

13-630  
TAX TYPE: SALES AND USE TAX  
TAX YEAR: 1-1-05 through 12-31-11  
DATE SIGNED: 6-13-2014  
COMMISSIONERS: B. JOHNSON, M. CRAGUN, R. PERO  
EXCUSED: D. DIXON

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BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER,  Petitioner,  v.  AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,  Respondent.	<b>INITIAL HEARING ORDER</b>  Appeal No.    13-630  Account No.    ##### Tax Types:    Sales and Use Tax / Transient Room Tax  Audit Period:  01/01/05 – 12/31/11 Judge:        Chapman
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**Presiding:**

Kerry Chapman, Administrative Law Judge

**Appearances:**

For Petitioner:    REPRESENTATIVE FOR TAXPAYER, Owner (by telephone)  
For Respondent:    REPRESENTATIVE FOR RESPONDENT, Utah Assistant Attorney General  
                          RESPONDENT, from Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5, on March 11, 2014.

TAXPAYER (“Petitioner” or “taxpayer”) has appealed Auditing Division’s (“Division”) assessment of sales and use tax and transient room tax for the period January 1, 2005 through December 31, 2011 (“audit period”). On January 22, 2013, the Division issued a Statutory Notice – Sales and Use Tax, in which it imposed additional sales and use tax, transient room tax, and interest (calculated through February 21, 2013)<sup>1</sup> for the audit period, as follows:

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1 Interest continues to accrue until any tax liability is paid.

<u>Tax Type</u>	<u>Tax</u>	<u>Penalties</u>	<u>Interest</u>	<u>Total</u>
Sales and Use	\$\$\$\$	\$\$\$\$	\$\$\$\$	\$\$\$\$
Transient Room	\$\$\$\$	\$\$\$\$	\$\$\$\$	\$\$\$\$
				<u>\$\$\$\$</u>
				\$\$\$\$

REPRESENTATIVE FOR TAXPAYER explained that in 2000, he built a (X) house on ##### acres of land in CITY, Utah that his family had owned for many years. The taxpayer and his family originally used the house only as a personal vacation home. Around 2005, the taxpayer started a business of renting out the house on a short-term basis during those times his family was not using it. The taxpayer rented out the house either on a nightly basis, a four-night basis, or a weekly basis. The taxpayer stated that he usually rents out the house 12 to 15 times a year, although he rented it out 30 times during one of the years included in the audit period.

The taxpayer admits that he did not charge his guests any sales tax or transient room tax on the amounts they paid for the accommodations. The taxpayer stated that when he started his business, he contacted the person who prepared his income tax returns and the CITY to find out what taxes he needed to collect for the business. He did not contact the Tax Commission. The taxpayer stated that he was told that he needed to pay income taxes and property taxes in regards to the business, but that he was never told to collect sales tax or transient room tax.

The Division explained that it mailed the taxpayer a Vacation Rental Self-Review survey asking him to review his rentals and to report the appropriate sales tax and transient room tax. When the taxpayer did not respond to the survey, the Division assessed sales tax and transient room tax on the business's net gross receipts, as shown on Schedule C of the taxpayer's federal income tax returns. The taxpayer did not dispute that these net gross receipts represent the amounts that he charged his customers during the audit period.<sup>2</sup>

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<sup>2</sup> The taxpayer admitted that he did not collect any sales tax or transient room tax during the audit period (i.e., 2005 through 2011). Accordingly, the net gross receipts the taxpayer reported on his federal income tax returns for these years would not have included any sales tax or transient room tax.

The taxpayer asks the Commission to excuse him from having to pay the taxes that the Division has assessed because he did not know that he was supposed to charge these taxes to his guests. He also indicated that paying the taxes would be difficult because the business is barely profitable enough to cover expenses and because he has not able to collect the taxes from those past customers whom he has contacted. The taxpayer also asked the Commission to consider that he has collected sales tax and transient room tax on the amounts he has charged his customers for the past year (i.e., since he became aware of the taxes).<sup>3</sup>

As an alternative, if the Commission will not excuse the entire assessment, the taxpayer asks for the assessment to be recalculated so that the net gross receipts the Division used as the taxable charges are considered to include the sales tax and transient room tax. The taxpayer proffers that the assessment will be reduced if the Commission “backs” the taxes out of the net gross receipts before determining the tax liability.

The Division admits that if the net gross receipts it used to assess the taxpayer for the audit period included sales taxes and transient room taxes collected from his guests, then the taxes would need to be “backed” out to arrive at the amounts subject to taxation. However, because the taxpayer did not collect sales tax and transient room tax during the audit period, the Division explained that the net gross receipts for these years does not include these taxes. As a result, the Division asks the Commission to deny the taxpayer’s request to back taxes out of the tax basis it used for the assessment. In addition, the Division contends that the Tax Commission should not excuse the full amount of the assessment due to the taxpayer’s not knowing that he was required to collect these taxes. For these reasons, the Division asks the Commission to sustain its assessment in its entirety.

