
BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER 1 & PETITIONER 2, Petitioners, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	ORDER DENYING REQUEST FOR RECONSIDERATION Appeal No. 09-0044 Account No. ##### Tax Type: Income Tax Tax Years: 2005 Judge: Chapman
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STATEMENT OF CASE

This matter came before the Utah State Tax Commission upon a Request for Reconsideration (“Request”), which PETITIONER 1 & PETITIONER 2 (the “taxpayers”) timely submitted on May 26, 2009. The taxpayers submitted the Request in response to the Commission’s Order Granting [Auditing Division’s] Motion to Dismiss, which was issued on May 11, 2009 (“Order to Dismiss”). The taxpayer requests that the Commission reconsider its ruling in the Order to Dismiss based on “newly discovered evidence and expansion of matters addressed in the previous hearing.”

On June 25, 2009, Auditing Division (the “Division”) submitted its Objection to Petitioner’s Request for Reconsideration (“Objection”), asking the Commission to deny the taxpayers’ Request. On July 2, 2009, the taxpayers submitted their Response to Auditing Division’s Objection (“Response”).

APPLICABLE LAW

1. Utah Code Ann. §63G-4-302(1)(a) provides that a party receiving a final decision from the Commission may request reconsideration, as follows:

(1)(a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63G-4-301 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which

relief is requested.

2. Utah Administrative Rule R861-1A-29(B) provides that “[w]ithin 20 days after the date that an order . . . is issued, any party may file a written request for reconsideration alleging mistake of law or fact, or the discovery of new evidence.”

3. The Commission generally will not grant reconsideration on the basis of the discovery of new evidence where the evidence could, with due diligence, have been discovered and produced at the hearing. In *Western Water, LLC v. Olds*, 2008 UT 18, 184 P.3d 578 (Utah 2008), the Utah Supreme Court discussed the definition of “reconsider” and concluded that it means “to discuss or take up (a matter) *again*” or “to consider *again*, esp. with the intent to modify an earlier decision.” Based on these definitions, the Court concluded that a request for reconsideration is subject to limitations, as follows:

Obviously, it is impossible to discuss a matter *again*, if it has never been discussed in the first place. Accordingly, it makes sense that a request for reconsideration is not the proper time to raise new arguments or new issues or to present new [evidence]. See, e.g., *Toledo, Peoria & W. Ry. v. Surface Transp. Bd.*, 462 F.3d 734, 753 (7th Cir. 2006) (refusing to consider new evidence presented on a request for reconsideration because “if a party were free to reshape its case, so long as it did so within 20 days after a decision, the administrative process might never end[.]”

In *Toledo*, the Court of Appeals for the Seventh Circuit explained that:

The [agency] generally does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages of the proceeding. Moreover, the term “new evidence” refers to evidence that was not reasonably available to the party when the record was developed, and not simply newly raised. . . . [I]f a party were free to reshape its case, so long as it did so within 20 days after a decision, the administrative process might never end. The agency is not expected to behave like Penelope, unraveling each day’s work to start the web again the next day.

DISCUSSION

In their Request, the taxpayers claim that their representative, PETITIONER REP, had extensive discussions with the Division concerning the taxpayers' specific tax circumstances prior to the Division issuing its Statutory Notice. As a result, the taxpayers believe that the Division acted improperly when it issued its Statutory Notice to the taxpayers without also issuing a copy of it to PETITIONER REP 1. Because the taxpayers anticipated that the Division would send a copy of their Statutory Notice to PETITIONER REP 1 and that he would file an appeal on their behalf within the statutory timeframe, they believe that the Commission should reconsider its Order of Dismissal and reopen their appeal.

The Commission declines to reopen the appeal based on this "new" evidence and these arguments. First, PETITIONER REP 1 stated at the hearing that he had spoken to the Division about the taxpayers' specific tax matters. The Commission ruled, as it had in other cases, that a representative does not automatically receive a copy of a Statutory Notice unless he or she submits a document to the Division specifically showing that he or she is authorized to represent the taxpayer *and* indicating on the document that he or she is requesting to receive a copy of all notices. PETITIONER REP 1 admitted at the hearing that he did not submit a document on which he requested to receive all notices. Second, the argument in the taxpayers' Request is merely an expansion of the argument already heard at the hearing and is not the type of new evidence or argument for which reconsideration may be granted.

In addition, the taxpayers present a new argument concerning the statutory deadline to appeal. The Statutory Notice issued to the taxpayers provided that an appeal had to be filed by December 4, 2008 in order to be timely. The taxpayers did not file an appeal until January 5, 2009. The taxpayers claim that the Internal Revenue Service ("IRS") has granted an extension of time to file all returns and correspondence due to damage caused by NATURAL DISASTER to January 5, 2009 for any items due from September 7, 2008 to January 5, 2009. The Statutory Notice was sent to the taxpayers' correct address in CITY, Utah. The

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Commission finds that the damage caused in the (X) region of the United States by NATURAL DISASTER has no affect on the timeframe for which an appeal should have been filed in response to a Statutory Notice properly issued to a Utah address.

Furthermore, as explained in the Order of Dismissal, the Commission does not address an underlying tax issue for an appeal that is filed late and subsequently dismissed. Based on the foregoing, the Commission denies the taxpayers' Request for Reconsideration. The Commission notes, however, that certain taxpayers now have an additional remedy when they object to a final assessment. Senate Bill 108 ("S.B. 108") was recently enacted and is currently in effect. S.B. 108 allows certain taxpayers who have not previously filed timely appeals to object to a final assessment by paying the tax and then filing a claim for a refund as provided in the statutes. UCA §59-1-501(7). The Tax Commission will either grant or deny the claim for a refund. If the Tax Commission denies the claim, then a taxpayer may appeal the denial by filing a petition with the commission within 30 days of the denial. UCA §59-1-1410(9). Please note that a taxpayer's claim of refund must still meet the general deadline for all claims of refunds, which in these cases will generally be two years from the date of payment. UCA §59-1-1410(8)(a)(ii). Because the Commission has determined that your protest was untimely, this remedy will apply to you. Accordingly, if you pay the tax, you may still pursue your administrative remedies by filing a claim for refund at any time within two years of that payment.

DECISION AND ORDER

Based upon the foregoing, it is the decision and order of the Utah State Tax Commission that the taxpayers' Request for Reconsideration is denied. It is so ordered.

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DATED this _____ day of _____, 2009.

BY ORDER OF THE UTAH STATE TAX COMMISSION.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
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-4-401 et seq.

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