

08-0904
INCOME
TAX YEAR: 2005
SIGNED: 03-10-2009
COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, M. JOHNSON
EXCUSED: D. DIXON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER,</p> <p>Petitioner,</p> <p>v.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p>Respondent.</p>	<p>ORDER DENYING PETITIONER'S REQUEST TO SET ASIDE DEFAULT</p> <p>Appeal No. 08-0904</p> <p>Acct. No. ##### Tax Type: Income Tax Year: 2005 Judge: Chapman</p>
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STATEMENT OF THE CASE

On March 3, 2009, PETITIONER ("Petitioner" or "taxpayer") submitted a written request for the Commission to set aside an Order of Default that the Commission issued on October 13, 2008. The Commission issued the Order of Default because neither the taxpayer nor the taxpayer's representative attended a Telephone Status Conference held on September 3, 2008. 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 last fall, he spoke to a "gentleman" concerning the September 3, 2008 Telephone Status Conference who informed him that the conference would be rescheduled and that he would be notified of the new date by mail. He states that he

asked for a continuance because his representative, PETITIONER REP., would be out of town on the date the conference was scheduled. Specifically, the taxpayer states in his letter that:

The day of the conference call I was informed that PETITIONER REP. was out of town and not available. A call to the teleconference technician was made, and notice was given to reschedule. This notice never came and I have been informed this rescheduling didn't take place, and the default was entered. My hope is to reschedule.

First, it appears from the taxpayer's statement that he called and asked for a continuance on September 3, 2008, the scheduled date of the Telephone Status Conference. There is no note in the appeal file, however, showing that a member of the appeals staff ever spoke to the taxpayer about a continuance. However, even had the taxpayer spoken to a member of the appeals staff, the Commission generally does not grant a continuance request made on the day of a scheduled event.

In addition, the Commission notes that on August 12, 2008, it issued an Order Denying Petitioner's Request for a Stay of Proceedings. The order was issued in response to a July 21, 2008 request from PETITIONER REP. asking the Commission to postpone the September 3, 2008 Telephone Status Conference "until further communications is received from the IRS." PETITIONER REP. did not inform the Commission in his letter that he would be out of town on the date of the scheduled conference. The Commission considered PETITIONER REP.'s letter to be a motion for stay, not a motion for a continuance. In its August 12, 2008 Order, the Commission denied the request and informed the Petitioner and PETITIONER REP. that the IRS matter would be discussed "[a]t the upcoming Telephone Status Conference."

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 October 13, 2008. Although the Order of Default informed the taxpayer that he could submit a request to set the default aside, the taxpayer did not do so until March 3, 2009, more than four 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 Commission believes that the taxpayer is asking for the Order of Default to be set aside for a “mistake” or for “surprise,” which are found 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 three months of the October 13, 2008 date on which the Commission issued its Order of Default in this matter. Accordingly, the Commission denies the taxpayer’s request to set the default aside.

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Although the Commission is not reopening this appeal, it notes that the taxpayer would have the right to have his 2005 Utah tax liability modified in the future, should the Internal Revenue Service make changes affecting his 2005 federal adjusted gross income.

DECISION AND ORDER

Based on the foregoing, the Commission denies the taxpayer's request to set aside the October 13, 2008 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

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. §§59-1-601et seq. and 63G-4-401 et seq.

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