

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, vs. TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION Appeal No. 07-1144 Tax Type: Sales Tax Tax Years: April 2007 and May 2007 Judge: Marshall
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Presiding:

D'Arcy Dixon Pignanelli, Commissioner
Jan Marshall, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE, President, PETITIONER
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, Taxpayer Services Division
RESPONDENT REPRESENTATIVE 3, Taxpayer Services Division
RESPONDENT REPRESENTATIVE 4, Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on May 1, 2008 in accordance with Utah Code Ann. §63-46b-6 *et al.* Taxpayer and the Division jointly requested that this Appeal be heard with Appeal No. 07-1145, as the issues for both appeals arise from the same set of facts. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. Taxpayer is appealing the assessment of penalties for the failure to timely pay sales tax payments for the April 2007 and May 2007 filing periods.
2. Penalties were imposed in the amount of \$\$\$\$ for April 2007 and in the amount of \$\$\$\$ for the May 2007 period.
3. For the periods at issue, an employee of Taxpayer prepared the sales tax returns (Form TC-61) and on line 13, which asks for "Food sales included in line 7", the employee listed the full amount of Taxpayer's food sales.

4. Line 13 is a credit related to the sale of food. Taxpayer's representative testified that the employee was confused by the wording of the form, and did not understand that the credit was limited to non-prepared food.
5. The Taxpayer incorrectly took the food sales credit, which resulted in an underpayment of tax, and the imposition of penalties at issue.
6. The Initial Hearing Order waived the penalties for both April 2007 and May 2007. This is inconsistent with the Initial Hearing Order in Appeal No. 07-1145, which involved the same circumstances for Taxpayer's restaurant located at the (X). The Initial Hearing Order in Appeal No. 07-1145 waived the penalties for April 2007 but denied the waiver of penalties for May 2007.
7. Taxpayer's representative asked the Commission to sustain the Initial Hearing Order, but to treat Appeal No. 07-1145 in the same manner and grant a waiver for both periods at issue.
8. The Division agreed that there was an inconsistency with the Commission's prior order in this appeal and Appeal No. 07-1145, and asked that the Commission clarify its position.
9. RESPONDENT REPRESENTATIVE 2, for the Taxpayer Services Division testified that the Taxpayer underpaid by the amount of the food sales discount for the periods at issue, but that the returns were filed and otherwise paid on time.
10. The Taxpayer Services Division initially denied the Taxpayer's waiver request because of their compliance history. The errors were Taxpayer's fourth and fifth in the preceding three years.
11. Taxpayer Services Division acknowledged that the food sales discount could have been misunderstood, as it was a new discount at this time, and RESPONDENT REPRESENTATIVE 2 stated that she believed the Taxpayer got "caught up in the learning curve for the new discount."

APPLICABLE LAW

Penalties are imposed under for the late payment of tax under Utah Code Ann. §49-1-401(3) as follows in pertinent part:

- (a) If a person fails to pay a tax, fee, or charge due, the person is subject to a penalty as provided in this Subsection (3).
- (b) (i) A penalty in the amount described in Subsection (3)(b)(ii) is imposed if:
 - (A) a person files a return with respect to a nonqualifying obligation on or before the due

date for filing a return described in Subsection (2)(a), but fails to pay the nonqualifying obligation due on the return on or before that due date;

- (B) a person:
 - (I) is subject to a penalty under Subsection (2)(b); and
 - (II) fails to pay a nonqualifying obligation due on a return within a 90-day period after the due date for filing a return described in Subsection (2)(a)...

(ii) For purposes of Subsection (3)(b)(i), the penalty is an amount equal to the greater of:

- (A) \$20; or
- (B) 10% of the unpaid nonqualifying obligation due on the return

Utah Code Ann. §59-1-401(3) (2007).

Section 59-1-402(5) of the Utah Code provides, “[i]nterest 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 Ann. §59-1-402(5) (2007).

The Commission has been granted the discretion to waive penalties and interest. Section 59-1-401(13) of the Utah Code provides, “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) (2007).

CONCLUSIONS OF LAW

The Commission has issued Publication 17, available at <http://tax.utah.gov/forms/pubs>, which sets forth the factors the Commission may consider in determining whether “reasonable cause” exists for the waiver of penalties or interest. Publication 17 also indicates the Commission will consider a taxpayer’s filing history when making a decision on a request to waive penalties. The Taxpayer’s compliance history indicates past errors within the three years prior to the years at issue.

One of the factors the Commission will consider in determining whether there is “reasonable cause” to waive penalties is whether the Taxpayer is a “first time filer.” While the Taxpayer in this instance is not a first time filer, Publication 17 provides that “The Commission may also consider waiving penalties on the first return after a filing period change if filed and paid within a reasonable time.” While not a change in Taxpayer’s filing period, the food sales

credit was a new item on the sales tax return, and the Division acknowledged at the hearing that the changes could be confusing. Further, the Taxpayer timely filed the returns for the periods at issue, and once the Taxpayer was notified of their mistake, the tax deficiency was paid.

Typically the “first time error” waiver would only apply to the return for the Taxpayer’s first filing period, or the first period after a change in filing period. However, in the past, the Commission has waived the penalties for multiple periods, if the penalty was assessed at the same time, for the same error, but for different periods. In this circumstance, the Commission looks at when the Taxpayer was first notified of the error. The Taxpayer made the same error on the returns for the April 2007 and May 2007, Taxpayer was made aware of the error for both periods in July of 2007, and paid the deficiency balance for both periods on July 11, 2007. Therefore, the Commission finds that there is reasonable cause to warrant a waiver of the penalties for both the April 2007 and May 2007 periods.

DECISION AND ORDER

Based on the foregoing, the Commission finds that sufficient cause has been shown to justify a waiver of the penalties for the April 2007 and May 2007 tax periods. It is so ordered.

DATED this _____ day of _____, 2008.

Jan Marshall
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 of Appeal Rights: 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 Ann. Sec. 63-46b-13. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. 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 Sec. 59-1-601 et seq. and 63-46b-13 et seq.

Appeal No. 07-1144

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