

11-3055 & 12-2373
TAX TYPE: CORPORATE FRANCHISE TAX
TAX YEAR: 2006
DATE SIGNED: 8-14-2014
COMMISSIONERS: B. JOHNSON, M. CRAGUN, R. PERO
EXCUSED: D. DIXON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYER,</p> <p style="padding-left: 40px;">Petitioner,</p> <p>vs.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="padding-left: 40px;">Respondent.</p>	<p>ORDER DENYING REFUND CLAIM</p> <p>Appeal Nos. 11-3055/12-2373</p> <p>Account No. #####</p> <p>Tax Type: Corporate Franchise Tax</p> <p>Audit Period: Jan. 1, 2006 – Dec. 31, 2006</p> <p>Judge: Phan</p>
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Presiding:

Bruce Johnson, Commission Chair
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE-1 FOR TAXPAYER, Representative
REPRESENTATIVE-2 FOR TAXPAYER, Representative
REPRESENTATIVE-3 FOR TAXPAYER, Representative

For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General
RESPONDENT-1, Manager, Corporate Franchise Tax Auditing
RESPONDENT-2, Assistant Director Auditing
RESPONDENT-3, Auditor

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on April 22, 2014 for a Hearing on Statute of Limitations Pertaining to Refund Claim. It was Respondent's ("Division's") position that the amended return in which a refund was requested for the 2006 calendar year was not timely filed by Petitioner ("Taxpayer") within the applicable limitations period and that the Taxpayer Services Division had correctly denied the claim. The Division had filed a Prehearing Brief outlining its position on February 7, 2014. The Taxpayer submitted its Response to Prehearing Brief on March 10, 2014 and the Division its Reply Brief on March 31, 2014. After consideration of the facts and legal argument

presented by the parties in the prehearing briefs and at the hearing, the Tax Commission issues its decision in this matter.

FINDINGS OF FACT

The facts relating to this Division's request were not substantially in dispute and were presented by the parties¹ as follows:

1. The Taxpayer's original Utah Corporate Franchise or Income Tax return for the year ending December 31, 2006 (Return) was timely filed with the Tax Commission on September 26, 2007.

2. In March 2010 the Taxpayer and the Internal Revenue Service (IRS) signed a Consent to Extend the Time to Assess Tax, Federal Form 872, allowing the Taxpayer's federal income tax for the year ending December 31, 2006 to be assessed by the IRS on or before September 30, 2012.

3. On April 4, 2011, the Taxpayer filed an amended 2006 Utah return that claimed a Utah tax refund of \$\$\$\$ based on the re-characterization of previously reported business income to non-business income, which then changed the Utah apportionment fraction and resulted in a claimed overpayment of Utah tax for the 2006 year.

4. On October 13, 2011, the Taxpayer Services Division issued a Notice of Expired Refund or Credit stating that the time to claim a refund or credit for Corporate Tax for the tax period ending December 31, 2006 has expired.

5. On November 11, 2011, the Taxpayer timely filed a Petition for Redetermination to appeal the Notice of Expired refund. This appeal, Appeal 11-3055, is the matter before the Tax Commission in this proceeding. It was the Taxpayer's argument in the Petition that Utah Code Sec. 59-7-522(2) allows for the statute of limitations for the 2006 tax year to be held open until the expiration of the 2006 federal waiver.

6. On December 22, 2011, the Division issued an Answer to Petition for Redetermination and Notice agreeing with the Taxpayer that the statute of limitations for the 2006 tax year was still open under Utah Code Sec. 59-7-522(2).

7. The Division originally accepted the amended return as timely filed but issued a Statutory Notice on August 22, 2012, in which it recalculated the non-business income as business income, and assessed an additional amount in tax. The Taxpayer timely filed a Petition for Redetermination to appeal this Statutory Notice of additional tax. This became Appeal No. 12-2373.

¹ The Facts listed herein are taken nearly verbatim from the prehearing briefs filed by the parties. The Division's Prehearing Brief, pages 1-2, and the Petitioner's Response to Prehearing Brief, pages 1-2.

