

07-1265  
Penalty & Interest  
Signed 03/24/2008

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,  Petitioner,  v.  TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION,  Respondent.	<b>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</b>  Appeal No. 07-1265  Account No. ##### Tax Type: Sales & Tourism Tax Year: Multiple 2005-2006  Judge: Marshall
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**Presiding:**

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

**Appearing:**

For Petitioner: PETITIONER REPRESENTATIVE, PETITIONER  
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney  
General  
RESPONDENT REPRESENTATIVE 2, Waivers Unit,  
Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on Formal Hearing pursuant to Utah Code Ann. §63-46b-6 on February 12, 2008. Based on the testimony and evidence presented at the Formal Hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. Petitioner is appealing the assessment of penalties for failure to timely file and failure to timely pay sales and tourism tax for various filing periods between October 2005 and October 2006. The penalties were assessed pursuant to Utah Code Ann. §59-1-401(1) & (2). Interest was assessed on the unpaid balance pursuant to Utah Code Ann. §59-1-402 and continues to accrue. Petitioner does not contest the interest assessment.

2. The penalties for each period are as follows:

<u>Period</u>	<u>Tax Type</u>	<u>Amount</u>	
10/2005	Sales	\$\$\$\$	(Late Filing/Late Payment)
	Tourism	\$\$\$\$	(Late Payment)

11/2005	Sales	\$\$\$\$\$	(Late Payment)
	Tourism	\$\$\$\$\$	(Late Payment)
02/2006	Sales	\$\$\$\$\$	(Late Filing/Late Payment)
	Tourism	\$\$\$\$\$	(Late Filing/Late Payment)
03/2006	Tourism	\$\$\$\$\$	(Late Payment)
04/2006	Sales	\$\$\$\$\$	(Late Filing/Late Payment)
	Tourism	\$\$\$\$\$	(Late Filing/Late Payment)
05/2006	Sales	\$\$\$\$\$	(Late Filing/Late Payment)
	Tourism	\$\$\$\$\$	(Late Payment)
06/2006	Sales	\$\$\$\$\$	(Late Filing/Late Payment)
	Tourism	\$\$\$\$\$	(Late Payment)
07/2006	Sales	\$\$\$\$\$	(Late Filing/Late Payment)
	Tourism	\$\$\$\$\$	(Late Filing/Late Payment)
08/2006	Sales	\$\$\$\$\$	(Late Filing)
	Tourism	\$\$\$\$\$	(Late Payment)
09/2006	Sales	\$\$\$\$\$	(Late Payment)
	Tourism	\$\$\$\$\$	(Late Payment)
10/2006	Sales	\$\$\$\$\$	(Late Payment)
	Tourism	\$\$\$\$\$	(Late Payment)

3. Petitioner operates the “( X )” restaurants, and has been in business for approximately 25 years. Petitioner is a monthly filer for the sales and tourism tax, and files a single combined return for the sales generated by all locations.

4. Up until the fall of 2006, Petitioner operated a ( X ) restaurant at the COMPANY. Petitioner’s representative estimated the COMPANY location generated 40% of Petitioner’s total sales. He testified that the company underwent financial difficulties as a result of the COMPANY project, and received a 30 day notice to vacate although they were previously told that ( X ) would be included in the new development.

5. Petitioner also operated a ( X ) at the ( X ) near the ( X ). Petitioner’s representative estimated that the ( X ) location generated 25% of Petitioner’s total sales. Around the same time as the COMPANY location was experiencing financial difficulties, the lease for the ( X ) location was not renewed, and the restaurant was forced to close.

6. During the periods at issue, Petitioner had an in-house bookkeeper who had been with the company for many years. The in-house bookkeeper managed the financial dealings of the company. Though Petitioner also had an independent C.P.A., the in-house bookkeeper was responsible for the filing and payment of the monthly sales and tourism tax returns.

7. Petitioner’s representative acknowledged that the bookkeeper applied the collected sales and tourism tax to other debts and operating expenses when the company experienced financial difficulties.

8. Petitioner’s representative stated that during the periods in question the bookkeeper filed most of the returns in a timely manner; however, he applied the payments to prior periods.

Petitioner's representative stated that the bookkeeper believed he was following the advice of the accountant by paying the oldest liabilities first to reduce the interest; not realizing that this would result in additional penalties for failing to pay the tax when due. He further testified that the bookkeeper asked to resign because he was over his head. Petitioner's son has since taken over the bookkeeping responsibilities.

9. Upon learning of the late filings and outstanding balance, Petitioner's representative and his wife paid the tax liability from their personal funds and he stated that PETITIONER has since been in compliance. The Division did not refute that Petitioner had been in compliance since October 2006.

10. In a letter dated September 17, 2007, Respondent denied Petitioner's waiver request, finding that Petitioner did not make a showing of reasonable cause and because Petitioner's compliance history shows a pattern of late filings and/or payments.

11. Petitioner's compliance history shows eighteen instances of late filings or payments between November 2003 and September 2005. Respondent did not provide evidence that the Commission had waived those penalties. Petitioner maintains that prior to that time period, they had a good compliance history and asked the Commission to consider the 20 years prior. The Division did not refute Petitioner's earlier compliance history, but stated they only review the three years immediately preceding the periods at issue due to the statute of limitations.

