

08-2526
AUDIT
SIGNED 08-17-09

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,

Petitioner,

v.

AUDITING DIVISION OF THE UTAH
STATE TAX COMMISSION,

Respondent.

INITIAL HEARING ORDER

Appeal No. 08-2526

Account No. #####

Tax Type: Audit – Sales Tax

Tax Year: 2008

Judge: Marshall

Presiding:

Jan Marshall, Administrative Law Judge

Appearing:

For Petitioner: PETITIONER, *Pro Se*
PETITIONER SPOUSE

For Respondent: RESPONDENT REP 1, Assistant Attorney General
RESPONDENT REP 2, 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 March 24, 2009. The Taxpayer disputes the tax, penalties, and interest assessed as a result of a sales tax audit on the purchase of a vehicle. The Taxpayer was assessed \$\$\$\$\$ in additional tax, a \$\$\$\$\$ fraud penalty, and interest, which continues to accrue.

APPLICABLE LAW

Sales tax is imposed on certain transactions as set forth in Utah Code Ann. §59-12-103, below in relevant part:

(1) A tax is imposed on the purchaser as provided in this part for amounts paid or charged for the following transactions:

(a) retail sales of tangible personal property made within the state...

Utah Code Ann. §59-12-103 (2008)

“Retail sale” is defined in Utah Code Ann. §59-12-102(81), as follows:

“Retail sale” or “sale at retail” means a sale, lease, or rental for a purpose other than:

- (a) resale;
- (b) sublease; or
- (c) subrent.

Utah Code Ann. §59-12-102(81) (2008).

The legislature has defined “Sale” at Utah Code Ann. §59-12-102(83), below:

- (a) “Sale” means any transfer of title, exchange, or barter, conditional or otherwise, in any manner, of tangible personal property or any other taxable transaction under Subsection 59-12-103(1), for consideration.
- (b) “Sale” includes:
 - (i) installment and credit sales;
 - (ii) any closed transaction constituting a sale;
 - (iii) any sale of electrical energy, gas, services, or entertainment taxable under this chapter;
 - (iv) any transaction if the possession of property is transferred but the seller retains the title as security for the payment of the price; and
 - (v) any transaction under which right to possession, operation, or use of any article of tangible personal property is granted under a lease or contract and the transfer of possession would be taxable if an outright sale were made.

Utah Code Ann. §59-12-102(83) (2008).

Penalties are imposed for the underpayment of tax under Utah Code Ann. §59-1-401(7), set forth below in pertinent part:

- (a) Additional penalties for underpayments of tax are as provided in this Subsection (7)(a)...
- (iv) If the underpayment is due to fraud with intent to evade the tax, the penalty is the greater of \$500 per period or 100% of the underpayment.

Utah Code Ann. §59-1-401(7) (2008).

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) (2008).

The Commission has been granted the discretion to waive penalties and interest. Section 59-1-401(13) 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) (2008).

DISCUSSION

The Division conducted a sales tax audit because Taxpayer registered a 2005 Chrysler PT Cruiser in July of 2008. At the time of registration, Taxpayer submitted a bill of sale that stated the vehicle was gifted and that the purchase price was \$\$\$\$\$. The Division received loan documentation from the lien holder, FINANCIAL INSTITUTION A that indicated the purchase price of the vehicle was \$\$\$\$\$. The Division assessed tax in the amount of \$\$\$\$\$, a fraud penalty of \$\$\$\$\$, and interest. Taxpayer disputes the assessment of tax, penalty, and interest.

Prior to the hearing, Taxpayer submitted an affidavit, in which she asserts she does not owe the assessed tax liability, did not commit fraud, and has never purchased an automobile subject to the tax laws of the State of Utah. Taxpayer proffered that she did not obtain the loan from FINANCIAL INSTITUTION A to “purchase” the PT Cruiser, and that obtaining the loan was not fraud. Taxpayer’s affidavit maintains that her mother in law, PERSON A, gifted the vehicle to her on or about May 20, 2008, with the requirement that Taxpayer continue to make payments to FINANCIAL INSTITUTION B.

Taxpayer also submitted an affidavit of PERSON A. PERSON A asserted that she purchased a Chrysler PT Cruiser on March 16, 2005 in CITY, STATE. PERSON A maintains that on or about April 3 of 2005 she loaned the vehicle to the Taxpayer, with the understanding that the Taxpayer would make the payments owed to FINANCIAL INSTITUTION B for as long as she had use of the car. PERSON A asserted that Taxpayer made all payments timely. On or about May 20, 2008, PERSON A gifted the vehicle to Taxpayer, with the understanding she would continue to make all payments to FINANCIAL INSTITUTION B.

