

12-1909

TAX TYPE: PENALTY and INTEREST

TAX YEAR: 2008 and 2011

DATE SIGNED: 2-8-2013

COMMISSIONERS: B. JOHNSON, D. DIXON, M. CRAGUN

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BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER,  Petitioner,  v.  TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION,  Respondent.	<b>INITIAL HEARING ORDER</b>  Appeal No. 12-1909  Account No. ##### Tax Type: Penalties - Sales and Use Tax Tax Periods: 4 <sup>th</sup> Quarter 2008, 2 <sup>nd</sup> Quarter 2011 & 3 <sup>rd</sup> Quarter 2011  Judge: Chapman
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**Presiding:**

Kerry R. Chapman, Administrative Law Judge

**Appearing:**

For Petitioner: TAXPAYER-1, Taxpayer

TAXPAYER-2, Taxpayer

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.

PETITIONER requested a waiver of the penalties that it incurred on its sales and use tax account for three periods, specifically the 4<sup>th</sup> quarter of 2008, the 2<sup>nd</sup> quarter of 2011, and the 3<sup>rd</sup> quarter of 2011. On May 22, 2012, the Taxpayer Services Division (the "Division") issued a Waiver Decision in which it denied the penalty waiver request for all three quarters at issue.

The penalties at issue total \$\$\$\$\$ and consist of: 1) \$\$\$\$\$ of late filing and late payment penalties for the 4<sup>th</sup> quarter of 2008; 2) \$\$\$\$\$ of late filing and late payment penalties for the 2<sup>nd</sup> quarter of 2011; and 3) \$\$\$\$\$ of late filing and late payment penalties for the 3<sup>rd</sup> quarter of 2011.

TAXPAYER-1 and TAXPAYER-2 ask the Commission to waive the penalties at issue for several reasons. First, they explain that they have been in business since 1994 and that their business was

good until around 2005, when they began to experience a decline in business and when many of their customers stopped paying their accounts on time. Second, they explain that cash flow problems prevented them from timely filing and paying its taxes after the downturn, in part, because they are required to remit taxes before many of their customers pay their bills. As a result, they have to pay the sales taxes before their customers have remitted the taxes to them.

Third, the taxpayers explained that they have worked with Division personnel for a number of years in regards to their delinquent account and to enter into payment agreements. They stated that they were astonished to learn in November 2011 that for past periods when they did not have the funds to pay their sales and use taxes, they could have still filed the returns on time and avoided late filing penalties. They had thought until this time that they could not file returns unless the return was accompanied by the payment shown due on the return. They assert that they could have avoided a majority of the \$\$\$\$ in penalties they have incurred since the economic downturn if they had known they could file returns without payments.

Fourth, they ask the Commission to consider that they have been trying to comply with the duties associated with their sales and use tax license. They state that they have used their retirement savings to make sure that they have filed and paid the sales and use taxes on time since November 2011 and to make \$\$\$\$ monthly payments on their past delinquency in compliance with a payment agreement with the Division. They state and the Division confirms that they finally got all taxes caught up in May of 2012, at which time they could ask for a waiver of penalties. For these reasons, the taxpayers ask the Commission to waive the penalties they paid for the three quarters at issue.

The Division states that the only “reasonable cause” that applies to a waiver of penalties under the taxpayers’ circumstances would be the “compliance history” section of the Tax Commission’s waiver rule. Utah Admin. Rule 42(3)(1) (“Rule 42”). The Division explained that for each period at issue, it will look back three years to determine whether a taxpayer’s compliance history is good enough to warrant a waiver of that period’s penalties. If, within the past three years of a period at issue, the account does not

have more than two periods for which returns were filed late or payments were made late, the Division states that it will waive the penalties for that period on the basis of a good compliance history.

The Division explained that when this policy is applied to each of the three periods at issue in this appeal, the taxpayers do not have a good compliance history for any of the periods. For the 4<sup>th</sup> quarter of 2008, the Division showed that there were 12 quarters in the prior three years in which the taxpayers had filed and/or paid late. For the 2<sup>nd</sup> quarter of 2011, the Division showed that there were 5 quarters in the prior three years in which the taxpayers had filed and/or paid late. For the 3<sup>rd</sup> quarter of 2011, the Division showed that there were also 5 quarters in the prior three years in which the taxpayers had filed and/or paid late. Because none of the periods at issue satisfied the Division's three-year "look back" policy, it determined that "reasonable cause" for compliance history did not exist. The Division claims that "reasonable cause" does not exist to waive the taxes at issue under any section of Rule 42 and asks the Commission to sustain its denial for all three periods at issue.

The Division did not explain how the "fresh start" program might apply to these taxpayers, but stated that it would be willing to talk to the taxpayers after the hearing to see if there were other periods for which they might qualify for waiver.

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

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(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:
  - (i) Underpayments and late filings or payments were attributable to incorrect advice obtained from the commission, unless the taxpayer gave the commission inaccurate or insufficient information.
  - (ii) Proof of erroneous information may be based on written communication provided by the commission or, if the taxpayer clearly documents, verbal communication. Clear documentation of verbal communication should include the dates, times, and names of commission employees who provided the erroneous information.
  - (iii) A failure to comply will also be excused if it is demonstrated that the taxpayer requested the necessary tax forms and instructions timely, and the commission failed to timely provide the forms and instructions requested.
- (g) Tax Commission Office Visit: The taxpayer proves that before expiration of the time for filing the return or making the payment, the taxpayer visited a commission office for information or help in preparing the return and a commission employee was not available for consultation.
- (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 that 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). The taxpayers explain that their customers often do not pay their bills by the time the taxpayers have to submit the sales and use tax that they owe. Businesses with a sales tax license are expected to meet their sales and use tax obligations in a timely manner even in times of economic downturn and even if their customers are late in paying their bills. These circumstances are ones that are experienced by numerous businesses and do not constitute “reasonable cause” to waive penalties.

The taxpayers mention that prior to November 2011, they had a number of conversations and meetings with Tax Commission personnel and were never told that they could file their returns prior to remitting the sales and use tax shown due on the returns. They state that a Division employee told them in November 2011 that they could have at least avoided the late filing penalties they had incurred if they had filed their returns on time. Rule 42(3)(f) provides that penalties can be waived if a taxpayer shows that he or she received erroneous information from the Tax Commission. There is no evidence to suggest that a Tax Commission employee gave the taxpayers erroneous advice for any period at issue. The taxpayers suggest that Tax Commission employees did not disclose information that could have benefitted them. However, they could not recall any specific conversations and whether discussions of penalties and how they arise were ever discussed. For these reasons, there is no evidence of Tax Commission error or wrongdoing. Accordingly, “reasonable cause” to waive penalties does not exist under Rule 42(3)(f).

Although these *specific* circumstances do not constitute “reasonable cause” to waive penalties, Rule 42(3)(l) 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 at issue if there are no more than two periods within the past three years for which returns were filed late or payments were made late. In this case, there are at least five periods within three years of each period at issue in which the taxpayers filed and/or paid late. As a result, the Tax Commission does not consider the taxpayers' compliance history to be good enough to warrant a waiver of penalties for any of the three periods for which they have requested a waiver.

“Reasonable cause” does not exist to waive the taxpayers' tax penalties under any section of Rule 42. Accordingly, the taxpayer's penalty waiver request should be denied for all three periods at issue.

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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 taxpayers' penalty waiver request for the 4<sup>th</sup> quarter of 2008, the 2<sup>nd</sup> quarter of 2011, and the 3<sup>rd</sup> quarter of 2011. 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

