

17-214
TAX TYPE: SALES & USE TAX
TAX YEAR: 07/01/13 – 06/30/16
DATE SIGNED: 01/17/2018
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. PERO, R. ROCKWELL
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER,</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="text-align: center;">Respondent.</p>	<p>INITIAL HEARING ORDER</p> <p>Appeal No. 17-214</p> <p>Account No. #####</p> <p>Tax Type: Sales & Use Tax and Transient Room Tax</p> <p>Audit Period: 07/01/13 – 06/30/16</p> <p>Judge: Phan</p>
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Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: NAME-1, Owner
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney
General
RESPONDENT-1, Auditing Division
RESPONDENT-2, Auditing Division
RESPONDENT-3, Audit Manager

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on September 12, 2017 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. Petitioner had filed an appeal of an audit deficiency of sales and use tax, transient room tax, penalties and interest issued for the audit period of July 1, 2013 through June 30, 2016. The penalties assessed were a 10% failure to timely file, 10% failure to timely pay and 10% fraud penalty. The Notice of Deficiency was issued on December 28, 2016. The amount of the deficiency with tax, penalties and interest calculated to the date of the notice is as follows:

	Tax	Penalty	Interest	Total ¹
Sales and Use Tax	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
Transient Room Tax	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
Grand Total	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

¹ With interest calculated to the Notice Date. Interest continues to accrue on the unpaid balance.

APPLICABLE LAW

Sales and use tax is imposed under Utah Code Subsection 59-12-103(1)² on the following:

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;

...

The term “regularly rented” for purposes of the Utah Sales and Use Tax act is defined at Utah Code Subsection 59-12-102(101) as follows:

“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.

Counties are authorized to impose the transient room tax under Utah Code Subsection 59-12-301(1)³ which provides:

- (a) A county legislative body may impose a 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.
- (b) Subject to Subsection (2), the revenues raised from the tax imposed under Subsection (1)(a) shall be used for the purposes listed in Section 17-31-2.
- (c) The tax imposed under Subsection (1)(a) shall be in addition to the tax imposed under Part 6, Tourism, Recreation, Cultural, Convention, and Airport Facilities Tax.

Utah Administrative Rule R865-19S-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.

....

² This decision cites to the 2015 Utah Code and Administrative Rule Sections for ease of reference. However, there were not any substantive changes to these provisions during the audit period from January 1, 2012 to June 30, 2016.

³ The governing body of a city or town may also impose transient room tax of up to 1.5% under Utah Code Secs. 59-12-352 & 59-12-353.

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.

Utah Code Section 59-1-401 provides for the assessment of a late payment penalty at Subsection (3) of 10% the tax due and a late filing penalty at Subsection (6) of 10% of the tax due. Additionally that section provides in relevant part:

...

(7)(a) Additional penalties for an underpayment of a tax, fee, or charge are as provided in this Subsection (7)(a).

(i) Except as provided in Subsection (7)(c), if any portion of an underpayment of a tax, fee, or charge is due to negligence, the penalty is 10% of the portion of the underpayment that is due to negligence.

...

(14) 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...

(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:

(i) It is the first return required to be filed and the taxes were filed and paid within a reasonable time after the due date.

(ii) The commission may also consider waiving penalties on the first return after a filing period change if the return is filed and tax is paid within a reasonable time after the due date.

(k) Bank Error...

(l) Compliance History...

(m) Employee Embezzlement...

- (n) Recent Tax Law Change: The taxpayer's failure to file and pay was due to a recent change in tax law that the taxpayer could not reasonably be expected to be aware of.
- (4) Other Considerations for Determining Reasonable Cause.
 - (a) The commission allows for equitable considers in determining whether reasonable cause exists to waive a penalty. Equitable considerations include:
 - (i) whether the commission had to take legal means to collect the taxes;
 - (ii) the length of time between the event cited and the filing date;
 - (iv) typographical or other written errors; and
 - (v) other factors the commission deems appropriate.
 - (b) Other clearly supported extraordinary and unanticipated reasons for late filing or payment, which demonstrate reasonable cause and the inability to comply, may justify a waiver of the penalty.
 - (c) In most cases, ignorance of the law, carelessness, or forgetfulness does not constitute reasonable cause for waiver. Nonetheless, other supporting circumstances may indicate that reasonable cause for waiver exists.
 - (d) Intentional disregard, evasion, or fraud does not constitute reasonable cause for waiver under any circumstance.

