with the commission within the later of:
 - (i) three years from the due date of the return, including the period of any extension of time provided in statute for filing the return; or
 - (ii) two years from the date the tax was paid.
- (b) The commission shall extend the time period for a person to file a claim under Subsection (8)(a) if:
 - (i) the time period described in Subsection (8)(a) has not expired; and
 - (ii) the commission and the person sign a written agreement:
 - (A) authorizing the extension; and
 - (B) providing for the length of the extension.

Utah Code §59-1-1417, provides:

In a proceeding before the commission, the burden of proof is on the petitioner except for determining the following, in which the burden of proof is on the commission . . .

A taxpayer may appeal a Waiver Decision pursuant to Utah Admin. Rule R861-1A-42(1)(d) as follows:

If the request for waiver of penalty or interest is denied, the taxpayer has a right to appeal. Procedures for filing appeals are found in Title 63G, Chapter 4, Administrative Procedures Act and commission rules.

The deadline for petitions for an adjudicative proceeding pursuant to Utah Code Secs. 59-1-501 or 63G-4-201 is provided at Rule R861-1A-22 of the Utah Administrative Rules, as follows in relevant part:

- (1) Time for Petition. Unless otherwise provided by Utah statute, petitions for adjudicative actions shall be filed within the time frames specified in R861-1A-20. If the last day of the 30-day period falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next Tax Commission business day.

CONCLUSIONS OF LAW

1. Waiver Decision: The Taxpayer missed the deadline to file an appeal of the decision by the Division to waive penalties for the 2005 tax year, but not waive penalties for additional periods. The Division issued its waiver decision on June 18, 2012. The Waiver Decision specifically informed the Taxpayer that the deadline to appeal the decision was July 18, 2012. The Taxpayer did not file an appeal of the decision by this deadline. Under Utah Code Sec. 63G-4-201 and Utah Admin. Rules R861-1A-42(1)(d) and R861-1A-22, this appeal of the waiver decision must be dismissed because it was untimely. The Tax Commission has no statutory authority to allow an extended deadline for cause and there was no showing that an action on the part of the Division during the thirty-day appeal period caused the Taxpayer to delay in filing an appeal of the decision.

2. Refund Request: The issue before the Commission regarding the refund request is also one of the Taxpayer failing to meet a statutorily set limitations period. The Division had issued a refund for the periods from 2009 through 2012 based on refund requests filed by the Taxpayer in August or September of 2012. The Division denied the refund requests for the periods from 2006 through 2008 based on the expired refund period. As noted by the Division, the deadline to file for the refund for the 2006-2008 periods is set out by Utah Code Sec. 59-1-1410(8). Based on Utah Code Sec. 59-1-1410(8) the statute of limitations for these refunds expired on July 15, 2012.

3. There is no statutory basis for the Tax Commission to extend the statute of limitations period set by Utah Code Sec. 59-1-1410(8) for cause. The Commission strictly construes limitations periods uniformly against taxpayers who have missed the statutory deadline.¹⁶

4. In this matter, the issue is whether the November 22, 2011 emails or the May 21, 2012 letter from the Taxpayer's attorney could be construed as a refund request. The November 22, 2011 emails do not discuss the refund issue, that COMPANY had also paid the tax, and is not a refund request. The letter from the Taxpayer's attorney mentions a refund issue, but asks that it be considered in the decision to waive penalties rather than have the Taxpayer file a claim for refund. It appears based on the amount of the claim that this is not the refund related to the COMPANY payments. The Division had issued its decision on this waiver request in a timely manner, on June 18, 2012. The statute of limitations did not expire until July 14, 2012. The Taxpayer chose at that time to request consideration as part of a waiver instead of filing a refund request. The letter does not constitute an express filing of a claim for the COMPANY refund. It was not until after the July 15, 2012 date that express claims for refund were filed in this matter. As noted by the Division in its Prehearing Brief, the Utah Supreme Court in *Matrix*

¹⁶ See *Utah State Tax Commission Decisions in Appeal Nos. 12-1247, 11-115, 09-0037, 09-1601 and 05-1414*. These and other decisions issued by the Tax Commission are available to the parties in a redacted format at tax.utah.gov/commission-office/decisions.

Funding Corp. v. Utah State Tax Comm'n, 52 P.3d 1282, 1289 (2002) considered the issue of what might constitute a refund claim. Neither the emails nor the attorney's letters are sufficient to be construed as a refund claim being submitted prior to the expiration of the statute of limitations.

5. Although the Commission may consider an extension of a statute of limitation period if an action on the part of the Commission or an employee of the Commission prevented a taxpayer from filing within a limitations period, there is no such basis under the facts in this appeal. The Taxpayer argued how difficult it was to resolve this account. However, the difficulty was primary of the Taxpayer's own making. She did not file and pay tax returns timely as they were due for several years and then when she did finally file it took some time to process and post the late returns. Later the Taxpayer discovered the returns which she eventually filed were in error. The basis for the refund was the error that the Taxpayer had made in her returns by claiming more tax than she actually owed. It is in no way the responsibility of the Division, nor is it possible for the Division to audit every return for this type of error. These were actions under the control of the Taxpayer, not the Division. The Taxpayer had noted in a November 2011 email, "All of this would have been easily averted from the get go if I could have gotten such a response *6 years ago*, . . ." In fact, this was something that the Division would not likely have reconciled prior to the Taxpayer bringing her filings current, due to the improperly filed return and then the number of unfiled returns.

The Taxpayer's appeal of the waiver decision should be dismissed as it was not timely filed and the Taxpayer's appeal of the Notice of Expired Refund or Credit should be denied.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, this Commission dismisses the Taxpayer's waiver decision appeal and denies the Taxpayer's refund claim. This decision reverses and sets aside the Commission's Initial Hearing Decision. It is so ordered.

DATED this _____ day of _____, 2014.

R. Bruce Johnson
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

COMMISSIONER DIXON CONCURS

The information and findings of fact are different from those of the initial hearing in this appeal. It was not as clear in the instant formal hearing on this matter that there was a period of time when the Tax Commission was not addressing or investigating the Taxpayer's concerns or inquiries about unexplained increases to her sales and use tax accounts. It is not clear based upon the testimony and evidence in the Formal Hearing record that there was an error made by the Tax Commission in assisting the Taxpayer with questions on her account, which may have led to her delay in filing a request for a refund because she did not have the correct, or corrected information necessary to file an adequate or proper request for a refund.

It was on the basis of my prior understanding from the Initial Hearing that I ruled the Commission should accept the taxpayers refund requests for the 11 periods at issue. The facts do not appear the same, and as such, I have no basis to decide otherwise, except to concur.

D'Arcy Dixon Pignanelli
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.