

09-2701
AUDIT
TAX YEARS: 2004, 2005, 2006, 2007
SIGNED 03-04-2010
COMMISSIONERS: R. JOHNSON, M. JOHNSON, D. DIXON
EXCUSED: M. CRAGUN
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.</p>	<p>INITIAL HEARING ORDER Appeal No. 09-2701 Account No. ##### Tax Type: Sales Tax Tax Year: 7/04 – 3/07 Judge: Marshall</p>
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Presiding:

Jan Marshall, Administrative Law Judge

Appearing:

For Petitioner: PETITIONER REP., Sales Tax Manager for PETITIONER
For Respondent: RESPONDENT REP., 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 November 25, 2009. The Taxpayer requested a waiver of the penalties assessed as a result of a sales and use tax audit. The Taxpayer was assessed \$\$\$\$ in additional tax, penalties in the amount of \$\$\$\$\$, and interest in the amount of \$\$\$\$\$. As of the hearing date, all amounts had been paid in full.

APPLICABLE LAW

Utah Code Ann. §59-1-401 imposes penalties, as follows in pertinent part:

- (5) (a) Additional penalties for underpayments of tax are as provided in Subsection (5)(a)(i) through (iv).
 - (i) Except as provided in Subsection (5)(c), if any underpayment of tax is due to negligence, the penalty is 10% of the underpayment..

Utah Code Ann. §59-1-401 (2004-2006).¹

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

DISCUSSION

Taxpayer is requesting a waiver of the interest assessed on the sales and use tax audit for the periods from July 2004 through March 2007. The Taxpayer was assessed \$\$\$\$ in additional tax, and a 10% negligence penalty. The Division assessed the negligence penalty because Taxpayer made the same types of errors in a prior audit dated April 22, 2004, and the tax deficiencies are significant; the percentage of the deficiency to the tax paid is high; and reasonable controls have not been instituted to ensure proper collection and/or accrual of tax.

Taxpayer’s representative stated that the majority of the deficiency was due to a failure in their internal billing system. He explained that a new billing customer site was created to bring a new call center into operation and was erroneously set up as “not taxable”. This is the underreported taxable asset purchases reflected in Schedule 2 of the audit report. With regard to the reconciliation of returns reflected in Schedule 1 of the audit report, the Taxpayer’s representative stated that they collected tax at the correct rate, but have always filed using the CITY rate. He stated that the State received all tax money, but the filings were not broken down by county. Taxpayer’s representative state that Taxpayer endeavors to remain in compliance and that none of the errors were intentional or flagrant, and asked to have the penalty abated.

The Division’s representative argued that the 10% negligence penalty was properly assessed. She stated that the Taxpayer did not take the care necessary to improve their reporting since the last audit in 2004, and indicated that Taxpayer’s reporting actually had gotten worse. She stated that there was a very sizable increase in the underreporting for assets purchased. In the audit completed in 2004, there was a deficiency in assets to the total amount of goods consumed of 4.8%, in the audit at issue that had increased to 42.78%.

Taxpayer does not dispute the underlying tax liability, but requests a waiver of the 10% negligence penalty. The Utah Supreme Court has held that the “negligence penalty is appropriate ‘when the taxpayer has failed to pay taxes and a reasonable investigation into the applicable rules and statutes would have revealed that the taxes were due.’” *Broadcast International, Inc. v. Tax Comm’n*, 882 P.2d 691, 701 (Utah 1994), quoting *Hales Sand & Gravel, Inc. v. Tax Comm’n*, 842 P.2d 887, 895 (Utah 1992). Furthermore, it held that “[t]he taxpayer can escape the penalty if he

¹ In 2007, this provision was moved to Utah Code Ann. §59-1-401(7).

or she can show that he or she based the nonpayment of taxes on a legitimate, good faith interpretation of an arguable point of law.” *Id.* Taxpayer has not shown a good faith interpretation of an arguable point of law in this matter. There has been no allegation that Taxpayer was unaware of the applicable rules and statutes that resulted in the largest portion of the deficiency. In fact, most of the deficiency was attributable to a failure in Taxpayer’s internal billing system. Taxpayer was aware of the applicable rules and statutes, as the Division had identified similar problems in the prior 2004 audit. Taxpayer not only continued to make the same errors, but did so to a significantly increased degree. Under the circumstances, there does not appear to be reasonable cause to waive the 10% negligence penalty.

Jan Marshall
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission finds that sufficient cause has not been shown to justify a waiver of the penalty assessed as a result of the sales and use tax audit. 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 _____, 2010.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D’Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

Appeal No. 09-2701

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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