

04-1122  
Audit  
Signed 03/21/2005

BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER,	)	
	)	<b>ORDER</b>
Petitioner,	)	
	)	Appeal No.    04-1122
v.	)	
	)	Account No.    #####
AUDITING DIVISION OF	)	Audit Period: 1/1/01 – 12/31/02
THE UTAH STATE TAX	)	Tax Type:    Withholding Tax
COMMISSION,	)	
	)	Judge:        Chapman
Respondent.	)	

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**Presiding:**

Kerry R. Chapman, Administrative Law Judge

**Appearances:**

For Petitioner:    PETITIONER REPRESENTATIVE

For Respondent:    RESPONDENT REPRESENTATIVE, from 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 March 8, 2005.

Petitioner is appealing an audit deficiency of additional withholding tax, penalties and interest for the audit period of January 1, 2001 through December 31, 2002. The Statutory Notice was mailed on August 19, 2004. For the two calendar years at issue, the Division assessed tax equal to the difference between the amount of withholding remitted to the state, as reported on the Form TC-96R, and the amount actually withheld, as reported on W-2 Forms. The amount of the tax deficiency was \$\$\$\$ for the 2001 calendar year and \$\$\$\$ for the 2002 calendar year. In accordance with UCA §59-10-406(3), the Division also assessed a 10% penalty for failure to

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reconcile the tax remitted with the tax withheld. The Division also assessed interest pursuant to UCA §59-10-537(1).

The Petitioner explains that it hired a payroll agent named COMPANY (“COMPANY”), whose duties including remitting the withholding tax at issue. The Petitioner states that it paid COMPANY the withholding tax at issue to remit to the state, but that COMPANY did not remit it. The Petitioner also explains that not only did COMPANY fail to remit its federal and state withholding taxes, but also that it failed to remit taxes for approximately ##### other clients. The Petitioner proffered evidence of a suit against COMPANY in which it is participating with other COMPANY clients.

The Petitioner states that it realizes that it is nevertheless liable for the tax, but asks for whatever relief the Commission can offer under these circumstances. The Petitioner also states that it has worked with the Internal Revenue Service (“IRS”) to pay the federal delinquency in installment payments and that the IRS waived the penalties it had assessed due to the circumstances. Although the Petitioner states that it cannot pay all of the state delinquency at once, it wishes to make installment payments and has already begun to make them, even though Taxpayer Services Division’s does not consider payment schedules while the matter is still under appeal. Because the Petitioner has chosen to pay the assessment in part prior to the appeal being closed, it has also been assessed a 10% failure to pay penalty in addition to the tax, penalty, and interest originally assessed.

APPLICABLE LAW

“Each employer shall, on or before the last day of April, July, October, and January, pay to the commission the amount required to be deducted and withheld from wages paid to any employee during the preceding calendar quarter under this part.” Utah Code Ann. §59-10-406(1)(a).

“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.” UCA §59-1-401(11).

DISCUSSION

The Petitioner agrees that the assessment imposed by the Division is correct, but due to the circumstances involving its payroll agent, it asks the Commission for whatever relief is it may receive. While the Commission does not have authority to waive legally due withholding tax, it does have authority to waive penalties and interest “upon reasonable cause shown,” pursuant to Section 59-1-401(11).

“Reasonable cause” to waive interest is limited to circumstances where the Commission contributed to the delinquency at issue. Because the Commission was not responsible for the withholding tax delinquencies, sufficient reasonable cause to waive the interest in this matter does not exist. Waiver of penalties, however, is appropriate not only when the Commission has made an error, but also, among other reasons, when the error is due to reliance on competent tax advice or due to employee embezzlement. See Tax Commission Publication 17, Waivers – Reasonable Cause (revised 04/04).

Even though the failure to reconcile penalties were assessed for the first error made on the account, the Division explains that it considers the Petitioner's failure to reconcile the TC-96R and the employee W-2 forms to be "gross negligence," thereby disqualifying them for a waiver due to their good compliance history. The Commission does not agree that the Petitioners failure to reconcile their account was "gross negligence" where it had retained professionals to perform this duty on their behalf and where they had no reason to know that the professionals were not performing their contractual duties. Under these circumstances, the Commission finds sufficient reasonable cause to waive the failure to reconcile penalties associated with the assessment.

As for the failure to timely pay penalty that has been prematurely assessed, the Commission orders that this penalty be abated at this time and until such time that the appeal is finalized and a portion of the tax remains unpaid. The Commission recognizes the responsibility shown by the Petitioner in making payments while the matter is still under appeal. Once a decision in this appeal is final, the Commission suggests the Petitioner contact TAX COMMISSION EMPLOYEE at ##### in Taxpayer Services Division to discuss payment options.

DECISION AND ORDER

Although the Division's assessment is correct, the Petitioner has shown sufficient reasonable cause for the Commission to waive the penalties at issue. For this reason, the Commission waives the failure to reconcile penalties assessed by the Division, but sustains the Division's assessment of additional withholding tax and interest. The subsequently assessed failure

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to timely pay penalty was prematurely assessed and is abated until such time that it is appropriate to assess such a penalty. 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 \_\_\_\_\_, 2005.

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Kerry R. Chapman  
Administrative Law Judge

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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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