14-1531
TAX TYPE: INCOME TAX / REFUND REQUEST
TAX YEAR: 2009
DATE SIGNED: 6-5-2015
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R.PERO
EXCUSED: D. DIXON

BEFORE THE UTAH STATE TAX COMMISSION

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| TAXPAYER,<br><br>Petitioner,<br><br>v.<br><br>TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION,<br><br>Respondent. | **INITIAL HEARING ORDER**<br><br>Appeal No. 14-1531<br><br>Account No. #####<br>Tax Type: Income Tax / Refund Request<br>Tax Year: 2009<br><br>Judge: Chapman |

**Presiding:**
Kerry R. Chapman, Administrative Law Judge

**Appearances:**
For Petitioner: TAXPAYER, 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 for an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5, on December 17, 2014.

On May 5, 2014, the Auditing Division of the Utah State Tax Commission ("Auditing Division") mailed a letter to TAXPAYER ("Petitioner" or "taxpayer"), in which it informed TAXPAYER that the Tax Commission had no record of his filing a 2009 Utah individual income tax return.

Upon receiving Auditing Division's letter, TAXPAYER determined that his employer, COMPANY-1 ("COMPANY-1"), had erroneously reported his 2009 wages to STATE-1 instead of Utah. TAXPAYER explained that in January 2009, he informed COMPANY-1 that he had moved from STATE-1 to Utah. However, the 2009 W-2 that TAXPAYER originally received from COMPANY-1 showed that the company

had withheld $$$$$ of STATE-1 income tax and STATE-1 state disability insurance ("SDI") from his 2009 wages.[1] As a result, TAXPAYER claims that COMPANY-1 failed to change the state to which it reported his 2009 wages. He stated that because of the erroneous 2009 W-2 he received from COMPANY-1 in early 2010, his accountant prepared 2009 federal and STATE-1 returns for him to file, but not a 2009 Utah return.

To correct COMPANY-1's error, TAXPAYER had COMPANY-1 issue a revised 2009 W-2 on which it showed his 2009 wages to be Utah wages instead of STATE-1 wages. The revised W-2, which COMPANY-1 prepared sometime after May 5, 2014 (after TAXPAYER received Auditing Division's letter), now shows that COMPANY-1 withheld $$$$$ of Utah state income tax from the taxpayer's 2009 wages. On June 4, 2014, TAXPAYER submitted a 2009 Utah income tax return on which he reported Utah withholding in the amount of $$$$$ and claimed a refund of $$$$$.

On June 23, 2014, the Taxpayer Services Division of the Utah State Tax Commission ("Respondent" or "Division") issued a Notice of Expired Refund or Credit ("Notice"), in which it informed TAXPAYER that the time to claim a refund or credit for the 2009 tax year had expired. The Notice informed the taxpayer that "Utah law limits the time allowed to claim a refund or credit to the later of three years from the due date of the return, plus the extension period, or two years from the payment date."

The Division stated that that the period for claiming a refund or credit of taxes for the 2009 tax year generally expires on October 15, 2013, which is three years and six months after the original April 15, 2010 due date for a 2009 income tax return. Because the June 4, 2014 date on which the Tax Commission received TAXPAYER 2009 Utah return occurred more than seven months after this October 15, 2013 deadline, the Division determined that the Utah law precludes the Tax Commission from issuing a refund or credit for 2009.

At the hearing, however, an alternative statute of limitations period was raised, specifically whether

1 The $$$$$ amount consisted of state income tax in the amount of $$$$$ and SDI in the amount of $$$$$.

TAXPAYER June 4, 2014 claim for refund was made within two years of the payment date. TAXPAYER stated that it was only after Auditing Division's May 5, 2014 letter that COMPANY-1 revised his 2009 W-2 and would have paid to Utah the $$$$$ of withholding shown on the revised W-2. As a result, he contends that the Tax Commission received his June 4, 2014 refund request within two years of the taxes being paid to Utah. For these reasons, he asserts that his refund request is not barred by the statute of limitations and, thus, should be granted.

The Division stated that when it issued its Notice denying the refund request, it had not considered the statute of limitations associated with the date on which the tax was paid. As a result, the presiding officer gave the Division an opportunity to provide post-hearing information to show whether the $$$$$ of withholding from COMPANY-1 has been paid to Utah and, if so, when. In addition, the Division was asked to discuss in its post-hearing submission whether any statutory provisions address when an amount withheld by an employer, as reported on a revised W-2 form, is considered paid for purposes of the statute of limitations to request a refund.

