

05-0889/05-0890
Sales/Penalty & Interest / Withholding/Penalty & Interest
Signed 07/23/2007

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER 1, Petitioner, v. TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.</p>	<p>FINDINGS OF FACT, CONCLUSIONS OF LAW & FINAL DECISION</p> <p>Appeal No. 05-0890</p> <p>Account No. #####</p> <p>Tax Type: Withholding / Penalty & Interest</p> <p>Tax Periods: 09/01/03 - 01/31/04; 03/01/04 - 03/31/04; 05/01/04 - 11/30/04</p> <p>Judge: Chapman</p>
<p>PETITIONER 2, Petitioner, v. TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.</p>	<p>Appeal No. 05-0889</p> <p>Account No. #####</p> <p>Tax Type: Sales / Penalty & Interest</p> <p>Tax Periods: 08/01/03 - 06/30/04; 08/01/04 - 01/31/05</p> <p>Judge: Chapman</p>

Presiding:

Marc B. Johnson, Commissioner
Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE, General Manager of PETITIONER 1 and
PETITIONER 2
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, from Taxpayer Services Division

STATEMENT OF THE CASE

These matters came before the Utah State Tax Commission for Formal Hearings on July 18, 2007. Because of the commonality of the witnesses, issues, and ownership of the two Petitioning entities, the parties agreed to combine the appeals for hearing purposes. Based upon the evidence and testimony presented at the combined hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. PETITIONER 1 and PETITIONER 2 are among a number of businesses owned by the (X) and have been in business since the early to mid-1990's. The Petitioning businesses are requesting a waiver of penalties and interest they have paid in regards to PETITIONER 1 withholding tax responsibilities and PETITIONER 2 sales and use tax responsibilities.

2. The amounts of penalties and interest for which PETITIONER 1 is requesting a waiver are associated with the periods September 2003 through November 2004 and total \$\$\$\$\$, as follows:

Period	Failure to File Penalty	Failure to Pay Penalty	Lien Fees	Interest	Total
09/2003	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
10/2003	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
11/2003	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
12/2003	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
01/2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
02/2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
03/2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
04/2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
05/2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
06/2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
07/2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
08/2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
09/2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
10/2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
11/2004	<u>\$\$\$\$\$</u>	<u>\$\$\$\$\$</u>	<u>\$\$\$\$\$</u>	<u>\$\$\$\$\$</u>	<u>\$\$\$\$\$</u>
Total	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

3. The amounts of penalties and interest for which PETITIONER 2 is requesting a waiver are associated with the periods August 2003 through January 2005 and total \$\$\$\$\$, as follows:

Period	Failure to File Penalty	Failure to Pay Penalty	Lien Fees	Interest	Total
08/2003	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
09/2003	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
10/2003	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
11/2003	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
12/2003	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
01/2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
02/2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
03/2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
04/2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
05/2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
06/2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
07/2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
08/2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
09/2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
10/2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
11/2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
12/2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
01/2005	<u>\$\$\$\$\$</u>	<u>\$\$\$\$\$</u>	<u>\$\$\$\$\$</u>	<u>\$\$\$\$\$</u>	<u>\$\$\$\$\$</u>
Total	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

4. In late 2003, EMPLOYEE was hired to be the controller of the two Petitioning businesses. In March 2003, she was promoted to general manager of both businesses. EMPLOYEE was

employed in this position until she resigned in November 2005. During her employment at the two businesses, EMPLOYEE'S duties included the preparation and filing of federal and state tax returns and opening and handling all mail that arrived for the businesses.

5. Prior to the March 2003 reporting period, PETITIONER 1 had had only one delinquency involving a monthly withholding tax return, specifically for its July 2002 return. Similarly, prior to the March 2003 period, PETITIONER 2 also had had only one delinquency involving a monthly or quarterly sales or use tax return, specifically for its 1st Quarter 2000 return. Division's Exhibit 1 & Exhibit 2.

6. Beginning with the March 2003 period and continuing through the November 2005 period, which corresponds to the time EMPLOYEE was employed as general manager, almost all of PETITIONER 1's withholding tax returns and PETITIONER 2's sales and use tax returns were filed late. Many of the payments due during this timeframe were also paid late.

7. Subsequent to the December 2005 period after which EMPLOYEE was no longer employed, PETITIONER 1 has filed one monthly withholding tax return late, and PETITIONER 2 has not filed any monthly sales and use tax returns late.

8. PETITIONER REPRESENTATIVE states that his family believed EMPLOYEE to be competent until she resigned in late 2005 and they discovered that the various businesses, including the two Petitioners in these matters, owed or had accrued significant federal and state liabilities that EMPLOYEE had kept from the family during weekly meetings the family held with her. PETITIONER REPRESENTATIVE indicated that EMPLOYEE was "doctoring" the reports she submitted to the family for review. The family also discovered that due to EMPLOYEE'S failure to file tax returns in a timely manner, the businesses had incurred large amounts of penalties and interest not only to the state but also to the federal government during her employment. PETITIONER REPRESENTATIVE also states that EMPLOYEE had also failed to keep

current the businesses' accounts with its vendors and customers.

