

04-1023
Audit
Signed 03/08/2005

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,	)	ORDER	
)		
Petitioner,	)	Appeal No.	04-1023
)		
v.	)	Account No:	#####
)		
AUDITING DIVISION	)	Tax Type:	Individual Income Tax
OF THE UTAH STATE)		
TAX COMMISSION,	)	Tax Year:	1996 & 1997
)		
Respondent.	)	Judge:	Chapman

Presiding:

Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER

For Respondent: RESPONDENT REPRESENTATIVE 1, from the Auditing Division
RESPONDENT REPRESENTATIVE 2, from the Auditing 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 February 23, 2005.

On July 9, 2004, Auditing Division (“Division”) imposed audit assessments of individual income tax upon the Petitioner for the 1996 and 1997 tax years. For the 1996 tax year, the Division imposed additional tax because the Internal Service Revenue (“IRS”) had increased the Petitioner’s federal adjusted gross income (“FAGI”) and the taxpayer had not filed the required amended Utah tax return. On the date of the assessment, the tax imposed for the 1996 tax year included \$\$\$\$\$ in tax and \$\$\$\$\$ in interest.

For the 1997 tax year, the Division imposed an *estimated* tax assessment, claiming that the Petitioner did not file a return for that year. On the date of assessment, the estimated tax imposed included \$\$\$\$\$ in tax, \$\$\$\$\$ in penalties (10% failure to file and 10% failure to pay), and \$\$\$\$\$ in taxes. At the hearing, the Division states that its records show that the Petitioner's employer withheld and remitted \$\$\$\$\$ to the state on behalf of the Petitioner for the 1997 tax year and that its assessment did not consider this pre-payment. For this reason, the Division recommends that the Commission reduce the assessment so that the Petitioner receives credit for the prepayment.

The Petitioner contends that the Commission should not sustain the assessments because he was notified of the additional taxes due more than six and seven years, respectively, after each tax return was due. The Petitioner admits that he worked in Utah for the entirety of the 1997 tax year and believes he filed a 1997 tax return, but states that he does not keep records this old. Also, he states that his bank informed him that it did not retain records more than five years old when he approached it to obtain check receipts. Because he claims it is impossible for him to obtain records to refute the assessments, the Petitioner states that the Commission should not impose tax after so long a period of time. In addition, he states that had he been notified earlier, the interest that has accrued would not have been so great an amount.

APPLICABLE LAW

Under Utah Code Ann. §59-10-104(1), “a tax is imposed on the state taxable income . . . of every resident individual.” For purposes of Section 104(1) and for the year in question, Utah Code Ann. §59-10-103(1)(q) defined “resident individual” to include:

- i) an individual who is domiciled in this state for any period of time during the taxable year, but only for the duration of such period; or
- ii) an individual who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate 183 or more days of the taxable year in this state.

In UCA §59-10-536, the Legislature provides specific time limitations within which the Tax Commission may assess individual income tax, pertinent parts as follows:

(1) Except as otherwise provided in this section, the amount of any tax imposed by this chapter shall be assessed within three years after the return was filed (whether or not such return was filed on or after the date prescribed), and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

...

(3) The tax may be assessed at any time if:
(a) no return is filed;

...

(5) (a) If a change is made in a taxpayer's net income on his or her federal income tax return, either because the taxpayer has filed an amended return or because of an action by the federal government, the taxpayer must notify the commission within 90 days after the final determination of such change. The taxpayer shall file a copy of the amended federal return and an amended state return which conforms to the changes on the federal return. No notification is required of changes in the taxpayer's federal income tax return which do not affect state tax liability.

(b) The commission may assess any deficiency in state income taxes within three years after such report or amended return was filed. The amount of such assessment of tax shall not exceed the amount of the increase in Utah tax attributable to such federal change or correction. The provisions of this Subsection (b) do not affect the time within which or the amount for which an assessment may otherwise be made. However, if the taxpayer fails to

report to the commission the correction specified in this Subsection (b) the assessment may be made at any time within six years after the date of said correction.

....

In an appeal concerning the Division's assessment of individual income tax, UCA §59-10-543 provides that the burden of proof is upon the Petitioner except for the following issues:

- (1) whether the petitioner has been guilty of fraud with intent to evade tax;
- (2) whether the petitioner is liable as the transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax; and
- (3) whether the petitioner is liable for any increase in a deficiency where such increase is asserted initially after a notice of deficiency was mailed and a petition under Title 59, [Chapter 1](#), Part 5 is filed, unless such increase in deficiency is the result of a change or correction of federal taxable income required to be reported, and of which change or correction the commission had no notice at the time it mailed the notice of deficiency.

DISCUSSION

On July 9, 2004, the Division imposed additional Utah individual income tax upon the Petitioner for the 1996 and 1997 tax years. Based on the Petitioner's own admissions, he was a Utah resident individual who earned taxable income for the years at issue. Accordingly, the Commission finds that he was required to file Utah tax returns for these years. Because of the length of time that has expired since the tax years at issue, the Petitioner claims that he has not retained and is not able to obtain tax records concerning these years. In this appeal, not only are the amounts of tax due at issue, but also the applicable statutes of limitation.

1997 Tax Year. Although the assessment for the 1997 tax year is based on estimates, it was calculated using the Petitioner's 1997 FAGI as provided by the IRS and, thus,

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was calculated using reliable information. There is no evidence to refute the amount of the assessment except for the Division's own admission that a \$\$\$\$ pre-payment of tax should have been applied as a credit. Accordingly, if the assessment was issued in accordance with the applicable statute of limitation, it will be sustained subject to the amendment described.

Section 59-10-536(3) provides that an assessment may be imposed at any time if no return is filed. As explained earlier, the Petitioner was required to file a 1997 Utah tax return. Because the agency has no record of receiving such a return and the Petitioner has provided no information to show that he filed, the Commission finds that the Petitioner did not file a 1997 return. Accordingly, Section 59-10-536(3) provides that the Division may assess tax for the 1997 tax year at any time. For these reasons, the Division's audit assessment for the 1997 tax year is sustained except that it should be adjusted to reflect the \$\$\$\$ of taxes previously remitted by the Petitioner's employer.

1996 Tax Year. For the 1996 tax year, there is no evidence to dispute the amount of the Division's assessment. Accordingly, the amount of additional tax calculated by the Division is deemed correct. Nevertheless, the Division's assessment for the 1996 tax year may violate the applicable statute of limitation, depending on the date the IRS corrected the Petitioner's 1996 federal return.

The Division states that it based its 1996 tax year assessment on the IRS increasing the Petitioner's 1996 FAGI. In addition, the Division claims that the Petitioner did not report the IRS increase to the Commission, as required under Section 59-10-536(5)(a), a fact

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that the Petitioner is unable to dispute. Under such circumstances, Section 59-10-536(5)(b) provides that the statute of limitation for the Commission to impose an assessment is six years after the date the federal correction was made. Because the Division issued its Statutory Notice on July 9, 2004, the assessment is valid only if the federal correction occurred within the preceding six years; i.e., if the federal correction was made after July 9, 1998. Because the Petitioner's 1996 federal return was originally due in April 1997, it is a distinct possibility that the federal correction occurred after April 1997 but on or before July 9, 1998. However, the Division has no information with which it can determine whether it violated the statute of limitation.

In a Commission proceeding concerning the assessment of individual income tax, Section 59-10-543 provides that the Petitioner has the burden of proof except in three specified instances. The three listed exceptions are not applicable in this matter. Although the Commission would encourage the Division to check whether it is violating the statute of limitation by issuing an assessment, the Petitioner nonetheless has the burden to show that the Division has violated the statute of limitation, which he has not done. Accordingly, the Division's 1996 tax year assessment is sustained.

Nevertheless, should the Petitioner request a Formal Hearing as described below and show at that hearing that the IRS corrected his 1996 federal FAGI on or before July 9, 1998, the Commission would consider finding the 1996 tax year assessment in violation of the statute of limitation and, thus, invalid.

Penalty and Interest. The Commission may waive penalty and interest upon a showing of reasonable cause under UCA §59-1-401(11). Because the Commission has vacated the 1996 assessment, the remaining penalty and interest relate only to the 1997 tax year. The only cause for which the Petitioner requests a waiver relates to the number of years that has expired between the tax years at issue and the date of the assessments and the resulting difficulty in obtaining records. Commission policy does not recognize these circumstances as “reasonable cause” required for waiver of penalties or interest. As explained above, the Legislature provides lengthy or indefinite statutes of limitation concerning the assessment of taxes for past years under the circumstances present in this matter. The assessments at issue would not have occurred had the Petitioner fulfilled his Utah income tax duties when they were due. For these reasons, the Commission does not waive the remaining penalties and interest.

DECISION AND ORDER

Based upon the foregoing, the Commission sustains the Division’s 1996 tax year assessment in full and the 1997 tax year assessment in part. The 1997 assessment is sustained except that it should be amended to reflect, as a credit, the \$\$\$\$\$ in tax already remitted by the Petitioner’s former employer. 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

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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 _____, 2005.

Kerry R. Chapman
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION.

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this _____ day of _____, 2005.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Palmer DePaulis
Commissioner

Marc B. Johnson
Commissioner

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