On December 23, 2014, the Division submitted a "Memo," in which it stated that a review of COMPANY-1's Utah withholding account for the past four years does not show that it has remitted any amended returns or made any payments on behalf of TAXPAYER for the 2009 tax year. The Division, however, stated, as it had at the hearing, that its practice is to treat all withholding credits as having been made on the due date of the income tax return for the year at issue. In the Memo, the Division stated that it could not find a statutory reference to support this practice. It further stated that it was unaware of any Commission decision on the issue. As a result, even though COMPANY-1 has not yet paid to Utah the $$$$$ of tax reported on the revised W-2, the Division considers the $$$$$ of taxes to have been paid on April 15, 2010 (the due date for a 2009 income tax return) for purposes of the statute of limitations. Because the taxpayer's

refund request was not received within two years of this April 15, 2010 date, the Division asserts that the Utah law precludes a refund from being issued.

On January 19, 2015, the taxpayer submitted a response to the Division's post-hearing Memo. The taxpayer referred the Commission to two alternative statutes of limitations found in Utah law and contends that these two statutes support his position, specifically Utah Code Ann. §§59-10-529(12)(a) and 59-12-110. Section 59-12-110 is a sales and use tax statute concerning bad debt and repossessions that is not applicable to this case. However, Section 59-10-529(12)(a) is an income tax statute that should be considered further.

The taxpayer contends that because Auditing Division told him he needed to get COMPANY-1 to change his 2009 W-2 to reflect Utah income and taxes, the revised 2009 W-2 is a "notice of change" for purposes of Section 59-10-529(12)(a). Because Section 59-10-529(12)(a)(ii) allows a taxpayer two years to file a refund claim if a taxpayer "is required to . . . report a change or correction that is treated in the same manner as if the change or correction were an overpayment for federal income tax purposes[,]" the taxpayer contends that submitting a revised W-2 form should invoke a new two-year period to claim a refund. Although Section 59-10-529(12)(a) specifically applies to instances where a change is made to the taxpayer's federal tax liability or where a taxpayer is required to file an *amended* state return, the taxpayer believes that the provision is close enough to apply to his circumstances.

Finally, the taxpayer stated in his response that the refund should be granted because of "common sense and the ex post facto doctrine." He reiterated that as soon as he received the notice from the Tax Commission and discovered the error on his original 2009 W-2, he had the error corrected and submitted a Utah return. He stated that prior to his having COMPANY-1 correct its original W-2, he could not have requested a refund because the W-2 did not show that any Utah taxes had been withheld. The taxpayer did not explain what the ex post facto doctrine entails and stated that he may be applying the doctrine improperly. However, he contends that it is "absurd" that the State of Utah "will confiscate money that was transferred to

them using a Statute with a limitation that had expired before the money was even transferred[.]" He asserts that the refund should be granted on the basis of "common sense" and because it is "the right thing" to do.

The taxpayer made one additional argument at the Initial Hearing. In case the Commission finds that the statute of limitations period has expired and that he is not entitled to the $$$$$ refund at issue, the taxpayer asked the Commission to consider that $$$$$ of the $$$$$ of tax COMPANY-1 originally withheld from his wages was for STATE-1 SDI (State Disability Insurance), not for income taxes. He asserts that at the very least, Utah should refund the $$$$$ originally reported as STATE-1 SDI and now reported as Utah income taxes because Utah does not require SDI to be withheld from wages.

APPLICABLE LAW

UCA §59-10-514 provides for the filing of a Utah individual income tax return, as follows in pertinent part:

> (1) . . . .
> (a) an individual income tax return filed for a tax imposed in accordance with Part 1, Determination and Reporting of Tax Liability and Information, shall be filed with the commission:
> (i) except as provided in Subsection (1)(a)(ii), on or before the 15th day of the fourth month following the last day of the taxpayer's taxable year; . . . .

UCA §59-10-516(1) provides that the Commission shall allow an extension of time for filing an individual income tax return, as follows in pertinent part:

> (1) (a) The commission shall allow a taxpayer an extension of time for filing a return.
> (b) (i) For a return filed by a taxpayer except for a partnership, the extension under Subsection (1)(a) may not exceed six months.
> . . . .

UCA §59-1-1410(8) provides the timeframes within which a taxpayer can generally request a refund or credit of taxes, as follows in pertinent part:

> (8) (a) Except as provided in Subsection (8)(b) or Section 19-12-203, 59-7-522, 59-10-529, or 59-12-110, the commission may not make a credit or refund unless a person files a claim with the commission within the later of:

(i) three years from the due date of the return, including the period of any extension of time provided in statute for filing the return; or
(ii) two years from the date the tax was paid.
. . . .