9. PETITIONER REPRESENTATIVE admits that, in hindsight, the businesses and the family did not have adequate oversight practices in place to discover EMPLOYEE'S failure to timely file and pay tax returns. Although the businesses did not hire an accounting firm to audit the business practices during EMPLOYEE'S employment, they did employ an accounting firm to review financial statements and other reports. The extent of the review conducted by the accounting firm failed to discover EMPLOYEE'S activities.

10. PETITIONER REPRESENTATIVE also admits that one or more of the family's businesses experienced financial difficulties in 2003 and 2004 due to a contract with the Utah Department of Transportation ("UDOT"). He explains, however, that none of the businesses were ever insolvent and that had the family known of the tax liabilities that were due during this period, (X) would have covered the amount due, as he did for any payments that EMPLOYEE informed him or the family about.

11. After EMPLOYEE resigned, the family discovered the extent of the delinquencies that had occurred during her employment and immediately paid all tax due, including penalties and interest. They have since put into place additional oversight procedures concerning their tax reporting responsibilities.

EMPLOYEE'S Actions to File the Appeals

12. In late 2004 or early 2005, EMPLOYEE submitted requests to the Commission to waive or reduce the penalties and interest that had accrued to PETITIONER 1 and PETITIONER 2 for periods since she had become general manager. EMPLOYEE indicated to the Commission that the businesses had failed to file and pay their liabilities in a timely manner because of financial hardship.

13. Because the amounts of the waiver requests exceeded \$\$\$\$\$, the Division brought the

requests to the Commission for review. In early 2005, after considering EMPLOYEE'S excuse of financial hardship, the Commission informed the Division that it had decided not to waive any portion of the requests.

14. At the time the Commission informed the Division that it declined to waive any portion of the penalties at issue, the Commission was not aware of the manner in which EMPLOYEE was performing her duties at the two Petitioning businesses, as testified to by PETITIONER REPRESENTATIVE.

15. On May 11, 2005, the Division issued a letter to PETITIONER 1, informing it that its request for a waiver of penalties and interest had been denied and informing PETITIONER 1 of its appeal rights. This letter indicated that the Division's action concerned all periods between and including September 2003 and November 2004, with the exception of the February 2004 and April 2004 periods.

16. On May 31, 2005, the Division issued a letter to PETITIONER 2, informing it that its request for a waiver of penalties and interest had been denied and informing PETITIONER 2 of its appeal rights. This letter indicated that the Division's action concerned all periods between and including August 2003 and January 2005, with the exception of the July 2007 period.

17. The Division's May 11, 2005 and May 31, 2005 letters were addressed to EMPLOYEE at the Petitioners' business address.

18. On June 14, 2005, the Commission received PETITIONER 1 and PETITIONER 2's Petitions for Redetermination ("Petitions"), which EMPLOYEE signed and in which she indicated that the Petitioners sought a reduction or waiver of penalties and interest because (X) had suffered severe financial hardship in 2003 and 2004 because of the difficulty it was having in receiving payment from UDOT.

19. PETITIONER REPRESENTATIVE states that the family was unaware of the penalties and interest that had accrued or of EMPLOYEE'S waiver request to the Commission until (X), the son of (X), received a notice from the Commission in 2005. When the matter was brought to EMPLOYEE

to explain, she convinced the family that the taxes had been paid and that the notice was a mistake that the Commission was in the process of fixing.

20. PETITIONER REPRESENTATIVE states that the Petitioners have sought advice on receiving redress from EMPLOYEE and have been told that it is a civil matter, not a criminal one. Because EMPLOYEE'S actions unnecessarily led to the penalties and interest at issue and because the (X) family who owned the Petitioning businesses was unaware of her actions and the penalties and interest resulting from them, the Petitioners ask the Commission to waive the penalties and interest at issue.

21. The Division asks the Commission not to waive any of the penalties and interest at issue because it asserts that the Petitioners were negligent in not overseeing EMPLOYEE'S activities and that the consequences of their negligence should not be excuses. The Division also points out that under the circumstances, it believes it would have been proper to impose an additional 10% negligence penalty for each period at issue, in addition to the failure to timely file and pay penalties already imposed.

APPLICABLE LAW

1. UCA §59-1-401 provides for the imposition of penalties for failure to file returns and pay tax when due, as follows:

(1) (a) The penalty for failure to file a tax return within the time prescribed by law including extensions is the greater of \$20 or 10% of the unpaid tax due on the return.

.....

