13-440
TAX TYPE: INCOME / REFUND
TAX YEAR: 2005 & 2006
DATE SIGNED: 8-16-13
COMMISSIONERS: B. JOHNSON, D. DIXON, M. CRAGUN, R. PERO
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER-1 & TAXPAYER-2, Petitioners, v. TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**INITIAL HEARING ORDER** Appeal No. 13-440 Account No. #### Tax Type: Income / Refund Tax Years: 2005 & 2006 Judge: Chapman

Presiding:
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: TAXPAYER-1, Taxpayer (by telephone)
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General
RESPONDENT-1, from Taxpayer Services Division
RESPONDENT-2, from Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5, on June 5, 2013.

On January 11, 2013, TAXPAYER-1 and TAXPAYER-2 ("Petitioners" or "taxpayers") filed an amended 2005 Utah income tax return and an original 2006 income tax return. On the returns, the taxpayers requested refunds or credits of overpaid Utah taxes in the amounts of $$$$$ for the 2005 tax year and $$$$$ for the 2006 tax year.

On January 17 and January 30, 2013, the Taxpayer Services Division ("Division") issued Notices of Expired Refund or Credit ("Notices"), in which it informed the taxpayers that the time to claim a refund or credit for the 2005 and 2006 tax years had expired. The Notices informed the taxpayers that "Utah law limits

the time allowed to claim a refund or credit to the later of three years from the due date of the return, plus the extension period, or two years from the payment date."

The Division's Notices indicate that the general deadlines to claim a refund or credit of overpaid taxes is October 15, 2009 for the 2005 year and October 15, 2010 for the 2006 tax year.[1] The taxpayers, however, ask the Commission to consider that their accountant, unbeknownst to them, improperly had them pay taxes to Utah that they instead owed to STATE on income received from property in STATE. As a result, the STATE State Tax Commission has assessed them taxes on the same income on which they paid Utah taxes. They state that if the Commission does not refund them the taxes that they erroneously paid to Utah, they will end up having to pay state taxes twice, once to Utah and once to STATE. They also ask the Commission to consider that they lost a lot on money through the NAME investment scheme, part of which was refunded by the IRS, and that they have gone through a voluntary bankruptcy proceeding. They ask the Commission to extend any statutory deadlines for requesting a refund or credit of overpaid taxes because their bankruptcy attorney told them that matters would be stayed while they were in bankruptcy. Regardless of the statutory deadlines, they ask the Commission to consider that it would be unjust for Utah to keep money that it was not due when they now have to pay the same taxes to STATE. For these reasons, they ask the Commission to refund the $$$$$ of 2005 taxes and the $$$$$ of 2006 taxes that they overpaid to Utah.

The Division stated that Utah law does not permit a refund of the overpaid taxes at issue in this appeal, even if extended deadlines to request a refund or credit should be considered because of the bankruptcy proceeding, because of actions taken by the Internal Revenue Service ("IRS") concerning the NAME scheme, or because of the audit assessment issued by the STATE State Tax Commission. The Division asserts that the taxpayers' January 11, 2013 request is past any extended deadline that may be appropriate because of these

1 Three years from the due date of the 2005 return, plus extensions, is October 15, 2009. Three years from the due date of a 2006 return, plus extensions, is October 15, 2010.

circumstances. For these reasons, the Division asks the Commission to sustain its actions to deny the taxpayers' requests for refunds or credits of the 2005 and 2006 taxes that they overpaid to Utah.

APPLICABLE LAW

Utah Law.

UCA §59-10-514 provides for the filing of a Utah individual income tax return, as follows in pertinent part:

> (1) . . . .
> (a) an individual income tax return filed for a tax imposed in accordance with Part 1, Determination and Reporting of Tax Liability and Information, shall be filed with the commission:
> (i) except as provided in Subsection (1)(a)(ii), on or before the 15th day of the fourth month following the last day of the taxpayer's taxable year; . . . .

UCA §59-10-516(1) provides that the Commission shall allow an extension of time for filing an individual income tax return, as follows in pertinent part:

> (1) (a) The commission shall allow a taxpayer an extension of time for filing a return.
> (b) (i) For a return filed by a taxpayer except for a partnership, the extension under Subsection (1)(a) may not exceed six months.
> . . . .

