

07-0421  
Income – Waiver of Penalties  
Signed 11/16/2007

---

BEFORE THE UTAH STATE TAX COMMISSION

---

PETITIONER 1 & PETITIONER 2,  Petitioners,  v.  AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,  Respondent.	<b>ORDER</b>  Appeal No.    07-0421  Account No.   #####  Tax Type:     Income – Waiver of Penalties Tax Years:    1998, 1999, 2000, 2001 & 2002  Judge:        Chapman
--	--

---

**Presiding:**

Kerry R. Chapman, Administrative Law Judge

**Appearances:**

For Petitioner:    PETITIONER REPRESENTATIVE, CPA

For Respondent:    RESPONDENT REPRESENTATIVE, from Auditing Division

STATEMENT OF THE CASE

On November 6, 2007, this matter came before the Utah State Tax Commission for a Telephone Status Conference, which was converted to an Initial Hearing upon agreement of the parties.

In November 2004, Auditing Division (“Division”) issued Statutory Notices of Estimated Income Tax (“Statutory Notices”) to the Petitioners for the 1998 through 2002 tax years. The Petitioners had filed a 1997 return as Utah resident individuals, but did not file returns for the subsequent years at issue, even though they received Internal Revenue Service Form W-2’s for each year showing income earned from teaching at ( X ) (“ X ”). Based on this information, the Division originally assessed the Petitioners as resident individuals, imposing additional tax, a 10% penalty for late filing, a 10% penalty for late payment, and interest for all years at issue. On February 9, 2005, approximately 90 days after the Statutory Notices were issued, the Division imposed liens for each year at issue because the Petitioners had not paid the assessments

Appeal No. 07-0421

and had not filed an appeal. A \$\$\$\$ legal fee was also assessed for each tax year at the time the liens were imposed.

After receiving the Division's assessments, the Petitioners sought tax advice from PETITIONER REPRESENTATIVE'S firm and filed non-resident returns for each year at issue, on which they reported and paid taxes on their Utah source income from ( X ). The Division has accepted the Petitioners' non-resident returns for all years at issue and, based on these returns, adjusted the Petitioners' tax liability for each year. As a result, the amounts of the income tax liability are no longer at issue. In addition, the Petitioners accept liability for the revised interest amounts and the legal fees that were imposed. However, the Petitioners ask the Commission to waive the revised 10% penalties for late filing and 10% penalties for late payment for all years at issue. The amounts of the penalties that remain at issue are as follows:

<u>Year</u>	<u>10% Filing Penalty</u>	<u>10% Payment Penalty</u>	<u>Total</u>
1998	\$\$\$\$	\$\$\$\$	\$\$\$\$
1999	\$\$\$\$	\$\$\$\$	\$\$\$\$
2000	\$\$\$\$	\$\$\$\$	\$\$\$\$
2001	\$\$\$\$	\$\$\$\$	\$\$\$\$
2002	\$\$\$\$	\$\$\$\$	<u>\$\$\$\$</u>
			<u>\$\$\$\$</u>

APPLICABLE LAW

UCA §59-1-401 provides for the imposition of penalties for failure to file returns and pay tax when due, as follows:

(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.

....

(2) 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);

(c) failure to pay any tax within 30 days of the date of mailing any notice of deficiency of tax unless a petition for redetermination or a request for agency action is filed within 30 days of the date of mailing the notice of deficiency;

(d) failure to pay any tax within 30 days after the date the commission's order constituting final agency action resulting from a timely filed petition for redetermination or request for agency action is issued or is considered to have been denied under Subsection 63-46b-13(3)(b); and

(e) failure to pay any tax within 30 days after the date of a final judicial decision resulting from a timely filed petition for judicial review.

UCA §59-1-401(11) provides that the Tax Commission is authorized to waive, reduce, or compromise penalties and interest upon a showing of reasonable cause.

### DISCUSSION

The Petitioners did not file Utah income tax returns or pay the amounts of taxes due until September 1, 2005 for tax years 1998 through 2001 and February 27, 2007 for tax year 2002. As a result, the Division properly imposed the 10% penalties for late filing in accordance with Section 59-1-401(1)(a) and the 10% penalties for late payment in accordance with Section 59-1-401(2)(b).

However, the Petitioners have asked the Commission to waive the revised penalty amounts. Under Section 59-1-401(11), the Commission is authorized to waive penalties upon a showing of reasonable cause. The Petitioners ask the Commission to waive the penalties because they were no longer Utah resident individuals as of 1998 and did not know of the requirement to file non-resident returns to report Utah source income. Specifically, the Petitioners ask the Commission to waive the penalties under the “first time filer” circumstances that are described in UTSC Publication 17 (Waivers – Reasonable Cause) (“Publication 17”), because their mistake first arose in 1998, the year they first became Utah non-resident filers.

