

17-555
TAX TYPE: SALES & USE TAX
TAX YEAR: 01/01/14- 09/30/15
DATE SIGNED: 10/10/2017
COMMISSIONERS: M CRAGUN, R PERO, R ROCKWELL
RECUSED: J VALENTINE
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>TAXPAYER,</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>ORDER ON RESPONDENT’S MOTION TO DISMISS</p> <p>Appeal No. 17-555</p> <p>Account No. #####</p> <p>Tax Type: Sales & Use Tax</p> <p>Audit Period: 01/01/14 – 09/30/15</p> <p>Judge: Phan</p>
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Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE-1 FOR TAXPAYER, Attorney at Law
REPRESENTATIVE-2 FOR TAXPAYER, President, TAXPAYER

For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General
RESPONDENT-1, Director, Auditing Division
RESPONDENT-2, Assistant Director, Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on September 11, 2017 for a Hearing on Motion to Dismiss filed by Respondent (“Division”). The Division’s Motion was based on Petitioner’s (“Taxpayer’s”) failure to file the Petition for Redetermination of an audit deficiency within the statutory time period set forth at Utah Code Sec. 59-1-501.

APPLICABLE LAW

Utah Code Ann. §59-1-501 provides that a taxpayer must file a petition for a redetermination of a deficiency within thirty days of the issuance of a notice of deficiency, as follows in pertinent part:

- (2) A person may file a request for agency action, petitioning the commission for redetermination of a deficiency.
- (3) Subject to Subsections (4) through (6), a person shall file the request for agency action described in Subsection (2):

- (a) within a 30-day period after the date the commission mails a notice of deficiency to the person in accordance with Section 59-1-1405...

Utah law makes it clear when the notice is considered to be mailed and which address is to be used for the mailing. Utah Code Sec. 59-1-1404 provides in relevant part:

...

(2) ...

- (b) the document is considered to be mailed: (i) for a document that is mailed using the method described in Subsection (2)(a)(i), on the date the document is postmarked;

...

- (4) Subject to Subsection (5), if the commission is required to mail a notice to a person under this part, the commission shall mail the notice to the person at the person's last-known address as shown on the records of the commission.

Filing within the thirty-day deadline is governed by Rule R861-1A-20 of the Utah Administrative Rules, as follows:

- (1) Except as provided in Subsection (2), a petition for adjudicative action must be received in the commission offices no later than 30 days from the date of the action that creates the right to appeal. The petition is deemed to be timely if:
 - (a) in the case of mailed or hand-delivered documents:
 - (i) the petition is received in the commission offices on or before the close of business of the last day of the 30-day period; or
 - (ii) the date of the postmark on the envelope or cover indicates that the petition was mailed on or before the last day of the 30-day period; or
 - (b) in the case of electronically-filed documents, the petition is received no later than midnight of the last day of the 30-day period.
 - (c) A petition for adjudicative action that is mailed but not received in the commission offices shall be considered timely filed if the sender complies with the provisions of Subsections 68-3-8.5(2)(b) and (c).
- (2) If a statute provides the period within which an appeal may be filed, a petition for adjudicative action is deemed to be timely if:
 - (a) in the case of mailed or hand-delivered documents:
 - (i) the petition is received in the commission offices on or before the close of business of the last day of the time frame provided by statute; or
 - (ii) the date of the postmark on the envelope or cover indicates that the request was mailed on or before the last day of the time frame provided by statute; or
 - (b) in the case of electronically-filed documents, the petition is received no later than midnight of the last day of the time frame provided by statute.
 - (c) A petition for adjudicative action that is mailed but not received in the commission offices shall be considered timely filed if the sender complies with the provisions of Subsections 68-3-8.5(2)(b) and (c).

- (3) Any party adversely affected by an order of the commission may seek judicial review within the time frame provided by statute. Copies of the appeal shall be served upon the commission and upon the Office of the Attorney General.

Further guidance on the filing deadline is provided in Rule R861-1A-22 of the Utah Administrative Rules, as follows in relevant part:

- (1) Time for Petition. Unless otherwise provided by Utah statute, petitions for adjudicative actions shall be filed within the time frames specified in R861-1A-20. If the last day of the 30-day period falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next Tax Commission business day.

STATEMENT OF FACTS

1. There are ##### related business entities of which REPRESENTATIVE-2 FOR TAXPAYER is the President, that were being audited at the same time and the Notices of Deficiency for all ##### entities were mailed on the same date.

2. One of the Division's auditors working on the audits had sent an email to REPRESENTATIVE-2 FOR TAXPAYER on December 22, 2016 in which he stated, "My manager just wanted me to let you know that all the audits will be mailed in the next day or two." REPRESENTATIVE-2 FOR TAXPAYER did not deny receiving this email.

3. The Notice of Deficiency and Audit Change that is the subject of this appeal had been mailed on December 23, 2016 to the last known address on the Commission's records for the Taxpayer and was sent by certified mail return receipt requested. The Notice of Deficiency was delivered on December 27, 2016, as evidenced by the return receipt signed for by NAME-1 at the Taxpayer's address. The Division had tracking documents from the United States Postal Service to show when the Notice was mailed and when it was received at the Taxpayer's address.

4. The Notices all stated that if the Taxpayer disagreed with the audit, the Taxpayer had until January 22, 2017 to file a Petition for Redetermination.

