09-3022
INCOME TAX
TAX YEAR: 2006
SIGNED: 06-04-2009
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, v. TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**INITIAL HEARING ORDER** Appeal No. 09-3022 Account No. ##### Tax Type: Income Tax Tax Years: 2006 Judge: Nielson-Larios

Presiding:
Aimee Nielson-Larios, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER, Taxpayer
For Respondent: RESPONDENT REP. 1, Assistant Attorney General
RESPONDENT REP. 2, Taxpayer Services Division
RESPONDENT REP. 3, Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. § 59-1-502.5, on April 13, 2010.

Petitioner (the "Taxpayer") is appealing the Taxpayer Services Division's (the "Division's") assessment of individual income tax for the 2006 tax year. On August 20, 2007, the Division issued a "Notice of Change to Return" ("Statutory Notice") to the Taxpayer, in which the Division provided the following "Result of Change."

Year	Tax	Penalties	Interest	Credits as of Aug. 20, 2007	Total Amt. Due
2006	$$$$$	$$$$$	$$$$$	$$$$$	$$$$$

The Division made its revisions based on an IRS change that disallowed the Taxpayer a personal exemption for his wife, PETITIONER SPOUSE, who does not have a taxpayer identification number. The Taxpayer contends he is entitled to the personal exemption for his wife because the IRS and the Social Security

Administration ("SSA") have incorrectly refused to issue her an identification number. Furthermore, he asserts that state law does not require a federal identification number. On the other hand, the Division contends that the Taxpayer is not entitled to a personal exemption for his wife because Utah law is based on federal law and he is not allowed an exemption under federal law. Furthermore, the Division asserts that the Taxpayer is not allowed to file a joint return with his wife under federal law because she is a nonresident alien.

APPLICABLE LAW

Utah Code Ann. § 59-10-104(1) (2006)[1] provides that "a tax is imposed on the state taxable income, as defined in Section 59-10-112, of every resident individual. . . ."

Utah Code Ann. § 59-10-112 (2006) defines "state taxable income" to mean "federal taxable income, as defined by Section 59-10-111, with additions and subtractions required by Section 59-10-114."

Utah Code Ann. § 59-10-111 (2006) defines "federal taxable income" to mean "taxable income as currently defined in Section 63, Internal Revenue Code of 1986."

Utah Code Ann. § 59-10-102 (2006) states, in part:

> The intent of the Legislature . . . is to accomplish the following objectives:
> (1) to impose on each resident individual . . . a tax measured by the amount of his "taxable income" . . . , as determined for federal income tax purposes, subject to certain adjustments; and
> . . . .
> (3) to adopt for Utah . . . tax purposes, by reference, the provisions of the federal income tax laws . . . ;
> (4) to conform, to the extent practicable, certain of the existing rules of procedure . . . for . . . Utah . . . tax law to corresponding . . . rules of administration and procedure prescribed by the federal income tax laws . . .

Utah Code Ann. § 59-10-114 (2006) provides for certain additions to and subtractions from the federal taxable income of an individual when calculating that person's Utah state taxable income. Section 59-10-114(1)-(1)(d) states in part:

> There shall be added to federal taxable income of a resident or nonresident individual: . . .
> (d) 25% of the personal exemptions, as defined and calculated in the Internal Revenue Code . . .

Utah Code Ann. § 59-1-1417 (2009) provides that the burden of proof is upon the petitioner (taxpayer) in income tax matters before the Commission as follows:

[1] This Order cites to and applies the Utah Individual Income Tax Act that was in effect for the 2006 tax year, the year at issue in this appeal.

In a proceeding before the commission, the burden of proof is on the petitioner except for determining the following . . . [The statute then provides three exceptions; none of which apply to this case.]

For federal law, I.R.C. § 6013 (2006) states in part:

(a) Joint returns
A husband and wife may make a single return jointly of income taxes . . . except as provided below:
(1) no joint return shall be made if either the husband or wife at any time during the taxable year is a nonresident alien . . .

. . . .

