

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	INITIAL HEARING ORDER Appeal No. 07-0899 Account No. ##### Tax Type: Income Tax Year: 2000 Judge: Chapman
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Presiding:

Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE, Representative (by telephone)
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
 RESPONDENT REPRESENTATIVE 2, from Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5, on July 9, 2008.

On June 26, 2007, the Division issued a Notice of Deficiency and Estimated Income Tax (“Statutory Notice”) to the taxpayer, in which it imposed taxes, penalties, and interest, as follows:

<u>Year</u>	<u>Tax</u>	<u>Penalties</u>	<u>Interest</u>	<u>Total</u>
2000	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

The taxpayer did not file a 2000 tax return. The Division’s assessment is its estimate of the taxpayer’s tax liability for that year. The taxpayer concedes that he owes the additional tax that the Division assessed. However, he asks the Commission to waive interest, as well as the 10% penalty for failure to timely file and the 10% penalty for failure to timely pay.

The taxpayer proffers that he has worked outside of Utah for most of his career and that he and his wife were divorcing during 2000. He also proffers that he relied on a CPA who advised him that he did not have to file a 2000 Utah return, even though he had filed a Utah return in prior years. Based on his reliance on a tax professional, he asks the Commission to waive the penalties and interest.

The Division opted not to take a position on whether the Commission should waive the penalties and interest. Nevertheless, the Division pointed out to the Commission that the tax amount to which the taxpayer is conceding is an estimate prepared by the Division and that the taxpayer has not filed a 2000 tax return. In addition, the Division pointed out that the taxpayer has yet to pay the assessed tax liability. Lastly, the Division pointed out that the “Waivers Procedures” described in Utah State Tax Commission Publication 17 provides that a waiver will not be considered until a return is filed and the tax is paid.

APPLICABLE LAW

1. Utah Code Ann. §59-1-401(13) provides that “[u]pon 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.”

2. Utah State Tax Commission Publication 17 (“Publication 17”) sets forth Commission policies concerning the waiver of penalties and interest. Concerning the waiver of interest, Publication 17 specifies that “[g]rounds for waiving interest are more stringent than for penalty. To be granted a waiver of interest, you must prove that the Tax Commission gave you erroneous information or took inappropriate action that contributed to the error.”

3. Publication 17 also sets forth a number of circumstances that may be considered “reasonable cause” for purposes of waiving penalties, as follows in pertinent part:

....

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.

....

4. In addition, Publication 17 sets forth "Waiver Procedures," as follows:

A request for waiver of any penalties and/or interest will be considered when:

- a. you provide a signed statement requesting a waiver;
- b. the total tax owed for the period(s) has been paid;
- c. the tax liability is based on a return you filed with the Tax Commission (not on an estimate provided by you or one of our auditors); and
- d. you have not previously received a waiver review for the same period(s).

When we receive the waiver request, we will:

- a. review the request;
- b. notify you if additional documentation is needed to consider the waiver request; and
- c. review the account history for prior waiver requests, taxpayer deficiencies, and historical support for the reason given.

DISCUSSION

A preliminary issue is whether the Commission can consider the waiver request, even though the taxpayer has not filed a 2000 tax return and has not yet paid the taxes due. The Waivers Procedures on Publication 17 indicate that a return must be filed and the tax paid before a waiver request is considered. However, the Waiver Procedures appear to be designed for waiver requests made to the Waivers Section of Taxpayer Services Division. The contact information on Publication 17 is for the Waivers Section. In addition, the Waiver Procedures describe actions that the Waivers Section will take upon receiving a waiver request that meets the specified conditions.

When the waiver request arises in the appeals process, however, the Commission considers the matter to be different. A taxpayer is not generally required to pay an assessment until a final order is issued. Furthermore, a final decision in the appeals process is often required to establish the taxpayer's liability. Until such a decision is issued, filing a return may not be beneficial. For these reasons, the Commission finds that it may address the taxpayer's waiver request in this matter. Nevertheless, whether or not the taxpayer has filed a

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return or paid the taxes due may be a factor that the Commission considers when determining if reasonable cause exists to grant a waiver.

Interest. Although penalties and interest may both be waived upon a showing of reasonable cause, the criteria for which the Commission waives interest are different from the criteria for which it waives penalties. Interest is charged because the taxpayer has had the use of the tax dollars during a period when the state should have had that use. For this reason, interest is only waived if the imposition of interest arose from a Commission employee's error. The taxpayer admits that the error arose because of his CPA's error. Accordingly, the Commission finds that no reasonable cause exists to waive the interest at issue.

Penalties. On the other hand, reasonable cause to waive a penalty may exist under a number of circumstances. In Publication 17, the Commission provides that a penalty may be waived upon a showing of "reliance on competent tax advisor." The proffered testimony indicates that the taxpayer did not file a Utah return because his CPA advised him that it was unnecessary. Furthermore, it appears that the taxpayer's reliance on the CPA's advice and decision not to seek further advice was not unreasonable, as the taxpayer worked out-of-state and was getting a divorce from his wife in Utah.

Generally, the Commission is concerned when a taxpayer does not file a return. However, the taxpayer is not challenging the non-filing assessment, and there is no indication that the estimated tax liability is incorrect. Under these circumstances, the Commission does not find the taxpayer's failure to file a return that mirrors the Division's assessment to be problematic. For these reasons, the Commission finds that reasonable cause exists to waive the penalties at issue.

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division's assessment of additional tax and interest. However, the Commission waives the 10% late filing and 10% late payment penalties. It is so ordered.

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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 taxpayer'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 _____, 2008.

Kerry R. Chapman
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 _____, 2008.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Notice: If a Formal Hearing is not requested as discussed above, failure to pay the balance resulting from this order within thirty (30) days from the date of this order may result in a late payment penalty.

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