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3 The taxpayer admitted that he had not yet remitted to the Tax Commission the sales taxes and transient room tax taxes that he has collected from his customers in 2013 and 2014 (which are periods subsequent to the audit period at issue in this appeal). The parties agreed to meet after the hearing for the Division to explain to the taxpayer how to remit these trust funds that he has collected on behalf of the state.

APPLICABLE LAW

1. Utah Code Ann. §59-12-103(1) (2011)<sup>4</sup> provides for the imposition of sales and use tax on certain transactions, as follows in pertinent part:

(1) A tax is imposed on the purchaser as provided in this part for amounts paid or charged for the following transactions:

....

(i) amounts paid or charged for tourist home, hotel, motel, or trailer court accommodations and services that are regularly rented for less than 30 consecutive days;

....

2. UCA §59-12-102(89) defines “regularly rented” as follows:

(89) "Regularly rented" means:

(a) rented to a guest for value three or more times during a calendar year; or

(b) advertised or held out to the public as a place that is regularly rented to guests for value.

3. Utah Administrative Rule R865-19S-79 (“Rule 79”) provides guidance concerning the taxes imposed on sales of accommodations, as follows in pertinent part:

A. The following definitions shall be used for purposes of administering the sales tax on accommodations and transient room taxes provided for in Sections 59-12-103, 59-12-301, 59-12-352, and 59-12-353.

1. "Tourist home," "hotel," or "motel" means any place having rooms, apartments, or units to rent by the day, week, or month.

....

4. "Accommodations and services charges" means any charge made for the room, apartment, unit, trailer, or space to park a trailer, and includes charges made for local telephone, electricity, propane gas, or similar services.

4. UCA §59-12-301(1)(a) provides that a “county legislative body may impose a [transient room] tax on charges for the accommodations and services described in Subsection 59-12-103(1)(i) at a rate of not to exceed 4.25%, beginning on or after October 1, 2006.”<sup>5</sup>

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4 All citations are to the 2011 version of the Utah Code and the Utah Administrative Code, unless otherwise indicated.

5 Prior to October 1, 2006, the transient room tax authorized under this subsection could not exceed 3%.

5. UCA §59-12-352(1)(a) provides that “the governing body of a municipality may impose a [municipality transient room] tax of not to exceed 1% on charges for the accommodations and services described in Subsection 59-12-103(1)(i).”

6. UCA §59-12-353(1) provides that “the governing body of a municipality may, in addition to the tax authorized under Section 59-12-352, impose [an additional municipal transient room] tax of not to exceed .5% on charges for the accommodations and services described in Subsection 59-12-103(1)(i). . . .”

7. UCA §§59-12-302(1) and 59-12-354(1) provide that the transient room tax, the municipal transient room tax, and the additional municipal transient room tax “shall be administered, collected, and enforced in accordance with: (a) the same procedures used to administer, collect, and enforce the tax under: (i) Part 1, Tax Collection; or (ii) Part 2, Local Sales and Use Tax Act; and (b) Chapter 1, General Taxation Policies.”

8. UCA §59-1-401(13) (2013) provides that “[u]pon 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.”

9. Utah Admin. Rule R865-1A-42(2) (“Rule 42”) provides guidance concerning the waiver of interest, as follows:

(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.

10. UCA §59-1-1417 provides that the burden of proof is generally upon the petitioner in proceedings before the Commission, with limited exceptions as follows:

(1) 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:  
(a) whether the petitioner committed fraud with intent to evade a tax, fee, or charge;

(b) whether the petitioner is obligated as the transferee of property of the person that originally owes a liability or a preceding transferee, but not to show that the person that originally owes a liability is obligated for the liability; and

(c) whether the petitioner is liable for an increase in a deficiency if the increase is asserted initially after a notice of deficiency is mailed in accordance with Section 59-1-1405 and a petition under Part 5, Petitions for Redetermination of Deficiencies, is filed, unless the increase in the deficiency is the result of a change or correction of federal taxable income:

(i) required to be reported; and

(ii) of which the commission has no notice at the time the commission mails the notice of deficiency.

....

### DISCUSSION

Section 59-12-103(1)(i) imposes a sales and use tax on “amounts paid or charged for tourist home, hotel, motel, or trailer court accommodations and services that are regularly rented for less than 30 consecutive days[.] Pursuant to this statute, the taxpayer’s charges are subject to sales and use tax if: 1) the taxpayer charges his guests for accommodations; 2) the charges are for rentals of less than 30 consecutive days; 3) the CITY property is a tourist home, hotel, or motel; and 4) the rental property is “regularly rented” for less than 30 consecutive days. The taxpayer admits that he charges his guests for accommodations and rents the property out on a nightly, four-night, or weekly basis. As a result, the first two criteria are met.

Rule 79(A)(1) defines a “tourist home,” “hotel,” or “motel” as “any place having rooms, apartments, or units to rent by the day, week, or month.” The taxpayer rents out his property on a daily, four-day, or weekly basis. Accordingly, the CITY property is a tourist home, hotel, or motel, which meets the third criteria.

