

08-18-04
REFUND REQUEST
SIGNED 01-21-2010

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,

Petitioner,

v.

AUDITING DIVISION OF THE UATH,
STATE TAX COMMISSION,

Respondent.

**ORDER DENYING REQUEST FOR
RECONSIDERATION**

Appeal No. 08-1804

Account No. #####

Tax Type: Refund Request/Sales

Judge: Phan

STATEMENT OF CASE

This matter came before the Utah State Tax Commission upon a Request for Reconsideration of Formal Hearing, dated November 4, 2009, ("Request") filed by Petitioner as a result of the Commission's Order Denying Request to Set Aside Default, which was issued on October 15, 2009. ("Final Order"). The Final Order had been issued after Petitioner requested that an Order of Default be set aside or a Formal Hearing scheduled. The Order of Default had been issued after Petitioner had failed to appear at a Telephone Status Conference. As noted in the Final Order, this had been the second Order of Default issued against Petitioner in this matter for failing to appear.

The history of this appeal shows that the appeal had been filed August 27, 2008. It had been scheduled for a Telephone Status Conference on December 18, 2008, but that was continued at the request of Petitioner and rescheduled for January 28, 2009. Petitioner failed to appear on the January 28, 2009 date, and an Order of Default was issued on February 10, 2009. Petitioner filed a request that the default be set aside and an Order Setting Aside Order of Default was issued on March 17, 2009. In that Order the Commission stated, "As this is the taxpayer's first default in this matter, the Commission will set it aside. The Commission will apply more stringent criteria before setting aside a second default." After the default was set aside, the appeal was scheduled for a Telephone Status Conference on April 21, 2009 and again Petitioner failed to appear. A second Order of Default was issued on June 8, 2009. Petitioner filed a Motion to Set Aside Default and Second Request for Formal Hearing. In response to this request, the Commission issued its Final Order.

APPLICABLE LAW

Utah Code Sec. 63G-4-3012 provides that a party may, within 20 days after the date an order

constituting final agency action has been issued, file a written request for reconsideration.

Utah Administrative Rule R861-1A-29 provides that a party may file a written request for reconsideration "alleging a mistake of law or fact, or the discovery of new evidence." Under this rule, the Tax Commission may exercise its discretion in granting or denying a Petition for Reconsideration and generally will not reconsider based on evidence that could, with due diligence, have been discovered and produced at the hearing.

DISCUSSION

In the Request, Petitioner asserts that the Commission should reverse its legal conclusion that Petitioner cannot proceed with its request for a Formal Hearing. Or in the alternative, Petitioner asks that the Commission grant Petitioner a hearing at which the Petitioner may argue whether a default at the Initial Hearing level precludes the filing of a petition for Formal Hearing.

The Commission disagrees with Petitioner's legal conclusion as well as his characterization of the facts in this matter. This matter had not been scheduled for an Initial Hearing and, therefore, the Commission does not consider that it was at the "initial hearing level" as stated by Petitioner.

This matter was scheduled for a Telephone Status Conference. Had the matter been scheduled for an Initial Hearing, the process would have proceeded as outlined in Utah Code Sec. 59-1-502.5, which is the statute in the Utah Tax Code that codifies the additional procedural step of an Initial Hearing in Tax Commission administrative hearing procedures. The Initial Hearing is not contemplated in the Utah Administrative Procedures Act and may be unique to only the Tax Commission. Because the Initial Hearing is governed by Utah Code Sec. 59-1-502.5 and not the Administrative Procedures Act, the Commission does acknowledge that this results in a different process for defaults issued from Initial Hearings and defaults from other scheduled events in the hearing process. For defaults from Initial Hearings the parties may still request a Formal Hearing if they file the request within thirty days from the Order of Default, pursuant to Utah Code Sec. 59-1-502.5(6). However, if a party defaults from other proceedings, they may request that the Order of Default be set aside pursuant to Utah Code Sec. 63G-4-209.

DECISION AND ORDER

Based upon the foregoing, Petitioner has not presented a mistake of fact or law in the Commission's Final Order. There is no basis for reconsideration and the Petitioner's Request is denied. It is so ordered.

DATED this ____ day of _____, 2010.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

NOTICE: You have thirty (30) days after the date of this order to pursue judicial review of this order pursuant to Utah Code Ann. §§59-1-601 et seq. and 63G-4-302 et seq.

JKP/08-1804.drc