

06-1454

PENALTY & INTEREST

TAX YEARS: 1997, 1998, 2000, 2001, 2002, 2003, 2004, 2005

SIGNED: 06-11-2007

COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, D. DIXON

ABSENT: M. JOHNSON

GUIDING DECISION

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BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER 1 & PETITIONER 2,  Petitioners,  vs.  TAXPAYER SERVICES DIVISION, UTAH STATE TAX COMMISSION,  Respondent.	<b>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</b>  Appeal No. 06-1454  Account No. ##### Tax Type: Penalty & Interest Income Tax Tax Periods: 1997-1998, 2000-2005  Judge: Phan
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**Presiding:**

D'Arcy Dixon Pignanelli, Commissioner  
Jane Phan, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER REP., Attorney At Law  
                  PETITIONER 1  
For Respondent: RESPONDENT REP. 1, Assistant Attorney General  
                  RESPONDENT REP. 2, Supervisor, Waiver Unit  
                  RESPONDENT REP. 3, Waiver Unit

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing pursuant to Utah Code Sec. 63-46b-6 et al., on September 24, 2007. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. Petitioner is appealing the assessment of penalties for failure to timely file and failure to timely pay Utah individual income tax for tax years 1997 through 1998 and 2000 through 2005. These

penalties had been assessed pursuant to Utah Code Sec. 59-1-401(1) & (2). Penalties had also been assessed for the 1996 tax year but had been waived previously by the Waiver Unit. Interest was assessed on the unpaid balance pursuant to Utah Code Sec. 59-1-402. However, Petitioner did not contest the interest.

2. The amount of the penalties for each period are as follows:

Year	Penalties
1997	\$\$\$\$\$
1998	\$\$\$\$\$
2000	\$\$\$\$\$
2001	\$\$\$\$\$
2002	\$\$\$\$\$
2003	\$\$\$\$\$
2004	\$\$\$\$\$
2005	\$\$\$\$\$

3. During the years at issue PETITIONER 1 owned a business in CITY 1, Utah. He had purchased this business, COMPANY A, in 1981 when it was a small ( # )-room motel. PETITIONER 1 developed and expanded the business over the years. By the end of the period at issue the business had grown to a ( # ) room motel with ( WORDS REMOVED ). During this time Petitioner also owned other businesses including both a ( X ) and a ( X ) in STATE 1.

4. Sometime prior to the period at issue the COMPANY A operations had been organized as a "C" Corporation. Prior to 1996 the corporate structure was then changed to an "S" Corporation. Petitioner began receiving employee wage income from the business by 1996.

5. In 1995 or 1996 Petitioners moved to CITY 2, STATE 2, and considered STATE 2 to be their state of residency throughout the entire period at issue.

6. However, PETITIONER 1 continued to operate the COMPANY A business and the business paid wages to PETITIONER 1. The business issued W-2's to PETITIONER 1 based on the wages for each of the years at issue. PETITIONER 1's W-2's were mailed directly to his accountant, ACCOUNTANT, CPA.

7. Prior to the period at issue in this appeal, in 1979 or 1980, PETITIONER 1 retained ACCOUNTANT to prepare tax filings for all his businesses as well as Petitioner's individual income tax. The COMPANY A operations were located within the boundaries of the TERRITORY and, therefore, in addition to the state and federal tax issues, ACCOUNTANT dealt with the TERRITORY tax issues. ACCOUNTANT prepared tax returns and gave tax advice to Petitioner individually and for all his various businesses in multiple states for a period of 25 years. During this period PETITIONER 1 relied on ACCOUNTANT and did not question his competence as a tax advisor. There had been some sales tax audits that resulted in little liability in comparison to the total sales. Other than the situation at issue, there had never been any significant errors with all the other taxing jurisdictions and taxes regarding the businesses or Petitioner's personal income tax. When PETITIONER 1 had questions about any of the taxes he would ask ACCOUNTANT, who, if he did not know the answer, would research the answer for PETITIONER 1. Also PETITIONER 1 did have discussions with other business owners regarding tax issues and there was never anything in the discussions from which PETITIONER 1 concluded that ACCOUNTANT was giving erroneous advice.

8. The Auditing Division of the Utah Tax Commission began an audit of Petitioners that was completed in 2006, during which the auditor concluded that Petitioners had income taxable to Utah. The contact during the audit was the first indication from the Utah Tax Commission to Petitioners that they owed Utah income tax going back to all of the years at issue. In June 2006, Petitioners had retained an attorney and provided W-2's. Thereafter Petitioners filed Utah Individual Income Tax Returns for all years at issue and paid the Utah tax indicated with the filings, which totaled \$\$\$\$\$.

9. For tax year 1999, Petitioners did file a Utah Individual Income Tax Return as a nonresident. There had been some taxable dividends generated that year. To PETITIONER 1 it was not clear why he needed to file a Utah return for that year when he had not filed or paid Utah tax for previous years, but he relied on his accountant so he filed and paid Utah tax pursuant to ACCOUNTANT's instruction for that year. He did not question ACCOUNTANT's instructions on what he needed to file for that year or subsequent

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years.

10. ACCOUNTANT died before this matter proceeded to the hearing. In support of their position, Petitioners submitted an unsigned copy of a letter from ACCOUNTANT addressed to EMPLOYEE at the Tax Commission. In the letter ACCOUNTANT indicated that Petitioners were residents of STATE 2. ACCOUNTANT also acknowledged that PETITIONER 1's W-2's were mailed directly to him and that ACCOUNTANT did not notice they were indicating Utah wages. The Respondent did not contest that the letter had been prepared and mailed to the Tax Commission by ACCOUNTANT.

APPLICABLE LAW

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. (b) This Subsection (1) does not apply to amended returns. Utah Code Sec. 59-1-401(1).

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). Utah Code Sec. 59-1-401(2).

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 Sec. 59-1-402 (5).

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. §59-1-401(11).

The Following clearly documented circumstances may constitute reasonable cause for a waiver of penalty: . . . I. Reliance on Competent Tax Advisor: You fail to file after furnishing all necessary and relevant information to a competent tax advisor, who incorrectly advised you that a return was not required.

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You are required, and have an obligation to file; reliance on a tax advisor 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. (Utah Tax Commission Pub. 17.)

#### CONCLUSIONS OF LAW

1. Petitioners did not dispute that they had Utah individual income tax liability during the period in question. Even if they had been residents of STATE 2, there would be a tax liability on their Utah source income, which they received in the form of wages from a business operated in Utah. Petitioner has now filed Utah Individual Income Tax Returns for each of the years at issue and paid the tax indicated on the returns. Petitioner does not contest the interest that has accrued on the underlying tax amounts, and certainly interest is generally waived only where it has been shown that a Tax Commission error caused the late filing or payment.

2. Petitioner points to Tax Commission Publication 17, Reliance on Competent Tax Advisor, as reasonable cause for waiver of the penalty. The publication provides that penalties may be waived when the taxpayer has provided all necessary and relevant information to a competent tax advisor, who incorrectly advised the taxpayer that no return was required. Petitioner's representative argued that the partnership and "S" Corporation tax issues that ACCOUNTANT had handled for Petitioner were "wildly complex." He also pointed out that ACCOUNTANT's representation had been extremely successful for many years. With ACCOUNTANT's tax assistance, the COMPANY A operations had grown from a small 'mom & pop' motel to a large, complicated business. Based on these facts in this matter the Commission concludes that some reliance by Petitioner on ACCOUNTANT was not unreasonable. Publication 17 goes on to indicate that the taxpayer "must demonstrate that ordinary business care, prudence, and diligence were exercised in

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determining whether to seek further advice.” However, the responsibility for filing a return ultimately remains with the taxpayer. PETITIONER 1 was receiving wage income from his Utah businesses and he would have been given the W-2’s as an attachment to the federal returns that he filed. Although the business returns may have been complicated, the concept of source income from a nonresident state is relatively straightforward and is not unique to Utah. The Commission concludes that Petitioners also had responsibility in this matter in failing to file Utah returns and allowing this to continue for so many years. The Commission determines that it will waive one-half of all the penalties assessed for all of the tax years at issue on the basis of reliance on a competent taxpreparer. The Commission does not find cause for further waiver.

DECISION AND ORDER

Based upon the foregoing, the Tax Commission finds that sufficient cause has not been shown to justify a waiver of one half the penalties assessed for all of the periods at issue. It is so ordered.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

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Jane Phan  
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

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**Notice and Appeal Rights: Failure to pay the balance due as a result of this decision within thirty (3) days from the date hereon could result in additional penalties.** 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 §63-46b-13 and Utah Admin. Rule R861-1A-29. 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 §§59-1-601 et seq. and 63-46b-13 et. seq.

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