

BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER,

Petitioner,

v.

AUDITING DIVISION OF THE  
UTAH STATE TAX COMMISSION,

Respondent.

**ORDER DENYING PETITIONER'S  
MOTION FOR CONTINUANCE AND  
GRANTING DIVISION'S MOTION TO  
DISMISS**

Appeal No. 08-0519  
Account No. #####  
Tax Type: Income Tax  
Tax Years: 2004  
Judge: Chapman

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**Presiding:**

Kerry R. Chapman, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER REPRESENTATIVE, CPA  
PETITIONER

For Respondent: RESPONDENT REPRESENTATIVE, from Auditing Division

STATEMENT OF THE CASE

On May 20, 2008, Auditing Division ("Division") filed a Motion to Dismiss this matter on the basis that the taxpayer did not file a Petition for Redetermination within the 30-day statutory appeals period. On June 30, 2008, this matter came before the Commission for a Hearing on Motion, at which time both parties had an opportunity to present oral arguments. At the hearing, the taxpayer asked the Commission to delay the hearing and grant a 60-day continuance. The taxpayer made this motion because she filed an amended return with the Internal Revenue Service in March 2008, which if accepted, will reduce the underlying tax liability at issue in this appeal.

APPLICABLE LAW

Utah Code Ann. §59-10-524(1) provides that "[i]f the commission determines that there is a deficiency in respect of the tax imposed by this chapter, it shall send notice of the deficiency to the taxpayer at the taxpayer's last-known address."

UCA §59-1-501 provides that “[a]ny taxpayer may file a request for agency action, petitioning the commission for redetermination of a deficiency.”

UCA §59-10-525(1)(a) provides that a notice of deficiency shall constitute a final assessment “upon the expiration of 30 days . . . after the date of mailing of the notice of deficiency to the taxpayer[,]” unless the taxpayer has previously filed a petition for redetermination.

Utah Admin. Rule R861-1A-26(6)(b) (“Rule 26”) provides guidance concerning continuances and provides as follows:

(6)(b) Continuation. A continuance may be granted at the discretion of the presiding officer.

(i) In the absence of a scheduling order:

(A) Each party to an appeal may receive one continuance, upon request, prior to the initial hearing.

(B) If the initial hearing is waived or a formal hearing is timely requested after an initial hearing decision is issued, each party may receive one continuance, upon request, prior to the formal hearing.

(C) A request must be submitted no later than ten days prior to the proceeding for which the continuance is requested and may be denied if a party is prejudiced by the continuance.

(ii) If a scheduling order has been issued or the requesting party has already been granted a continuance, a continuance request must be submitted in writing to the presiding officer. The request must set forth specific reasons for the continuance.

After reviewing the request with one or more commissioners, the presiding officer shall grant the request only if the presiding officer determines that adequate cause has been shown and that no other party or parties will be unduly prejudiced.

### DISCUSSION

Motion for Continuance. The Commission generally grants a first-time continuance request if it is received in time so as not to prejudice the other party. Rule (6)(B)(i)(C). In this case, however, the request was not made until the hearing. As a result, the Division had already prepared its exhibits and arranged for its employee to attend the hearing and present its case. Under these circumstances, the Commission denies the taxpayer’s Motion for Continuance.

Motion to Dismiss. On February 4, 2008, the Division issued a Notice of Deficiency and Audit Change (“Statutory Notice”) to the taxpayer, in which it imposed additional income tax for the 2004 tax year. The Statutory Notice contained language informing the taxpayer that she had until March 5, 2008 to appeal the assessment. The taxpayer submitted a Petition for Redetermination (“Petition”) on March 16, 2008, 11 days after the deadline. Because the taxpayer filed her appeal more than 30 days after the issuance of the Statutory Notice, the Division asserts that the Commission no longer has jurisdiction to hear an appeal concerning the assessment. For these reasons, the Division asks the Commission to grant its Motion to Dismiss.

The taxpayer does not contest that her appeal was filed more than 30 days after the issuance of the Statutory Notice. She explained, however, that an employee had been sick, which resulted in the late filing of her appeal. It appears that the Division’s Statutory Notice was issued to the taxpayer in compliance with Utah law and that the Division did not cause the circumstances resulting in the taxpayer filing her appeal late. Accordingly, the Commission finds that the taxpayer was not deprived of due process. For these reasons and in accordance with Section 59-10-525, the Commission finds that it no longer has jurisdiction to hear the appeal.

ORDER

Based upon the Commission's review of the motions and consideration of the parties’ positions, the taxpayer’s Motion for Continuance is denied and the Division’s Motion to Dismiss is granted. It is so ordered.

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

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Appeal No. 08-0519

Kerry R. Chapman  
Administrative Law Judge

BY ORDER OF THE COMMISSION:

The undersigned Commissioners have reviewed this matter 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: Any balance due as a result of this order must be paid within thirty days of the date of this order or a late penalty could be applied. In order to appeal to the District Court or the Utah Supreme Court, you must post security or obtain a waiver under Utah Code Ann. §59-1-611.**

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