(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 a timely filed return;

(b) failure to pay any tax within 90 days of the due date of the return, if there was a late filed return subject to the penalty provided under Subsection (1)(a);

.....

2. UCA §59-1-402(5) provides that “[i]nterest on any underpayment, deficiency, or delinquency of any tax or fee administered by the tax commission shall be computed from the time the original return is due, excluding any filing or payment extensions, to the date the payment is received.”

3. UCA §59-1-401(11) provides that the Tax Commission is authorized to waive, reduce, or compromise penalties and interest upon a showing of reasonable cause.

DISCUSSION

Interest. Although penalties and interest may both be waived upon a showing of reasonable cause, the criteria for which the Commission waives interest are different from the criteria for which it waives penalties. Interest is charged because the taxpayer has had the use of the tax dollars during a period when the state should have had that use. For this reason, interest is only waived if its imposition arose from a Commission employee’s error. PETITIONER REPRESENTATIVE indicates that the interest arose due to EMPLOYEE’S actions, not due to the Commission’s actions. Accordingly, the Commission finds that no reasonable cause exists to waive the interest associated with either of the appeals.

Penalties. In Utah State Tax Commission Publication 17 (Waivers – Reasonable Cause), the Commission provides that a waiver of penalty may be appropriate when employee embezzlement or reliance on a competent tax advisor is the cause of the penalty. These specified circumstances suggest that reasonable cause to waive a penalty may exist when a taxpayer has *reasonably* relied on an employee or tax advisor’s actions or advice that cause the penalty. The publication also provides that a penalty may be waived upon a showing of “clearly supported extraordinary and unanticipated reasons for late filing or payment, which demonstrate reasonable cause and the inability to comply, may justify a waiver of the penalty.” Lastly, the publication provides that “[e]ach case is judged on its individual merits.”

In this matter, it is clear that the Petitioners hired an employee, EMPLOYEE, who performed her duties in a manner that resulted in numerous penalties that she hid from the family. Although EMPLOYEE may not have embezzled any funds, she was hired to perform tax duties on behalf of the Petitioners. As a result of EMPLOYEE'S actions, the Petitioners have been assessed and have paid penalties relating to almost all periods in 2003 and 2004 and many periods in 2005.

The Commission, however, does not believe that the Petitioners are not without fault under the circumstances. It is clear that the Petitioning businesses did not have in place sufficient oversight procedures to discover that EMPLOYEE was filing tax returns and paying taxes in a delinquent manner. Had such procedures been in place, the Commission believes the Petitioners could have discovered EMPLOYEE'S actions within a relatively short period of time, instead of discovering them only after she resigned after three years of employment. For these reasons, the Commission finds that the Petitioners themselves are partially to blame for the penalties at issue.

CONCLUSIONS OF LAW

1. Under the circumstances, the Commission believes it would have been reasonable for the Petitioners to have discovered EMPLOYEE'S actions within several months had reasonable oversight procedures and business practices been in place. As a result, the Commission finds that reasonable cause exists to waive three months of penalties for each Petitioning business. For these reasons, the Commission will waive the first three months of penalties at issue in each of the appeals. However, the Commission does not find reasonable cause to waive the remaining penalties or any of the lien fees and interest at issue.

2. Accordingly, the Commission finds reasonable cause to waive the following penalties imposed to and paid by PETITIONER 1: 1) the \$\$\$\$ failure to timely file penalty imposed for the September 2003 period; 2) the \$\$\$\$ failure to timely file penalty imposed for the October 2003 period; and 3) the \$\$\$\$

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failure to timely file penalty imposed for the November 2003 period. The total amount of the penalties waived for PETITIONER 1 totals \$\$\$\$\$.

3. In addition, the Commission finds reasonable cause to waive the following penalties imposed to and paid by PETITIONER 2: 1) the \$\$\$\$\$ failure to timely file penalty imposed for the August 2003 period; 2) the \$\$\$\$\$ failure to timely file penalty imposed for the September 2003 period; and 3) the \$\$\$\$\$ failure to timely file penalty and \$\$\$\$\$ failure to timely pay penalty imposed for the October 2003 period. The total amount of the penalties waived for PETITIONER 2 totals \$\$\$\$\$.

DECISION AND ORDER

Based on the foregoing, the Tax Commission waives \$\$\$\$\$ of the penalties at issue in Appeal 05-0890, which concerns PETITIONER 1, and \$\$\$\$\$ of the penalties at issue in Appeal 05-0889, which concerns PETITIONER 2. The Commission does not waive the liens, interest and remaining penalties at issue in both appeals. It is so ordered.

DATED this ____ day of _____, 2007.

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 _____, 2007.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

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Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Notice: Failure to pay within thirty days the balance that results from this order may result in additional penalties and interest. You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Sec. 63-46b-13. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Sec. 59-1-601 et seq. & 63-46b-13 et seq.

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