12. Petitioner's representative offered testimony that he and his wife are no longer involved in the operations of the company. He stated that they have retired and moved to STATE to care for their son who has been diagnosed with cancer. A son and daughter of Petitioner's representative have taken over management of the company.

13. Petitioner's representative believes that the penalties will "bury" the company. He stated that he and his wife no longer have the means to bail the company out, and that it must stand on its own. Petitioner's representative requested a waiver of the penalties on the ground that the returns were timely filed, reliance on a tax advisor, the company's compliance history, and financial hardship.

#### APPLICABLE LAW

Section 59-1-401(1) of the Utah Code imposes a penalty for the failure to file a timely return as follows:

- (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.

Utah Code Ann. §59-1-401(1) (2005 and 2006).

Section 59-1-401(2) of the Utah Code imposes a penalty for failure to pay the tax due as follows:

The penalty for failure to pay tax due shall be the greater of \$20 or 10% of the unpaid tax for:...

- (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)

Section 59-1-401(2) (2005 and 2006).

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) (2005 and 2006).

The Commission has been granted the discretion to waive penalties and interest. Section 59-1-401(11) 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) (2005 and 2006).

The Commission has issued Tax Commission 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.

#### CONCLUSIONS OF LAW

Petitioner does not dispute the sales and tourism tax liability for the periods in question. Petitioner has filed the returns and paid the tax indicated on the returns for the relevant periods. Petitioner does not contest the interest that has accrued on the underlying tax amounts, and interest is generally waived only where it has been shown that a Tax Commission error caused the late filing or payment. Petitioner points to Tax Commission Publication 17, specifically the provisions for timely mailing, reliance on a tax advisor, and compliance history, as reasonable cause warranting waiver of the penalties.

Applying the principals of Publication 17, the Commission finds that Petitioner does not meet the reasonable cause waiver for a “timely mailing”. Publication 17 explains that the timely mailing circumstance is applicable when a tax return and/or payment were timely mailed, but failed to be delivered by the post office. This is not the circumstance surrounding Petitioner’s late filings/payments.

Petitioner has also requested waiver on the basis of reliance on a competent tax advisor. Publication 17 explains the reasonable cause waiver for reliance on a tax advisor as follows:

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.

Petitioner's representative argued that an in-house bookkeeper who had been with the company almost since its inception was responsible for the financial dealings of the company, including the filing and payment of sales and tourism tax returns. He further stated that the bookkeeper had access to an independent C.P.A. This is not the circumstance of the instant case. There is no question that Petitioner knew that the monthly sales and tourism filings and payments were required. Rather, the bookkeeper had diverted funds to pay other operating expenses. Petitioner's representative argued that the bookkeeper had filed most returns in a timely manner, but was applying the payments to prior periods, at the direction of an independent C.P.A. Upon review of the filing and payment dates for the periods at issue, it appears that this may have been the case for three periods; the payment of the September 2006 sales and tourism tax at the time the October 2006 returns were filed, payment of the August 2006 tourism tax when the September 2006 tourism return was filed, and payment of the February 2006 tourism tax when the March 2006 return was filed. The Commission finds that this is not enough to show a consistent application of the payments to prior periods to warrant a waiver of penalties on the basis of reliance on a competent tax advisor.

The Petitioner has requested a waiver of penalties on the basis of their compliance history. Publication 17 states that the Commission will consider the taxpayer's "recent history for payment, filing, and delinquencies" in determining whether to waive a penalty. Petitioner argued that although the periods in question and the years immediately preceding show delinquencies, that it is not representative of Petitioner's twenty-five year tax history. The Commission has previously determined that looking back at three-years of a taxpayer's compliance history was reasonable, based upon the three-year statute of limitations set forth in Utah Code Ann. 59-10-529(7) for requesting a refund. Petitioner's compliance history shows 18 instances of late filing and/or payment in the three years preceding the periods at issue. Therefore the Commission finds

that there is not reasonable cause to waive penalties on the basis of Petitioner's compliance history.

Finally, the Petitioner has asked for a waiver of penalties based on financial hardship, arguing that the penalties could put the company under. Financial hardship is not considered grounds for waiver of penalties through the appeal process. However, the Commission has established the "Offer in Compromise" program in the event that a taxpayer is experiencing financial hardship and does not have the ability to pay any unpaid portion of tax, penalty, or interest. The Commission does not know whether Petitioner would qualify for the "Offer in Compromise" program; however, the Petitioner may contact Taxpayer Services directly regarding the program.

DECISION AND ORDER

Based on the foregoing, the Commission finds that reasonable cause has not been shown to justify waiver of the penalties and interest assessed. 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:** Failure to pay the balance due as a result of this decision within thirty (30) days from the date hereon could result in additional penalties. Petitioner may contact the Taxpayer Services Division to make payment arrangements, or to discuss the Offer In Compromise program by calling (801) 297-7703.

**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. §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 Ann. §59-1-601 and §63-46b-13 et. seq.

*JM/07-1265.fof*