

12-1882  
TAX TYPE: PENALTY- TRANSIENT ROOM TAX  
TAX YEAR: 2011  
DATE SIGNED: 2-8-2013  
COMMISSIONERS: B. JOHNSON, D. DIXON, M. CRAGUN

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BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER,  Petitioner,  v.  TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION,  Respondent.	<b>INITIAL HEARING ORDER</b>  Appeal No. 12-1882  Account No. ##### Tax Type: Penalty - Transient Room Tax Tax Period: March 2011  Judge: Chapman
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**Presiding:**  
Kerry R. Chapman, Administrative Law Judge

**Appearing:**  
For Petitioner: REPRESENTATIVE FOR PETITIONER, Representative  
For Respondent: RESPONDENT-1, from Taxpayer Services Division  
RESPONDENT-2, from Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on January 17, 2013 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5.

TAXPAYER (“Petitioner” or “taxpayer”) requested a waiver of the penalties that it incurred on its transient room tax account for the March 2011 period. On May 15, 2012, the Taxpayer Services Division (the “Division”) issued a Waiver Decision in which it denied the taxpayer’s waiver request concerning the transient room tax penalties. For the March 2011 period, the transient room tax penalties at issue consist of a late filing penalty of \$\$\$\$ and a late payment penalty of \$\$\$\$.

The taxpayer asks the Commission to waive the transient room tax penalties at issue for two reasons. First, the taxpayer asks the Commission to consider that on March 9, 2011, it changed controllers, which led to its March 2011 transient room tax return being filed and paid late. The Division points out, however, that the March 2011 transient room tax return and payment was due on May 2, 2011

and that the taxpayer's February 2011 transient room tax return and payment were timely filed and paid on March 31, 2011. As a result, the taxpayer demonstrated the ability to file and pay its transient room taxes several weeks after the controller left. For these reasons, the Division does not believe that the change in controllers was a circumstance that qualifies as "reasonable cause" to waive the transient room tax penalties associated with the March 2011 period.

Second, the taxpayer points out that at the same time it submitted its request for a waiver of transient room penalties, it also submitted a request for a waiver of sales and use tax penalties for the same March 2011 period. The Division waived the sales and use tax penalties in a separate Waiver Decision that is also dated May 15, 2012. The taxpayer contends that it is inconsistent for the Commission to waive the sales and use tax penalties, but not the transient room tax penalties.

The Division explains that it considers each account separately when determining whether to waive penalties. The Division also explains that for each account, it will look back three years to determine whether the taxpayer's compliance history is good enough to warrant a waiver of penalties. If the account does not have more than two periods within the past three years for which returns were filed late or payments were made late, the Division states that it will waive the penalties for that account on the basis of a good compliance history.

As to the taxpayer's sales and use tax account, there were two or fewer periods in the three years prior to March 2011 for which the taxpayer's sales and use tax return had been filed late or that its sales and use taxes had been paid late. As a result, the Division waived the sales and use tax penalties for compliance history. As to the taxpayer's transient room tax account, however, the Division found that there had been four periods in the three years prior to March 2011 for which the taxpayer had either filed late or paid late, specifically the periods July 2008, August 2008, September 2008, and May 2009. As a result, the Division did not waive the transient room tax penalties for compliance history. For these reasons, the Division asks the Commission to sustain its denial of the taxpayer's waiver request for the transient room tax penalties.

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 Utah Admin. Rule R861-1A-42 (“Rule 42”) to provide additional guidance on the waiver of penalties and interest, as follows in pertinent part:

....

(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
    - (i) The commission will consider the taxpayer's recent history for payment, filing, and delinquencies in determining whether a penalty may be waived.
    - (ii) The commission will also consider whether other tax returns or reports are overdue at the time the waiver is requested.
  - (m) Employee Embezzlement...
  - (n) Recent Tax Law Change...
- (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 demonstrate 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.

Utah Code Ann. §59-1-1417 provides, “[i]n a proceeding before the commission, the burden of proof is on the petitioner. . . .”

#### DISCUSSION

Section 59-1-401(13) authorizes the Commission to waive penalties upon a showing of reasonable cause. The Commission has promulgated Rule 42 and USTC Publication 17 to outline the circumstances the Commission may consider “reasonable cause” to justify a waiver of penalties.

“Reasonable cause” can be shown by the specific circumstance listed in Rule 42(3) or by other circumstances as described in Rule 42(4). In this case, the taxpayer contends that the penalties should be waived because its prior controller left on March 9, 2011, which resulted in its March 2011 transient room tax returns and sales and use tax returns being filed late. Almost two months passed between the controller’s leaving and the May 2, 2011 date on which the March 2011 returns were due. In addition, the taxpayer was able to timely file its February 2011 returns three weeks after the controller left. These circumstances are insufficient to constitute “reasonable cause” to waive penalties under Rule 42(3) or Rule 42(4).

Although these *specific* circumstances do not constitute “reasonable cause” to waive penalties, Rule 42(3)(1) provides that the commission will also consider the taxpayer's compliance history when determining whether “reasonable cause” exists to waive a penalty. The Commission’s general policy is to waive penalties for a period if the specific account at issue does not have more than two periods within the past three years in which returns were filed late or payments were made late. In this case, the taxpayer’s transient room tax account shows four periods within the three years prior to March 2011 in which returns were filed late or payments were made late. Accordingly, “reasonable cause” does not exist to waive the taxpayer’s March 2011 transient room tax penalties because of compliance history.

The Commission does not find it inconsistent that the Division waived the taxpayer’s sales and use tax penalties for the same period because the taxpayer’s compliance history concerning its sales and use tax account was better than its compliance history for its transient room tax account. For these

reasons, the taxpayer's request for a waiver of transient room tax penalties for the March 2011 period should be denied.

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Kerry R. Chapman  
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division's action to deny the taxpayer's request for a waiver of transient room tax penalties for the March 2011 period. 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 J. Cragun  
Commissioner