

BEFORE THE UTAH STATE TAX COMMISSION

---

PETITIONER,

Petitioner,

v.

AUDITING DIVISION OF THE UTAH STATE  
TAX COMMISSION,

Respondent.

**ORDER GRANTING MOTION TO  
DISMISS**

Appeal No. 07-1527

Account No. #####

Tax Type: Income Tax

Tax Year: 2003, 2004 & 2005

Judge: Phan

---

**Presiding:**

Jane Phan, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER

For Respondent: RESPONDENT REPRESENTATIVE, Manager, Income Tax Auditing

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Hearing on Motion to Dismiss on July 7, 2008. Respondent's (the "Division's") Motion to Dismiss, dated April 23, 2008, ("Motion") was based on the contention that Petitioner (the "Taxpayer") had failed to timely file an appeal of the audit deficiencies for the 2003 through 2005 tax years.

APPLICABLE LAW

State taxable income is defined as federal taxable income with some modifications, subtractions and adjustments. (Utah Code Sec. 59-10-112 (2004&2005 ).)1

For the purposes of determining state taxable income, federal taxable income means taxable income as defined in Section 63, of the Internal Revenue Code. (Utah Code Sec. 59-10-111(2004 & 2005).)

---

1 The Individual Income Tax Act was recently revised and sections renumbered. The Commission applies the substantive law that was in effect during the tax years at issue regarding the amount of the tax calculation, and cites

If a change is made in a taxpayer's net income on his or her federal income tax return, either because the taxpayer has filed an amended return or because of an action by the federal government, the taxpayer must notify the Utah Tax Commission within 90 days after the final determination of such change. The taxpayer shall file a copy of the amended federal return and an amended state return that conforms to the changes on the federal return. (Utah Code Sec. 59-10-536 (5)(a).)

Except in any case where the taxpayer has earlier filed with the commission a petition for Redetermination of the deficiency as provided in Title 59, Chapter 1 Part 5, the notice of deficiency shall constitute a final assessment of the deficiency in tax, including interest thereon and any penalties or other additions to tax: (a) upon the expiration of 30 days, or 90 days if the notice is addressed to a person outside of the states of the union and the District of Colombia, after the date of mailing of the notice of deficiency to the taxpayer. . . (Utah Code Sec. 59-10-525.(1).)

A taxpayer may file a request for agency action, petitioning the commission for redetermination of a deficiency. (Utah Code Sec. 59-1-501.)

A petition for redetermination is deemed to be timely if: 1) the petition is received in the Tax commission offices on or before the close of business of the last day of the time frame provided by statute; or 2) the date of the postmark on the envelope or cover indicates that the request was mailed on or before the last day of the time frame provided by statute. (Utah Admin. Rule R861-1A-20(2).)

Contents. A petition for adjudicative action need not be in any particular form, but shall be in writing and, in addition to the requirements of Utah Code Ann. Section 63-46b-3, shall contain the following: 1) name and street address and if available, a fax number or e-mail address of petitioner or the petitioner's representative; 2) a telephone number where the petitioning party or that party's representative can be reached during regular business hours; 3) petitioner's tax identification, social security number or other relevant

identification number, such as real property parcel number or vehicle identification number; 4) particular tax or issue involved, period of alleged liability, amount of tax in dispute, and, in the case of a property tax issue, the lien date; 5) if the petition results from a letter or notice, the petition will include the date of the letter or notice and the originating division or officer; and 6) in the case of property tax cases, the assessed value sought. (Utah Admin. Rule R861-1A-22(B).)

### DISCUSSION

The representative for the Division points out that the Statutory Notice of Audit Change was issued on October 9, 2007. The Taxpayers' appeal was not submitted in this matter until December 5, 2007. The Division's representative pointed out that pursuant to Utah Code Sec. 59-10-525 an audit deficiency becomes the final assessment unless an appeal is filed within thirty-days from the date of the Notice of Deficiency. He also points to Utah Code Sec. 59-1-501 and Utah Admin. Rule R861-1A-20 in support of the Division's position. In addition, the thirty-day deadline and instructions on how to file an appeal and form for filing the appeal were included with the Statutory Notice, which also indicates that the Tax Commission would not have jurisdiction to review a late filed appeal.

The Taxpayer explained that his wife had called someone at the Tax Commission. At the time they were trying to appeal the IRS audit decision and that matter was not yet resolved. They did not keep a record of whom she spoke with at the Tax Commission. It was his understanding that his wife had been told by a Tax Commission employee that they would have an additional 30 day extension to file the appeal.

The Division representative testified there was a record of a telephone call from the Taxpayer in December, after the appeal would already have been late. There was no record indicated that she had called prior. Furthermore, the thirty-day deadline is set by statute and an auditor would not have the authority to extend the deadline in the manner indicated by Petitioner.

The Commission weighs the evidence submitted. The Taxpayer's wife was not present to testify under oath about the telephone conversation, and the only record of a telephone call occurred after the thirty-day period had expired. Auditors generally know they do not have discretion to grant an extension to file an appeal, because this is a statutory deadline and there is no basis to extend the time. However, if the Taxpayer's wife had called after the deadline to file an appeal, an auditor may have advised her that she could still file the appeal late and there would be a period of time before the state audit appeal would be dismissed for failure to timely file, in which the taxpayers could continue to work on resolution of the state audit. This would be a correct statement after the appeal deadline had expired. There may have been a misunderstanding on the part of the parties to the conversation. Regardless, there is no basis for waiver of the appeal.

ORDER

The thirty-day requirement for filing an appeal is jurisdictional and the Taxpayer's failure to meet the requirement is cause for dismissal of this appeal. The Taxpayer has not shown any extraordinary circumstances that would justify a late filing of this appeal. Based upon the foregoing, the Commission dismisses the Taxpayers' appeal in this matter. It is so ordered.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

---

Jane Phan  
Administrative Law Judge

Appeal No. 07-1527

BY ORDER OF THE COMMISSION.

The undersigned have reviewed this motion and 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 order within thirty days may result in an additional late payment penalty. You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Commission pursuant to Utah Code 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.

*Jkp/07-1527.dis.doc*