

10-0360 and 10-0940  
TAX TYPE: INCOME TAX  
TAX YEARS: 2003 and 2007  
DATE SIGNED: 7-19-2012  
COMMISSIONERS: M. JOHNSON, D. DIXON, M. CRAGUN  
EXCUSED: B. JOHNSON

---

BEFORE THE UTAH STATE TAX COMMISSION

---

<p>TAXPAYER Petitioner,</p> <p>vs.</p> <p>AUDITING DIVISION, OF THE UTAH STATE TAX COMMISSION</p> <p>Respondent.</p>	<p><b>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</b></p> <p>Appeal No. 10-0360 and 10-0940</p> <p>Account No. #####</p> <p>Tax Type: Income Tax</p> <p>Tax Year: 2003 and 2007</p> <p>Judge: Marshall</p>
--	---

---

**Presiding:**

D'Arcy Dixon Pignanelli, Commissioner  
Jan Marshall, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER REPRESENTATIVE-1, Representative, via telephone  
TAXPAYER, via telephone

For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney  
General  
RESPONDENT, Senior Auditor  
RESPONDENT REPRESENTATIVE, Disclosure Officer

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on August 2, 2011, in accordance with Utah Code Ann. §59-1-501 and §63G-4-201 et sec. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The issue before the Utah State Tax Commission in this matter is Taxpayer's appeal of income tax, penalty, and interest deficiencies issued for the 2003 and 2007 tax years.
2. Taxpayer considered himself a resident of Utah during the years at issue, and is thus subject to Utah Individual Income Tax laws.

3. For the 2003 tax year, the Division issued a Notice of Deficiency and Audit Change on February 8, 2010. The statutory notice reflected tax due in the amount of \$\$\$\$\$, interest in the amount of \$\$\$\$\$ through March 10, 2010, and penalties in the amount of \$\$\$\$\$. (Exhibit R-4).
4. In calculating the audit tax due for the 2003 tax year, the Division relied in part upon an IRS Account Transcript for the 2003 tax year. The Division obtained the information electronically through the ordinary course of business. (Exhibit R-3).
5. In calculating the audit tax due for the 2003 tax year, the Division relied in part upon electronically filed 1099'S, 1098, and a W-2, (Exhibit R-1). The W-2 was issued by BUSINESS-1 and showed wages in the amount of \$\$\$\$\$. There was a 1098 showing \$\$\$\$\$ in mortgage interest that was issued by CORPORATION-1. There was a 1099-G showing \$\$\$\$\$ of unemployment compensation. There was a 1099-MISC issued by BUSINESS-2 showing \$\$\$\$\$ in nonemployee compensation; and a 1099-MISC issued by BUSINESS-3 showing \$\$\$\$\$ in "other income".
6. On or about October 12, 2004, the Taxpayer filed a "zero" return for the 2003 tax year. (Exhibit R-2).
7. For the 2007 tax year, the Division issued a Notice of Deficiency and Estimated Income Tax on December 29, 2010. The statutory notice reflected tax due in the amount of \$\$\$\$\$, interest in the amount of \$\$\$\$\$ through January 28, 2010, and penalties in the amount of \$\$\$\$\$. (Exhibit R-10).
8. In calculating the audit tax due for the 2007 tax year, the Division relied in part upon an IRS Account Transcript for the 2007 tax year. The Division obtained the information electronically through the ordinary course of business. (Exhibit R-9).
9. In calculating the audit tax due for the 2007 tax year, the Division relied in part upon electronically filed 1098, and a 1099-MISC, (Exhibit R-8). The 1099-MISC was issued by BUSINESS-2 and showed nonemployee compensation in the amount of \$\$\$\$\$. There was a 1098 showing \$\$\$\$\$ in mortgage interest that was issued by CORPORATION-2; a 1098 showing \$\$\$\$\$ in mortgage interest from COMPANY-1; and another 1098 showing mortgage interest in the amount of \$\$\$\$\$ from COMPANY-1. The two 1098, from COMPANY-1, show different account numbers.
10. Taxpayer did not file a return for the 2007 tax year.

11. The Taxpayer's representative argued that the information relied upon by the Division were "merely print-outs", that there are no attestations, and that the Commission cannot rely on such documents as Section 6103 of the Internal Revenue Code requires a written request for the information.

APPLICABLE LAW

Utah Code Ann. §59-10-104 provides for the imposition of tax as follows in pertinent part:

[A] tax is imposed on the state taxable income, as defined in Section 59-10-112, of every resident individual...

For the 2007 tax year, Utah Code Ann. §59-10-104 was amended, as follows:

[A] tax is imposed on the state taxable income of every resident individual as provided in this section...

