

05-0470  
Audit  
Signed 10/06/2005

BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER,	)	
	)	<b>ORDER</b>
Petitioner,	)	
	)	Appeal No. 05-0470
v.	)	
	)	Account No. #####
AUDITING DIVISION,	)	
UTAH STATE TAX COMMISSION,	)	Tax Type: Sales and Use
	)	
Respondent.	)	Presiding: Phan

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**Presiding:**  
Jane Phan, Administrative Law Judge

**Appearances:**  
For Petitioner: PETITIONER REPRESENTATIVE  
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General  
RESPONDENT REPRESENTATIVE 2, 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 September 8, 2005. Petitioner is appealing 10% failure to pay penalty and a 10% negligence penalty assessed with a sales and use tax audit for the period of January 1, 2002 through December 31, 2004.

APPLICABLE LAW

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

- (2) The penalty for failure to pay tax due shall be the greater of \$20 or 10% of the unpaid tax for (a) failure to pay any tax, as reported on an timely filed return; (b) failure to pay tax within 90 days of the due date of the return, if there was a late filed return subject to the penalty and provided under Subsection (1)(a) . . .
- (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 explained that he had purchased items like water-heaters, garbage disposals and faucets and at the time of the purchase he paid sales tax. The items were then used in his plumbing repair service through which they would be installed in homes and businesses. Petitioner did not have a sales tax license and generally understood that he was required to pay sales tax at the time of purchase. However, when Petitioner invoiced his customer he would list an amount as sales tax on the invoice. Petitioner then did not remit to the state that amount claimed as sales tax on the invoice. He had already paid the tax and did not understand that by putting the amount that he paid on the invoice as tax, he was obligated to remit it to the Tax Commission.

Petitioner now understands the process and has paid the tax amount, but he points out that this is essentially double taxation as he had paid the tax at the time of sale and now a second time as part of the audit deficiency. He argues that the penalties assessed in this matter are excessive, as it had just been an unintended error.

This would be considered the first time error on the part of Petitioner, as he did not have a sales tax license. Additionally Petitioner was paying taxes at the time he purchased the items. Certainly based

on these factors there is basis for waiver of the failure to pay penalty. Concerning the negligence penalty, the sate was being paid the correct amount of tax as Petitioner was correctly paying at the time of purchase. Petitioner did not have a sales tax license and was not required to have one. Without some indication that he should have been aware that the invoicing was incorrect, the Commission finds that the negligence penalty should also be waived.

DECISION AND ORDER

Based upon the foregoing the Commission waives both the failure to pay and negligence penalties relating to the audit for the period of January 1, 2002 through December 31, 2004. It is so ordered. The Commission would note that interest is generally waived only in the event that there was on error on the part of the Tax Commission or Tax Commission employee that led to the late payment or underpayment and there was no basis presented for waiver of the interest. 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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Jane Phan  
Administrative Law Judge

Appeal No. 05-0470

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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