

07-0355
Penalty
Signed 09/12/2007

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER</p> <p>Petitioner,</p> <p>vs.</p> <p>TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p>Respondent.</p>	<p>ORDER</p> <p>Appeal No. 07-0355 Account No. #####</p> <p>Tax Type: Penalty</p> <p>Tax Period: 0704-0904, 1004-1204, 0105-0305</p> <p>Judge: Jensen</p>
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Presiding:

Clinton Jensen, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE

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 June 4, 2007. Petitioner is appealing penalties of \$\$\$\$ for the late filing and payment of withholding tax for the filing period of 0704-0904, penalties of \$\$\$\$ for the late filing and payment of withholding tax for the filing period of 1004-1204, and penalties of \$\$\$\$ for the late filing and payment of withholding tax for the filing period of 0105-0305. Additionally, lien fees and interest were assessed for these periods; however, only the penalty fees were appealed.

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's representative explained that petitioner had initially contracted out Petitioner's payroll to include the filing and payment of withholding taxes to COMPANY A and ACCOUNT REP was handling petitioner's account. Petitioner remained with ACCOUNT REP when he left COMPANY A and formed his own payroll business: COMPANY B. The payroll company was responsible for the paying and filing of both state and federal taxes and had signature authority; thus the filings did not need to go before petitioner to be signed prior to filing. Petitioner sent the appropriate forms to COMPANY B on the 5th and 20th of each month and paid accordingly. COMPANY B did not, however, make filings for the periods of 1003-1203, 0104-0304, 0404-0604, 0704-0904, 1004-1204, and 0105-0305, nor did it make any tax payments for these periods.

Petitioner first became aware of tax deficiencies during the first quarter of 2005. Prior to the first quarter of 2005 all correspondences had been sent to COMPANY B, so petitioner was not aware of any problems, and had no reason to suspect any problems since ACCOUNT REP had theretofore always performed satisfactorily and while with COMPANY A petitioner's filings had been timely and not deficient. There was no cause to give rise to suspicion because signature authority was granted to ACCOUNT REP so there was no notice to petitioner of delinquencies in filings or payments.

The Internal Revenue Service had been contacting COMPANY B because there had been payment made but no forms filed, eventually the IRS contacted petitioner. When petitioner became apprised of the situation petitioner switched back to COMPANY A to handle payroll and had COMPANY A redo the filings for the periods of 1003-1203, 0104-0304, 0404-0604, 0704-0904, 1004-1204, and 0105-0305. Petitioner initiated the contact with the Commission in October of 2005. Prior to switching from and since switching back to COMPANY A petitioner has been current in filings and payments. The Division waived the penalties on the first three periods that were delinquent, but did not do so for the remaining three and from this assessment petitioner appeals.

The Division's representative does not contest any of the foregoing facts presented by petitioner. The Division explains that it is allowed to waive penalties for reasonable cause. In making the original assessment the Division was not aware of embezzlement as the cause; it did,

however, see fit to waive the penalties for the first three periods but not the second three because of the time frame over which petitioner was delinquent—the Division waived the fees for the first three periods based on the compliance history of the petitioner, but denied it for the remaining three periods. Since time periods were not given in the initial request the Division could not base a waiver on petitioner’s reliance on the tax advisor. On learning of the embezzlement, the Division maintains that while embezzlement merits reasonable cause and thus waiver of penalties, the taxpayer still has to act in a reasonable amount of time and that the period was too long and only the three that were originally waived are appropriate. Because the Division believes it took petitioner too long to realize and correct the problem, the Division seeks payment of the penalties for the periods of 0704-0904, 1004-1204, and 0105-0305.

Tax Commission Publication 17, available at <http://tax.utah.gov/forms/pubs/pub-17.pdf>, explains the factors that the Commission will consider in reviewing waiver requests. The Commission may waive penalties for reasonable cause. Among those circumstance which will give rise to reasonable cause and may constitute the Commission waiving penalties, three are pertinent in this case: reliance on a competent tax advisor, compliance history, and employee embezzlement.

When a taxpayer relies on a competent tax advisor to prepare a tax return and pay the taxes the taxpayer may be entitled to relief from any penalties assessed because the tax advisor failed to do so. However, the duty to file is an obligation on the taxpayer and such reliance does not automatically entitle the taxpayer to relief from penalties. For the Commission to waive penalties due to reliance on a competent tax advisor the reliance must be done with ordinary business care, prudence and diligence. In this case, petitioner had a working relationship of trust with the tax advisor and had no reason to believe that the advisor was not competently fulfilling his duties. Petitioner switched tax advisors as soon as possible after learning of the problem. Because petitioner was relying on a tax advisor with whom petitioner had an existing relationship of trust and acted swiftly upon discovery of the situation petitioner is found to have acted with reasonable business care, prudence and diligence and by so relying on a competent tax advisor is eligible for waiver of penalties. Petitioner’s reliance amounts to reasonable cause for waiver of penalties.

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Compliance history is one factors the Commission considers in making a decision to waive penalties. In this case, petitioner filed timely and paid taxes prior to staying with ACCOUNT REP after he left COMPANY A and formed COMPANY B. Furthermore, after learning of the deficiencies in payment and filing, petitioner filed and paid the taxes in a timely manner and has since continued to do so.

DECISION AND ORDER

Based upon the foregoing, the Commission finds that sufficient cause to justify a waiver of the penalties to the amount of \$\$\$\$ for the filing period of 0704-0904, \$\$\$\$ for the filing period of 1004-1204, and \$\$\$\$ for the filing period of 0105-0305. 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 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.

Clinton Jensen
Administrative Law Judge

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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 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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