8. After a Telephonic Status Conference on November 29, 2012, based on the agreement of the parties, Appeals 11-3055 and 12-2373 were consolidated by order dated December 3, 2012.

9. On November 27, 2013, the Division filed an Amended Answer in which it stated that the 2006 amended return was not timely filed, thereby denying the refund due to the three year statute of limitations set forth in Utah Code Sec. 59-1-1410(8).

10. There was no written agreement in place between the Taxpayer and the Division or the Tax Commission to hold open the period for the Taxpayer to file an amended return beyond the statutorily allowed three year period.

APPLICABLE LAW

The time limit for making a claim for refund is set forth in Utah Code §59-1-1410, below in pertinent part:

- (8) (a) Except as provided in Subsection (8)(b) or Section 19-2-124, 59-7-522, 59-10-529, or 59-12-110, the commission may not make a credit or refund unless a person files a
 - claim with the commission within the later of:
 - (i) three years from the due date of the return, including the period of any extension of time provided in statute for filing the return; or
 - (ii) two years from the date the tax was paid.
 - (b) The commission shall extend the time period for a person to file a claim under Subsection (8)(a) if:
 - (i) the time period described in Subsection (8)(a) has not expired; and
 - (ii) the commission and the person sign a written agreement:
 - (A) authorizing the extension; and
 - (B) providing for the length of the extension.

Utah Code §59-1-1417, provides:

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 . . .

DISCUSSION

It was the Division's position that the Taxpayer's refund request was not related to a change or correction of federal taxable income by the IRS, but instead was based on a proposed change to its Utah taxable income and apportionment fraction as a result of reclassifying previously reported business income to non-business income. The fact that the requested refund was a result of this reclassification by the Taxpayer was not in dispute. It was the Division's argument then, that although Utah Codes Sec. 59-

7-522 and 59-7-519² were applicable as far as the Division's audit, these provisions were not applicable to the Taxpayer's refund claim. The Division argued that based on a plain reading of these statutes and when read in harmony with Utah Code Sec. 59-1-1410, it would be the limitations provisions at Sec. 59-1-1410 that apply to the refund claim.

Utah Code Sec. 59-1-1410(8) does specifically note an exception "as provided in . . . Sec. 59-7-222. . ." However, the Division points out the exception provided in Utah Code Section 59-7-222 is only when the claimed overpayment relates to a change in federal taxable income, which are not the facts of this case. It was the Division's position that the applicable limitation provision for the refund was Utah Code Sec. 59-1-1410(8) which provides only three years from the due date of the return or two years from the date the tax was paid. It was clear in this case that following the provisions of Utah Code Sec. 59-1-1410(8) the amended return was beyond the deadline for filing a claim for refund.

The Taxpayer did not necessarily dispute the Division's current interpretation that Utah Code Sec. 59-1-1410(8) would have been the correct limitation period to apply, but instead argues that the Division has both explicitly and implicitly waived the statute of limitations defense in this proceeding.³ The Taxpayer points out that the Division had originally issued its answer on December 22, 2011, in which it agreed with the Taxpayer that the statute of limitations was still open for the refund. The Taxpayer notes that there has been almost two years of responding to numerous information requests from the Division and several telephone status conferences before the Division issued its amended answer asserting the expired statute of limitations on November 27, 2013. The Taxpayer concludes, "Taken together, these actions are wholly inconsistent with any intention on the part of Respondent to object to the timeliness of Petitioner's amended return." It was the Taxpayer's contention that the Division, "has clearly waived its right to object to the timeliness of Petitioner's 2006 amended return."⁴

2 Utah Code Sec. 59-7-522(2)(2011) states, "If an overpayment relates to a change in or correction of federal taxable income described in Section 59-7-519, a credit may be allowed or a refund paid any time before the expiration of the period within which a deficiency may be assessed."

Utah Code Sec. 59-7-519(6)(2011) provides, "If any corporation agrees with the commissioner of internal revenue for an extension, or a renewal of an extension, of the period for proposing and assessing deficiencies in federal income tax for any year, the period for sending a notice of proposed Utah tax deficiencies for that year is the later of: (a) three years after the return is filed; or (b) six months after the date of the expiration of the agreed period for assessing deficiencies in federal income tax."

