

10-0979  
PENALTY AND INTEREST  
TAX YEAR: 2009  
SIGNED: 09-30-2011  
COMMISSIONERS: R. JOHNSON, M. JOHNSON, M. CRAGUN  
EXCUSED: D. DIXON

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BEFORE THE UTAH STATE TAX COMMISSION

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| <p>PETITIONER,</p> <p>Petitioner,</p> <p>vs.</p> <p>TAXPAYER SERVICES DIVISION, UTAH<br/>STATE TAX COMMISSION,</p> <p>Respondent.</p> | <p><b>FINDINGS OF FACT, CONCLUSIONS OF<br/>LAW, AND FINAL DECISION</b></p> <p>Appeal No. 10-0979</p> <p>Account No. #####</p> <p>Tax Type: Penalty &amp; Interest</p> <p>Tax Period: 2009</p> <p>Judge: Jensen</p> |
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**Presiding:**

Marc B. Johnson, Commissioner  
Clinton Jensen, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER REP.  
For Respondent: RESPONDENT REP. 1  
RESPONDENT REP. 2

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on in accordance with Utah Code Sec. 63G-4-201 et seq. On the basis of the evidence and testimony presented at the hearing, the Tax Commission makes its:

FINDINGS OF FACT

1. Petitioner (the "Taxpayer") is appealing the assessment of penalties for failure to timely file and failure to timely file or pay Utah sales tax for August, September, and October of 2009. These penalties had been assessed pursuant to Utah Code Sec. 59-1-401(2) & (3). Penalties had also been assessed for the first and second quarters of 2009 and for July 2009 but had been waived previously by the Taxpayer Services Division of the Utah State Tax Commission (the "Division"). Interest was assessed on the unpaid balance pursuant to Utah Code Sec. 59-1-402. However, Petitioner did not contest the interest.

2. The amount of the penalties for each period are as follows:

| <u>Tax Period</u>   | <u>Penalties</u> |
|---------------------|------------------|
| First Quarter 2009  | \$\$\$\$\$       |
| Second Quarter 2009 | \$\$\$\$\$       |
| July 2009           | \$\$\$\$\$       |
| August 2009         | \$\$\$\$\$       |
| September 2009      | \$\$\$\$\$       |
| October 2009        | \$\$\$\$\$       |
| November 2009       | \$\$\$\$\$       |

3. The Taxpayer started its business in YEAR. It started with two stores in a CITY 1 VENUE. In 2008, it opened two additional stores. In YEAR, it added three more stores and planned a fourth. To help manage this growth, the Taxpayer hired CHIEF FINANCIAL OFFICER as a chief financial officer (the “CFO”). The CFO controlled all books and financial records for the Taxpayer.

4. The CFO generally met with the Taxpayer’s directors each week. During 2009, the CFO reported to the Taxpayer’s directors in a weekly staff meeting. In those meetings, the CFO reported that tax filings and payments were current.

5. In early 2010, one of the Taxpayer’s directors received a letter from the Division indicating that the Taxpayer was not current in its taxes.

6. The following business day, the director phoned the Division representative who sent the letter. In that call, the director learned that the Taxpayer was at least six months behind in transmitting sales tax to the state.

7. The Taxpayer’s CFO was present and heard the director’s call to the Division. At the end of the call, the CFO confessed that she had fallen behind in her work and felt overwhelmed in her duties. She had been issuing checks to pay taxes, but had then failed to send the checks. The CFO reconciled the Taxpayer’s bank accounts, but concealed the outstanding checks for sales tax.

8. In 2010, the Taxpayer borrowed funds to cure the late tax payments to the State of Utah.

9. The Taxpayer provided testimony that it had an annual accounting review by an outside accounting firm in February or March of each year.

10. The Division granted waiver for the first three periods at issue, but denied further waivers because it concluded that it was not sufficient oversight to make an annual accounting review and to have a single person handle all or nearly all of the Taxpayer’s financial dealings.

APPLICABLE LAW

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.”

The Commission has promulgated Administrative Rule R861-1A-42(3) to provide additional guidance on the waiver of penalties, as follows:

Reasonable Cause for Waiver of Penalty. The following clearly documented circumstances may constitute reasonable cause for a waiver of penalty:

- (a) Timely Mailing...
- (b) Wrong Filing Place...
- (c) Death or Serious Illness...
- (d) Unavoidable Absence...
- (e) Disaster Relief...
- (f) Reliance on Erroneous Tax Commission Information...
- (g) Tax Commission Office Visit...
- (h) Unobtainable Records...
- (i) Reliance on Competent Tax Advisor...
- (j) First Time Filer...
- (k) Bank Error...
- (l) Compliance History...
- (m) Employee Embezzlement...
- (n) Recent Tax Law Change...

Tax Commission Publication 17 provides additional information regarding waivers for reliance on a competent tax adviser. It indicates that “[r]elying on a tax advisor to prepare a return does not automatically create reasonable cause for failure to file or pay. You must show you used normal business care and diligence when you decided to seek further advice.” Publication 17 indicates that an employer seeking a penalty waiver for employee embezzlement is required to show that “employee(s) embezzled tax funds and you couldn’t get funds from any other source.”

#### CONCLUSIONS OF LAW

1. The Taxpayer has demonstrated that it relied on an employee to handle tax matters and had annual accounting reviews. While it now has additional reviews and safeguards in place, the safeguards in place for the times at issue in this case were insufficient to allow the Taxpayer to detect tax payment problems for a period approaching a full year. The Taxpayer has not demonstrated that during the periods at issue in this case, it had more than one person taking care of financial matters. The Commission finds that this is insufficient oversight to establish the reasonable business prudence necessary to support penalty waivers beyond the three periods already waived by the Division.

2. While the Taxpayer has presented some elements of employee embezzlement, it has not given evidence sufficient to support a penalty waiver on the basis of employee embezzlement.

Appeal No. 10-0979

Clinton Jensen  
Administrative Law Judge

DECISION AND ORDER

The Tax Commission finds that sufficient cause has not been shown to justify a waiver of the penalties assessed for the period at issue beyond those previously waived by the Division. It is so ordered.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

R. Bruce Johnson  
Commission Chair

Marc B. Johnson  
Commissioner

D'Arcy Dixon Pignanelli  
Commissioner

Michael J. Cragun  
Commissioner

**Notice and Appeal Rights: Failure to pay the balance due as a result of this decision within thirty (3) days from the date hereon could result in additional penalties.** 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 §63-46b-13 and Utah Admin. Rule R861-1A-29. 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 §§59-1-601 et seq. and 63-46b-13 et. seq.