

11-2671
INCOME
TAX YEAR: 2006
SIGNED: 04-24-2013
COMMISSIONERS: R. JOHNSON, D. DIXON, M. CRAGUN
EXCUSED: R. PERO

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,

Petitioner,

v.

AUDITING DIVISION OF THE UTAH
STATE TAX COMMISSION,

Respondent.

INITIAL HEARING ORDER

Appeal No. 11-2671

Account No. #####

Tax Type: Income Tax

Tax Year: 2006

Judge: Phan

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER, By Telephone

For Respondent: RESPONDENT REP., Manager, Income Tax Auditing

STATEMENT OF THE CASE

This matter came before the Commission for an Initial Hearing pursuant to the provisions of Utah Code 59-1-502.5 on January 16, 2013. Petitioner (the Taxpayer”) is appealing penalties and interest issued with an income tax audit for tax year 2006. The statutory Notice of Deficiency and Estimated Income Tax had been issued on August 30, 2011. The Taxpayer is now in agreement with the tax amount indicated in the audit, but requests that the penalties and interest be waived. The penalties are 10% failure to file and 10% failure to pay penalties totaling \$\$\$\$\$. Interest as of the date of the notice was \$\$\$\$\$.

APPLICABLE LAW

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 under provisions a Utah Code Sec. 59-1-401(2).

An additional penalty for failure to pay tax due may be assessed under the provisions at are set out at Utah Code Sec. 59-1-401(3). This may be a graduated penalty based on the period of time between the due date and payment of the tax, but could be as high as 10% of the unpaid tax.

Interest on any underpayment, deficiency, or delinquency of any tax or fee administered by the commission shall be computed from the time the original return is due, excluding any filing or payment extensions, to the date the payment is received. (Utah Code Sec. 59-1-402 (6).)

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. (Utah Code Sec. 59-1-401(13).)

A person may file a request for agency action, petitioning the commission for redetermination of a deficiency. (Utah Code Sec. 59-1-501(2).)

“Deficiency” means: (a) the amount by which a tax, fee, or charge exceeds the difference between (i) the sum of: (A) the amount shown as the tax, fee or charge by a person on the person’s return; and (B) any amount previously assessed, or collected without assessment, as a deficiency; and (ii) any amount previously abated, credited refunded or otherwise repaid with respect to that tax, fee, or charge; or (b) if a person does not show an amount as a tax, fee, or charge on the person’s return, or if a person does not make a return, the amount by which the tax, fee, or charge exceeds: (i) the amount previously assessed, or collected without assessment, as a deficiency; and (ii) any amount previously abated, credited, refunded or otherwise repaid with respect to that tax, fee or charge. (Utah Code Sec. 59-1-1402(3).)

“Liability” means the following that a person is required to remit to the commission: (a) tax, fee, or charge; . . . or (e) a penalty that accrues in accordance with Sections 59-1-401. (Utah Code Sec. 59-1-1402(5).)

The action of the commission on the taxpayer’s petition for redetermination of deficiency shall be final 30 days after the date the commission’s notice of agency action is sent. All tax, interest, and penalties are due 30 days from the date the commission’s decision or order is sent, unless the taxpayer seeks judicial review. (Utah Code Sec. 59-1-504.)

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:

- (1) Procedure.
 - (a) A taxpayer may request a waiver of penalties or interest for reasonable cause under Section 59-1-401 if the following conditions are met:
 - (i) the taxpayer provides a signed statement, with appropriate supporting documentation, requesting a waiver; (ii) the total tax owed for the period has been paid; (iii) the tax liability is based on a return the taxpayer filed with the commission, and not on an estimate provided by the taxpayer or the commission . . .
- (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:
- (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...

DISCUSSION

The Taxpayer indicated that she no longer contested the amount of the tax, but she asked for waiver of the penalties and interest based on reasonable cause. In this matter the Taxpayer has not filed a Utah return for 2006 and it would take some additional work on her part to get the information together and get the return filed. She stated the reason the return for 2006 had not been filed was that she was coping with emotional issues from the death of her child at the end of 2005. She had given her mother her tax information and money to pay the taxes, but her mother had not done so. She did indicate that her mother had prepared returns for her and helped with bookkeeping tasks previously. The Taxpayer also indicates that she is currently in a financial hardship situation.

