

08-0408
AUDIT
SIGNED 11-17-2009

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	ORDER DENYING PETITIONER'S REQUEST TO SET ASIDE DEFAULT Appeal No. 08-0408 Acct. No. ##### Tax Type: Income Tax Year: 2004 Judge: Chapman
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STATEMENT OF THE CASE

On August 25, 2009, PETITIONER (“Petitioner” or “taxpayer”) submitted a written request for the Commission to set aside an Order of Default that the Commission had issued on March 16, 2009. The Commission issued the Order of Default because the taxpayer did not appear at a Telephone Status Conference held on March 3, 2009. In the Order of Default, the Commission informed the taxpayer that:

A default is a failure to exhaust administrative remedies, which precludes further judicial review. Utah Code Ann. Sec. 63-46b-14. A party may file a motion to set aside the default pursuant to Utah Code Ann. Sec. 63-46b-11 and the Utah Rules of Civil Procedure. Pending an order by the Commission to set aside the default, this matter is closed without further recourse.

In his request to set aside the default, the taxpayer states that he missed the Telephone Status Conference because he was sick and that he called in after the time for the conference had passed. He was told that he would be issued an Order of Default and that he could ask for it to be set aside once he received it. In August 2009, the taxpayer had not received the Order of Default and called the Commission. He was told that the Order of Default had been issued on March 16, 2009 and mailed to him at the address he provided on his petition to open the appeal. The taxpayer gave the Commission his

new address and on August 13, 2009, Commission staff faxed the taxpayer a copy of the March 16, 2009 Order of Default.

APPLICABLE LAW

1. Utah Code Ann. §63G-4-209(3) provides, as follows:

(a) A defaulted party may seek to have the agency set aside the default order, and any order in the adjudicative proceeding issued subsequent to the default order, by following the procedures outlined in the Utah Rules of Civil Procedure.

(b) A motion to set aside a default and any subsequent order shall be made to the presiding officer.

(c) A defaulted party may seek agency review under Section 63G-4-301, or reconsideration under Section 63G-4-302, only on the decision of the presiding officer on the motion to set aside the default.

2. Utah Admin. Rule R861-1A-26(6)(c)(ii) provides that “[a] defaulted party may seek to have the default set aside according to procedures set forth in the Utah Rules of Civil Procedure.”

3. Utah Rules of Civil Procedure (“URCP”) 55(c) provides that “[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).”

4. URCP 60(b) provides, as follows in pertinent part:

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. . . .

DISCUSSION

An Order of Default was issued to the taxpayer on March 16, 2009. The taxpayer did not submit a written request for the Order of Default to be set aside until August 25, 2009, more than five months after the Order of Default was issued.

Under URCP(60)(b), a request to set aside an Order of Default must be “made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the . . . order . . . was entered.” The taxpayer’s request to set aside the Order of Default appears to be due to “mistake, inadvertence, surprise, or excusable neglect,” as described in reason (1). For reason (1), a request must be made within 3 months of the date on which an Order of Default was issued. The taxpayer’s request was not made within the three months subsequent to the Order of Default being issued.

Furthermore, the Commission has no record of the taxpayer informing the Appeals Division that his address had changed from the one he provided on his petition. As a result, the Commission finds that it mailed the March 16, 2009 Order of Default to the last address that the taxpayer had provided. In addition, the Commission does not consider it reasonable for the taxpayer to wait five months to telephone about an Order of Default that he knew was being issued and that he had not received. For these reasons, the Commission denies the taxpayer’s request to set the default aside.

DECISION AND ORDER

Based on the foregoing, the Commission denies the taxpayer’s request to set aside the March 16, 2009 Order of Default. It is so ordered.

BY ORDER OF THE COMMISSION:

DATED this _____ day of _____, 2009.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D’Arcy Dixon Pignanelli
Commissioner

Appeal No. 08-0408

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. §63G-4-302. 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 et seq. and 63G-4-401 et seq.

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