

12-2460
TAX TYPE: INCOME TAX
TAX YEAR: 2009
DATE SIGNED 4-11-2013
COMMISSIONERS: D. DIXON, M. CRAGUN, R. PERO
EXCUSED: B. JOHNSON

BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYER,</p> <p style="text-align: center;">Petitioner,</p> <p>vs.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="text-align: center;">Respondent.</p>	<p>ORDER ON RESPONDENT’S MOTION TO DISMISS</p> <p>Appeal No. 12-2460</p> <p>Account No. #####</p> <p>Tax Type: Income Tax</p> <p>Tax Year: 2009</p> <p>Judge: Nielson-Larios</p>
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Presiding:

Aimee Nielson-Larios, Administrative Law Judge

Appearances:

For Petitioner: TAXPAYER, in person
For Respondent: RESPONDENT, Auditing Division, in person

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on March 7, 2013 for a Hearing on Respondent’s (“Division”) Motion to Dismiss. The Division based its Motion to Dismiss on the contention that Petitioner’s (“Taxpayer”) Petition for Redetermination was not timely filed.

APPLICABLE LAW

Utah Code Ann. § 59-1-1405(1) states in part:

[T]he commission shall mail a notice of deficiency to a person in accordance with Section 59-1-1404 if the commission finds there is:

- (a) a deficiency in a tax, fee, or charge imposed; or
- (b) an increase or decrease in a deficiency.

Utah Code Ann. § 59-1-1404(4)-(5) states:

- (4) . . . if the commission is required to mail a notice to a person under this part, the commission shall mail the notice to the person at the person's last-known address as shown on the records of the commission.

Utah Code Ann. § 59-1-501 provides that a taxpayer must file a petition for a redetermination of a deficiency within thirty days of the issuance of a notice of deficiency, as follows in pertinent part:

- (2) A person may file a request for agency action, petitioning the commission for redetermination of a deficiency.
- (3) Subject to Subsections (4) through (6), a person shall file the request for agency action described in Subsection (2):
 - (a) within a 30-day period after the date the commission mails a notice of deficiency to the person in accordance with Section 59-1-1405...

The time for filing an appeal is governed by Rule R861-1A-20 of the Utah Administrative Rules, as follows in pertinent part:

- (2) Except as provided in Subsection (3), a petition for redetermination of a deficiency must be received in the commission offices no later than 30 days from the date of a notice that creates the right to appeal. The petition is deemed to be timely if:
 - (a) in the case of mailed or hand-delivered documents:
 - (i) the petition is received in the commission offices on or before the close of business of the last day of the 30-day period; or
 - (ii) the date of the postmark on the envelope or cover indicates that the request was mailed on or before the last day of the 30-day period; or
 - (b) in the case of electronically-filed documents, the petition is received no later than midnight of the last day of the 30-day period.

The time for filing a petition is governed by Rule R861-1A-22 of the Utah Administrative Rules, as follows in relevant part:

- A. Time for Petition. Unless otherwise provided by Utah statute, petitions for adjudicative actions shall be filed within the time frames specified in R861-1A-20. If the last day of the 30-day period falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next Tax Commission business day.

The Utah Service Members' Civil Relief Act is found in Utah Code Ann. §§ 39-7-101 to 39-7-119. Utah Code Ann. § 39-7-102(3) defines military service as follows:

“Military service” means active, full-time service with a recognized military unit called into service by the governor **for at least 30 days**.

(Emphasis added.)

The Servicemembers Civil Relief Act is found in 50 U.S.C. App. §§501-597b. 50 U.S.C. App. §§ 511(2) defines military service as follows:

The term “military service” means—

(A)

(ii) in the case of a member of the National Guard, includes service under a call to active service authorized by the President or the Secretary of Defense **for a period of more than 30 consecutive days** under section 502(f) of title 32, United States Code, for purposes of responding to a national emergency declared by the President and supported by Federal funds . . .

. . . .

(Emphasis added.)

DISCUSSION

The Statutory Notice of Deficiency and Audit Change for the 2009 tax year (“Statutory Notice”) was issued on August 31, 2012 to the Taxpayer at ADDRESS, CITY, UT ZIP CODE (“CITY address”). The Division said this address was based on an update in the Tax Commission’s system made on April 10, 2012. The CITY address was also used by the Taxpayer on his petition for this appeal.

