

08-0829
Audit
Signed 08/18/2008

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,

Petitioner,

v.

AUDITING DIVISION OF THE UTAH
STATE TAX COMMISSION,

Respondent.

INITIAL HEARING ORDER

Appeal No. 08-0829

Account No. #####

Tax Type: Income Tax

Tax Year: 2005

Judge: Marshall

Presiding:

Jan Marshall, Administrative Law Judge

Appearing:

For Petitioner: PETITIONER

For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney
General
RESPONDENT REPRESENTATIVE 2, Manager, Auditing
Division
RESPONDENT REPRESENTATIVE 3, from the Auditing
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 August 7, 2008. The Taxpayer is appealing an audit deficiency for the 2005 tax year. Taxpayer was assessed \$\$\$\$\$ in outstanding tax; 10% late payment and late filing penalties totaling \$\$\$\$\$; and interest, which continues to accrue. As of the hearing date, the total amount due was \$\$\$\$\$.

APPLICABLE LAW

Utah Code Ann. §59-10-104 provides for the imposition of tax as follows in pertinent part:

[A] tax is imposed on the state taxable income, as defined in Section 59-10-112, of every resident individual...

Utah Code Ann. §59-10-104 (2005).

Utah Code Ann. §59-10-103 defines a “resident individual” for tax purposes, below:

- (s) (i) “Resident individual” means:
 - (A) an individual who is domiciled in this state for any period of time during the taxable year, but only for the duration of the period during which the individual is domiciled in this state; or
 - (B) an individual who is not domiciled in this state but:
 - (I) maintains a permanent place of abode in this state; and
 - (II) spends in the aggregate 183 or more days of the taxable year in this state.
- (ii) For purposes of Subsection (1)(q)(i)(B), a fraction of a calendar day shall be counted as a whole day.

Utah Code Ann. §59-10-103 (2005).

Utah Code Ann. §59-10-514 sets forth the place and time for the filing of returns and payment of tax, as follows in pertinent part:

- (1) Except as provided in Subsection (3), a tax return required by this chapter shall be filed with the commission:
 - (a) except as provided in Subsection (1)(b), on or before the 15th day of the fourth month following the last day of the taxpayer’s taxable year; or
 - (b) notwithstanding subsection (1)(a), on or before the day on which the return is due under the Internal Revenue Code if:
 - (i) the return is an electronically filed individual income tax return; and
 - (ii) the Internal Revenue Code provides a due date for filing the electronically filed individual income tax return that is different from the due date described in Subsection (1)(a).
- (2) A person required to make and filed a return under this chapter shall, without assessment, notice, or demand, pay any tax due:
 - (a) to the commission; and
 - (b) before the due date for filing the return determined without regard to any extension of time for filing the return.

Utah Code Ann. §59-10-514 (2005).

Utah Code Ann. §59-10-539(1) imposes penalties and interest, as follows in pertinent part:

- (1) In case of failure to file an income tax return and pay the tax required under this chapter on or before the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to willful neglect, there shall be added to the amount required to be shown as tax on such return a penalty as provided in Section 59-1-401. For the purposes of this subsection, the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed upon the return.

Utah Code Ann. §59-1-401 sets the penalties as provided for in Utah Code Ann. §59-10-539 as set forth below in relevant part:

- (1) (a) The penalty for failure to file a tax return within the time prescribed by law including extensions is the greater of \$20 or 10% of the unpaid tax due on the return.

(b) Subsection (1) does not apply to amended returns.
- (2) The penalty for failure to pay tax due shall be the greater of \$20 or 10% of the unpaid tax for:
 - (a) failure to pay any tax, as reported on a timely filed return;
 - (b) failure to pay any tax within 90 days of the due date of the return, if there was a late filed return subject to the penalty provided under Subsection (1)(a);
 - (c) failure to pay any tax within 30 days of the date of mailing any notice of deficiency of tax unless a petition for redetermination or a request for agency action is filed within 30 days of the date of mailing the notice of deficiency;
 - (d) failure to pay any tax within 30 days after the date the commission's order constituting final agency action resulting from a timely filed petition for redetermination or request for agency action is issued or is considered to have been issued under Subsection 63-46b-13(3)(b); and

- (e) failure to pay any tax within 30 days after the date of a final judicial decision resulting from a timely filed petition for judicial review.

Utah Code Ann. §59-1-401 (2005).