PETITIONER REPRESENTATIVE also proffers that the Petitioners had a CPA firm in STATE prepare their federal returns for the five tax years at issue. However, he did not know whether the STATE firm advised the Petitioners not to file Utah tax returns or neglected to inform them of their duty to file. PETITIONER REPRESENTATIVE added that although the Petitioners earned income in Utah during

Appeal No. 07-0421

each year at issue, the primary source of their income was received from the ( X ), which employed PETITIONER 1.

Should the Commission decide not to waive all penalties, PETITIONER REPRESENTATIVE asks, in the alternative, that the Commission consider waiving the penalties for all years except 2002. The Petitioners filed a return and paid the taxes due for the 2002 tax year on February 27, 2007, more than two years after the Division issued the Statutory Notice for this year. In comparison, the Petitioners filed their returns and paid taxes due for the 1998 through 2001 tax years on September 1, 2005, less than a year after the Statutory Notices were issued and more than a year sooner than they filed their 2002 return.

The Division, on the other hand, asks the Commission to sustain all remaining penalties for the five tax years at issue. The Division further proffers that its records show that the Petitioners' tax returns for all other years in which they filed were also late. Prior to the five years at issue, the Petitioners' 1997 resident return was filed late on January 8, 1999. Subsequent to the years at issue, the Petitioners' 2003 and 2004 non-resident returns were filed late in 2007.

Reliance on a Competent Tax Advisor. Publication 17 provides that reliance on a competent tax advisor may be reasonable cause to waive penalties, as follows:

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.

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.

Although there is evidence that the Petitioners obtained the services of a CPA to prepare their federal tax returns for the years at issue, there is no information in regards to what advice the CPA gave the Petitioners concerning their Utah income tax liability. Accordingly, the Commission declines to waive the penalties at issue based on the Petitioners' reliance on a competent tax advisor.

Compliance History. Publication 17 also provides that a taxpayer's compliance history may be considered to determine if reasonable cause for a waiver of penalties exists, as follows:

L. Compliance History: The Tax Commission will consider your recent history for payment, filing, and delinquencies in determining whether a penalty may be waived. The Commission will also consider whether other tax returns or reports are overdue at the time the waiver is requested.

The only year that the Petitioners were Utah residents was 1997, and they filed their return for this year late. In addition, the Petitioners were alerted of their need to file returns to report their Utah tax liability for subsequent years in November 2004, when the Division issued its assessments for the years at issue. However, the Petitioners did not file any of their tax returns for the years at issue until September 2005, more than nine months later. Furthermore, the Petitioners filed their returns for the 2002 through 2004 tax years in 2007, more than two years after the Statutory Notices were issued. Under these circumstances, the Commission declines to waive the penalties based on the Petitioners' compliance history.

First Time Filer. Publication 17 also provides that reasonable cause may exist and penalties waived for a first time filer, as follows:

J. First Time Filer: It is the first return required to be filed and the taxes were filed and paid within a reasonable time. The Commission may also consider waiving penalties on the first return after a filing period change if filed and paid within a reasonable time.

Although 1998 was not the first year for which the Petitioners filed a Utah return, it was the first year for which they were required to file *non-resident* returns. For four of the five tax years at issue, the Petitioners filed and paid their taxes approximately nine months after the Division issued its Statutory Notices. Pursuant to the first time filer circumstances, the Commission finds that reasonable cause exists in this case to waive all penalties imposed for the 1998, 1999, 2000 and 2001 tax years.

Nevertheless, the Petitioners did not file its 2002 return until more than two years after the Division issued its Statutory Notice for this tax year. The Commission declines to find that this return was

Appeal No. 07-0421

filed within a reasonable time to qualify for waiver under the first time filer circumstances. Accordingly, the Commission denies the Petitioners' request to waive any penalty imposed for the 2002 tax year.

DECISION AND ORDER

Based upon the foregoing, the Commission waives all penalties associated with the 1998, 1999, 2000, and 2001 tax years. Nevertheless, the Commission denies the Petitioners' request to waive any penalty imposed for the 2002 tax year. Accordingly, the Petitioners' appeal is denied. 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

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

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

---

Kerry R. Chapman  
Administrative Law Judge

Appeal No. 07-0421

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 neither party requests a Formal Hearing, the balance due will become final thirty days from the date of this order. Failure to pay the balance due as a result of this order within the thirty days from the date hereon may result in an additional penalty. Petitioner should contact the Taxpayer Services Division to obtain an update of the interest or make payment arrangements at (801) 297-7703.

*KRC/07-0421.ord*