

05-1765
Withholding Tax Penalty & Interest
Signed 06/07/2007

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,	)	ORDER	
)		
Petitioner,	)	Appeal No.	05-1765
)		
v.	)	Account No.	#####
)		
AUDITING DIVISION,	)	Tax Type:	Withholding Tax
UTAH STATE TAX COMMISSION,	)		Penalty & Interest
	)	Tax Period:	2003
Respondent.	)	Presiding:	Robinson

Presiding:

R. Spencer Robinson, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE, Owner

For Respondent: RESPONDENT REPRESENTATIVE, from the Auditing Division

STATEMENT OF THE CASE

This matter came before the Commission for an Initial Hearing on January 16, 2007 in accordance with Utah Code Ann. §59-1-502.5. On November 18, 2005, Respondent sent Petitioner a Statutory Notice informing Petitioner an audit showed Petitioner owed additional withholding tax for 2002 and 2003. The Notice assessed a penalty for 2003, as well as interest for 2002 and 2003. The penalty was \$\$\$\$\$. The Petitioner appealed on December 17, 2005.

APPLICABLE LAW

Utah Code Ann. §59-1-401 (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.”

Utah Code Ann. §59-1-401 (2) “The penalty for failure to pay tax due shall be the greater of \$20 or 10% of the unpaid tax for:

....

(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);

Utah Code Ann. §59-1-401(11) “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.”

Utah Code Ann. §59-1-402.

(2) Except as otherwise provided for by law, the interest rate for a calendar year for all taxes and fees administered by the commission shall be calculated based on the federal short-term rate determined by the Secretary of the Treasury under Section 6621, Internal Revenue Code, and in effect for the preceding fourth calendar quarter.

(5) Interest on any underpayment, deficiency, or delinquency of any tax or fee administered by the 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.

Utah Code Ann. §59-10-406¹

(3) (a) Each employer shall file an annual return, in a form the commission prescribes, summarizing:

- (i) the total compensation paid;
- (ii) the federal income tax deducted and withheld; and
- (iii) the state tax deducted and withheld for each employee during the calendar year.

(b) This return shall be filed with the commission on or before February 28 of the year following that for which the report is made.

Utah Code Ann. §59-10-543

In any proceeding before the commission under this chapter, the burden of proof shall be upon the petitioner except for the following issues, as to which the burden of proof shall be upon the commission:²

DISCUSSION

Petitioner stated an employee responsible for submitting withholding tax payments embezzled some of the funds intended to pay withholding taxes. The employee also destroyed accounting records. Petitioner has used bank records in an effort to reconstruct its accounting records. Petitioner said the lack of records prevents it from challenging Respondent’s calculation of tax liability. Petitioner has sued the former employee.

¹ This is the version in effect in 2002 and 2003.

² None of the exceptions, fraud with intent to evade, issues involving a transferee of property, or an increase in a deficiency, apply in this case.

When the actions of employee constitute embezzlement, the Commission may grant a waiver. In this case, Petitioner's former employee converted some of the withholding payments to personal use and destroyed records to cover what had occurred. Petitioner believed everything was current. It was not until the audit that Petitioner discovered the discrepancy.

Respondent argues Petitioner should have reconciled the withholding amounts reflected on W-2's issued to employees with the amount of withholding reported on Form TC-96R. Respondent cites §59-10-406 (3) for a duty to reconcile tax withheld on W-2's. The Commission has previously held there is a duty to reconcile quarterly filings, information on W-2's, and the amount listed on Form TC-96R. Reconciliation, if attempted, would have revealed the absence of records needed to reconcile. Failure to discover this supports the penalty.

DECISION AND ORDER

Based upon the foregoing, the Commission finds the evidence does not establish reasonable cause for a waiver of the penalty. The Commission denies Petitioner's request for a waiver of penalty based on the current evidence. If Petitioner has additional evidence it believes may change the outcome, it may request a Formal Hearing, as outlined below.

There is no evidence of Commission error causing underpayment. The State of Utah did not have the use of the withholding tax funds that Petitioner should have submitted. The Commission sustains the audit with regard to interest.

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 _____, 2007.

R. Spencer Robinson
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

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
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.