UCA §59-1-1410 addresses the general timeframes within which a taxpayer can request a refund or credit of overpaid taxes, as follows 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.

UCA 59-10-529(12) provides an exception to the general timeframes to request a refund or credit of overpaid taxes. It allow a taxpayer to file a claim for a refund or credit of an overpayment within two years of the time that the taxpayer is required to file a notice of change, a notice of correction, or an amended return, as follows:

> (12) (a) A taxpayer may file a claim for a credit or refund of an overpayment within two years from the date a notice of change, notice of correction, or amended return is required to be filed with the commission if the taxpayer is required to:
>
> (i) report a change or correction in income reported on the taxpayer's federal income tax return;
>
> (ii) report a change or correction that is treated in the same manner as if the change or correction were an overpayment for federal income tax purposes; or
>
> (iii) file an amended return with the commission.
>
> . . . .
>
> (c) The amount of the credit or refund may not exceed the amount of the reduction in tax attributable to the federal change, correction, or items amended on the taxpayer's amended federal income tax return.
>
> (d) Except as provided in Subsection (12)(a), this Subsection (12) does not affect the amount or the time within which a claim for credit or refund may be filed.

UCA 59-10-536(2)(a) provides that that a taxpayer has the duty to report changes made by the IRS, as follows in pertinent part:

> (i) Except as provided in Subsection (2)(a)(iii), if a change is made in a taxpayer's net income on the taxpayer's federal income tax return because of an action by the federal government, the taxpayer shall file with the commission within 90 days after the date there is a final determination of the action:
>
> (A) a copy of the taxpayer's amended federal income tax return; and
>
> (B) an amended state income tax return that conforms with the changes made in the taxpayer's amended federal income tax return.
>
> (ii) Except as provided in Subsection (2)(a)(iii), if a change is made in a taxpayer's net income on the taxpayer's federal income tax return because the taxpayer files an amended federal income tax return, the taxpayer shall file with the commission within 90 days after the date the taxpayer files the amended federal income tax return:
>
> (A) a copy of the taxpayer's amended federal income tax return; and
>
> (B) an amended state income tax return that conforms with the changes made in the taxpayer's amended federal income tax return.
>
> (iii) A taxpayer is not required to file a return described in Subsection (2)(a)(i) or (ii) if a change in the taxpayer's federal income tax return does not increase state tax liability.

UCA §59-1-1417 provides that the burden of proof is generally upon the petitioner in proceedings before the Commission, with limited exceptions as follows:

> (1) 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) whether the petitioner committed fraud with intent to evade a tax, fee, or charge;
> (b) whether the petitioner is obligated as the transferee of property of the person that originally owes a liability or a preceding transferee, but not to show that the person that originally owes a liability is obligated for the liability; and
> (c) whether the petitioner is liable for an increase in a deficiency if the increase is asserted initially after a notice of deficiency is mailed in accordance with Section 59-1-1405 and a petition under Part 5, Petitions for Redetermination of Deficiencies, is filed, unless the increase in the deficiency is the result of a change or correction of federal taxable income:
> (i) required to be reported; and
> (ii) of which the commission has no notice at the time the commission mails the notice of deficiency.
> . . . .

Federal Bankruptcy Law.

11 USC §108(a) provides the timeframe within which a person who has filed bankruptcy may commence an action if the period to commence that action has not expired before the date of the filing of the petition, as follows in pertinent part:

> (a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of—
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
> (2) two years after the order for relief.

11 USC §301 provides that commencement of a voluntary bankruptcy case constitutes an order for relief, as follows:

> a) A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter.
> (b) The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.

