

18-1770

TAX TYPE: CORPORATE FRANCHISE

TAX YEAR: 2014

DATE SIGNED: 5/17/2019

COMMISSIONERS: J. VALENTINE, R. ROCKWELL, M. CRAGUN, L. WALTERS

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BEFORE THE UTAH STATE TAX COMMISSION

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TAXPAYER,  Petitioner,  v.  AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,  Respondent.	<b>ORDER DENYING MOTION TO DISMISS</b>  Appeal No.    18-1770  Account No.    ##### Tax Type:    Corporate Franchise Audit Period:  01/01/14 – 12/31/14  Judge:        Chapman
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**Presiding:**

Kerry R. Chapman, Administrative Law Judge

**Appearances:**

For Petitioner:    REPRESENTATIVE FOR TAXPAYER, CPA (by telephone)

For Respondent:    REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General

STATEMENT OF THE CASE

On November 15, 2018, Auditing Division (“Division”) filed a Motion to Dismiss this appeal on the basis that TAXPAYER. (“Petitioner” or “taxpayer”) did not file its Petition for Redetermination (“Petition”) in this matter within the 30-day statutory period to request an appeal. On March 13, 2019, this matter came before the Commission for a Hearing on Motion.

APPLICABLE LAW

1. Utah Code Ann. §59-1-1405 provides for the Tax Commission to mail a notice of deficiency to a taxpayer, as follows in pertinent part:

(1) Except as provided in Subsection (3) or (5), the commission shall mail a notice of deficiency to a person in accordance with Section 59-1-1404 if the commission finds there is:

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- (a) a deficiency in a tax, fee, or charge imposed; or
- (b) an increase or decrease in a deficiency.

.....

2. UCA §59-1-501 provides that a taxpayer may file an appeal for a redetermination of a 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; or
- (b) within a 90-day period after the date the commission mails a notice of deficiency to the person in accordance with Section 59-1-1405 if the notice of deficiency is addressed to a person outside the United States or the District of Columbia.

.....

(5) A person that mails a request for agency action shall mail the request for agency action in accordance with Section 59-1-1404.

(6) For purposes of Subsection (3), a person is considered to have filed a request for agency action:

- (a) if the person mails the request for agency action, on the date the person is considered to have mailed the request for agency action in accordance with Section 59-1-1404; or
- (b) if the person delivers the request for agency action to the commission by a method other than mail, on the date the commission receives the request for agency action.

(7) A person who has not previously filed a timely request for agency action in accordance with Subsection (3) may object to a final assessment issued by the commission by:

- (a) paying the tax, fee, or charge; and
- (b) filing a claim for a refund as provided in Section 59-1-1410.

3. UCA §59-1-1404 provides guidance concerning mailing procedures and gives the Commission rulemaking authority, as follows in pertinent part:

.....

(2) If the commission or a person is required to mail a document under this part:

- (a) the commission or the person shall mail the document using:

- (i) the United States Postal Service; or
  - (ii) a delivery service the commission describes or designates in accordance with any rules the commission makes as authorized by Subsection (3); and
- (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; or
  - (ii) for a document that is mailed using the method described in Subsection (2)(a)(ii), on the date the delivery service records or marks the document as having been received by the delivery service for delivery in accordance with any rules the commission makes as authorized by Subsection (3).

.....

(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.

.....

4. Utah Admin. Rule R861-1A-22(1) (“Rule 22”) provides that “[u]nless 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.”

5. Utah Admin. Rule R861-1A-20 (“Rule 20”) sets forth the timeframes during which an appeal must be filed, as follows in pertinent part:

(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.

....

6. For the instant matter, UCA §59-1-1417(1) provides guidance concerning which party has the burden of proof, 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 Subsection 59-1-1417(1), the taxpayer has the burden of proof in this matter. On August 20, 2018, the Division issued a Statutory Notice – Corporation Franchise Tax (“Statutory Notice”) to the taxpayer, in which it imposed Utah corporate franchise and income taxes (“corporate franchise taxes”) for the period January 1, 2014 through December 31, 2014. No one presented evidence that the

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Statutory Notice was not mailed on this August 20, 2018 date. The Division mailed the Statutory Notice to the following address:

TAXPAYER.  
ADDRESS-1  
CITY-1, STATE #####

This address will be referred to as the taxpayer's "CITY-1 address." The Statutory Notice contained language informing the taxpayer that it had until September 19, 2018 to file an appeal of the assessment.

The taxpayer subsequently requested an appeal of the Division's assessment by filing a Petition that REPRESENTATIVE FOR TAXPAYER, the taxpayer's CPA, signed on October 8, 2018, and subsequently emailed to the Tax Commission. The Tax Commission received the email with the taxpayer's Petition on October 9, 2018. On the Petition, the taxpayer indicated that its address was as follows:

TAXPAYER.  
ADDRESS-2  
CITY-2, STATE #####

This address will be referred to as the taxpayer's "CITY-2 address."