Utah Code Ann. §59-10-103<sup>1</sup> defined "resident individual" as follows:

- (q) (i) "Resident individual" means:
- (A) an individual who is domiciled in this state for any period of time during the taxable year, but only for the duration of the period during which the individual is domiciled in this state; or
  - (B) an individual who is not domiciled in this state but:
    - (I) maintains a permanent place of abode in this state; and
    - (II) spends in the aggregate 183 or more days of the taxable year in this state.
- (ii) For purposes of Subsection (1)(q)(i)(B), a fraction of a calendar day shall be counted as a whole day.

For the 2003 tax year, Utah Code Ann. §59-10-112 defines "state taxable income" for purposes of Utah Code Ann. §59-10-104 as follows:

"State taxable income" in the case of a resident individual means his federal taxable income (as defined by Section 59-10-111) with the modifications, subtractions, and adjustments provided in Section 59-10-114. The state taxable income of a resident individual who is the beneficiary of an estate or trust shall be modified by the adjustments provided in Section 59-10-209.

For the 2007 tax year, "state taxable income" is defined in Utah Code Ann. §59-10-103(1), as set forth below in pertinent part:

- (y) "Taxable income" or "state taxable income":
- (i) Subject to Subsection 59-10-302(2), for a resident individual other than a resident individual described in Subsection (1)(y)(iii), means the resident individual's federal taxable income after making the:

---

<sup>1</sup> For the 2007 tax year this definition was found in subsection (v) rather than subsection (q).

(A) Additions and subtractions required by Section 59-10-114; and

(B) Adjustments required by Section 59-10-115

For the 2003 tax year, Utah Code Ann. §59-10-111 defines “[f]ederal taxable income” for purposes of Utah Code Ann. §5-10-112 as follows:

“Federal taxable income” means taxable income as currently defined in Section 63, Internal Revenue Code of 1986.

For the 2007 tax year “federal taxable income” is defined in Utah Code Ann. §59-10-103(1)(k) as follows:

(i) For resident or nonresident individual, means taxable income as refined by Section 63, Internal Revenue Code...

Section 63 of the Internal Revenue Code, defines “taxable income” as set forth below:

[T]he term “taxable income” means gross income minus the deductions allowed by this chapter...

For purposes of determining “taxable income” Section 61 of the Internal Revenue Code defines “gross income” as follows:

- (a) Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
- (1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
  - (2) Gross income derived from business;
  - (3) Gains derived from dealings in property;
  - (4) Interest;
  - (5) Rents;
  - (6) Royalties;
  - (7) Dividends;
  - (8) Alimony and separate maintenance payments;
  - (9) Annuities;
  - (10) Income from life insurance and endowment contracts;
  - (11) Pensions;
  - (12) Income from discharge of indebtedness;
  - (13) Distributive share of partnership gross income;
  - (14) Income in respect of a decedent; and
  - (15) Income from an interest in an estate or trust.

Utah Code Ann. §59-10-539 imposes penalties and interest, as follows in pertinent part:

- (1) In case of failure to file an income tax return and pay the tax required under this chapter on or before the date prescribed therefore (determined with regard to any extension of time for filing), unless it is shown that such failure is due to willful neglect, there shall be added to the amount required to be shown as tax on such return a penalty as provided in Section 59-1-401. For the purposes of this subsection, the amount of tax required to be shown on

the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed upon the return...

- (3) If any part of a deficiency in tax imposed by this chapter, as defined by Section 59-10-523, is due to fraud, there shall be added to the tax a penalty as provide in Section 59-1-401. This amount shall be in lieu of any other addition to tax imposed by Subsection (1) or (2).

For the 2003 tax year, Utah Code Ann. §59-1-401 sets the penalties as provided for in Utah Code Ann. §59-10-539 as set forth below in relevant part:

- (1) (a) The penalty for failure to file a tax return within the time prescribed by law including extensions is the greater of \$20 or 10% of the unpaid tax due on the return.
  - (b) Subsection (1) does not apply to amended returns.
- (2) The penalty for failure to pay tax due shall be the greater of \$20 or 10% of the unpaid tax for:
  - (b) failure to pay any tax within 90 days of the due date of the return, if there was a late filed return subject to the penalty provided under Subsection (1)(a);

The penalty provisions of Utah Code Ann. §59-1-401 were revised for the 2007 tax year as follows:

- (1) As used in this section:
  - (a) (i) "Nonqualifying obligation" means a charge, fee, payment, or tax administered by the commission.
- (2) (a) The due date for filing a return is:
  - (i) if the person filing the return is not allowed by law an extension of the time for filing the return, the day on which the return is due as provided by law...
  - (b) (i) A penalty in the amount described in Subsection (2)(b)(ii) is imposed if:
    - (A) A person is required to file a return with respect to a nonqualifying obligation; and
    - (B) The person described in Subsection (2)(b)(i)(A) files the return after the due date described in Subsection (2)(a).
  - (ii) For purposes of Subsection (2)(b)(i), the penalty is an amount equal to the greater of:
    - (A) \$20; or
    - (B) 10% of the unpaid nonqualifying obligation due on the return.
- (3) (a) If a person fails to pay a tax, fee, or charge due, the person is subject to a penalty as provided in this Subsection (3).
  - (b) (i) A penalty in the amount described in Subsection (3)(b)(ii) is imposed if...
    - (B) a person:
      - (I) is subject to a penalty under Subsection (2)(b); and
      - (II) fails to pay a nonqualifying obligation due on a return within a 90-day period after the due date for filing a return

described in Subsection (2)(a)...

- (ii) For purposes of Subsection (3)(b)(i), the penalty is an amount equal to the greater of:
  - (A) \$20; or
  - (B) 10% of the unpaid nonqualifying obligation due on the return.

A frivolous filing penalty is imposed under Utah Code Ann. §59-1-401(7)<sup>2</sup>, as follows:

If any taxpayer in furtherance of a frivolous position has a prima facie intent to delay or impede administration of the tax law and files a purported return that fails to contain information from which the correctness of reported tax liability can be determined or that clearly indicates that the tax liability shown must be substantially incorrect, the penalty is \$500.

The burden of proof is on the Petitioner, except in certain instances, as set forth in Utah Code Ann. §59-1-1417, below:

In a proceeding before the commission, the burden of proof is on the petitioner except for determining the following, in which the burden of proof is on the commission:

- (1) whether the petitioner committed fraud with intent to evade a tax, fee, or charge;
- (2) whether the petitioner is obligated as the transferee of property of the person that originally owes a liability or a preceding transferee, but not to show that the person that originally owes a liability is obligated for the liability; and
- (3) whether the petitioner is liable for an increase in a deficiency if the increase is asserted initially after a notice of deficiency is mailed in accordance with Section 59-1-1405 and a petition under Part 5, Petitions for Redetermination of Deficiencies, is filed, unless the increase in the deficiency is the result of a change or correction of federal taxable income:
  - a. required to be reported; and
  - b. of which the commission has no notice at the time the commission mails the notice of deficiency.

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.”

#### CONCLUSIONS OF LAW

- A. Tax is imposed on the “state taxable income” of every “resident individual” under Utah Code Ann. §59-10-104. Taxpayer has made no argument that he was not domiciled in the State of Utah during the years at issue, in fact he acknowledged that he was a resident of Utah during the tax years at issue. The Commission concludes that Taxpayer is a “resident individual” as defined in Utah Code Ann. §59-10-103. “State taxable income”

---

<sup>2</sup> For 2007, this section was renumbered as Utah Code Ann. §59-1-401(9).

is determined from an individual's federal taxable income less certain adjustments, and is defined as "federal taxable income" as defined in I.R.C. §63. *See* Utah Code Ann. §59-10-103, §59-10-112, and §59-10-111. Section 63 of the Internal Revenue Code defines "taxable income" as "gross income" minus certain deductions. "Gross income" is defined as "all income from whatever source derived" and provides a list of examples, including compensation for services. *See* 26 U.S.C. §61 (1986, as amended). The Division provided evidence, including copies of the Taxpayer's W-2, 1099-MISC, and IRS Account Transcripts, which show that the Taxpayer had Utah taxable income for the 2003 and 2007 tax years. Taxpayer's representative argued that the Division improperly received documents from the IRS without making a written request pursuant to 26 U.S.C. §6103(d)(1). The Division provided copies of the written master agreement between the State of Utah and the IRS. The Division argued that the master agreement satisfied the written request requirement. The Commission agrees. The Agreement on Coordination of Tax Administration and Implementation Agreement to the Agreement on Coordination of Tax Administration between the Utah State Tax Commission and the Internal Revenue Service provided by the Division suggest that the agreement between the State of Utah and the IRS is comprehensive and detailed. It addresses specifically the subject of documents produced by the IRS and provides for delivery of the documents from the IRS to the State. Therefore, the Commission finds that the Taxpayer's position is without merit. The Commission sustains the Division's tax assessment for the 2003 and 2007 tax years.

- B. Interest is required to be assessed under Utah Code Ann. §59-10-537 for the non-payment of a tax deficiency. Under Utah Code Ann. §59-1-402(5), interest is calculated from the due date of the return, and continues to accumulate until the deficiency amount is paid. Interest was assessed on Taxpayer's outstanding tax liability from April 15, 2004, the due date of the return for the 2003 tax year, and from April 15, 2004, the due date on the return for the 2007 tax year. Interest continues to accrue. The Commission finds that the Division properly assessed interest on the Taxpayer's deficiency balance, and that the Taxpayer has not shown reasonable cause that would justify a waiver of that interest.
- C. The Division assessed a \$500 frivolous filing penalty on the February 8, 2010 notice of deficiency for the 2003 tax year. Utah Code Ann. §59-1-401(7) provides for the assessment of the \$500 frivolous filing penalty if a taxpayer takes action that includes the following three elements (1) the action is in furtherance of a frivolous position; (2) there

exists a prima facie intent to delay or impede administration of the tax law; and (3) the taxpayer files a purported return that fails to contain information from which the correctness of reported tax liability can be determined or that clearly indicates that the tax liability shown must be substantially incorrect.

Furtherance of a frivolous position. Courts have generally found that the filing of a “zero return” is frivolous and have upheld frivolous filing penalties. See *Little v. United States*, 2005 WL 2989696; *Schultz v. United States*, 2005 WL 1155203; *Yuen v. United States*, 290 F. Supp 1220 (D. Nev. 2003); *Gillett v. United States*, 233 F. Supp.2d 874 (W.D. Mich. 2002); and *Bonaccorso v. Commissioner*, T.C. Memo. 2005-278. The Commission finds that the filing of a zero return in the instant case is a frivolous position. The Division has presented sufficient evidence to show that Taxpayer did have taxable income for the years at issue.

Prima facie intent to delay or impede administration of the tax law. The Taxpayer filed a frivolous tax return that required time and effort by the Tax Commission to properly analyze and address. By purposefully filing a tax return that asserts this frivolous position, the Taxpayer has delayed and impeded the administration of tax laws. The Commission also finds that the Taxpayer’s delay or impediment of tax law administration was intentional. The evidence shows that the Taxpayer filed the return on October 12, 2004 that reports his income as zero. It has long been held by the Courts that wages and compensation for services are taxable income.<sup>3</sup> For these reasons, the Commission finds that the Taxpayer has acted in an intentional manner to delay or impede tax law administration.

Return has insufficient information to determine liability or clearly indicates that the liability shown is incorrect. The “zero” return filed by the Taxpayer for the 2003 tax year contains a frivolous position, asserting that the Taxpayer had no income. The Division received information in the regular course of business that indicated the Taxpayer had

---

<sup>3</sup>The 5th Circuit stated "it is clear beyond peradventure that the income tax on wages is constitutional." *Stelly v. Commissioner*, 761 F.2d 1113, 115 (1985). See also *Granzow v. C.I.R.*, 739 F.2d 265, 267 (1984) in which the Seventh Circuit stated, "It is well settled that wages received by taxpayers constitute gross income within the meaning of Section 61 (a) of the Internal Revenue Code . . . and that such gross income is subject to taxation." In *United States v. Koliboski*, 732 F.2d 1328, 1329 fn 1 (1984), the Seventh Circuit stated "the defendant’s entire case at trial rested on his claim that he in good faith believed that wages are not income for taxation purposes. Whatever his mental state, he, of course, was wrong, as all of us already are aware. Nonetheless, the defendant still insists that no case holds that wages are income. Let us now put that to rest: WAGES ARE INCOME." See also *United States v. Mann*, 884 F.2d 532 (10th Cir. 1989).



received Utah taxable income in the amount of \$\$\$\$ during the 2002 tax year. Accordingly, the Commission finds that the return filed by the Taxpayer clearly indicates that the liability shown was incorrect.

The Commission finds that the Division has shown all elements required for it to impose the \$500 penalty in this manner, and imposes the \$500 frivolous filing penalty for the 2003 tax year.

- D. The Division assessed a 10% non-filing and 10% non-payment penalty on the December 29, 2010 notice of deficiency for the 2007 tax year. The Taxpayer was required to file a return for the 2007 tax year, and to pay the resulting tax liability. The Division properly assessed the penalties under Utah Code Ann. §59-1-401. While the Commission does have discretion to waive penalties pursuant to Utah Code Ann. §59-1-401(13), the Taxpayer has not provided reasonable cause to do so.

---

Jan Marshall  
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the audit assessments for the 2003 and 2007 tax years. It is so ordered.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

R. Bruce Johnson  
Commission Chair

Marc B. Johnson  
Commissioner

D'Arcy Dixon Pignanelli  
Commissioner

Michael J. Cragun  
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 Ann. §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 Ann. §59-1-601 et seq. and §63G-4-401 et seq.