

08-1964
REVOCATION
SIGNED 1-26-09

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER SERVICES DIVISION, UTAH
STATE TAX COMMISSION,

Petitioner,

vs.

RESPONDENT,

Respondent.

**FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND FINAL DECISION**

Appeal No. 08-1964

Account No. #####

Tax Type: Revocation
Withholding Tax License

Judge: Phan

Presiding:

Marc Johnson, Commissioner
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP 1, Assistant Attorney General
PETITIONER REP 2, Tax Compliance Agent
For Respondent: RESPONDENT REP

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on January 7, 2009. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. This matter is before the Utah State Tax Commission due to the Revocation of Tax License, filed by Petitioner (the "Division") on September 22, 2008. Petitioner requests revocation of withholding tax license number ##### pursuant to Utah Code Sec. 59-10-405(7)(a), on the grounds that Respondent (the "Taxpayer") has failed to comply with the withholding tax provisions. Primarily it is the Division's contention that the Taxpayer has failed to make the required payments.

2. The Taxpayer's withholding tax account was opened in 1992. For several years the business filed the withholding tax returns and paid the tax timely. Beginning in 1997 there started to be some periods where there were late payments, but as of the date of the hearing all the balances had been paid. Most

of the periods in 1998 and into 1999 were filed or paid late and penalties and interest had been assessed. However, again as of the date of the hearing, the balances due for these periods have been paid in full. However, there are currently balances due for periods beginning with the October 1999 period and through June 2000. Returns were filed, but were not paid. After June 2000, some payments were made for the periods from July 2000 through September 2000 and returns filed. The Taxpayer continued to file returns for the periods from October 2000 through March 2001, but taxes were not paid in full for these periods and there is currently an unpaid balance. From April 2001 through June 2001 returns were filed and paid timely. From July 2001 through June 2002 returns were filed, but no payment has been made.

3. June 2002 is the most recent period with a balance due. After June 2002 through the end of 2007 the Taxpayer filed returns, most of which were \$\$\$\$ returns. For the few periods where tax was claimed to be due on the returns, the Taxpayer filed the returns and paid the tax. For periods in 2008 there have been no estimates made.

4. Currently the Taxpayer owes \$\$\$\$ in withholding tax, penalty and interest.

5. The Division representatives explained that they had made numerous attempts to contact the Taxpayer about the balance owed. They had set up two payment agreements with the Taxpayer in 2007, to pay off the balance, but the Taxpayer defaulted on the agreements. There had been telephone calls and garnishment actions.

6. The Taxpayer indicated that he had started the business in the 1970's and everything had gone well until the 1990's when he had tried to expand. The business had been installing acoustic ceiling tiles and they had expanded into drywall. It was with the expansion that the business started into some financial difficulties. Then from 2001 to 2007 he had a number of difficult and significant health problems including five major surgeries that kept him from being able to work to the extent needed to operate the business fully. He indicates that he has been the only one working at the business for years, so there have been no employees or withholding. This was the reason there were so many periods with \$\$\$\$ returns. In addition, he testified in the current economy, he has been unable to obtain any installation jobs for the business.

7. It was the Taxpayer's position that he would like to be able to pay the balance and optimistically he would like to retain the license so that he could at some point operate the business with employees. He also indicated that if the license were revoked it would be difficult for him to pay the balance due. He testified that he had already lost the two homes that he had owned and was barely able to pay his rent at this time.

APPLICABLE LAW

It was not until 2005 that the statute relied on by the Division as a basis for revocation of the withholding license was adopted. Prior to 2005, there was no provision for revocation of a withholding tax number. The current statute provides as follows:

(a) The commission shall revoke a license under this section if: (i) a licensee violates any provision of this part; and (ii) before the commission revokes the license the commission provides the licensee; (A) reasonable notice; and (B) a hearing. (b) If the commission revokes a licensee's license in accordance with Subsection (7)(a), the commission may not issue another license to that licensee until that licensee complies with the requirements of this part, including: (i) paying any: (A) amounts due under this part; (B) penalty as provided in Section 59-1-401; or (C) interest as provided in Section 59-1-402; and (ii) posting a bond in accordance with Subsections (5) and (6). (Utah Code Section 59-10-405.5(7). (2008).

CONCLUSIONS OF LAW

Upon review of all the facts in this matter, and the law as it existed at the time the account deficiencies were incurred, it is the conclusion of the Commission that the withholding tax license should not be revoked. We note that when the taxpayer was issued a withholding number, it was not considered to be a license at that time. In 2005 the law was changed and the current provisions adopted at Utah Code Sec. 59-10-405.5(7). Under the new provisions, taxpayers are granted a withholding license, which the Commission is required to revoke for failure to make payments. In this matter, all deficiencies were originally incurred years prior to the change in the law. There is no period with a balance owing subsequent to 2005.

Section 59-10-407(c), however, provides that the civil and criminal penalties provided for failure to pay income tax "shall apply in the same manner to a failure to . . . make prepayments of withholding taxes on time. . . ." Section 59-10-406(5)(c) provides that any amount of withholding "required to be deducted and remitted to the commission . . . is considered to be tax of the employer. . . ." Finally, Section 59-10-539(9) provides that interest is assessed, collected, and paid in the same manner as taxes and any reference to tax is "deemed also to refer to the additions to tax, penalties, and interest" Because interest continues to accrue, and interest is treated as tax under these provisions, the Commission determines that the failure to pay the interest due violates the statute, just as a failure to pay over withholding taxes themselves violates the statute. Accordingly, the taxpayer is currently in violation of Utah Code Sec. 59-10-402 and revocation under

Appeal No. 08-1964

59-10-405.5 is allowable.

In this case, however, taxpayer is not currently paying any payroll. Accordingly, there are currently no taxes that must be withheld. Other than additional accruals of interest, the taxpayer's debt to Utah is not increasing. Nor is the taxpayer currently misapplying any government trust funds. The taxpayer last failed to pay over actual taxes for June of 2002, over six years ago. Continuation of the license in this case appears likely to help the taxpayer pay off his liabilities to the state. Accordingly, the Commission will exercise its discretion in this case to deny revocation of the license. Should the Taxpayer incur a withholding tax deficiency for any period in the future that becomes delinquent, the Division may reapply for revocation and the Tax Commission will consider further action at that time.

DECISION AND ORDER

Based upon the foregoing, the Tax Commission denies Petitioner's request. It is so ordered.

DATED this ____ day of _____, 2009.

Jane Phan
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 _____, 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 Sec. 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 Secs. 59-1-601 et seq. and 63G-4-401 et seq.

Appeal No. 08-1964

JKP/08-1964.fof