

05-1680
Audit
Signed 03/07/2006

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)		
)	ORDER	
)		
Petitioner,)		
)	Appeal No.	05-1680
v.)		
)	Account No.	#####
TAXPAYER SERVICES DIVISION,)		
UTAH STATE TAX COMMISSION,)	Tax Type:	Penalty & Interest
)		
Respondent.)	Presiding:	Jensen

Presiding:

Clinton Jensen, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER
PETITIONER REPRESENTATIVE, Attorney at Law
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, from the Taxpayer Services
Division
RESPONDENT REPRESENTATIVE 3, from the Taxpayer Services
Division

STATEMENT OF THE CASE

This matter came before the Commission for an Initial Hearing on January 17, 2006,
pursuant to Utah Code Ann. §59-1-502.5.

APPLICABLE LAW

The Tax Commission is granted the authority to waive, reduce, or compromise
penalties and interest upon a showing of reasonable cause. Utah Code Ann. §59-1-401(11).

DISCUSSION

Petitioner is appealing penalties, interest, and legal fees for the late payment and filing of sales and resort tax for tax periods 0702 (July 2002), 0802 (August 2002), 0902 (September 2002), 1002 (October 2002), 1102 (November 2002), 1202 (December 2002), 0103 (January 2003), 0203 (February 2003), 0403 (April 2003), 0503 (May 2003), 0603 (June 2003), and 0703 (July 2003). Additionally, the Petitioner has already paid penalties and interest for six monthly filing periods that occurred before the tax periods at issue in this case. The parties agree that the periods before July 2002 are not part of this action because the statute of limitation for the earlier periods precludes Tax Commission action on the earlier periods.

Petitioner's representative provided two reasons for his late filing of tax returns and associated payments. First, the Petitioner explained that until approximately November 2002, the Petitioner had employed the services of a CPA to prepare monthly sales and resort tax returns. The CPA came to the Petitioner's place of business approximately once a month to download the necessary data to complete the monthly sales and resort tax returns. These monthly data transfers required that the Petitioner's computer system be shut down for a period of time, so the CPA came after hours to make the necessary downloads. In early 2002, the CPA quit making monthly downloads and failed to file monthly tax returns. The Petitioner did not immediately notice that the CPA was not making monthly visits because the Petitioner's officers and employees were at the business during working hours and would not have been expected to see the CPA during the after-hours visits. The Petitioner's representative provided testimony that the Petitioner did not discover the CPA's lack of filing until late 2002 when the Petitioner applied for an (X) loan. (X) bank representatives reviewed the Petitioner's financial records in November 2002 and indicated that the Petitioner's tax filing and payment obligations were not

current. The Petitioner ultimately had to pursue an action against the CPA for malpractice in failing to file tax returns for the Petitioner.

The Petitioner provided a second reason for late filing and payment. Petitioner's business is in CITY, Utah and as such is highly dependent on tourism business. The Petitioner's representative explained that tourism in general as well as in CITY took a sharp downturn following the events of September 11, 2001. The Petitioner's copy store suffered the effects of this downturn as CITY hotels, restaurants, and similar hospitality clients reduced their need for the Petitioner's business. This amounted to a 30 percent loss in business that became particularly troubling to a small business with eight employees. The Petitioner was still obligated to pay leases on copy equipment whether the Petitioner fully utilized the equipment or whether it was idle. The Petitioner's representative explained that the only way he was able to stay in business was by refinancing his personal residence in the fall of 2003 and ultimately selling his home in the summer of 2005.

The Division argued that financial difficulties are not reasonable cause to waive penalties and interest for late taxes. As for the problems associated with the Petitioner's CPA, the Division noted that the petitioner discovered the CPA's inadequacies in late 2002 but did not pay back taxes due or to even stay current for ongoing newly-incurred tax obligations.