“Regularly rented” is defined in Section 59-12-102(89) to mean “rented to a guest for value three or more times during a calendar year” or “advertised or held out to the public as a place that is regularly rented to guests for value.” The taxpayer stated that he typically rents his property out at least 12 times a year. In addition, the Division provided evidence showing that as of 2012, the taxpayer advertises the availability of accommodations for less than 30 days on the internet at WEB ADDRESS. The taxpayer did not indicate that

he had not similarly advertised the property during the audit period. As result, the CITY property is “regularly rented” for less than 30 consecutive days, which meets the fourth criteria.<sup>6</sup> Because all of the criteria of Section 59-2-103(1)(i) have been met, the amounts that the taxpayer charges his guests for accommodations and services at the CITY property are subject to sales tax.

The same charges for accommodations and services that are subject to sales tax under Section 59-12-103(1)(i) are also subject to the various transient room taxes authorized under Sections 59-12-301(1)(a), 59-12-352(1)(a), and 59-12-353(1). As a result, the Division properly concluded that the amounts the taxpayer charged its guests were subject to both sales tax and transient room tax.

The Division used the taxpayer’s net gross receipts, as shown on Schedule C of his federal tax returns, as the tax basis on which to impose sales and transient room taxes. The taxpayer admitted that these net gross receipts are the amounts that he charged and collected from his customers for their accommodations and that he did not charge to or collect any taxes from his customers. Nevertheless, the taxpayer contends that the net gross receipts on which the Division imposed taxes should be reduced to back out these taxes. This argument is not convincing, at least for the audit period, because the taxpayer did not charge and collect any sales tax or transient room tax from his guests until after the audit period. “Purchase price” and “sales price” are defined in Section 59-12-102(87)(a) to mean “the total amount of consideration . . . (ii) for which tangible personal property, a product transferred electronically, or services are: (A) sold, (B) leased; or (C) rented.” All evidence suggests that the net gross receipts on which the Division imposed sales and transient room taxes are the total amounts for which the taxpayer sold the taxable accommodations to his guests. The taxpayer, who

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<sup>6</sup> It is noted that the taxpayer’s net gross receipts are only \$\$\$\$ for 2005 and \$\$\$\$ for 2007, whereas the net gross receipts for each year beginning with 2008 is at least \$\$\$\$ (there were \$\$\$\$ net gross receipts for 2006). Accordingly, it is not inconceivable that the taxpayer rented the CITY house less than three times per year prior to 2008. However, the taxpayer did not provide evidence to show how many times he rented the house out in any specific year of the audit period. Regardless, even if the taxpayer rented the house out less than three times a year in 2005 and 2007, the house would still be “regularly rented” if he advertised or held it out to the public as a place that is regularly rented to guests for value during these years.

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has the burden of proof in this matter, has not shown that the net gross receipts included other amounts that are not subject to sales and transient room taxation. For these reasons, the Commission should deny the taxpayer's request to reduce the assessment by backing the taxes out of the net gross receipts.

The Commission is authorized to waive penalties and interest for reasonable cause under Section 59-1-401(13). However, the Commission has not been authorized to waive taxes that have been properly imposed and are legally due. The Commission has regularly found that ignorance of the law does not excuse a taxpayer from paying the taxes that he or she legally owes. Furthermore, the fact that the taxpayer began to collect taxes from his customers in 2013 does not excuse his failure to collect taxes during the audit period. Accordingly, the Commission should deny the taxpayer's requests to forgive his failure to collect and remit sales taxes and transient taxes during the audit period and to abate the audit.

As already mentioned, the Commission is authorized to waive penalties and interest upon a showing of reasonable cause. No penalties were imposed in this case. A taxpayer is charged interest because the state has not had the use of funds that should have previously been remitted to the state. Rule 42(2) provides that reasonable cause exists to waive interest only if a taxpayer shows that the Commission gave erroneous information or took inappropriate action that contributed to the error. The taxpayer admitted that he did not contact the Tax Commission for advice concerning his tax responsibilities for his CITY property, but instead relied on advice he received from his tax advisor and the CITY. Accordingly, the Tax Commission did not commit any error that led to the taxpayer's failure to collect and remit the sales and transient room taxes at issue. For these reasons, reasonable cause does not exist to waive interest.

In conclusion, the Commission should sustain the Division's assessment in its entirety.

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Kerry R. Chapman  
Administrative Law Judge



DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division's assessment in its entirety. 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 \_\_\_\_\_, 2014.

R. Bruce Johnson  
Commission Chair

D'Arcy Dixon Pignanelli  
Commissioner

Michael J. Cragun  
Commissioner

Robert P. Pero  
Commissioner

**Notice:** The taxpayer can contact Tax Services Division at 801-297-2200 to discuss payment arrangements. If a Formal Hearing is not requested as discussed above, failure to pay the balance resulting from this order within thirty (30) days from the date of this order may result in a late payment penalty.