The Division acknowledged that the Taxpayer was a first time filer in Utah for 2006 and had filed subsequent returns timely. The Division did not argue there was not reasonable cause for waiver of penalties under the reasons listed at Utah Admin. Rule R861-1A-42(3), but instead argued that the penalties could not be waived unless the Taxpayer filed a return under the procedures listed at Subsection 42(1). The Division also argued that the return would need to be filed before interest could be considered for waiver as well, but noted that there was no basis for waiver of interest even if that occurred. The Division pointed to subsection 42(2), which provides that interest is waived if there is a showing of Tax Commission error. The Division did not see a showing of such error.

From the information presented by the parties in this matter there is reasonable cause for waiver of the penalties. As noted by the Division, Utah Admin. Rule R861-1A-42(1) does have a procedural requirement that the taxpayer file a return before a taxpayer may request of waiver of penalties. It also has a requirement that the taxpayer must have paid the tax due for this period. This rule enacted the procedure already in place at the time for a waiver request processed through the Waiver Unit of the Taxpayer Services Division. The Waiver Unit considers only penalties and interest and does not review audit deficiencies. Typical filings to the Waiver Unit occur when a taxpayer is several months late in filing a return and paying the taxes. The tax amount is set based on the return filed, not on an audit. Other penalties may occur when a taxpayer files a return timely but does not pay the tax indicated on the return until later. These actions often result in an assessment of penalties and interest, but not an audit of the tax amount.

However, this appeal is not a Waiver Unit appeal because it is the result of an audit deficiency that was timely appealed by the Taxpayer. Tax, penalties and interest were included in the audit. The Commission has consistently held that when a taxpayer files an appeal of an audit they may contest all amounts in the audit including penalties and interest. Under Utah Code 59-1-501(2) taxpayers have the right to appeal an audit deficiency and are not required to pay the tax or file a return prior to doing so. In fact, if an appeal is filed under that provision, the amount of the audit, tax and penalties do not become an assessment due and payable until thirty-days after the Commission issues its decision. See Utah Code Sec. 59-1-503 and 59-1-504. The Commission does understand why the Division has determined from a reading of Utah Admin. R861-1A-42(1) that a return must be filed and that technically a penalty although part of the “liability” is not part of the “deficiency” under Utah Code 59-1-1402. However, if Rule 42(1) were to be applied in the manner requested by the Division both a return would have to be filed and the tax portion paid before a taxpayer could contest penalties and interest in an audit appeal and this is inconsistent with Utah Code 59-1-503 and 59-1-504.

Therefore, the Commission considers that the procedural limitations set out at Utah Admin. R861-1A-42(1) apply to penalty and interest appeals through the Taxpayer Services Division, Waiver Unit, and not to those that are appealed with a timely filed audit deficiency appeal. The Commission will apply the same standards for reasonable cause set out in subsections (2) through (4) of Rule 42 in determining if there is cause for waiver of penalties and interests in either situation.

The Taxpayer has provided reasonable cause for waiver of penalties due both to the first time filing in Utah and death of family member. There was not a showing that would provide the basis for waiver of interest.

Appeal No. 11-2671

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based upon the foregoing, the Commission finds that sufficient cause has been shown to justify a waiver of the penalties assessed for tax year 2006. The audit tax and interest for the 2006 year is upheld. 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 _____, 2013.

R. Bruce Johnson
Commission Chair

D'Arcy Dixon Pignanelli
Commissioner

Michael Cragun
Commissioner

Robert P. Pero
Commissioner

NOTICE: Failure to pay the balance due as a result of this order within thirty days from the date hereon may result in an additional penalty. Petitioners may contact the Taxpayer Services Division about setting up a payment plan, at (801) 297-7703.