Section 59-10-529(12)(a) is an alternative statute of limitations concerning the refund or credit of income taxes, which provides as follows in pertinent part:

(12)(a) A taxpayer may file a claim for a credit or refund of an overpayment within two years from the date a notice of change, notice of correction, or amended return is required to be filed with the commission if the taxpayer is required to:
(i) report a change or correction in income reported on the taxpayer's federal income tax return;
(ii) report a change or correction that is treated in the same manner as if the change or correction were an overpayment for federal income tax purposes; or
(iii) file an amended return with the commission.
. . .
(c) The amount of the credit or refund may not exceed the amount of the reduction in tax attributable to the federal change, correction, or items amended on the taxpayer's amended federal income tax return.

UCA §59-1-1417(1) 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

Pursuant to Section 59-1-1417(1), the burden of proof in this matter is upon TAXPAYER, not the Division. Section 59-1-1410(8)(a) provides that a taxpayer is entitled to receive a refund or credit of overpaid taxes within either of two scenarios. The first scenario involves whether the request was made within three years from the due date of the return (including any statutory extension). The due date of a 2009 income tax return, with extensions, is October 15, 2010. Sections 59-10-514 and 59-10-516(1). Three years from this date is October 15, 2013. As a result, a request for a refund or credit of 2009 taxes must be claimed by October 15, 2013, to satisfy this scenario. TAXPAYER submitted his refund request on June 4, 2014, which is after this October 15, 2013 date. Accordingly, TAXPAYER does not qualify for a refund of 2009 taxes under the first scenario of Section 59-1-1410(8)(a).

The second scenario under Section 59-1-1410(8)(a) involves a determination of whether the refund request is made within "two years from the date the tax was paid." TAXPAYER is asking for $$$$$ of the $$$$$ of Utah withholding that COMPANY-1 reported on the taxpayer's revised 2009 W-2 to be refunded. At issue is whether TAXPAYER June 4, 2014 claim of refund was made within two year from the date the tax was paid.

Neither party has provided any law or other precedent to show when income taxes withheld from wages are considered "paid" for purposes of the statute of limitations. However, in *USTC Appeal No. 10-0050* (Initial Hearing Order Aug. 19, 2010),[2] the Commission previously considered an income tax refund case in which it addressed the statute of limitations and the date that income taxes withheld from mineral production payments are considered to have been paid.[3]

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2 Redacted versions of this and other selected Commission decisions can be reviewed on the Commission's website at http://www.tax.utah.gov/commission-office/decisions.

3 Utah Code Ann. 59-6-102(1) provides that "each producer shall deduct and withhold from each payment being made to any person in respect to production of minerals in this state, but not including that to

In *Appeal No. 10-0050*, the petitioners were partners in a partnership that produced minerals in Utah. The partnership did not file its 2005 Utah partnership return of income, which reflects 2005 Utah source income and mineral production withholding, until September 30, 2009. In November of 2009, the petitioners received an *original* TC-65 (not a *revised* TC-65) from the partnership, which reflected their share of the 2005 Utah source income and withholding. The petitioners filed their 2005 Utah return within two weeks of receiving the TC-65. The petitioners argued that they should be treated as having "paid" the withholding on September 30, 2009, the date the partnership first filed its 2005 Utah return and reported the withholding. If the Commission had agreed with these petitioners, their December 2, 2009 refund request would have been made within two years of the payment date, and they would have been entitled to their refund request. But, the Commission found differently.

In *Appeal No. 10-0050*, the Division indicated that there is no definition of "paid" in Utah law, but stated that there were no additional funds remitted by the partnership in 2009 when it filed its return. The Division's position was that payment occurred when the funds were deposited with the State of Utah, which it believed to have occurred in either 2005 or 2006.[4] The Commission concluded that "[t]he only reasonable interpretation of when tax is 'paid' is when it is received by the state." Based on the withholding payment being made in 2005 or 2006, the Commission found that the petitioners' December 2, 2009 refund claim was made more than two years after the payment was received by the State of Utah. As a result, the Commission denied the refund claim.

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which the producer is entitled, an amount equal to 5% of the amount which would have otherwise been payable to the person entitled to the payment." Utah Code Ann. 59-6-104(1) provides that "[t]o the extent the following are consistent with this chapter, the commission shall administer this chapter in accordance with . . . Chapter 10, Part 4, Withholding of Tax." Accordingly, *Appeal No. 10-0050* appears applicable to the withholding taxes at issue in the instant appeal.

4 The Division's position in the instant case appears to be different because it asks for reported withholding to be considered "paid" on the date that the taxpayer's return was due for the tax year at issue.

There are some similarities and some differences between *Appeal No. 10-0050* and the instant case. In both cases, the taxpayers received a tax document on which Utah withholding was reported. In both cases, the taxpayers did not receive either the original or revised tax document until several years after the tax year at issue. However, the cases are different because it was determined that the partnership in *Appeal No. 10-0050* remitted the taxes to the State of Utah at least three years before the refund claim was made. In contrast, in the instant case, the Division indicates that COMPANY-1 has not yet remitted TAXPAYER taxes to the State of Utah. In accordance with the Commission's ruling in *Appeal No. 10-0050*, TAXPAYER taxes have not been "paid" because they have not yet been remitted to the State of Utah. If TAXPAYER income taxes have not yet been paid, then it seems illogical to find that TAXPAYER made his refund request more than two years after the date of payment, as the Division contends. As a result, the Commission should not find that the statute of limitations to claim a refund under the second scenario of Section 59-1-1410(8)(a) has expired.

If the Commission finds that statute of limitations (under the second scenario of Section 59-10-1410(8)(a)) has not expired, the Commission must still consider if a refund should be issued *at this time*. One option would be for the Commission to deny TAXPAYER refund request at the current time because no taxes have yet been paid to Utah. If these taxes have not yet been paid to Utah, Utah has not received anything to refund. However, under this option, if COMPANY-1 were to later pay the taxes to Utah, TAXPAYER would have two years from the date of the payment to resubmit his refund request.

A second option would be for the Commission to grant TAXPAYER refund request at this time. Then, the Tax Commission could approach COMPANY-1 to collect the taxes that they reported to Utah on TAXPAYER revised 2009 W-2. This second option seems preferable for several reasons. First, the Commission is aware that the Tax Commission generally approaches an employer, not the employee, to collect income taxes that the employer withheld from an employee's wages (and reported on the employee's W-2) but did not remit to the State of Utah. This appears to be consistent with Section 59-10-402(3), a withholding tax

statute that provides that "[t]he amount withheld under this section shall be allowed to the recipient of the income as a credit against the tax imposed by this chapter."[5]

Second, the Division has not explained why its position in the instant case is different from its position in *Appeal No. 10-0050*. If the Division believes that its prior position and the Commission's acceptance of it in *Appeal No. 10-0050* are incorrect, it should explain why. Until then, *Appeal No. 10-0050* suggests that the statute of limitations period found in Section 59-1-1410(8)(a) has not expired in regards to the taxpayer's 2009 refund request because the request has not been made more than two years after the tax was paid. As a result, TAXPAYER still has a right to request a refund of the taxes shown on his revised W-2. If the Division believes that the request should be made in the future after COMPANY-1 remits the tax to Utah instead of being paid at the current time pursuant to 59-10-403(2), it should explain why. Until such explanations are provided, it seems reasonable to grant the taxpayer's refund request at the present time. For these reasons, the Commission should grant the taxpayer's refund request for the 2009 tax year.[6]

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5 Another withholding tax statute, Section 59-10-406(5)(b)(i), provides that "[i]f an employer pays the tax required to be deducted and withheld under this part: . . . an employee of the employer is not liable for the amount of any payment [required to be deducted and withheld.]" The Division, however, did not argue that this statute is applicable to this case, much less argue that it means that a taxpayer is liable for taxes that an employer withheld but did not pay. In addition, Division has not indicated that the Tax Commission would approach TAXPAYER to collect the $$$$$ of Utah taxes reported on the revised W-2 if COMPANY-1 does not itself remit the taxes to Utah. For these reasons, TAXPAYER refund request should not be denied on the basis of Section 59-10-406(5)(b).

6 If the Commission grants the taxpayer's refund request, it need not address the taxpayer's other arguments. However, it may be helpful to explain why the taxpayer's other arguments are not convincing. First, the alternative statutes of limitations to which TAXPAYER referred in his post-hearing document do not appear to apply to this case. Section 59-12-110 is a sales and use tax provision concerning bad debt and repossessions that is not applicable to income tax cases. Section 59-10-529(12)(c) refers to changes made for federal income tax purposes and does not address changes that an employer makes to an employee's W-2 for state tax purposes. Second, the taxpayer's "ex post facto" argument is also not convincing. The Commission has not applied any law that did not exist when the taxpayer made his refund request. Third, the taxpayer's argument about SDI funds initially withheld and paid to STATE-1 has no effect on a refund of the taxes reported on his revised W-2 form. The Commission is aware of no Utah law that requires it to refund taxes that an employer may have withheld in accordance with another state's laws.

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Kerry R. Chapman
Administrative Law Judge

DECISION AND ORDER

Based upon the foregoing, the Commission overturns the Division's action and grants the taxpayer's request for a refund or credit of taxes for the 2009 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 _____, 2015.

John L. Valentine
Commission Chair

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner