

07-0012
Income Tax / Penalty
Signed 08/20/2007

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER 1 & PETITIONER 2,

Petitioners,

vs.

TAXPAYER SERVICES DIVISION,
UTAH STATE TAX COMMISSION,

Respondent.

ORDER

Appeal No. 07-0012

Tax Type: Income Tax / Penalty

Account No. #####

Tax Year: 2005

Judge: Robinson

Presiding:

R. Spencer Robinson, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER 1, *pro se*, via telephone

For Respondent: RESPONDENT REPRESENTATIVE, from the Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Commission for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5 on May 31, 2007. This appeal arises from the Division's assessment of a ten percent extension penalty of \$\$\$\$ for the 2005 tax year. Petitioners request waiver of the penalty

Petitioner PETITIONER 1 suffered a mental breakdown in August of 2005. He was in an inpatient facility from August of 2005 to January of 2006. He has been in aftercare since then.

He has been receiving disability payments from an insurance company based on its determination that he was disabled as of August 9, 2005. Under the policy, payments began 180 days after his disability began. He remains disabled.

PETITIONER 1 had handled household finances up until the time of his disability. He had been self-employed. PETITIONER 2 was not involved in the business.

In August of 2005, PETITIONER 2 discussed the situation with WITNESS, a Registered Representative and Investment Advisory Representative of COMPANY A. WITNESS assessment of the situation at that time was that records were incomplete, at best.

The PETITIONERS met with WITNESS for their first tax appointment on March 27, 2006. Information regarding PETITIONER 1's income was incomplete. It was unknown whether there would be any State tax liability at that time, or if an estimated payment had been made.

WITNESS recommended an extension be filed in order to gather the necessary data. PETITIONER 1 asked what would happen if there were liability for State taxes. A February 27, 2007 letter from WITNESS to RESPONDENT REPRESENTATIVE states, "I told him that 'if' there was a liability, there would be interest charges for payments made after April 15th. I also noted that there should not be any penalty charges due to the extreme medical circumstances he faced in the last half of 2005 and the first part of 2006." PETITIONER 1 said WITNESS did not advise Petitioners about penalty and interest when he advised them to seek an extension.

WITNESS' February 27, 2007 letter RESPONDENT REPRESENTATIVE also contains a paragraph at the bottom of each page stating, "To ensure compliance with requirements imposed by IRS Circular 203, please be advised that any federal tax advice contained in this communication is not intended or written to be used for the purpose of (i) avoiding penalties under the Internal Revenue Code . . ." There is no evidence Petitioners received a letter containing this disclaimer, or that WITNESS made an oral statement of that nature to them.

With WITNESS' help, Petitioners filed a tax return on August 14, 2006. WITNESS requested a waiver based on a best effort to ascertain any balance that might have been due at the time the extension was filed, PETITIONER 2's lack of familiarity with household finances and tax issues, and a lack of complete records when the extension was filed.

Respondent denied the request for the waiver. It based its decision, in part, on Petitioners' previous history. PETITIONER 1 incurred a failure to pay penalty of \$\$\$\$ for the 2002 tax year. He was penalized \$\$\$\$ for the 2003 tax year for failure to pay. An extension penalty of \$\$\$\$ was assessed for the 2004 tax year.

APPLICABLE LAW

59-10-516. Filing extension - Payment of tax - Penalty - Foreign residency.

- (1) (a) The commission shall allow a taxpayer an extension of time for filing returns.
 - (b) The extension under Subsection (1)(a) may not exceed six months.
- (2) (a) Except as provided in Subsection (2)(b), the commission may not impose on a taxpayer during the extension period prescribed under Subsection (1) a penalty under Section 59-1-401 if the taxpayer pays, on or before the 15th day of the fourth month following the close of the taxpayer's taxable year:

- (i) at least 90% of the total tax reported on the income tax return when it is filed;
or
 - (ii) an amount equal to the total amount of tax reported on the income tax return for the previous year.
- (b) If a taxpayer fails to meet the requirements of Subsection (2)(a), the commission may apply to the total balance due a penalty as provided in Section 59-1-401.

59-1-401. Offenses and penalties - Rulemaking authority - Statute of limitations - Commission authority to waive, reduce, or compromise penalty or interest.

(4) (a) In case of an extension of time to file an individual income tax or corporate franchise tax return, if the lesser of 90% of the total tax reported on the tax return or 100% of the prior year's tax is not paid by the due date of the return, not including extensions, a 2% per month penalty shall apply on the unpaid tax during the period of extension.

(b) If a return is not filed within the extension time period as provided in Section 59-7-505 or 59-10-516 penalties as provided in Subsection (1) and Subsection (2)(b) shall be added in lieu of the penalty assessed under this Subsection (4) as if no extension of time for filing a return had been granted.

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 1 had a mental health condition that prevented him from addressing his tax situation until January of 2006, at the earliest. Though no longer receiving in-patient care, he remains disabled. PETITIONER 2 did not have knowledge of PETITIONER 1's business that would have allowed her to address Petitioners' tax situation on her own. PETITIONER 1's condition prevented him from accessing records needed to prepare and file a return.

On March 27, 2006, Petitioners met with WITNESS, who advised them to seek an extension while the necessary information was gathered. WITNESS did not advise them of the need to make a prepayment in order to avoid the penalty.

Three possible reasons for granting a waiver found in Publication 17 may apply in this case: unobtainable records; serious illness; and, reliance on a competent tax advisor. With respect to unobtainable records, that they are unattainable must be beyond the control of the taxpayer. With respect to reliance on a competent tax advisor, the taxpayer must supply the necessary information to the tax advisor, who then advises the taxpayer a return is not required. Additionally, the taxpayer, when so

advised, must exercise ordinary business care, prudence, and diligence in determining whether to seek additional advice.

In this case, records were unavailable, at least for the latter part of 2005 and the early part of 2006, for reasons beyond the control of the taxpayers. PETITIONER 1's condition placed him in in-patient care, where he could neither access previously created records, nor could he access information in order to create records.

Not only did PETITIONER 1's condition limit the taxpayers' ability to access or create records, it has been on going. PETITIONER 1 was totally disabled through the due date of the return, and beyond.

WITNESS advised Petitioners that PETITIONER 1's condition meant there should not be a penalty. Petitioners relied on that advice. The foregoing factors support Petitioners' request for a waiver of the penalty.

Petitioners worked with WITNESS and filed a return on October 16, 2006. In 2006, the filing date was April 17, 2006. The return was filed within six months of April 17, 2006.

Petitioners' history supports Respondent's decision. Moreover, Petitioners' history suggests ordinary business care, prudence, and diligence would have prompted additional questions for WITNESS about the possibility of a penalty.

PETITIONER 1's illness is a factor in three of the circumstances outlined in Publication 17 that may serve as reasonable cause for waiving penalties. It limited access to records, it was ongoing at the time a return was due, and it may have been a factor in what appears to be reliance on WITNESS' advice regarding a penalty without additional inquiry. On balance, the evidence supports Petitioners' request.

DECISION AND ORDER

Based upon the foregoing, the Commission finds that sufficient cause has been shown to justify a waiver of the extension penalty of \$\$\$\$\$. 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

Appeal No. 07-0012

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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.

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