

13-634
TAX TYPE: INCOME TAX
TAX YEAR: 2006
DATE SIGNED: 5-16-2014
COMMISSIONERS: D. DIXON, M. CRAGUN, R. PERO
EXCUSED: B. JOHNSON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	INITIAL HEARING ORDER Appeal No. 13-634 Account No. ##### Tax Type: Income Tax Year: 2006 Judge: Chapman
---	---

Presiding:

Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner: TAXPAYER, Taxpayer
For Respondent: 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 10, 2014.

TAXPAYER (“Petitioner” or “taxpayer”) appealed Auditing Division’s (the “Division”) assessment of individual income tax for the 2006 tax year. On January 23, 2013, the Division issued a Notice of Deficiency and Estimated Income Tax for the 2006 tax year, in which it imposed additional taxes, penalties and interest (calculated through February 22, 2013),¹ as follows:

<u>Year</u>	<u>Tax</u>	<u>Penalties</u>	<u>Interest</u>	<u>Total</u>
2006	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

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

The Division imposed its assessment because the Tax Commission does not have a record of a 2006 Utah tax return being filed by the taxpayer. The Division based its assessment on information it received from the Internal Revenue Service (“IRS”), including information showing that the taxpayer’s 2006 federal adjusted gross income (“FAGI”) is \$\$\$\$\$. The entire \$\$\$\$\$ of 2006 income was attributable to wages that TAXPAYER earned from BUSINESS (“BUSINESS”).

The Division did not deduct any Utah withholding tax that the taxpayer’s employer may have withheld because it does not have a W-2 form showing the amount of any Utah taxes that were withheld. The Division also stated that in 2006, BUSINESS filed its Utah withholding report in a paper format, which is no longer available to show the amount that BUSINESS withheld and remitted for each of its employees.

The taxpayer admits that he cannot locate the 2006 W-2 form that he received from BUSINESS. He explained that he worked for BUSINESS from 2000 to 2012 and that BUSINESS is not willing to provide him a copy of his W-2. The taxpayer, however, contends that BUSINESS always withheld Utah taxes for him and that he never owed more than several hundred dollars of tax, if any, on his Utah returns while he worked for BUSINESS. TAXPAYER explained that he thought he had filed his 2006 Utah return until he received the assessment. He also explained that because of a Turbo Tax formatting problem concerning the 2006 tax year, his 2006 tax information has been lost. The Division confirmed that 2006 is the only year for which the taxpayer had not filed a Utah income tax return.

TAXPAYER asks the Commission to consider reversing all or part of the assessment because he can show that BUSINESS withheld and remitted Utah taxes for years both before and after the 2006 tax year. TAXPAYER stated that he never asked BUSINESS not to withhold Utah taxes and that it should have withheld taxes the same way every year he worked for it. For 2005 and 2007 through 2012, the following chart shows the amounts of Utah withholding tax that BUSINESS withheld and remitted from TAXPAYER’S

wages, the amounts of TAXPAYER’S wages from BUSINESS, and the Utah withholding amount as a percentage of the wage amount, as follows:

Tax Year	Utah Withholding from BUSINESS	BUSINESS Wages	Utah Withholding as a Percentage of Wages
2005		\$\$\$\$\$	%%%%%
2007	\$\$\$\$\$	\$\$\$\$\$	%%%%%
2008	\$\$\$\$\$	\$\$\$\$\$	%%%%%
2009	\$\$\$\$\$	\$\$\$\$\$	%%%%%
2010	\$\$\$\$\$	\$\$\$\$\$	%%%%%
2011	\$\$\$\$\$	\$\$\$\$\$	%%%%%
2012	\$\$\$\$\$	\$\$\$\$\$	%%%%%

The lowest percentage of wages that BUSINESS withheld as Utah taxes for these seven tax years was %%%%. If this percentage is multiplied by the taxpayer’s 2006 wages of \$\$\$\$\$, the Utah withholding would be estimated at \$\$\$\$\$, which is more than the \$\$\$\$\$ of tax that the Division imposed on the \$\$\$\$\$ of income.

The Division, however, states that it would prefer to have evidence of the amount of Utah tax actually withheld by BUSINESS for 2006 before allowing it as a credit. As a result, the Division asks the Commission to sustain its audit and not allow a credit for any withholding that BUSINESS might have withheld from TAXPAYER’S 2006 wages. The Division stated that while the Commission may have authority to allow a credit under these circumstances, the Division does not.

APPLICABLE LAW

Utah Code Ann. 59-10-104 (2006)² provides that “a tax is imposed on the state taxable income, as defined in Section 59-10-112, of every residential individual as provided in this section.”

² The 2006 version of the Utah law is cited, unless otherwise indicated. UCA §§59-10-111 and 59-10-112 were repealed in 2007. The definitions in these sections are currently found in UCA §59-10-103.

Appeal No. 13-634

UCA §59-10-112 defines “state taxable income” to mean “federal taxable income (as defined by Section 59-10-111) with the modifications, subtractions, and adjustments provided in §59-10-114.”

UCA §59-10-111 defines “federal taxable income” to mean “taxable income as currently defined in Section 63, Internal Revenue Code of 1986.”

UCA §59-10-402 provides that “[e]ach employer making payment of wages shall deduct and withhold from wages an amount . . . which will, as closely as possible, pay the income tax imposed by this chapter” and that “[t]he amount withheld . . . shall be allowed to the recipient of the income as a credit against the tax imposed by this chapter.”

UCA §59-10-406(4) provides that an employer shall “provide each employee from whom state income tax has been withheld with a statement of the amounts of total compensation paid and the amounts deducted and the amounts deducted and withheld for that employee during the preceding calendar year” and that the employee make that statement available to each employee on or before January 31 for the year following that for which the report is made.

UCA §59-1-1417 (2013) provides that the burden of proof is upon the petitioner in proceedings before the Commission, with limited exceptions as follows:

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:

- (1) whether the petitioner committed fraud with intent to evade a tax, fee, or charge;
- (2) 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
- (3) 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;
 - (a) required to be reported; and
 - (b) of which the commission has no notice at the time the commission mails the notice of deficiency.

DISCUSSION

UCA §59-10-402 provides that “[t]his amount [of Utah tax] withheld . . . shall be allowed to the recipient of the income as a credit against the tax imposed by this chapter.” The taxpayer cannot show that BUSINESS withheld Utah taxes from his 2006 income or the exact amount of any such withholding. Nevertheless, the taxpayer has shown that it is likely that BUSINESS withheld as least \$\$\$\$ of Utah tax from his 2006 wages and that this amount is greater than his 2006 tax liability as assessed by the Division without any withholding tax credit.

The Commission has considered evidence that it might accept as a substitute for the actual Utah withholding amount, as shown on the W-2 form, in other cases where the taxpayer can no longer locate the W-2 form and where the Division can no longer access an employer’s records. In *USTC Appeal No. 11-2265* (Initial Hearing Order Mar. 12, 2013),³ the petitioners were not able to obtain some missing W-2 forms. In that case, the petitioners had a representative from their tax preparer proffer testimony and records. The tax preparer had the copies of the returns that it had prepared, which showed that the tax preparer had deducted credits for Utah withholding tax. The tax preparer admitted, however, that it did not keep a copy of the W-2 forms. In addition, the petitioners no longer had them. For the years for which W-2 forms were available, the withholding amounts shown on the W-2 forms matched the amounts of withholding that the tax preparer had deducted on the tax returns it prepared. As a result, for the years for which W-2 forms were unavailable, the Commission allowed withholding amounts equal to the amounts shown on the tax returns that the tax preparer had prepared and had in its records.

Considering the evidence presented, it is clear that the taxpayer had at least some Utah withholding for each year that is known. Accordingly, it would be unreasonable to conclude that the taxpayer had no Utah

³ Redacted copies of this and other selected decisions can be viewed on the Commission’s website at <http://www.tax.utah.gov/commission-office/decisions>.

Appeal No. 13-634

withholding in the period with unknown information. TAXPAYER was able to show that BUSINESS withheld between %%%% and %%%% of his wages as Utah tax for seven other years he worked for them. The Division admitted that BUSINESS submitted withholding tax for its employees in 2006. From this information, it is reasonable to assume that BUSINESS withheld and remitted at least %%%%, or \$\$\$\$\$, of TAXPAYER'S 2006 wages. Because this amount exceeds that \$\$\$\$\$ of tax that the Division imposed on TAXPAYER'S 2006 wages, the Division's assessments should be reversed.

Kerry R. Chapman
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission finds that the taxpayer has shown that its employer withheld Utah taxes from his 2006 wages that exceeds the 2006 tax liability assessed by the Division. Accordingly, the Commission reverses the Division's audit and finds that the taxpayer has no tax liability for the 2006 tax year. 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: 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.