The Division explained that the sales and resort taxes at issue in this case are different from some taxes in that the Petitioner collects the taxes and holds them in trust for the state. Sales and use taxes are not costs to the Petitioner but are paid directly by customers of the Petitioner. By using state tax funds to pay business expenses, the Petitioner was taking state money for its own purposes. The Division pointed out that at least as early as December 2002,

the Petitioner made a conscious decision to use state funds as part of an attempt to lessen some of its cash flow difficulties. As a matter of public policy, tax penalties are meant to dissuade business owners from making this kind of decision.

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).

Upon review of the parties’ submissions, the Tax Commission agrees with the Division that financial hardship is not the type of reasonable cause required by Utah Code Ann. §59-1-401(11) for the waiver of penalties or interest. This is particularly true for taxes that a business collects and then holds in trust for the state. Accordingly, the Tax Commission will not consider a waiver of penalties or interest from December 2002 through July 2003. From December 2002 through July 2003, there is no dispute that Petitioner knowingly used state funds to further its own business interests.

For the tax periods before November 2002, there appears to be evidence that the Petitioner’s late returns and payments were due at least in part to CPA neglect. Thus, while the Division was correct in assessing penalties in interest for the Petitioner’s tax periods before December 2002, the Tax Commission will consider whether there may nevertheless be reasonable cause to waive all or part of the interest and penalties for July 2002 through November 2002. “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 sales 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). But waiver of penalties is not automatic when the taxpayer relies on a competent tax adviser. As Tax Commission Publication 17 explains, the taxpayer still has the duty to oversee the work of the tax adviser:

You are required, and have an obligation, to file; reliance on a tax adviser to prepare a return does not automatically constitute reasonable cause for failure to file or pay. You must demonstrate that ordinary business care, prudence, and diligence were exercised in determining whether to seek further advice.

Under this standard, the Tax Commission looks at evidence of taxpayer care and prudence as well as the taxpayer's compliance history. See Tax Commission Publication 17. Petitioner had six tax delinquencies in the three years prior to the delinquencies at issue in this case. Three of the six delinquencies were in April 2002, May 2002, and June 2002. These were immediately before the months at issue in this case and were caused by the same CPA. These months would be part of this case if they were not time-barred by the applicable statute of limitation. As for the remaining three delinquencies, the testimony indicates that two were in the year 2000 and one in 2001. Three of the six prior delinquencies can be explained by the actions of the petitioner's CPA. But the other three remain and indicate a compliance history problem even before 2002.

As for the Petitioner's business care and prudence in reviewing the actions of the Petitioner's tax professional, the Commission notes that no one in the Petitioner's organization noticed the inaction of the CPA from April 2002 through November 2002. Even in November

2002, it was someone from a (X) bank who found the CPA problem. The Commission appreciates that during most of 2002, the Petitioner's representative was distracted by financial difficulties. It was also during this time that Petitioner's representative was forced to make and deliver copies himself to save payroll expenses. Even so, the Petitioner did not discover its sales tax problem for approximately eight months. Even when others found the problem, the Petitioner did not make its file an on-time sales tax return until seven more months had passed. Under these circumstances, the Tax Commission cannot find the "business care, prudence, and diligence" that would be necessary to support a waiver of penalties for tax periods December 2002 through July 2003.

Although a taxpayer's financial hardships cannot form the basis for a waiver of tax penalties or interest, they may form the basis of an offer and compromise or payment arrangements. The Commission directs the Petitioner to phone TAX COMMISSION EMPLOYEE at ##### to discuss possible compromise or payment arrangements.

DECISION AND ORDER

Based upon the foregoing, the Commission finds that sufficient cause has not been shown to justify a waiver of penalties or interest in this matter. 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

Appeal No. 05-1680

Salt Lake City, Utah 84134

Appeal No. 05-1680

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2006.

Clinton Jensen
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 _____, 2006.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Palmer DePaulis
Commissioner

Marc B. Johnson
Commissioner

Notice: If the Petitioner does not request a Formal Hearing within the thirty-days as discussed above, failure to pay the amount of deficiency that results from this order may result in an additional penalty.

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