Upon questioning from the Division, the Taxpayer testified that she obtained financing from FINANCIAL INSTITUTION A and paid off FINANCIAL INSTITUTION B on behalf of her mother-in-law. Prior to obtaining the financing, Taxpayer stated that she made payments to her mother-in-law to cover the monthly payments.

The Division provided copies of the Utah Tax Audit Summary, Application for Title, Certificate of Ownership from the STATE, the Bill of Sale signed by PERSON A, the Odometer Disclosure Statement, the Certificate of Inspection, FINANCIAL INSTITUTION A loan documents, and a copy of the official check to FINANCIAL INSTITUTION B for the pay off of the PT Cruiser. The Division’s representative argued that the Taxpayer paid consideration for the vehicle first directly to her mother-in-law, and then by obtaining the financing from FINANCIAL INSTITUTION A. The Division’s representative maintains that there was a sale, and that sales

tax is due on that transaction. Further, it is the Division's position that the fraud penalty was appropriately assessed because Taxpayer arranged a convoluted transaction with the purpose of avoiding the payment of tax.

Taxpayer maintains that she did not purchase the PT Cruiser, and is not subject to sales tax. The Commission disagrees. "Retail sale" is defined in Utah Code Ann. §59-12-102(81) as a sale, lease, or rental for a purpose other than resale, sublease, or subrent. Utah Code Ann. §59-12-102(83) goes on to define a "sale" as any transfer of title, exchange, or barter, conditional or otherwise, in any manner, of tangible personal property for consideration. The Utah Court of Appeals in *Coulter & Smith, Ltd. v. Russell*, 925 P.2d 1258, 1261 (Ct. App. Utah 1996), citing *Resource Management Co. v. Weston Ranch*, 706 P.2d 1028, 1036 (Utah 1985), held, "[i]t is well settled that consideration may be something other than money. Any 'act or promise, bargained for and given in exchange for a promise' constitutes consideration." The Court goes on to note, citing Joseph M. Perillo & Helen H. Bender, *Corbin on Contracts* §5.8 at 34 (1995), "consideration may involve 'some right, interest, profit, or benefit, accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.'" *Id.* Here, the Taxpayer had the benefit of using the PT Cruiser, and ultimately title transferred to her, in exchange for her promise to pay her mother-in-law's financial obligation to FINANCIAL INSTITUTION B. The Commission finds that the transaction was a "sale" under Utah Code Ann. §59-12-102(83), and taxable as a retail sale of tangible personal property subject under Utah Code Ann. §59-12-103.

Utah Code Ann. §59-1-401(7) provides that if an underpayment is due to fraud with intent to evade the tax liability a penalty of the greater of \$500 or 100% of the tax underpayment. The affidavit of PERSON A indicates that she purchased the vehicle on March 16, 2005 and "loaned" the vehicle to the Taxpayer less than three weeks later, with the understanding that Taxpayer would make the payments to FINANCIAL INSTITUTION B in PERSON A's name. Once the Taxpayer obtained financing to pay off FINANCIAL INSTITUTION B, PERSON A transferred the title to the Taxpayer. The Commission finds that the Taxpayer arranged the transaction with her mother-in-law with the intent to evade the sales tax liability. The Commission does have the authority under Utah Code Ann. §59-1-401(13) to waive penalties or interest for reasonable cause. However, the Taxpayer has not offered testimony or evidence of reasonable cause that would warrant a waiver of the penalty.

Interest is assessed under Utah Code Ann. §59-1-402(5) on a tax deficiency from the original due date until payment is received. As noted above, the Commission does have discretion to waive both penalties and interest for reasonable cause. The Commission has

promulgated Administrative Rule R861-1A-42 to provide further guidance on what constitutes “reasonable cause.” With regard to the waiver of interest, the rule specifically provides, “Grounds for waiving interest are more stringent than for penalty. To be granted a waiver of interest, the taxpayer must prove that the commission gave the taxpayer erroneous information or took inappropriate action that contributed to the error.” Taxpayer offered no testimony or other evidence that would show a Tax Commission employee provided the Taxpayer with erroneous information that contributed to the non-payment of the sales tax, or that the Tax Commission took inappropriate action. The Commission finds there is not reasonable cause for a waiver of interest.

DECISION AND ORDER

Based on the foregoing, the Commission sustains the tax deficiency, fraud penalty, and interest assessed by the Division. 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 _____, 2009.

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 _____, 2009.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D’Arcy Dixon Pignanelli
Commissioner

Appeal No. 08-2526

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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