

11-2012  
INCOME TAX  
TAX YEAR: 2006  
SIGNED: 12-22-2011  
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 1 AND PETITIONER 2,  Petitioner,  vs.  AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,  Respondent.</p>	<p><b>ORDER ON RESPONDENT’S MOTION TO DISMISS</b></p> <p>Appeal No. 11-2012</p> <p>Account No. #####-1 Tax Type: Income Tax Tax Year: 2006</p> <p>Judge: Nielson-Larios</p>
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**Presiding:**  
Aimee Nielson-Larios, Administrative Law Judge

**Appearances:**  
For Petitioner: PETITIONER REP., Representative  
For Respondent: RESPONDENT REP. 1, Auditing Division  
RESPONDENT REP. 2, Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on October 25, 2011 for a Hearing on Respondent’s (“Division”) Motion to Dismiss. The Division based its Motion to Dismiss on the contention that Petitioner’s (“Taxpayer”) Petition for Redetermination was not timely filed.

APPLICABLE LAW

Utah Code Ann. §59-1-501 provides that a taxpayer must file a petition for a redetermination of a deficiency within thirty days of the issuance of a notice of deficiency, as follows in pertinent part:

- (2) A person may file a request for agency action, petitioning the commission for redetermination of a deficiency.
- (3) Subject to Subsections (4) through (6), a person shall file the request for agency action described in Subsection (2):
  - (a) within a 30-day period after the date the commission mails a notice of deficiency to the person in accordance with Section 59-1-1405...

The time for filing an appeal is governed by Rule R861-1A-20 of the Utah Administrative Rules, as follows in pertinent part:

- (2) Except as provided in Subsection (3), a petition for redetermination of a deficiency must be received in the commission offices no later than 30 days from the date of a notice that creates the right to appeal. The petition is deemed to be timely if:
  - (a) in the case of mailed or hand-delivered documents:
    - (i) the petition is received in the commission offices on or before the close of business of the last day of the 30-day period; or
    - (ii) the date of the postmark on the envelope or cover indicates that the request was mailed on or before the last day of the 30-day period; or
  - (b) in the case of electronically-filed documents, the petition is received no later than midnight of the last day of the 30-day period.

The time for filing a petition is governed by Rule R861-1A-22 of the Utah Administrative Rules, as follows in relevant part:

- (1) Time for Petition. Unless otherwise provided by Utah statute, petitions for adjudicative actions shall be filed within the time frames specified in R861-1A-20. If the last day of the 30-day period falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next Tax Commission business day.

#### DISCUSSION

The Division issued a Notice of Deficiency to the Taxpayer on February 9, 2011 based on a non-filing audit. Taxpayer does not contend the notice was sent to the wrong address. The notice explains the appeals procedures, and instructs the Taxpayer that if they disagree with the audit, they must file a petition within 30 days of the date of the notice. The Division maintains that the Taxpayer's Petition for Redetermination was not received by the Commission until May 12, 2011, the date of the postmark. The Division's representative asked the Commission dismiss the Taxpayer's appeal because it was not received within the 30 day time period.

The Taxpayer filed state and federal returns before the hearing on motion, but the Division had not accepted the state return by the time of the hearing because the Division was waiting for the IRS to accept the federal return. The Division said it would continue to work with the Taxpayer outside of the appeals process if the Taxpayer contacted the Division when the Taxpayer learned the IRS has accepted the federal return.

The representative of the Taxpayer explained that she responded to the Notice of Deficiency within a few days of when the Taxpayer brought the notice to her office. The representative was concerned that the Taxpayer's response would not be timely according to the Notice of Deficiency, but the representative sent the response anyway, hoping for leniency. The representative said she wanted to

relieve the Taxpayer of the stress of liens and levies because the Taxpayer would probably not owe tax after the Taxpayer filed the return and the return was accepted.

The thirty-day requirement for filing an appeal is set by statute and is a jurisdictional requirement. The Statutory Notice was issued by the Division on February 9, 2011. The Taxpayer's Petition for Redetermination was received by the Commission on May 12, 2011. This is beyond the 30-day deadline provided in Utah Code Ann. §59-1-501. Utah Administrative Code R861-1A-20 provides that a Petition for redetermination must be received in the commission offices, or postmarked, no later than 30 days from the date of the statutory notice. This language is not discretionary, and the appeal should be dismissed absent extraordinary circumstances that interfered with Taxpayer's due process rights. In general, such extraordinary circumstances involve actions by the Tax Commission that interfered with a taxpayer's due process rights. In this case, there is no evidence that the Taxpayer was not given due process, and the appeal should be dismissed.

However, the Taxpayer may still work with the Division outside of the Appeals Process to have the state return accepted. In particular, the Taxpayer may contact the Auditing Division if the Taxpayer learns the IRS has accepted the federal return.

Lastly, there may be one more remedy available to the Taxpayer although the appeal is dismissed. Utah Code Ann. §59-1-501(7) allows 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. 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. *See* Utah Code Ann. §59-1-1410(9). A taxpayer's claim of refund must still meet the general deadline for all claims of refunds, which is generally two years from the date of payment. *See* Utah Code Ann. §59-1-1410(8)(a)(ii). Taxpayer's Petition for Redetermination was untimely; therefore, this remedy is available to the Taxpayer. Accordingly, if the tax is paid, the Taxpayer may still pursue administrative remedies by filing a claim for refund at any time within two years of that payment.

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Aimee Nielson-Larios  
Administrative Law Judge

ORDER

The thirty-day requirement for filing an appeal is set by statute and is a jurisdictional requirement. Because the Taxpayer did not file a Petition for Redetermination within the thirty days provided by Utah law, the Commission hereby dismisses the Taxpayer's appeal. 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 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. Sec. 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.