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) (2005).

The burden of proof is on the Petitioner, except in certain instances, as set forth in Utah Code Ann. §59-10-543, below:

In any proceeding before the commission under this chapter, the burden of proof shall be upon the petitioner except for the following issues, as to which the burden of proof shall be upon the commission:

- (1) whether the petitioner has been guilty of fraud with intent to evade tax;
- (2) whether the petitioner is liable as the transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax;
- (3) whether the petitioner is liable for any increase in a deficiency where such increase is asserted initially after a notice of deficiency was mailed and a petition under Title 59, Chapter 1, Part 5 is filed, unless such increase in deficiency is the result of a change or correction of federal taxable income required to be reported, and of which change or correction the commission had no notice at the time it mailed the notice of deficiency.

Utah Code Ann. §59-10-543 (2005).

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(11) (2005).

DISCUSSION

The Taxpayer had no objection to the amount of the Division’s assessment, but stated that he has already submitted payment for the outstanding liability. The Taxpayer argued that he submitted a “Bonded Promissory Note” as payment of the outstanding tax liability, and submitted a copy thereof prior to the hearing. The “Bonded Promissory Note” is in the amount of \$\$\$\$\$,

made to the order of (X), the (X) and (X), (X) of the Utah State Tax Commission, and payable through the Taxpayer's pre-paid pass-through account.

At the hearing, the Taxpayer testified that because the Commission would not use his exemption, he issued the "Bonded Promissory Note" in satisfaction of his liability. Upon questioning, the Taxpayer would not identify the exemption he was claiming, and stated that he would send in another note to pay his tax liability. The Taxpayer added that he has no other funds or means of paying the outstanding liability.

The Division's representative stated that because the Taxpayer does not dispute the tax assessment by the Division, it should be upheld. In addition he argued that the note submitted by the Taxpayer is not legal tender, and not an acceptable form of payment for tax liability. He stated that the Taxpayer's documents purport to have a fiduciary relationship with both (X), the (X) and (X). The Division's representative argued that neither (X) nor (X) consented to such a relationship, and therefore are not the Taxpayer's fiduciaries.

A fiduciary relationship can be created either through contract, or implied in law. *See First Security Bank of Utah v. Banberry Development Corp.*, 786 P.2d 1326, 1333 (Utah 1990). The Taxpayer has submitted a "Commercial Notice Appointment of Fiduciary Debtor" identifying (X) as his fiduciary debtor; and a "Commercial Notice of Appointment of Fiduciary Creditor identifying (X), the (X), as his fiduciary creditor. Neither (X) nor (X) have signed the notices, and the Taxpayer has not provided any other evidence that would suggest that they have accepted such appointment. The Commission finds that there is not a contractually created fiduciary relationship between the Taxpayer and either (X) or (X).

The existence of a fiduciary relationship can also be implied in law. To determine whether such relationship exists, the Commission examines the factual situation of the transaction and the relationship of the parties. "[T]o determine whether a fiduciary duty should be implied in law due to the factual situations surrounding the transaction and the relationship of the parties, we consider the following principles...a position of peculiar confidence...a condition of superiority of one of the parties over the other...the property, interest or authority of the other is placed in the charge of the fiduciary." *Id.* citing *Vacinek v. First Nat'l Bank of Pine City*, 416 N.W.2d 795, at 800 (Minn. Ct. App. 1987). The Commission finds that the Taxpayer has not provided any evidence to support the finding of an implied fiduciary relationship between himself and either (X) or (X).

There are several payment options available to taxpayers who owe additional income taxes. The instructions for the 2005 TC-40 (Utah Individual Income Tax Return) identify those payment options on page 15. Taxpayers may pay online via credit card or an electronic check

debit from a checking account. In addition, Taxpayers may mail in a personal check or money order payable to the Utah State Tax Commission. Finally, if the Taxpayer is unable to pay all or a portion of the amount owed, they may request a payment agreement. The Taxpayer did not submit payment by any of these methods, rather he submitted a "Bonded Promissory Note." The Commission finds that such a note is not an acceptable form of payment, and as such, the Taxpayer continues to owe the outstanding tax liability, penalties, and accrued interest.

DECISION AND ORDER

Based on the foregoing, the Commission sustains the assessment of income tax, interest, and penalties for failure to timely file and pay associated with the Taxpayer's 2005 income tax return. 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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