

08-0567
Penalty and Interest
Signed 07/07/2008

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,

Petitioner,

v.

TAXPAYER SERVICES DIVISION OF THE
UTAH STATE TAX COMMISSION,

Respondent.

INITIAL HEARING ORDER

Appeal No. 08-0567

Account No. #####

Tax Type: Withholding Tax

Tax Year: 2007

Judge: Marshall

Presiding:

Jan Marshall, Administrative Law Judge

Appearing:

For Petitioner:

PETITIONER REPRESENTATIVE, *Office Manager*
PETITIONER

For Respondent:

RESPONDENT REPRESENTATIVE 1, Waiver Unit, Taxpayer
Services Division
RESPONDENT REPRESENTATIVE 2, Waiver Unit, Taxpayer
Services Division
RESPONDENT REPRESENTATIVE 3, Waiver Unit, 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 24, 2008. The Taxpayer requested a waiver of the penalties assessed on the withholding tax filings for the first and second quarters of 2007. Taxpayer was assessed a 10% late file and 10% late payment penalty in the amount of \$\$\$\$ each for the first quarter and a 10% late file penalty in the amount of \$\$\$\$ and a late payment penalty in the amount of \$\$\$\$ for the second quarter. Interest was assessed, and as of the hearing date, all amounts had been paid.

APPLICABLE LAW

Penalties for the failure to timely file a return are set out in Utah Code Ann. §59-1-401(2), as follows:

- (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).

A penalty is imposed for the failure to timely pay a tax obligation under Utah Code Ann. §59-1-401(3), set forth below in relevant part:

- (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 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(3) (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.

DISCUSSION

Taxpayer is requesting a waiver of the penalties assessed for the late filing of returns and late payment of withholding tax for the first and second quarters of 2007. Taxpayer's representative stated that she started working for the Taxpayer in July of 2007. She stated that she did not have a lot of prior payroll experience, but she noticed that according to the company's records in QuickBooks, taxes had not been paid. She contacted the company's general manager and the owner and informed them that the taxes had not been paid.

Taxpayer gave a brief history of the company. She stated that the company was started in 2006 and that the previous bookkeeper had been a 20% owner of the company, but had not filed returns correctly, or made the associated payments. The prior bookkeeper assured the manager and the other owner that all of the taxes were being handled correctly and had been paid. The owner and manager discovered the problems with the prior bookkeeper, who was relieved of her duties in July of 2007, and the LLC was restructured. The Taxpayer's representative testified that they did not receive notification from the Tax Commission that the returns had not been filed or that amounts were due because the prior bookkeeper had changed the mailing address with the Tax Commission to either her personal P.O. Box or to her home address. Further, several of the payroll records were missing or incomplete and they had difficulty retrieving those records from the prior bookkeeper.

The representative for the Division stated that when they received the Taxpayer's waiver request, they looked at the Taxpayer's compliance history. Taxpayer had penalties assessed for the late file and late payment of withholding tax for the second and third quarters of 2006, as well as a failure to timely pay penalty for the fourth quarter of 2006. The Taxpayer's waiver request was denied because the errors were the Taxpayer's fourth and fifth errors in a two-year period.

Publication 17 sets forth the circumstances that Commission will consider to be "reasonable cause" that would justify the waiver of penalties. Among the circumstances identified is "unobtainable records". The Taxpayer's prior bookkeeper was responsible for the filing of returns and payment of withholding tax. When questioned by the owner and manager, she assured them that all filings and payments had been made. The prior bookkeeper also had all mailings sent to her home so that other employees or the owner did not receive any delinquency notices. Further, the payroll records were incomplete and it took several months for the Taxpayer to retrieve their records from the prior bookkeeper.

Taxpayers have a duty to exercise ordinary business care, prudence and diligence. Here, the Taxpayer had one of the owners/business partners handling responsible for filing and paying the withholding taxes. Upon learning of her dereliction of duty, she was relieved of her position,

and the company was restructured. A new bookkeeper was hired in July of 2007, but due to the missing payroll records was unable to prepare the second quarter return in a timely manner. Though the Taxpayer does not have a clean compliance history, the penalties assessed for the prior periods were paid in full, and no waiver was requested. Under the circumstances, the Commission finds that the Taxpayer acted with due diligence and that there is reasonable cause for the waiver of penalties assessed for the first and second quarters of 2007.

DECISION AND ORDER

Based on the foregoing, the Commission finds that sufficient cause has been shown to justify a waiver of the penalties associated with Taxpayer's withholding tax filings for the first and second quarters of 2007. 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.

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