Utah Code Sec. 59-1-1417 provides for both burden of proof and statutory construction in this matter as follows:

- (1) In a proceeding before the commission, the burden of proof is on the petitioner

DISCUSSION

At the hearing the owner of Petitioner ("Taxpayer") did not offer evidence or legal argument that the audit deficiency was incorrect based on the facts or the law. The business provided short-term lodging and was subject to both the sales tax and the transient room tax. The Taxpayer did not provide information that indicated the amount of total sales determined in the audit was incorrect. The Taxpayer did question whether a payment he had made had been credited toward the deficiency and requested relief from the penalty and the tax for other reasons.

The Taxpayer explained that the business has ##### rental units and had been owned by his brother until his brother's death at the end of 2015 from a car accident. The Taxpayer indicated that he had very little involvement with the business prior to his brother's death, but has been trying to run the business since that time. The business had first opened in July 2013, and the number of units had been increased to #####. The Taxpayer was aware of a \$\$\$\$ payment that his brother had made for the taxes and was not sure that had been credited to the account.

The Division explained that for this account the Division had sent in February 2015 a self-review audit packet that explained that sales and transient room tax was imposed on short term tourist or vacation rentals under Utah Code Subsection 59-12-103(1) and asked the business

to calculate the tax amount it should have been collecting. The business had not been filing returns prior to this self-review or paying taxes. The business did respond to the self-review and from that response, the Division concluded the Taxpayer owed \$\$\$\$ in tax and interest for the period from January 1, 2012 through December 31, 2014. That amount was paid by the business on June 10, 2015.

The Division states that after this self-review and payment, the business did not file any returns or pay any sales tax in 2015 or 2016. Because the business had failed to file and pay again, the Division audited the business for the period of July 1, 2013 to June 30, 2016 and issued the audit at issue in this appeal on December 28, 2016. Some of this second audit period overlapped the prior audit. It was because the business had already been through the prior audit and then made the same mistakes by not filing and paying the quarterly return that the Division assessed the 10% negligence penalty, a 10% failure to file and a 10% failure to pay penalty.

The Taxpayer could not speak for the time that the business was operated by his brother in 2015, but indicates that when he took over the business at the end of 2015 he did not know about the tax filing requirements.

From the information presented in this appeal, there is basis for waiver of some of the penalties. Although the first self-review audit period had been for the years 2012 through the end of 2014, the first self-review audit was not resolved until June 2015. By that time, the original owner of the business should have been aware that returns needed to be filed. The first quarter of 2015 would have already been past due at that point but he should have filed the second and third quarter of 2015 returns. Tragically, however, he died before the fourth quarter return was due and the current Taxpayer coming in unexpectedly after these unfortunate circumstances would not have had the benefit of his brother's knowledge about the filing requirements, which his brother should have learned after the first audit. Therefore, the portion of the late payment and late filing penalties should be waived for the fourth quarter of 2015 and the first quarter of 2016 for equitable considerations. The current Taxpayer unexpectedly ended up with a business that he knew very little about, but after two quarters should have figured out the taxes for the business. The fraud penalty should be abated as, although this is a second error for the same business, the current Taxpayer is a new business owner and due to the tragic and unexpected way he came to own the business did not have the benefit of information learned by his brother.

There was no basis provided for waiver of the interest, as interest is waived if there is a showing the Tax Commission gave the taxpayer erroneous information or took an inappropriate action that caused the error. *See* Utah Admin. Rule R861-1A-42(2). There was no showing of this type of Tax Commission error.

The Taxpayer did seem to be contesting the tax based on hardship or lack of knowledge of the tax laws. The Tax Commission does not consider financial hardship in an audit appeal as a basis to reduce a tax amount owed. After the appeal is closed, the Taxpayer may contact the Taxpayer Services Division at 801-297-7703 to discuss financial hardship in making payment arrangements. Ignorance of the law regarding sales and transient room taxes on short term or vacation rentals has been argued in prior cases to the Commission and has not been accepted as a basis to abate any portion of the tax due.⁴

For these reasons, the fraud penalty assessed for the entire audit period should be abated. The late file and late payment penalties should be upheld for the second and third quarters of 2015 and second quarter of 2016, and the remainder of these penalties waived for the rest of the audit period. The audit tax and interest accruing thereon should be upheld.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Tax Commission abates the fraud penalty assessed in this audit, and waives the late payment and late filing penalties for all of 2013 and 2014, for the first and fourth quarters of 2015 and the first quarter of 2016. The audit tax and interest is sustained. 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, or emailed, 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

or emailed to:
taxappeals@utah.gov

⁴ See *Utah State Tax Commission Initial Hearing Orders 13-630* (June 13, 2014) and *15-1941* (November 7, 2016). These and other Tax Commission decisions are published at tax.utah.gov/commission-office/decisions.

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2018.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Rebecca L. Rockwell
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.