DISCUSSION

The taxpayers' primary argument for receiving a refund or credit of the 2005 and 2006 Utah taxes at issue is that they erroneously paid tax to Utah instead of STATE and that they will now have to pay state tax twice if Utah does not refund the amounts they paid to it. Utah law provides statutes of limitations that set forth deadlines to request a refund or credit of overpaid taxes. Utah law, however, does not provide that a taxpayer can request a refund or credit of overpaid taxes *at any time* if the taxpayer shows that the taxes were not due to Utah. Accordingly, the Commission must consider the deadlines set forth in Utah law and, if appropriate, federal law to determine whether the taxpayers' January 11, 2013 request is timely.

Usually, these deadlines are based on the date the overpayment was made or the date the return for the year at issue was due, plus any extensions, as set forth in Section 59-10-1410(8). In this case, there are other deadlines that come into play because of bankruptcy proceedings, changes made by the IRS, and audit assessments imposed by STATE. The circumstances, however, are different for each of the two years at issue. Accordingly, the 2005 and 2006 tax years will be discussed separately.

I. 2005 Tax Year.

A. Section 59-1410(8)(a) Deadlines. Section 59-1-1410(8)(a) provides that a taxpayer is entitled to receive a refund or credit of overpaid taxes within three years from the due date of the return (including any statutory extension) or within two years from the date the tax was paid. For the 2005 tax year, the taxpayers paid the taxes at issue on June 2, 2006. Two years from this date is June 2, 2008. The due date of a 2005 return, with extensions, is October 15, 2006. Three years from this date is October 15, 2009. As a result, a request for a refund or credit of overpaid taxes for 2005 is timely under this statute if made by October 15, 2009. Because the Tax Commission did not receive the taxpayers' request for a refund or credit of 2005 taxes until January 11, 2013, the request for the 2005 tax year may not be granted under Section 59-1-1410(8)(a).

B. STATE Audit Deficiency. On April 13, 2010, the STATE State Tax Commission issued a Notice of Deficiency Determination ("STATE Notice"), in which it assessed additional income tax (excluding penalties and interest) to the taxpayers in the amount of $$$$$ for the 2005 tax year and $$$$$ for the 2006 tax year. The taxpayers proffer that the assessment concerns income earned on property in STATE and on which they should have paid STATE tax, but, instead, erroneously paid Utah tax. The STATE Notice informed the taxpayers that they had 63 days from the date of the notice (i.e., until June 15, 2010) to file a written petition for redetermination. Otherwise, "this determination becomes final." The taxpayers admit that they did not file a written petition for redetermination with the STATE State Tax Commission. Accordingly, the STATE assessment for 2005 and 2006 became final on June 15, 2010.

The Division proffered at the hearing that its policy is to allow a taxpayer to submit a Utah return that reflects changes required because of another state's actions within two years and ninety days of that other state's action. The Division stated that this policy is based on decisions that the Commission issued in the 1990's. For example, in *USTC Appeal No. 95-0006* (Order Aug. 18, 1995),[2] the Commission considered a situation where Petitioners in that case had an interest in a California partnership that was dissolved. The Petitioners' "CPA firm erred in not having the Petitioners file a California income tax return and instead had Petitioners pay tax on the California income to the State of Utah." The Petitioners were subsequently audited by California and assessed California income tax on the income. The Petitioners acknowledged that the amended Utah return they submitted to request a refund of the overpaid Utah taxes was beyond the general three-year deadline provided in Section 59-10-529(7) (which has since been amended and renumbered Section 59-1-1404(8)). However, they argued that the "California and Utah returns were extricable (sic) tied together so that the refund period should not begin until two years after payment was made to California."

2 Many of the Commission's decisions have been redacted and are available for review on the Commission's website at http://www.tax.utah.gov/commission-office/decisions.

In its decision for *Appeal No. 95-0006*, the Commission found that the Petitioners' claim for refund was not barred by the statute of limitation. The Commission noted that in Section 59-10-536(5) (which has since been amended and renumbered 59-10-536(2)), "the legislature has addressed the situation that occurs when a taxpayer's federal taxable income is modified in some way that would affect his or her state taxable income." The Commission also noted that the "taxpayer must file an amended Utah tax return within ninety days of the IRS's final determination of the change." Because the Petitioners filed their amended return within 90 days of the California assessment and because of the similarity between the circumstances in *Appeal No. 95-0006* and an IRS modification of federal taxable income, the Commission found that it would allow the Petitioners "the same period for filing amended returns that is applied to an IRS amendment of federal taxable income." As a result, the Commission found that the Petitioners' refund request was not barred by the statute of limitations.