3 The Taxpayer cites to *Hurley v. Town of Bingham*, 63 Utah 589, 228 P. 213 (Utah 1924) and *ASC v. Wolf Mountain*, 2010 Utah 65, 245 P. 3d 184 (Utah 2010). Neither case involved the statutes at issue in this matter or even a refund limitation statute. In *Hurley* the issue was a statute of limitations for a negligence claim and the court upheld the dismissal of the negligence claim where the statute of limitations had run. In *ASC* the court dealt with the issue of waiving a contractual right to arbitration.

4 Petitioner's Response to Prehearing Brief, pg. 2.

The Division counters that it cannot waive the statute of limitations to create jurisdiction after the time prescribed by statute has run. The Division points out that although the State Tax Commission was established by Article XIII Sec. 6 of the Utah Constitution, the Commission's "power and scope . . . is left to the Legislature to define." The Division cites *Blaine Hudson Printing v Utah State Tax Commission*, 870 P.2d 291, 294 (Utah App. 1994).⁵ It is the Division's position that limitations periods for tax refunds and jurisdictional requirements⁶ and that subject matter jurisdictional requirements cannot be expanded by waiver or consent.⁷ The Division also points out that courts have found that jurisdictional issues may be raised at any time, citing *Kennecott Corp. v. Utah State Tax Comm'n*, 814 P.2d 1099 (Utah 1991).

Upon review of the facts and the arguments of the parties, the Commission concludes with the Division that the appropriate statute of limitations in this matter is set out at Utah Code Sec. 59-1-1410(8) and the Taxpayer's amended return requesting the refund was not filed within its time limits. Furthermore, the statute does not provide the Commission discretion to allow a refund or credit after this period for good cause and the Commission has been consistent in its application of the statute.⁸ In addition, the Taxpayer cannot argue reliance on the Division's original December 22, 2011 Answer as the reason its refund claim was filed after the statute of limitations had expired. In this case for the refund claim to have been timely, it should have been filed long before the Division ever issued its original answer of December 22, 2011. At the time the Division's answer was issued, the refund claim was already late. The fact that the Division did not immediately request the refund claim be denied due to failure to timely file, did cause the matter to proceed through discovery and several Telephone Status Conferences, of course some of that work on the part of the Taxpayer also applies to the audit appeal that has been combined in this matter and is not affected by this decision.

Based on the failure to meet the statutory requirements set out at Utah Code Sec. 59-1-1410 for claiming a refund, the Taxpayer Services Division's denial of the refund request was proper and should be sustained. Appeal No. 11-3055/12-2373 will remain open regarding the audit appeal timely filed by the Taxpayer in response to the Statutory Notice issued by the Division on August 22, 2012.

⁵ In *Blaine Hudson* a taxpayer had requested that the Tax Commission hear its refund appeal from a County Commission, even though no statute authorized the action. In that case the court found that absent a specific statutory grant, the Tax Commission did not have subject matter jurisdiction.

⁶ The Division cites to *In re Graham*, 981 F.2d 1135, (10th Cir. 1992); and *U.S. v. Dalm*, 494 U.S. 596 (1990).

⁷ Citing *Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569 (Utah App. 1989).

⁸ See *Utah State Tax Commission Decisions in Appeal Nos. 11-115, 09-0037, 09-1601 and 05-1414*. These and other decisions issued by the Tax Commission are available to the parties in a redacted format at tax.utah.gov/commission-office/decisions.

Jane Phan
Administrative Law Judge

ORDER

Based on the foregoing, the Taxpayer's refund request is dismissed from this appeal. This matter will proceed forward regarding the audit appeal. It is so ordered.

DATED this _____ day of _____, 2014.

R. Bruce Johnson
Commission Chair

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Notice of Appeal Rights and Payment Requirement: Any balance due as a result of this order must be paid within thirty (30) days of the date of this order, or a late payment penalty could be applied. If you disagree with this order you have twenty (20) days after the date of this order to file a Request for Reconsideration with the Commission in accordance with Utah Code Ann. §63G-4-302. 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.