(g) Election to treat nonresident alien individual as resident of the United States
(1) In general
A nonresident alien individual with respect to whom this subsection is in effect for the taxable year shall be treated as a resident of the United States . . .
(2) Individuals with respect to whom this subsection is in effect
This subsection shall be in effect with respect to any individual who, at the close of the taxable year for which an election under this subsection was made, was a nonresident alien individual married to a citizen or resident of the United States, if both of them made such election to have the benefits of this subsection apply to them. . . .

Treasury Reg. § 1.6013-1(b) (2006) states:

Nonresident alien. A joint return shall not be made if either the husband or wife at any time during the taxable year is a nonresident alien, unless an election is in effect for the taxable year under section 6013 (g) or (h) and the regulations thereunder.

IRS Publication 519 (2006), titled "U.S. Tax Guide for Aliens," page 10, states in part:

Nonresident Spouse Treated as a Resident
If, at the end of your tax year, you are married and one spouse is a U.S. citizen . . . and the other spouse is a nonresident alien, you can choose to treat the nonresident spouse as a U.S. resident.

. . . .

How To Make the Choice
Attach a statement, signed by both spouses, to your joint return for the first tax year for which the choice applies. It should contain the following information.
• A declaration that one spouse was a non-resident alien and the other spouse a U.S. citizen or resident alien on the last day of your tax year, and that you choose to be treated as U.S. residents for the entire tax year.
• The name, address, and identification number of each spouse. . . .

Treasury Reg. § 301.6109-1(a)(1) (2006) states in part:

> In general—
> Taxpayer identifying numbers—
> . . . .
> (ii) Uses. Social security numbers [and] IRS individual taxpayer identification numbers . . . are used to identify individual persons. . . . [T]axpayer identifying numbers must be used as follows:
> (A) . . . [A]n individual required to furnish a taxpayer identifying number must use a social security number.
> (B) . . . [A]n individual required to furnish a taxpayer identifying number but who is not eligible to obtain a social security number must use an IRS individual taxpayer identification number.

IRS Form W-7 is titled "Application for IRS Individual Taxpayer Identification Number." The Instructions for Form W-7 (2010), page 2, provide that a taxpayer must submit certain documents to the IRS to substantiate the information on Form W-7 and confirm the taxpayer's identity. The Instructions, page 2, also provide that a taxpayer may submit a valid passport or at least two other documents from a list with one of these documents being a photo ID. Lastly, the Instructions state, "The documents must be current . . ."

DISCUSSION

The Taxpayer explained that he met his wife in COUNTRY and they decided to get married. After a three-year process, she obtained a fiancée visa and came to the United States, where they were married. The Taxpayer said that his wife does not have a social security number ("SSN") or an individual taxpayer identification number ("ITIN") despite seeking one because the SSA and the IRS improperly denied her requests for the numbers. He explained how he and his wife received different, inconsistent information from the federal agencies. The Taxpayer said that eventually, at his request, the SSA issued a letter stating that his wife cannot get a SSN. The Taxpayer further explained that he then sought an ITIN number from the IRS, again, and the IRS began requesting documents to know that the wife existed. First, the Taxpayer sent a birth certificate from COUNTRY. Then, he sent his wife's fiancée visa as the requested picture ID.[2] The Taxpayer explained that the IRS found the documents to be insufficient because the visa was expired. The Taxpayer stated that he is still trying to resolve the issue with the IRS.[3]

[2] The Taxpayer explained during the hearing that the federal government issues a fiancée visa to a person who wants to come to the United States to be married and that the visa is valid for three months unless that person marries within that time; in which case, the visa is automatically extended.

[3] During the appeals process with the State Tax Commission, the Taxpayer explained that he has been disputing the

The Taxpayer contended that the IRS and SSA are making it difficult to impossible for his wife to get a federal taxpayer identification number. He explained how the agencies were not willing to talk with each other and share information. He asserted that even though the IRS requires an ITIN or a SSN for the federal tax return, the State of Utah does not need to require that federal number, also. He said he would understand if the state were to deny the personal exemption for his wife if the IRS had correctly refused to issue an ITIN because she should not have it. However, he believes that the state should grant the personal exemption for the state return and not require a federal number if the IRS wrongly refused to issued her the ITIN. He expressed frustration at problems in the overall federal systems for immigration and for granting identification numbers, and he questioned whether we could do anything to fix them.