The Statutory Notice explains the appeals procedures, and instructs the Taxpayer that if he disagrees with the audit, he must file a petition within 30 days of the date of the Statutory Notice. The Taxpayer’s Petition for Redetermination was not received by the Commission until October 10, 2012, the date of the postmark. The Division’s representative asked the Commission to dismiss the Taxpayer’s appeal because it was not received within the 30 day time period.

The Taxpayer explained that the he had a problem getting the Statutory Notice in a timely manner because the notice was sent to a former address where his parents live. This is the CITY address. He said he filed a forwarding address with the U.S. Postal Service in January or February 2012. He also explained, however, that the CITY address is an ongoing address for him because he frequently moves.

Additionally, the Taxpayer explained that he is a member of a MILITARY BRANCH and that from September 9, 2012 to September 26, 2012 he was in active duty military training, which included travel to and from COUNTRY. For this appeal, the parties considered the federal Service members Civil Relief Act and the Utah Service Members’ Civil Relief Act. The Division did not see any section in these acts that would extend the thirty-day appeals deadline. The Taxpayer also did not find a specific section, but felt the purposes of the acts would be best served by granting such an extension.

The thirty-day requirement for filing an appeal is set by statute and is a jurisdictional requirement. The Statutory Notice was issued by the Division on August 31, 2012. The Taxpayer’s Petition for

Redetermination was received by the Commission on October 10, 2012, the date of the postmark. This is beyond the 30-day deadline provided in Utah Code Ann. § 59-1-501. Utah Administrative Code R861-1A-20 provides that a Petition for Redetermination must be received in the commission offices, or postmarked, no later than 30 days from the date of the statutory notice. This language is not discretionary, and the appeal should be dismissed absent extraordinary circumstances that interfered with Taxpayer's due process rights.

In general, such extraordinary circumstances involve actions by the Tax Commission that interfered with a taxpayer's due process rights. In this case, the Tax Commission did not interfere with the Taxpayer's due process rights even if the Taxpayer had difficulty retrieving the Statutory Notice from his parents' house, at the CITY address. The CITY address was an ongoing address for him and was the address last updated in the Tax Commission's system, on April 10, 2012, five months before the Statutory Notice was mailed. Thus, the Division correctly mailed the Statutory Notice to the Taxpayer's last known address, as required by § 59-1-1404(4). There is no evidence that the Taxpayer was not given due process.

Additionally, the Service members Civil Relief Act and the Utah Service Members' Civil Relief Act do not extend the thirty-day deadline for a timely appeal. These acts define military service as requiring the service to last thirty days or more. *See* Utah Code Ann. § 39-7-102(3) and 50 U.S.C. App. §§ 511(2). The Taxpayer's active duty training was about ##### days long.

In summary, because the Tax Commission did not interfere with the Taxpayer's due process rights and the civil relief acts do not apply, this appeal should be dismissed.

The Taxpayer has another remedy, though. Utah Code Ann. § 59-1-501(7) allows taxpayers who have not previously filed timely appeals to object to a final assessment by paying the tax and then filing a claim for a refund as provided in the statutes. The Tax Commission will either grant or deny the claim for a refund. If the Tax Commission denies the claim, then a taxpayer may appeal the denial by filing a petition with the commission within 30 days of the denial. *See* Utah Code Ann. §59-1-1410(9). A taxpayer's claim of refund must still meet the general deadline for all claims of refunds, which is generally two years from the date of payment. *See* Utah Code Ann. §59-1-1410(8)(a)(ii). Taxpayer's Petition for Redetermination was untimely; therefore, this remedy is available to the Taxpayer. Accordingly, if the tax is paid, the Taxpayer may still pursue administrative remedies by filing a claim for refund at any time within two years of that payment.

Also, if the Taxpayer believes that some of his income has been incorrectly treated for federal

Appeal No. 12-2460

purposes for the 2009 tax year, he may work with the IRS to have that income treated differently and then amend his Utah income tax return for the 2009 tax year.

Finally, the Taxpayer may contact the Taxpayer Services Division at 801-297-7703 if he would like to make payment arrangements.

Aimee Nielson-Larios
Administrative Law Judge

ORDER

The thirty-day requirement for filing an appeal is set by statute and is a jurisdictional requirement. Because the Taxpayer did not file a Petition for Redetermination within the thirty days provided by Utah law, the Commission hereby dismisses the Taxpayer's appeal. 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 and Payment Requirement: 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. Sec. 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. 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.