

07-0256  
Sales & Withholding Tax Penalty  
Signed 08/27/2007

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BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER,

Petitioner,

vs.

TAXPAYER SERVICES DIVISION,  
UTAH STATE TAX COMMISSION,

Respondent.

**ORDER**

Appeal No. 07-0256

Tax Type: Sales & Withholding Tax  
Penalty

Tax Period: Multiple<sup>1</sup>

Account No. #####

Judge: Robinson

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**Presiding:**

R. Spencer Robinson, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER REPRESENTATIVE 1, Attorney at Law  
PETITIONER REPRESENTATIVE 2

For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney  
General  
RESPONDENT REPRESENTATIVE 2, Asst. Div. Director,  
Taxpayer Services

STATEMENT OF THE CASE

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<sup>1</sup> Sales Tax Periods: All of 1997; July-Sept. and Oct.-Dec. 1998; April-June and July-Sept. 1999; Jan.-March and Oct.-Dec 2000, all of 2001 and 2002; April-June 2003; Jan-March and July-Sept. 2004; and all of 2005.

Withholding Tax Periods: All of 1997; July-Sept. and Oct.-Dec. 1998; April-June, July-Sept. and Oct.-Dec. 1999; July-Sept. 2000; Jan.-March, April-June, and Oct.-Dec. 2001; all of 2002; Jan-March and April-June 2003; Jan-March and July-Sept. 2004; and April-June and July-Sept. of 2005.

This matter came before the Commission for an Initial Hearing on April 27, 2007, in accordance with Utah Code Ann. §59-1-502.5. The parties were represented as indicated above.

Petitioner requested a waiver of penalties imposed for late filing of sales tax returns and withholding tax returns, and late payments from January-March of 1997 through October – December of 2005. The Division declined to waive the penalties. The Petitioner filed a timely appeal of that decision.

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:

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(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. §59-12-110

(2) (a) If a taxpayer pays a tax, penalty, or interest more than once or the commission erroneously receives, collects, or computes any tax, penalty, or interest, including an overpayment described in Subsection (1)(c), the commission shall:

(i) credit the amount of tax, penalty, or interest paid by the taxpayer against any amounts of tax, penalties, or interest the taxpayer owes; and

(ii) refund any balance to the taxpayer or the taxpayer's successors, administrators, executors, or assigns.

(b) Except as provided in Subsections (2)(c) and (d) or Section 19-2-124, a taxpayer shall file a claim with the commission to obtain a refund or credit under this Subsection (2) within three years from the day on which the taxpayer overpaid the tax, penalty, or interest.

(c) Notwithstanding Subsection (2)(b), beginning on July 1, 1998, the commission shall extend the period for a taxpayer to file a claim under Subsection (2)(b) if:

(i) the three-year period under Subsection (2)(b) has not expired; and

(ii) the commission and the taxpayer sign a written agreement:

(A) authorizing the extension; and

(B) providing for the length of the extension.

Utah Code Ann. 59-10-529

(7) (a) If a refund or credit is due because the amount of tax deducted and withheld from wages exceeds the actual tax due, a refund or credit may not be made or allowed unless the taxpayer or his legal representative files with the commission a tax return claiming the refund or credit:

(i) within three years from the due date of the return, plus the period of any extension of time for filing the return provided for in Subsection (7)(c); or

(ii) within two years from the date the tax was paid, whichever period is later.

### DISCUSSION

PETITIONER REPRESENTATIVE 2 operates PETITIONER. During the periods in question, he employed his wife, WITNESS 1, to file and pay sales and withholding taxes. WITNESS 1 has a history of medical and emotional problems dating back to 1991 when she had a hysterectomy. A letter from WITNESS 2, MD, addressed to EMPLOYEE of the IRS, states he has diagnosed WITNESS 1 with depression and

obsessive compulsive disorder. He said her depression added to her problems with the IRS. He asked the effect of her depression be considered.

WITNESS 3, MFT, also wrote a letter. He stated WITNESS 1 has been exhibiting symptoms of a dysthymic if not a major depressive disorder.

According to Petitioner, because of WITNESS 1's depression, she did not address tax issues, and did not tell PETITIONER REPRESENTATIVE 2 about them. PETITIONER REPRESENTATIVE 2 learned of the tax issues in late 2005. Petitioner now employs a CPA to take care of tax issues. Petitioner said the IRS has waived all penalties, but did not provide the basis for the IRS decision to waive penalties.

Respondent had no evidence contradicting Petitioner's assertions regarding WITNESS 1's health issues or the effect they had on her ability to appropriately address tax issues. Respondent acknowledged that depressed people can go into denial.

Respondent referred to Publication 17, which states in paragraph C that death or serious illness may establish reasonable cause for granting waivers. Three elements are present in paragraph C: first, the death or serious illness of the taxpayer or family member must cause the delay; second, the death or serious illness of the individual or immediate family member who had the sole authority to file the return; and, third, that the death or illness must have occurred immediately prior to the due date of the return. Respondent maintained that paragraph C refers to catastrophic, short term conditions, not long term, chronic conditions.

Respondent also said that if waivers were granted, some of them would be past statute. Respondent did not provide the date of Petitioner's request for waiver of penalty and interest. In one of its exhibits, Respondent stated all requests prior to July of 2002

were past statute. It said some in the period from July of 2002 through September 2002 were past statute. The first period in issue is July through September of 1997.

#### DISCUSSION

Depression, depending on its severity, can be a serious illness. WITNESS 1 is an immediate family member. WITNESS 2 and WITNESS 3 diagnosed her with depression. WITNESS 2 asked that her condition be considered. Absent argument or evidence her condition was not sufficiently serious to be the cause of the delay, the first part of the test in paragraph C is established.

There is no evidence WITNESS 1 had the sole authority to file the necessary returns. PETITIONER REPRESENTATIVE 2 could have prepared and filed them, or he could have employed a CPA to prepare and file them, which he has now done. The second part of the test is not established.

WITNESS 1's condition is chronic. There is no evidence of a sudden onset contemporaneous with any of the filing periods. Reasonable business practices would result in periodic review, revealing the filing issues attributed to WITNESS 1's condition. The third part of the test is not established.

With respect to refunds, while the evidence does not establish the exact date when Petitioner first requested refunds of penalties, the applicable statutes prohibit granting such requests if made more than three years after the tax period in question.

The Respondent has the ability to grant waivers of up to three periods of non-compliance. In this case, the first three periods where a refund could be granted precede the request by more than three years. Nevertheless, they, and others preceding those

where a refund is barred by statute, are part of the history to be considered when waivers of penalties are requested.

DECISION AND ORDER

Based upon the foregoing, the Commission sustains the Respondent's denial of Petitioner's request to waive penalties assessed for the periods at issue. Petitioner has not established reasonable cause for a waiver of the penalties.

Additionally, the Commission agrees with the Respondent that if reasonable cause were established, 59-12-110 (2) prohibits refunding any penalties paid with respect to sales tax, and that 59-10-529 (7) prohibits refunding any penalties paid with respect to withholding tax, in cases when the request was made more than three years after the tax period in question.

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



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.