5. There were three generally recognized holidays between December 23, 2016 and January 22, 2017.

6. The Taxpayer provided information that once the mail was received at its business address, an employee at that location scanned in the mail and emailed a copy of the mail to a different employee, NAME-2, who worked from home. NAME-2's job was to sort the mail emailed to her and distribute it to the employee or person who would follow up on behalf of the business. NAME-2 received emailed audit Notices from the first employee on December 30, 2016, while she was on vacation for the

holidays. She testified that the businesses received a lot of mail from the Utah State Tax Commission and it was her understanding that generally the business had thirty-days to respond to correspondence from the Tax Commission. Therefore, she felt that she could address these notices after the holidays.

7. REPRESENTATIVE-2 FOR TAXPAYER testified that after receiving the email from the auditor that the audits would be mailed in a day or two, he did contact during the holiday period two of his employees to inquire if they had received the audit notices. He testified he was told at that time that they had not seen the audit notices. He also testified that he did not think further about the audits because he had contacted his State Senator, NAME-3, about the audits and he thought NAME-3 was going to set up a meeting with the Division.

8. When NAME-2 returned to work after the holidays, she testified that she had two computer hard drive crashes, which put her behind on her work. She testified that she did not forward the Notices to REPRESENTATIVE-2 FOR TAXPAYER until February 9, 2017.

9. REPRESENTATIVE-2 FOR TAXPAYER testified that although he had received six of the notices, which he had appealed through his representative, REPRESENTATIVE-1 FOR TAXPAYER on March 10, 2017, he never received the notice for TAXPAYER, the Taxpayer at issue in this appeal. In fact, REPRESENTATIVE-2 FOR TAXPAYER and REPRESENTATIVE-1 FOR TAXPAYER stated that they did not file an appeal for the subject Taxpayer because they did not see an audit notice.

10. This appeal was opened because on March 6, 2017, an Appeal Form TC-738 was filed listing REPRESENTATIVE-2 FOR TAXPAYER as the Petitioner. The Form TC-738 did appear to be an appeal of the personal penalty assessment against REPRESENTATIVE-2 FOR TAXPAYER. However, an attachment to the form had listed TAXPAYER along with other information of the related business entities and discussed both the sales tax audit deficiencies and the personal penalty assessment against REPRESENTATIVE-2 FOR TAXPAYER. Out of caution to protect any appeal rights the Taxpayer might have, the Appeals Unit had treated this filing as both a personal penalty appeal and a separate audit appeal of the entities on the list for which an appeal had not been separately filed. At the hearing, the Taxpayer and his representative stated that this Form TC-738 was filed as an appeal of the personal penalty assessment against REPRESENTATIVE-2 FOR TAXPAYER and was not intended by them to be an audit appeal. They testified that they never filed an audit appeal of the Statutory Notice issued to the Taxpayer because they had never seen the Notice of Deficiency. This was regardless of the fact that the Notice of Deficiency had been delivered on December 27, 2016, based on the return receipt signed for by an employee of the Taxpayer.

DISCUSSION AND ORDER

The thirty-day requirement for filing an appeal is set by statute at Utah Code Sec. 59-1-501. Subsection 59-1-501(3)(a) specifically provides that the deadline to file an appeal is “within a 30-day period after **the date the commission mails** (emphasis added)” the notice. Utah Code Sec. 59-1-1404 makes it clear when a document is considered to be mailed. Subsection 59-1-1404(2)(b)(i) provides that the “document is considered to mailed . . . on the date the document is postmarked . . .” It is clear from the statutory provisions that the thirty-day period for filing an appeal begins from the date the notice is postmarked and not the date the notice was received. The Taxpayer did not dispute that the notice had been addressed to the last known address for the Taxpayer as is required by Utah Code Subsections 59-1-1405(1) and 59-1-1404(4). There is nothing in the statute that can be interpreted as giving the Tax Commission discretion to extend the deadline for cause, if cause had been shown. Furthermore, as long as the notice was mailed to the last known address of a taxpayer, the assertion that a notice was not received by a taxpayer has never been accepted as a basis to allow a late filed appeal. There is nothing in the statute or Administrative Rules noted above that would support the position that the Tax Commission may accept an appeal on the basis of when the principal of the business received the notice, regardless of when the notice was mailed. In this appeal, not only was the document which was treated as an appeal filed after the thirty-day statutory deadline had expired, the Taxpayer’s representative stated that the Taxpayer did not file an appeal because they never received the notice. If they did not intend to file this appeal, this matter should be dismissed.

Although the appeal is dismissed, there may be another remedy available to the Taxpayer. Utah Code §59-1-501(7) allows taxpayers who have not previously filed timely appeals to object to a final assessment by paying the tax and then filing a claim for a refund as provided in the statutes. A taxpayer’s claim of refund must still meet the general deadline for all claims of refunds, which is generally two years from the date of payment. *See* Utah Code Ann. §59-1-1410(8)(a)(ii).

Jane Phan
Administrative Law Judge

ORDER

Based on the foregoing, the Commission hereby dismisses the Taxpayer's appeal. It is so ordered.

DATED this _____ day of _____, 2017.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Rebecca L. Rockwell
Commissioner

Notice of Appeal Rights and 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. If you disagree with this order you have twenty (20) days after the date of this order to file a Request for Reconsideration with the Commission in accordance with Utah Code Ann. §63G-4-302. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §59-1-601 et seq. and §63G-4-401 et seq.