Because of this and other similar rulings, the Division stated that it allows a taxpayer to submit a request for refund or credit of overpaid Utah taxes within two years and ninety days of an action taken by another state. UCA 59-10-529(12) provides that a taxpayer may file a claim for a refund or credit of an overpayment within two years of the time that the taxpayer is required to file a notice of change, a notice of correction, or an amended return to report IRS actions. Because a taxpayer is given ninety days to report such changes under Section 59-10-536(2)(a), the Division allows two years and ninety days to file a request for refund or credit of Utah taxes.

Even if the ruling in *Appeal No. 95-0006* is applied to this present case, the taxpayers' request for refund or credit of overpaid taxes is untimely under Section 59-10-529(12). The STATE Notice was issued on April 13, 2010. Two years and ninety days after this date is July 12, 2012. In *Appeal No. 95-0006*, the Commission indicated that ninety day period to report an IRS change would be based on a "final determination of the change." The STATE assessment for 2005 and 2006 became final on June 15, 2010 because the

taxpayers did not file an appeal with the STATE State Tax Commission. Two years and ninety days after this date is September 13, 2012. The taxpayers did not submit their amended 2005 Utah return until January 11, 2013, which occurred after the two year and ninety period to request a refund or credit of overpaid taxes under Section 59-10-529(12) had expired, regardless of whether that period is calculated from the date STATE issued the assessment or from the date the STATE assessment became final. Accordingly, the taxpayers' request for a refund or credit of the Utah taxes that were overpaid for the 2005 tax year and that may be associated with the STATE assessment may not be granted under Section 59-10-529(12).

C. Bankruptcy. The taxpayers voluntarily filed for Chapter 7 bankruptcy relief on September 30, 2010, and an order of discharge was issued on July 11, 2011. The taxpayers state that they believe that the deadlines to request a refund or credit of overpaid Utah taxes for the 2005 and 2006 tax years should be stayed because their bankruptcy attorney told them not to do anything while they were in bankruptcy.

The Division stated that the date of the order of discharge has no effect on the deadlines to request a refund or credit of overpaid Utah taxes. The Division points out that state taxes are not discharged in bankruptcy and that bankruptcy proceedings stay the collections actions taken by certain creditors, but not actions to be taken by the debtor. The Division also points out that a specific section of federal bankruptcy law addresses the period within which a debtor may take actions, which, the Division contends, includes the period to request a refund or credit of overpaid taxes. The Division refers the Commission to 11 USC §108(a), which provides that:

> (a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of—
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> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) two years after the order for relief.

Under "applicable nonbankruptcy law" (in this case, Utah statutes of limitation for requesting a refund or credit of overpaid Utah taxes), the taxpayers had a right to request a refund or credit of overpaid Utah taxes for the 2005 tax year that appears to have begun on July 15, 2010, when the STATE audit assessment became final, and continued for two years and ninety days until September 13, 2012. This period had not expired when the taxpayers filed for bankruptcy on September 30, 2010. 11 USC §108(a) provides that if such a period has not expired, a person may commence an action only before the later of "the end of such period, including any suspension of such period occurring on or after the commencement of the case" or "two years after the order for relief." The Division contends that there is no suspension of the Utah deadlines at issue in this appeal.[3] For these reasons, it appears that the end of the period referred to in 11 USC §108(a)(1) is September 13, 2012.

