

08-0393
Penalty and Interest
Signed 07/02/2008

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,

Petitioner,

v.

TAXPAYER SERVICES DIVISION OF THE
UTAH STATE TAX COMMISSION,

Respondent.

INITIAL HEARING ORDER

Appeal No. 08-0393

Account No. #####

Tax Type: Withholding

Tax Year: 2007

Judge: Marshall

Presiding:

Jan Marshall, Administrative Law Judge

Appearing:

For Petitioner: PETITIONER REPRESENTATIVE for PETITIONER

For Respondent: RESPONDENT REPRESENTATIVE 1, Taxpayer Services Division
RESPONDENT REPRESENTATIVE 2, Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5 on June 12, 2008. The Taxpayer has requested a waiver of the failure to timely file and failure to timely pay penalties for the February, March, April, May, and July 2007 filing periods. Interest was assessed and continues to accrue. As of the hearing date the penalties and interest totaled \$\$\$\$\$.

APPLICABLE LAW

The duty of an employer to collect and pay withholding tax is set forth in Utah Code Ann. §59-10-406, below in pertinent part:

- (1) (a) Each employer shall, on or before the last day of April, July, October, and January, pay to the commission the amount required to be deducted and withheld from wages paid to any employee during the preceding calendar quarter under this part.
- (b) The commission may change the time or period for making reports or payments if:
 - (i) in its opinion, the tax is in jeopardy; or

- (ii) a different time or period will facilitate the collection and payment of the tax by the employer.
- (2) Each employer shall file a return, in a form the commission prescribes, with each payment of the amount deducted and withheld under this part showing:
 - (a) the total amount of wages paid to his employees;
 - (b) the amount of federal income tax deducted and withheld;
 - (c) the amount of tax under this part deducted and withheld; and
 - (d) any other information the commission requires.

Utah Code Ann. §59-10-406 (2007).

The monthly payment of withholding tax is provided for under Utah Code Ann. §59-10-407, below in relevant part:

- (3) Any employer whose withholding tax liability under Section 59-10-402 is estimated to average an amount designated by the commission by rule, shall make a monthly return and pay the amount required to be paid by Section 59-10-406 for each monthly period of each quarterly period. Monthly payments shall be made during the quarterly period designated by the commission and during each succeeding quarterly period until further notified in writing. The monthly return shall be prescribed and furnished by the commission and shall be filed with the commission on or before the last day of the month after the end of each monthly period of each quarterly period.

Utah Code Ann. §59-10-407 (2007).

Administrative Rule R865-9I-17 provides further guidance on the time for filing withholding tax returns, as set forth below:

- A. This rule provides exceptions to the statutory requirement that an employer shall file withholding tax returns and pay withholding taxes quarterly.
- B. An employer may elect to file withholding tax returns and pay withholding taxes on an annual basis for a calendar year in which the employer:
 - 1. files a federal Schedule H; or
 - 2. withholds less than \$1,000.
- C. The annual withholding return and payment under B. are due by January 31 of the year succeeding the year for which the payment and return apply.

- D. An employer withholding an average of \$1,000 or more per month shall file withholding tax returns and pay withholding taxes on a monthly basis.
- E. The monthly withholding return and payment under D. are due as prescribed in Section 59-10-407.

Utah Admin. Code R865-9I-17 (2007).

Section 59-1-401(2) of the Utah Code imposes a penalty for failure to file a timely return as follows:

- (2) (a) The due date for filing a return is:
 - (i) if the person filing the return is not allowed by law an extension of time for filing the return, the day on which the return is due as provided by law; or
 - (ii) if the person filing the return is allowed by law an extension of time for filing the return, the last day of that extension of time.
- (b) (i) A penalty in the amount described in Subsection (2)(b)(ii) is imposed if:
 - (A) a person is required to file a return with respect to a nonqualifying obligation; and
 - (B) the person described in Subsection (2)(b)(i)(A) files the return after the due date described in Subsection (2)(a).
- (ii) For purposes of Subsection (2)(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(2) (2007).

Section 59-1-401(3) of the Utah Code imposes a penalty for failure to pay the tax due as follows, in relevant part:

- (3) (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...

(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 to the greater of :

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

Utah Code Ann. §59-1-401 (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(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(13) (2007).

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.

DISCUSSION

Taxpayer is requesting a waiver of the penalties assessed for the late filing of returns and late payment of withholding tax for the February, March, April, May, and July 2007 filing periods. Taxpayer’s representative stated that for the 2006 tax year, they had a payroll company prepare and file their returns. In 2007, the Taxpayer started to prepare and file the withholding returns in-house. The Taxpayer filed quarterly for the first two quarters of 2007, and was then informed by the Tax Commission that they should be filing on a monthly basis. Taxpayer’s representative stated that the payroll company did not notify them that they had been filing

monthly withholding returns, and because all of their other filings were on quarterly basis, they believed they were properly filing their withholding returns.

The Taxpayer also noted that because they have less than \$1,000 a month in withholding that they should be filing on a quarterly basis. The Taxpayer provided a receipt for online payment for the first quarter of 2007, a copy of the check stub for the second quarter of 2007, and a receipt for online payment for July 2007.

The Division's representative stated that the Taxpayer is not required to be a monthly filer, but requested to do so in 2006. Upon receiving the Taxpayer's waiver request, the Division waived the penalties for the February 2007 and March 2007 periods. These were Taxpayer's second and third errors in a three-year period. The Division stated that the Taxpayer's prior error was in 2004. That Division acknowledged that Taxpayer has less than \$1,000 a month in withholding, but stated that they cannot change their filing status without a request.

Publication 17 provides that certain circumstances constitute "reasonable cause" for the waiver of penalties. While the Taxpayer has not demonstrated any of these circumstances, the Commission finds that the Taxpayer was seemingly in compliance with the law for the filing of returns and payment of withholding tax. The receipt for the first quarter of 2007 shows that payment was made on April 30, 2007. While the Taxpayer's check stub for the payment of the second quarter taxes does not indicate a date, the Commission assumes this would have been filed in a timely manner, as no penalties were assessed for the June 2007 period. The July 2007 period was filed on October 1, 2007, which would have been timely for a quarterly filer.

Based on the amounts the Taxpayer withholds each month, under Utah Code Ann. §59-10-406, they typically would file withholding returns on a quarterly basis. While the Taxpayer voluntarily requested to be a monthly filer, the statute and rule do not require the Taxpayer to request to return to quarterly filing status. Rather, the Tax Commission reviews each withholding account annually to determine if filing status needs to change. The Commission also notes that while Publication 14 instructs Taxpayers on the process to voluntarily change to a monthly filer, it does not provide similar guidance on changing from a monthly filer to a quarterly or an annual filer. Because the Taxpayer was seemingly in compliance with the law for the filing and payment of withholding taxes on a quarterly basis and there is no affirmative duty on the Taxpayer to request to file quarterly, the Commission finds that there is reasonable cause for the waiver of penalties.

DECISION AND ORDER

Based on the foregoing, the Commission finds that sufficient cause has been shown to justify a waiver of the penalties and interest associated with Petitioner's Withholding Tax Filings for the February, March, April, May, and June 2007 filing periods. 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 _____, 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 order within thirty days from the date hereon may result in an additional penalty.