

05-0432
Audit
Signed 10/18/2005

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	
)	ORDER
Petitioner,)	
)	Appeal No. 05-0432
v.)	
)	Account No. #####
AUDITING DIVISION,)	
UTAH STATE TAX COMMISSION,)	Tax Type: Sales and Use
)	
Respondent.)	Presiding: Phan

Presiding:
Jane Phan, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER REPRESENTATIVE 1, President and Managing Partner, PETITIONER
PETITIONER REPRESENTATIVE 2, Controller, PETITIONER
PETITIONER REPRESENTATIVE 3, V.P. PETITIONER
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, Tax Audit Manager, Sales and Use Tax
RESPONDENT REPRESENTATIVE 3, Auditor

STATEMENT OF THE CASE

This matter came before the Commission for an Initial Hearing on August 18, 2005. It had originally been scheduled for a Telephone Status Conference, but with the parties approval was converted to the Initial Hearing. Petitioner is appealing negligence penalties assessed with a sales and use tax audit for the period of May 1, 2002 through November 30, 2004. In its Petition for Redetermination, Petitioner originally contested the audit deficiency of sales and use tax in the amount of \$\$\$\$ as well as the penalty. At the hearing Petitioner's representatives indicated that they conceded to pay the tax amount, and were contesting only the penalty. The penalty assessed was a 10% negligence penalty that totaled \$\$\$\$\$. The Commission would note that the penalty amount calculates to slightly more than 10% of the additional tax due and it is unclear from the audit exactly how the amount was calculated.

APPLICABLE LAW

The Utah Legislature has provided for the imposition of penalties in Utah Code Ann. §59-1-401 which states:

(5) Additional penalties for underpayment of tax are as follows: (i) If any underpayment of tax is due to negligence, the penalty is 10% of the underpayment . . .

Negligence is generally recognized to be the omission to do something that a reasonably prudent and careful person would do, or the doing of something, which the reasonably prudent and careful person would not do. In a tax setting, the Utah Supreme Court has found that a negligence penalty is appropriate when the taxpayer fails to make a reasonable investigation into statutes and rules to determine if tax is due. Hales Sand & Gravel, Inc. v. State Tax Comm'n, 842 P.2d 887, 895 (Utah 1992). The Court further states that an error based on the good faith interpretation of an arguable point of law does not rise to the level of negligence. ID. Likewise, the Commission finds that an error based on a justifiable or honest mistake, when compared to the reasonable actions of other taxpayers, also does not rise to the level of negligence.

DISCUSSION

Petitioner's representatives present several arguments for waiver of the negligence penalty. They point out that the entity collects from its customers and pays to the state of Utah more than \$\$\$\$ in sales tax per year. The percentage of underpaid tax is very small compared to the total paid.

Petitioner's representatives indicated that much of the audit deficiency related to a use tax on a large purchase of new signs for the various retail outlets which were all shipped to Petitioner's headquarters in Salt Lake and then delivered to the various locations, many out of state. Petitioner has ##### retail outlets in Utah as well as numerous outlets in neighboring states. Petitioner's representatives did not realize that they had not been charged sales tax on the purchase by the vendor. Additionally, they indicated that they would not have thought the signs that were delivered to the Utah headquarters, but then shipped to the out of state

locations would have been subject to use tax. They argued they were not purchased for storage, use or other consumption in Utah. However, the Commission notes that they had not claimed and paid use tax on the signs, which they acknowledge were used in Utah.

They also acknowledge that there had been an issue on the prior audits with items purchased for consumption in the business. Petitioner's representatives had made changes attempting to catch this type of error. They had asked that the vendors charge the tax. Petitioner's computer accounting system was outdated and could not automatically account for use tax liability, so they tried to review the invoices individually on the items consumed and perform the accounting by hand on the use tax amounts. For the subject audit period Petitioner was catching much of the use tax amounts in this process, but the signs and other purchases were missed. Petitioner notes that in January 2005 a new computer accounting system was in place that would automatically track this type of liability.

Additionally, Petitioner had an issue with the \$\$\$\$ underpayment of sales tax, because Petitioner thought it could offset under collections at some of its Utah retail establishments with the over collections at other Utah establishments. Based on Petitioner's theory it had been short only \$\$\$\$ after the audit review. However, Respondent's position in the audit was that each retail location was separate and Petitioner could not offset collections in the manner that had been done.

Respondent indicated that the issue with the sales or use tax on the goods purchased for consumption by Petitioner was the same error as in prior audits. Respondent acknowledged that the audit error amounted to a very small percentage of the total tax that had been collected and paid by Petitioner, but due to prior audits requested the penalty be sustained.

DECISION AND ORDER

Upon review of the facts, most of the underpayment resulted from failure to pay use tax on

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items purchased tax free by Petitioner and then consumed. The fact that Petitioner's computer accounting system could not automatically track these sales and they had to be performed by hand, or that there had been changes in accounting staff is not sufficient for waiver of the penalty issued in this matter, considering the same type of error had occurred on the two prior audits.

Based upon the foregoing, the Commission sustains the penalties assessed with the audit for the period of March 1, 2002 through November 30, 2004. 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.

Jane Phan
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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