The Division also proffered that the "order for relief" referred to in 11 USC §108(a)(2) is the September 30, 2010 date the taxpayers filed their voluntary bankruptcy proceeding. The Division's position is supported by 11 USC §301, which provides that "[a] voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter" and that "[t]he commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter." As a result, it appears that "two years after the order of relief" is September 30, 2012, which is two years after the bankruptcy proceeding was filed on September 30, 2012. Accordingly, it appears that the taxpayers had to file their request for a refund or credit of overpaid 2005 Utah taxes before the later of September 13, 2012 or September 30, 2012. The later of these two dates is September

3 The Division refers the Commission to UCA §78B-2-112 of the Utah Judicial Code, which provides that "[t]he duration of an injunction or statutory prohibition which delays the filing of an action may not be counted as part of the statute of limitations." However, the Division indicates that there was no injunction issued by any court that would delay Utah's deadlines concerning requests for refunds or credits. In addition, the Division contends that there is no statutory prohibition under either Utah or federal law that precluded the taxpayers or their bankruptcy trustee from submitting a request for a refund or credit of overpaid Utah taxes.

30, 2012. For these reasons, it appears that the September 30, 2012 deadline provided under bankruptcy law for the taxpayers to file a request for refund or credit of the overpaid 2005 Utah taxes also expired before they submitted their request on January 11, 2013.

D. **Conclusion – 2005 Tax Year**. Unlike the 2006 tax year, the IRS did not make any adjustments at the federal level concerning the taxpayers' 2005 federal tax liability. As a result, changes made by the IRS concerning the losses the taxpayer incurred because of the NAME scheme do not appear to have any application to the 2005 tax year. Based on the foregoing, the taxpayers' January 11, 2013 request for a refund or credit of taxes they overpaid to Utah for the 2005 tax year is not timely under either Section 59-1-1404(8), Section 59-10-529(12), or federal bankruptcy law. For these reasons, the Commission should sustain the Division's action to deny the taxpayers' request for a refund or credit of overpaid 2005 Utah taxes. **II. 2006 Tax Year**.

A. Section 59-1410(8)(a) Deadlines. For the 2006 tax year, all taxes at issue were paid on April 17, 2007. Two years from this date is April 17, 2009. The due date of a 2006 return, with extensions, is October 15, 2007. Three years from this date is October 15, 2010. As a result, a request for a refund or credit of overpaid taxes for 2006 is timely under this statute if made by October 15, 2010. Because the Tax Commission did not receive the taxpayers' request for a refund or credit of 2006 taxes until January 11, 2013, the request for the 2006 tax year may not be granted under Section 59-1-1410(8)(a).

B. STATE Audit Deficiency. STATE issued its audit assessment for the 2005 and 2006 tax years in the same April 13, 2010 notice. Accordingly, the same dates concerning the STATE audit assessment that affected the 2005 tax year (as discussed earlier) also affect the 2006 tax year. As a result, the taxpayers had until September 13, 2012, at the latest, to request a refund or credit of overpaid Utah 2006 taxes associated with the STATE audit pursuant to Section 59-10-529(12). The September 13, 2012 deadline expired before the taxpayers submitted their request for refund or credit of 2006 taxes on January 11, 2013. Accordingly, the

taxpayers' request for a refund or credit of the Utah taxes that were overpaid for the 2006 tax year and that may be associated with the STATE assessment may not be granted under Section 59-10-529(12).

C. Bankruptcy. The same dates discussed earlier concerning the taxpayers' bankruptcy proceeding and the 2005 tax year also affect the 2006 tax year. Because of the STATE audit, the taxpayers had until September 13, 2012, at the latest, to request a refund or credit of overpaid Utah 2006 taxes under Section 59-10-529(12). In addition, the period of "two years after the order of relief" is September 30, 2012, which is two years after the September 30, 2010 date on which they filed their voluntary bankruptcy proceeding. The later of September 13, 2012 and September 30, 2012 is September 30, 2012. Under 11 USC §108(a), it appears that the taxpayers had to file their request for a refund or credit of overpaid 2006 Utah taxes before September 30, 2012 in order to be timely. For these reasons, it appears that the September 30, 2012 deadline allowed under bankruptcy law for the taxpayers to file a request for refund or credit of the overpaid 2006 Utah taxes also expired before they submitted their request on January 11, 2013.

D. IRS Changes for 2006 Tax Year. The taxpayers did not file a 2006 Utah return until January 11, 2013, when they submitted an original 2006 Utah return to request a refund of overpaid 2006 taxes. The taxpayers submitted a 2006 federal return to the IRS on March 19, 2008. They also submitted an amended 2006 federal return to the IRS on October 28, 2009. The Division proffered that it has a copy of the taxpayers' 2006 federal transcript. The Division proffers that on November 30, 2009 (approximately one month after the taxpayers submitted their amended 2006 federal return), the IRS approved a refund of more than $$$$$ of federal taxes. The Division also proffers that the transcript shows that the IRS actually "abated" more than $$$$$ of federal taxes on December 14, 2009.

The Division acknowledges that Section 59-10-529(12) allows a taxpayer to "file a claim for a credit or refund of an overpayment within two years from the date a notice of change, notice of correction, or amended return is required to be filed with the commission." The Division also points out that after a change

is made by the IRS, a taxpayer must submit within ninety days an amended state income tax return to reflect the changes, pursuant to Section 59-10-536(2)(a). The Division first argues that the two year and ninety day period to submit a request or refund to the Tax Commission does not apply to the taxpayers for the 2006 tax year because the taxpayers had not yet filed a Utah return when the IRS made its changes. As a result, the taxpayers would have had to file an *original* Utah return, not an *amended* Utah return, to reflect the IRS changes. Because the taxpayers would have had to file an original state return to reflect the IRS changes, the Division contends that the taxpayers do not benefit from the Section 59-10-529(12) deadline to request a refund or credit of overpaid 2006 Utah taxes associated with the IRS changes.

In the alternative, should the Commission find that Section 59-10-529(12) does apply to the taxpayers in regards to the 2006 changes made by the IRS, the Division argues that their January 11, 2013 request for a refund or credit of overpaid Utah taxes is untimely. At the latest, the IRS made its final determination concerning the abatement of 2006 federal taxes on December 14, 2009. Two years and ninety days after this date is March 13, 2012. However, this two year and ninety day period under Section 59-10-529(12) would have still been in effect when the taxpayers filed for bankruptcy in September 2010. For the same reasons as explained in the proceeding section concerning bankruptcy, it appears that the taxpayers would have had until September 30, 2012 to file a request for refund or credit of the 2006 Utah taxes associated with the changes made by the IRS. The taxpayers, however, did not submit their refund request for 2006 until January 11, 2013, which is more than three months after the September 30, 2012 deadline to request a refund or credit of taxes overpaid to Utah for the 2006 tax year. For these reasons, it does not appear that the taxpayers submitted their 2006 request for refund or credit within any of the deadlines set forth in Utah or federal law.

E. Equitable Estoppel. Ordinarily, the analysis would end at the discussion of the statutory deadlines. In this case, another issue arose at the Initial Hearing. The taxpayers stated that they called the Utah State Tax Commission to see how the IRS's treatment of their losses from the NAME scheme for the 2006 tax

year would affect their Utah tax liability. The taxpayers proffer that the person they spoke with at the Tax Commission told them that the IRS changes concerning their NAME scheme losses would have no effect on their Utah tax liability.[4] At issue is whether the Tax Commission gave the taxpayers incorrect advice and, if so, whether the taxpayers elected not to file a 2006 Utah return within the deadlines discussed earlier because of this advice. In at least one recent case, the Commission has found that equitable estoppel exists where a taxpayer has been injured because of incorrect advice that the taxpayer received from a Tax Commission employee and on which the taxpayer relied.

In *USTC Appeal No. 11-297* (Revised Initial Hearing Order, Aug. 25, 2011), the Commission acknowledged that applying the principle of equitable estoppel to Tax Commission cases is the exception rather than the rule. Nevertheless, the Commission determined that equitable estoppel was appropriate in that case because the Petitioner received written, erroneous advice from a Tax Commission employee and suffered injury by relying on this advice. In this present case, the taxpayers may have suffered injury if they received incorrect advice when they telephoned the Tax Commission and, relying on that advice, chose not to submit a 2006 return to reflect the federal changes within the deadlines previously discussed.

In *Eldredge v. Utah State Retirement Bd.*, 795 P.2d 671, 675 (Utah Ct. App. 1990), the Utah Court of Appeals concluded that equitable estoppel could be applied "where it is plain that the interest of justice so requires" and set out the elements of equitable estoppels, as follows: 1) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; 2) reasonable action or inaction by the other party taken on the basis of the first party's statement, admission, act, or failure to act; and 3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement admission, act, or failure to act.

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4 The taxpayers admit that they were given the same advice when the called the STATE State Tax Commission to inquire about the IRS changes made because of the NAME issue.

Critical to the first and third elements is whether the taxpayers' Utah tax liability would have been reduced because of the IRS actions that led to a federal tax abatement of more than $$$$$. At the Initial Hearing, the Division admitted that it could not tell how the IRS arrived at its abatement of more than $$$$$ (i.e., the Division did not know whether the IRS reduced the taxpayers' federal adjusted gross income or whether the IRS gave the taxpayers a tax credit). The Division, however, argued that if the refund was due to a federal tax credit, such credits do not affect state tax liability, pursuant to UCA §59-10-110. The Division was offered an opportunity to research the matter further and submit post-hearing information about the changes made by the IRS in regards to NAME losses, but it elected not to do so.

It appears that the IRS provided guidance concerning the NAME issue in 2009, when it issued IRS Revenue Ruling 2009-9 (Apr. 6, 2009). The IRS decided to allow victims of the NAME scheme to recoup some of their investment by claiming a fraud loss either in the year of discovery or through amended returns for prior years. It also appears that the losses could be taken either as a theft loss itemized deduction or by carrying the losses back or forward for a certain numbers of years. However, no information has been found to support the Division's suggestion that the IRS accounted for the NAME losses with a federal tax credit. Based on this information, the Commission is not convinced that the taxpayers were given correct advice when they called the Tax Commission (i.e., that the taxpayers were correctly told that the IRS changes due to the NAME losses would have no effect on their Utah tax liability).

However, the Commission does not have sufficient information to know what actions the IRS took that resulted in a federal tax abatement of more than $$$$$ for the 2006 tax year. The taxpayers have not provided their amended 2006 IRS return so that it can be seen what they submitted to the IRS and how they treated the NAME losses on the amended federal return. Without such information, it is unknown whether the federal changes, in fact, do impact the Utah tax liability. This, however, is but one reason why the Commission should

refrain from applying the principle of equitable estoppel to this case on the basis of the information proffered at the Initial Hearing.

In addition, the taxpayers provided very little information about the telephone call they made to the Tax Commission during which they claimed they were told that the IRS changes would have no effect on their Utah tax liability. They did not proffer information to show the day on which they called, who they spoke with, and the details of the call. In *Appeal No. 11-297*, the Commission applied equitable estoppel, in part, because the Petitioner in that case had received written advice from the Tax Commission that clearly showed that she had received incorrect advice. In the present case, the taxpayers received verbal advice in a telephone call, and there are very few details about the call. Furthermore, it is unclear if the Division has a record of the telephone call the taxpayers made and, if so, whether those records would provide additional information about the matters that may have been discussed. Regardless, the burden of proof in this matter is on the taxpayers. The evidence is insufficient to meet the high standard required before equitable estoppel should be applied to waive the deadline to request a refund or credit of 2006 Utah taxes associated with the NAME losses.

F. **Conclusion – 2006 Tax Year**. Based on the foregoing, the taxpayers' January 11, 2013 request for a refund or credit of taxes they overpaid to Utah for the 2006 tax year is not timely under either Section 59-1-1404(8), Section 59-10-529(12), or federal bankruptcy law. In addition, the taxpayers have proffered insufficient information to show that the Division should be equitably estopped from asserting that their request for a refund of credit of 2006 taxes associated with IRS changes is untimely. For these reasons, the Commission should sustain the Division's action to deny the taxpayers' request for a refund or credit of overpaid 2006 Utah taxes.

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Kerry R. Chapman
Administrative Law Judge

DECISION AND ORDER

Based upon the foregoing, the Commission sustains the Division's action to deny the taxpayers' requests for refunds or credits of taxes for the 2005 and 2006 tax years. 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 _____, 2013.

R. Bruce Johnson
Commission Chair

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner