

11-2348  
TAX TYPE: INCOME TAX  
TAX YEAR: 2009  
DATE SIGNED: 3-15-2013  
COMMISSIONERS: B. JOHNSON, D. DIXON, M. CRAGUN, R. PERO  
GUIDING DECISION

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BEFORE THE UTAH STATE TAX COMMISSION

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| TAXPAYER-1 AND TAXPAYER-2,<br><br>Petitioners,<br><br>vs.<br><br>TAXPAYER SERVICES DIVISION, OF<br>THE UTAH STATE TAX COMMISSION,<br><br>Respondent. | <b>FINDINGS OF FACT, CONCLUSIONS<br/>OF LAW, AND FINAL DECISION</b><br><br>Appeal No. 11-2348<br><br>Account No. #####<br>Tax Type: Income Tax<br>Tax Year: 2009<br><br>Judge: Phan |
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**Presiding:**

Michael Cragun, Commissioner  
Jane Phan, Administrative Law Judge

**Appearances:**

For Petitioner: TAXPAYER-1, By Telephone  
For Respondent: RESPONDENT-1, Taxpayer Services Division  
RESPONDENT-2, Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on January 3, 2013, in accordance with Utah Code §59-1-501 and §63G-4-201 et seq. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. Petitioners (“Taxpayers”) timely filed an appeal to the Utah State Tax Commission of Respondent’s (“Division’s”) decision to deny waiver of penalties and interest assessed for the late filing and late payment of the Taxpayers’ 2009 Utah Individual Income Tax return. However, at the Formal Hearing, the Taxpayer stated that he was not pursuing the request for waiver of interest, that instead the request was limited to waiver of penalties.

2. The penalties at issue for the 2009 tax year are a 10% late filing penalty in the amount of \$\$\$\$\$, and a 10% late payment penalty in the amount of \$\$\$\$\$, a total of \$\$\$\$\$ in penalties.

3. The Taxpayers filed their 2009 Utah Individual Income Tax Return on February 16, 2011 and paid the tax amount stated on the return at that time, which was \$\$\$\$\$.

4. The Taxpayer testified at the hearing that he had the same tax advisor prepare his returns from 2003 through 2010. His testified that his advisor was a professional certified public accountant which he paid to prepare his tax filings. That this was not a situation where a family member or relation was giving him advice.

5. It was the Taxpayer's contention that there was significant difficulty collecting the information necessary for filing the 2009 return. The Taxpayers had moved out of the country and had difficulty finding records. Additionally there was a dispute with a STATE partner regarding a K-1. When the 2009 return was due on April 15, 2010, the return was not ready. The return was not filed within the extension period either, which would have been until October 15, 2010.

6. The Taxpayer testified that his tax advisor did not tell him he should be making a prepayment or that he could have paid an estimate prior to filing the actual return. He said it was always his understanding that the payment was made with the return when the return was filed. The Taxpayer further testified that he had been late in filing returns in the past. He understood that there would be interest owed when filing late, but he testified that he did not understand there would also be penalties. The Taxpayer provided a copy of an email dated December 29, 2010, to his accountant in which he asked for an update on his 2009 taxes and if the accountant could give him an estimate of how much he owed.

7. The Taxpayer had been late in filing both his 2007 and 2008 Utah individual income taxes. Late payment and late filing penalties had been assessed for both of the years. However, although penalties were assessed on these prior years, the Taxpayers were not notified of these penalties until after a prepayment would have been due for the 2009 tax year. Prepayment estimates should be paid as of the April 15 due date for the return. For the 2007 tax year, the Taxpayers had not filed their return until March 2010. The Division acknowledges that the first billing notice to the Taxpayers assessing the penalties for the 2007 year had been issued September 15, 2010. The penalties assessed for the 2007 year totaled \$\$\$\$\$. The first billing assessing the penalties for the 2008 tax year had been mailed on November 16, 2010. The penalties for 2008 had totaled \$\$\$\$\$.

8. After the Taxpayer had filed his initial waiver request regarding the penalties for 2009, someone in the Division had suggested that he file a waiver request for the 2007 year, as that would have been the first error on his account. The Division testified that prior to 2007 the Taxpayers had been in compliance with filing and paying deadlines. After the Taxpayers filed the waiver request for 2007, the Division did waive the penalties for that year.

9. The Taxpayer testified that he had been involved in a start up business and so had little tax liability for several years, but for the 2009 tax year the liability had increased dramatically. The Taxpayers' Utah Individual Income taxes for the 2007 year had been \$\$\$\$ and for the 2008 year \$\$\$\$\$. However, for 2009 the Taxpayers' Utah Individual Income tax amount was substantially higher, at \$\$\$\$\$. As the penalties are based on the amount of the tax, the 2009 penalties were nearly as much as the tax was for the two prior years combined.

#### APPLICABLE LAW

The Commission may waive penalties under Utah Code Sec. 59-1-401(13) as follows:

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 to provide additional guidance on the waiver of penalties and interest, as follows in pertinent part:

(2) Reasonable Cause for Waiver of Interest. Grounds for waiving interest are more stringent than for penalty. To be granted a waiver of interest, the taxpayer must prove that the commission gave the taxpayer erroneous information or took inappropriate action that contributed to the error.

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

...

(h) Unobtainable Records: For reasons beyond the taxpayer's control, the taxpayer was unable to obtain records to determine the amount of tax due.

(i) Reliance on Competent Tax Advisor: (i) the taxpayer fails to file a return after furnishing all necessary and relevant information to a competent tax advisor, who incorrectly advised the taxpayer that a return was not required. (ii) the taxpayer is required, and has an obligation, to file the return. Reliance on a tax advisor to prepare a return does not automatically constitute reasonable cause for failure to file or pay. The taxpayer must demonstrate that ordinary business care, prudence, and diligence were exercised in determining whether to seek further advice.

...

(4) Other Considerations for Determining Reasonable Cause.

(a) The commission allows for equitable considerations in determining whether reasonable cause exists to waive a penalty. Equitable considerations include:

(i) whether the commission had to take legal means to collect the taxes; (ii) if the error is caught and corrected by the taxpayer; (iii) the length of time between the event

cited and the filing date; (iv) typographical or other written errors; and (v) other factors the commission deems appropriate.

(b) Other clearly supported extraordinary and unanticipated reasons for late filing or payment, which demonstrates reasonable cause and the inability to comply, may justify a waiver of the penalty.

(c) In most cases, ignorance of the law, carelessness, or forgetfulness does not constitute reasonable cause for waiver. Nonetheless, other supporting circumstances may indicate that reasonable cause for waiver exists.

(d) Intentional disregard, evasion, or fraud does not constitute reasonable cause for waiver under any circumstance.

The applicable statutes specifically provide that the taxpayer bears the burden of proof in proceedings before the Tax Commission. Utah Code Sec. 59-1-1417 provides:

In a proceeding before the commission, the burden of proof is on the petitioner. . . .

#### CONCLUSIONS OF LAW

1. The Tax Commission may waive penalties or interest if reasonable cause is shown under Utah Code Sec. 59-1-401(13). What constitutes reasonable cause is set out at Administrative Rule R861-1A-42. The Taxpayers argue that they meet the reasonable cause criteria at Rule 42 (3)(i) because they relied on a competent tax advisor. They point out that their tax advisor was a professional CPA who they had paid to prepare the return. It was the Taxpayers' contention that their CPA should have told them to make a prepayment or an estimated payment otherwise they would be subject to such significant penalties. However, under Rule 42(3)(i) reasonable cause it not necessarily found where the CPA was just late in getting the return prepared. This is not a situation where the CPA told that Taxpayers they did not need to file a return. Under that subsection, reliance on a tax advisor to prepare a return does not automatically constitute reasonable cause for failure to file or pay.

2. The Taxpayer had also testified that it was difficult obtaining the records needed to prepare the 2009 tax year because he had moved out of the country and there was a dispute regarding a K-1. Rule 42 (3)(h) does also have a provision for unobtainable records. However, the Taxpayers' return was not filed until well after the expiration of the extension period, having been filed in February 16, 2011 and the account history was that the Taxpayer had filed late for three years in a row.

3. The Taxpayer's primary argument at the hearing was that he was unaware that he should have paid an estimate in order to avoid the late payment penalty. Rule 42(4)(c) provides that in most cases ignorance of the law does not constitute reasonable cause for waiver. However, that Subsection 42(4) also allows the Commission to make equitable considerations. In this case the Taxpayer had filed late for the two prior years, but was not assessed penalties for either of

those prior years until after a prepayment for 2009 was required and a penalty for that year would have already been incurred. Additionally, the Taxpayers' 2009 tax liability was so much higher than the previous years' that the penalty was substantial, almost as much as the actual tax liability for the two prior years combined. Considering a combination of all the factors noted, it would be appropriate to reduce the total penalties for the 2009 tax year by half. The law requires that taxpayers file returns and pay taxes by the deadlines set. Failure to comply generally results in penalties and interest. Penalties serve to get taxpayers' attention and help insure compliance. However, in this case penalties totaling \$\$\$\$ would appear to be sufficient to do so and reasonable under the circumstances.

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Jane Phan  
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission reduces the late payment and late filing penalties assessed for the 2009 tax year each by half, so that the total amount in penalties for late payment and late filing is \$\$\$\$\$. It is so ordered.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

R. Bruce Johnson  
Commission Chair

D'Arcy Dixon Pignanelli  
Commissioner

Michael J. Cragun  
Commissioner

Robert P. Pero  
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.

