

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, vs. TAXPAYER SERVICES DIVISION, UTAH STATE TAX COMMISSION, Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION Appeal No. 07-0372 Account No. ##### Tax Type: Penalty & Interest - Income Tax Tax Periods: 1997, 1998, 1999, 2000, 2001 Judge: Jensen
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Presiding:

D'Arcy Dixon Pignanelli, Commissioner
Clinton Jensen, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER
 PETITIONER REPRESENTATIVE
For Respondent: RESPONDENT REPRESENTATIVE, from the Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on February 7, 2008 in accordance with Utah Code Section 63-46b-6 et al. On the basis of 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 late filing or late payment of income tax for the tax years 1997, 1998, 1999, 2000, and 2001. The Taxpayer Services Division (the "Division") assessed penalties for these years in accordance with Utah Code Sections 59-1-401(1) & (2). The Division also assessed interest on the unpaid balance in accordance with Utah Code Section 59-1-402. Interest accrues from the date that the tax was due until the balance has been paid.

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

<u>Year</u>	<u>Penalties and Lien Fees</u>	<u>Interest</u>
1997	\$\$\$\$\$	\$\$\$\$\$
1998	\$\$\$\$\$	\$\$\$\$\$
1999	\$\$\$\$\$	\$\$\$\$\$
2000	\$\$\$\$\$	\$\$\$\$\$

2001

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3. Petitioner requests a waiver of penalties and interest assessed for tax years 1997 to 2001 on the basis of actions taken by the IRS beginning in November 2000 and advice from a CPA to not file tax returns until resolution of the IRS action.

4. In November 2000, the IRS sent Petitioner a notice of a federal audit. The IRS audited Petitioner's tax returns for tax years 1997 to 2001 (the "IRS Audit").

5. As a result of the IRS Audit, the IRS informed Petitioner that it was finding an unpaid federal tax liability of approximately \$\$\$\$\$ for tax years 1997 to 2001.

6. Petitioner disagreed with the findings of the IRS Audit and worked with a CPA to challenge the IRS Audit.

7. Petitioner and his CPA initially formed the impression that the IRS Audit would resolve reasonably quickly. On that basis, and out of possible concern regarding possible criminal action discussed by IRS agents, the CPA advised Petitioner to not file tax returns until the IRS Audit could be resolved.

8. The IRS Audit did not resolve until March 2006 and involved intervention by Petitioner's representative to congress.

9. By the time of its resolution, the IRS Audit amount was reduced substantially from the original IRS claim.

10. The IRS Audit, as resolved, increased Petitioner's Federal Adjusted Gross Income for tax years including 1997, 1998, and 1999. Thus, Petitioner's Utah taxes increased for those years resulting in penalties and interest even though Petitioner had originally filed his 1997, 1998, and 1999 Utah returns timely. The Utah State Tax Commission sent notices to Petitioner regarding increased taxes for these tax years, but Petitioner did not respond to the notices with either payment or documents to file an appeal. The penalties for these years did not include penalties for failure to file, but did include penalties and interest for failure to pay the amount of increased taxes as stated in notices from the Utah State Tax Commission.

11. Petitioner did not file Utah state returns or pay Utah income tax for the 2000 or 2001 tax years until after the resolution of the IRS audit. However, by this time, the 2000 and 2001 state returns and payments on those returns were late. Accordingly, the Utah State Tax Commission assessed penalties and interest on the 2000 and 2001 returns.

12. Petitioner's tax returns for 1994, 1995 and 1996 were paid late. Additionally, Petitioner filed late for two of these three years.

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. This 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).

DISCUSSION

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. Reliance on a competent tax adviser is listed among the fact patterns that can provide the requisite showing of good cause for a penalty waiver. However, Publication 17 also makes clear that in following the advice of a tax adviser, a taxpayer must demonstrate that ordinary business care, prudence, and diligence were exercised in determining whether to seek further advice. Publication 17 indicates that the Tax Commission will consider a taxpayer's compliance history when making a decision on a waiver request.

Grounds for waiving interest are more stringent than for penalty. To be granted a waiver of interest, a taxpayer needs to show Tax Commission error.

Applying Utah law and the principles described in Tax Commission Publication 17, the Commission first considers whether there is a showing that the penalties or interest at issue were levied without basis. In this regard, Petitioner made no argument that Tax Commission lacked basis to levy penalties or interest or levied them in error. Rather, Petitioner argued that even though the penalties and interest may have been properly levied, the Commission should exercise discretion in waiving all or part of the penalties and interest at issue on the basis of advice from a tax adviser not to file returns pending resolution of the IRS Audit.

For tax years 1997, 1998 and 1999, Petitioner did not show that he relied on the advice of a tax adviser

in making a decision about whether to file tax returns for these years. There could be no such evidence because Petitioner timely filed returns for these years. The penalties and interest for these years came not from following advice to withhold filing for these years but for failing to respond to notices from the Utah State Tax Commission with regard to these years. Petitioner made no showing that he followed the advice of anyone in letting these notices go unanswered or unpaid. Accordingly, Petitioner has not shown good cause to waive penalties for tax years 1997, 1998, or 1999.

With regard to penalties for the 2000 and 2001, Petitioner did seek and follow the advice of a CPA in making a decision to not file returns for these years. However, this was not so much a mistake in whether a return was due as it was a business decision to weigh the consequences of possible adverse actions in the IRS Audit from filing Utah returns and to compare them to the consequences of not filing Utah returns. Petitioner chose the consequences of not filing Utah returns knowing that the returns should have been filed. Additionally, Petitioner's compliance history in the years before the years at issue shows problems with tax returns for 1994, 1995, and 1996.

As for interest on the tax years at issue, Petitioner did not make an argument that Tax Commission error caused late payments or filings for any of the years at issue.

CONCLUSIONS OF LAW

1. Petitioner has not shown good cause to waive penalties for tax years 1997 through 2001.
2. Petitioner has not alleged or shown Tax Commission error as a cause of late filings or payments for tax years 1997 through 2001 and has thus not shown good cause to waive interest for these tax years.

DECISION AND ORDER

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

DATED this _____ day of _____, 2008.

Clinton Jensen
Administrative Law Judge

Appeal No. 07-0372

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 _____, 2008.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

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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