The Division explained that state law follows federal law, and it quoted the legislative intent stated in § 59-10-102 (2006). The Division also noted that § 59-10-104.1(1) (2006) defines "personal exemptions" to mean "the total exemption amount an individual is allowed to claim for the taxable year ***under Section 151, Internal Revenue Code***, for . . . the individual's spouse" (emphasis added) and that § 59-10-114(1)(d) (2006) provides that "the personal exemptions [are] as defined and calculated ***in the Internal Revenue Code***" (emphasis added). The Division contended the IRS does not allow personal exemptions without a taxpayer first meeting the requirements of the federal law.

The Division also asserted that a nonresident alien cannot file a joint federal return. It cited I.R.C. § 6013(a)(1), which states, "no joint return shall be made if either the husband or wife at any time during the taxable year is a nonresident alien," and Treasury Reg. § 1.6013-1(b), which states, "A joint return shall not be made if either the husband or wife at any time during the taxable year is a nonresident alien, unless an election is in effect for the taxable year under section 6013 (g) or (h) and the regulations thereunder." The Division argued that because the wife was a nonresident alien, the Taxpayer and his wife could not file a joint return for the 2006 tax year. The Division also stated that it was unaware of a choice or an election that might be available to a nonresident alien married to a U.S. citizen, which would allow both spouses to file jointly. However, this election is located in I.R.C. § 6013(g) (2006) and the instructions for making the election are in IRS Publication 519 (2006), page 10.[4]

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issue with the IRS for over two years and that he did not want to continue to wait for the IRS before having a hearing with the State Tax Commission.

[4] IRS Publication 519 (2006), page 10 instructs taxpayers making the election to attach to their joint return a statement that includes certain information, including the identification number of each spouse. Assuming that the Taxpayer's wife is a nonresident alien and the Taxpayer and his wife made the election

The Commission considers all evidence presented when it decides the correct amount of "federal taxable income" as defined in §§ 59-10-111 and 59-10-112. *See Utah State Tax Comm'n Appeal No. 08-1313* (March 19, 2009), *available at* http://tax.utah.gov/research/decisions/08-1313.intsanqc.pdf. The Commission has authority to find that an assessment by the Division is incorrect even if that assessment reflects the federal tax information currently recognized by the IRS. *Id.*

Federal law requires a taxpayer to use a SSN or an ITIN number "to identify individual persons." *See* Treasury Reg. § 301.6109-1(a)(1) (2006). As indicated in the Instructions for Form W-7 (2010) page 2, the IRS requires a taxpayer to submit additional documentation when he or she applies for an ITIN to confirm that taxpayer's identity. Additionally, the Instructions for Form W-7 indicate that when a taxpayer lacks a valid passport, he or she must submit two other *current* documents, one of which being a picture ID. In this case, the Taxpayer's wife submitted two documents: a birth certificate and a fiancée visa. However, the IRS determined that the visa was not current, so it did not issue an ITIN. The IRS acted consistent with the Instructions for Form W-7. Thus, the Taxpayer has not shown that the IRS incorrectly refused to issue the ITIN and incorrectly denied the personal exemption.

Under Utah law, personal exemptions are "as defined and calculated in the Internal Revenue Code." *See* § 59-10-114(1)(d). Because federal law requires a SSN or ITIN for identification for the personal exemption, the Utah law requires a SSN or ITIN, also. Although the state and the federal governments are separate entities, the state legislature chose to link the state and federal laws when it defined personal exemptions for Utah purposes. The State Tax Commission must follow the Utah statute as written; it cannot ignore the requirements that personal exemptions are defined by federal law and that federal law requires an identification number. While it is unfortunate that the federal agencies may not be working well together, the State Tax Commission lacks the authority to change the federal system.

In conclusion, the Taxpayer has not shown the Division's assessment to be incorrect. Thus, the assessment should be sustained.

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Aimee Nielson-Larios
Administrative Law Judge

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for 2006, they still could not have included her ITIN number, as Publication 519 advised them to do.

DECISION AND ORDER

Based upon the foregoing, the Commission sustains the Division's assessment in its entirety. The Taxpayers' appeal is denied. 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

Notice: If a Formal Hearing is not requested as discussed above, failure to pay the balance resulting from this order within thirty (30) days from the date of this order may result in a late payment penalty.

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