

13-670
TAX TYPE: INCOME TAX
TAX YEAR: 2006, 2007 and 2008
DATE SIGNED: 5-5-2014
COMMISSIONERS: B. JOHNSON, M. CRAGUN, R. PERO
EXCUSED: D. DIXON

BEFORE THE UTAH STATE TAX COMMISSION

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| <p>TAXPAYER,</p> <p style="padding-left: 40px;">Petitioner,</p> <p>vs.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="padding-left: 40px;">Respondent.</p> | <p style="text-align: center;">INITIAL HEARING ORDER</p> <p>Appeal No. 13-670</p> <p>Tax Type: Income Tax Tax Year: 2006, 2007 and 2008</p> <p>Judge: Phan</p> |
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Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: TAXPAYER

For Respondent: RESPONDENT, Manager, Income Tax Auditing

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on March 18, 2014, for an Initial Hearing in accordance with Utah Code §59-1-502.5. Petitioner (Taxpayer) has appealed audit deficiencies issued for tax years 2006, 2007 and 2008. Petitioner had not filed returns for these years and the audits were based on the information that Respondent (Division) had been able to obtain for these years. The Notices of Deficiency and Estimated Income Tax had been issued on January 22, 2013, for each of the years at issue. The amounts of the deficiency as stated in the Notices are as follows:

| Year | Tax | Interest ¹ | Penalties | Total ² |
|------|------------|-----------------------|------------|--------------------|
| 2006 | \$\$\$\$\$ | \$\$\$\$\$ | \$\$\$\$\$ | \$\$\$\$\$ |

1 This is the interest amount as of the date of the Notice of Deficiency. Interest continues to accrue on the unpaid balance.

2 This is the total as of the date of the Notice of Deficiency. Because interest continues to accrue the current amount due will be higher.

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|------|------------|------------|------------|------------|
| 2007 | \$\$\$\$\$ | \$\$\$\$\$ | \$\$\$\$\$ | \$\$\$\$\$ |
| 2008 | \$\$\$\$\$ | \$\$\$\$\$ | \$\$\$\$\$ | \$\$\$\$\$ |

APPLICABLE LAW

State taxable income is defined in Utah Code §59-10-104(1) (2008)³ as follows:

For taxable years beginning on or after January 1, 2008, a tax is imposed on the state taxable income of a resident individual as provided in this section.

The Division has authority to issue assessments under Utah Code §59-10-527(1) as follows:

The commission shall make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this chapter or former chapters imposing income tax.

Utah law requires that returns are filed at Utah Code Sec. 59-10-502 as follows:

An income tax return with respect to the tax imposed by this chapter shall be filed by:

- (1) every resident individual, estate, or trust required to file a federal income tax return for the taxable year; and
- (2) every nonresident individual, estate, or trust having federal gross income derived from sources within the state for the taxable year and required to file a federal income tax return for such taxable year.

The Commission has been granted the discretion to waive penalties and interest. Utah Code §59-1-401(13) 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 Administrative Rule R861-1A-42 to provide additional guidance on the waiver of penalties and interest, as follows in pertinent part:

- (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.
- (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...

³ Although there were small revisions, the code provisions were not substantially different for all of the years at issue in this appeal.

- (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...
- (m) Employee Embezzlement...
- (n) Recent Tax Law Change...

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

DISCUSSION

The Taxpayer acknowledged that he had not been very responsible regarding things like filing returns prior to 2006 and for the audit years at issue in this case. He was a Utah resident for the years at issue. He had been working as a project manager for landscaping businesses during the audit years and he indicates that he was generally working out in the field. He did not file returns for the tax years 2006 through 2008. After receiving the audit deficiencies for these years he was unable to find W-2's or other proof of withholding for the years at issue. He did not file returns for these years prior to the hearing, but at the hearing had submitted forms for each of the years on which the amounts were penciled in. However, these were not completed forms and were not signed by the Taxpayer.

In 2006 the Taxpayer had been working for BUSINESS-1. The Division was not able to find any evidence of withholding for the Taxpayer by BUSINESS-1. For the year 2007 the Taxpayer had worked for BUSINESS-1, had received unemployment and worked for a new company, BUSINESS-2. For 2008 the Taxpayer had worked for BUSINESS-2. The Division had found withholding for the Taxpayer recorded by BUSINESS-2 and had given the Taxpayer credit for that withholding for 2007 and 2008. The Taxpayer argued at the hearing that if BUSINESS-1 was not responsible about doing their due diligence then it was unfair that he was now being held responsible for that company's actions and being charged penalties and interest.

The Taxpayer also explained that there were some extenuating circumstances that occurred during the years at issue. His wife had been diagnosed with cancer in 2007 or 2008 and had gone through chemo therapy treatments. Then in January 2009 the Taxpayer had triple by-pass surgery. These medical issues had made it difficult to file returns. The Taxpayer explained that after that time he was trying to be more responsible about filing returns.

The Division's representative explained that as a Utah resident the Taxpayer is subject to tax on his income under Utah Code Sec. 59-10-104. He also pointed out that under Utah Code

Sec. 59-10-502 and 514 the Taxpayer was required to file Utah Individual Income Tax Returns for each year by the April 15 deadline. The Division had calculated the tax amount based on the income reported by the Internal Revenue Service and then had allowed the Utah withholding that it had been able to find reported for the Taxpayer for the years 2007 and 2008. The Division provided for the hearing the IRS transcripts which supported the amount of the federal adjusted gross income in the audits for each of the tax years. The Division explained the discrepancies between the federal transcripts and the amounts penciled in on the returns offered by the Taxpayer. For the 2007 tax year the Taxpayer's return did not include wages from BUSINESS-1 or unemployment compensation. These sources of income had been included by the IRS in the federal adjusted gross income. There was no information from the Taxpayer that he had a different amount of federal adjusted gross income for these years.

Regarding the penalties and the interest, the Division requested that they be upheld. The Division's representative noted that this Taxpayer had a poor account history. Prior to the tax years at issue he had not filed returns and then he continued to not file during the audit years. The Taxpayer had filed a 2011 return, but then not filed a 2012 return. The representative pointed out that under Utah Admin. Rule R861-1A-42 the Taxpayer would have to establish that there had been a Tax Commission employee error that resulted in the late payment and in this matter it was the Taxpayer that had failed to file returns and pay the tax that caused the late payment.

Upon reviewing the facts and the law, it is the Taxpayer that was responsible for filing tax returns for each of the audit years and providing the withholding information. This was not his employer's responsibility. It is the Taxpayer's failure to file and pay that has led to this audit and the fact that the Division now has no information regarding withholding for the 2006 tax year. Had the Taxpayer filed the 2006 return when it was supposed to be filed he would have been able to establish withholding if there was any. Regarding waiver of the penalties, as noted by the Division, the account history does not support waiver. Medicinal issues as serious as cancer and triple by-pass often are cause for waiver in situations where the taxpayer has been filing returns and then returns are not filed timely during the time the medical issues were occurring, but then the taxpayer filed the returns within a reasonable period after the condition was resolved. In this case although these medical conditions were understandably difficult, the account history does not support that the failure to file was due to the medical issues because the Taxpayer acknowledged he was not filing returns in the years prior and he did not file the returns for the audit years after the medical situations were resolved. As noted by the Division, cause for waiver of interest would be a Tax Commission error and none has been shown in this case.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission denies the Taxpayer's appeal of the audit deficiencies for the tax years 2006 through 2008. 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 of Payment Requirement: Any balance due as a result of this order must be paid within thirty (30) days of the date of this order, or a late payment penalty could be applied. The Taxpayer may contact the Taxpayer Services Division at 801 297-7703 to discuss financial hardship options or set up a monthly installment plan.