The Division contends that pursuant to Subsection 59-1-501(3)(a), the taxpayer may not appeal its assessment unless the taxpayer filed its Petition within 30 days of the August 20, 2018 date on which the Division issued the Statutory Notice. The Division indicated that 30 days after this date would be September 19, 2018. Because the taxpayer did not file its appeal on or before this September 19, 2018 date, the Division contends that the Commission no longer has jurisdiction to hear the taxpayer's appeal. For these reasons, the Division asks the Commission to grant its Motion to Dismiss.

The taxpayer does not contest the Division's claim that it filed its appeal more than 30 days after

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the Division issued the Statutory Notice. However, the taxpayer asks the Commission to consider that it believes the Division's assessment to be incorrect. In addition, around the time the Division mailed its Statutory Notice, the taxpayer's president (who is also the taxpayer's primary shareholder) retired, which resulted in a change of address for the taxpayer. For this reason and because the taxpayer's president went on vacation around the time he retired, the taxpayer did not receive the Statutory Notice until after the 30-day appeals period had already elapsed. REPRESENTATIVE FOR TAXPAYER claims that he filed the appeal quickly once the taxpayer's president returned from vacation and provided the Statutory Notice to him.

The taxpayer also contends that it was deprived of its due process because the Division failed to mail a copy of the Statutory Notice to REPRESENTATIVE FOR TAXPAYER, even though the taxpayer had provided the Division with a USTC Form TC-737 (Power of Attorney and Declaration of Representative) ("Form TC-737") sometime in May 2018 (several months before the Division issued the Statutory Notice). On the Form TC-737, the taxpayer appointed REPRESENTATIVE FOR TAXPAYER as its representative for corporate franchise taxes purposes for the January 1, 2014 to December 31, 2014 period at issue. As a result, the taxpayer contends that the Division should have mailed a copy of the Statutory Notice to REPRESENTATIVE FOR TAXPAYER. REPRESENTATIVE FOR TAXPAYER stated that if the Division had properly sent him a copy of the Statutory Notice, he would have ensured that the taxpayer's appeal would have been filed within the 30-day appeals period. For these reasons, the taxpayer asks the Commission to deny the Division's Motion to Dismiss so that its appeal may proceed.

The taxpayer filed its appeal on October 9, 2018, which is the date that the Tax Commission received the email with the taxpayer's Petition. *See* Subsection 59-1-501(6)(b) and Rule 20(2)(b).

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Because this date is more than 30 days after the August 20, 2018 date on which the Division issued its Statutory Notice, the taxpayer did not file its appeal within the 30-day appeals period provided in Subsection 59-1-501(3)(a). As a result, the Division's assessment is final, and the Commission does not have jurisdiction to hear the taxpayer's appeal, unless the Division did not comply with Utah law when it mailed the Statutory Notice to the taxpayer's CITY-1 address or unless the taxpayer has been deprived of its due process.

The taxpayer used the CITY-1 address to which the Division mailed its Statutory Notice on correspondence it exchanged with the Division through at least May 25, 2018. For example, the taxpayer used its CITY-1 address on the Form TC-737 described earlier, which it submitted in May 2018. In addition, the taxpayer does not assert that it notified the Tax Commission of its "new" CITY-2 address on or prior to the August 20, 2018 date on which the Division mailed the Statutory Notice. Accordingly, when the Division mailed the Statutory Notice to the taxpayer's CITY-1 address on August 20, 2018, the Division mailed the notice to the taxpayer's "last-known address as shown on the records of the commission," in accordance with Subsection 59-1-1404(4). The taxpayer has not been deprived of its due process on the basis that the Division, in compliance with Utah law, mailed the Statutory Notice to the taxpayer's CITY-1 address. Furthermore, the taxpayer has not been deprived of its due process because it believes the Division's assessment to be incorrect or because the taxpayer's president was on vacation around the time the Statutory Notice was mailed.

On the other hand, the Commission finds, in this case, that the taxpayer was deprived of its due process where the Division did not mail a copy of the Statutory Notice to the representative that the taxpayer designated on the Form TC-737 that the taxpayer submitted. While the form does not expressly

state that a designated representative will receive a copy of a notice of deficiency, it does provide in paragraph 3, as follows:

This declaration authorizes the representative(s) to receive and inspect my confidential tax information and, to the extent not limited in section 4 below, to perform any acts that I can with respect to the tax matter(s) listed below in this section. This power does not include the power to receive funds, substitute or appoint another representative, or disclose confidential tax information to other parties.

As a result, the taxpayer authorized REPRESENTATIVE FOR TAXPAYER to “receive and inspect my confidential tax information and, to the extent not limited in section 4 below” to perform any acts that I can with respect to the taxpayer’s 2014 corporate franchise tax matters, with the express exceptions of “the power to receive funds, substitute or appoint another representative, or disclose confidential tax information to other parties.” Neither the express exceptions of paragraph 3 nor the “acts not authorized” under section 4 of the form preclude REPRESENTATIVE FOR TAXPAYER from receiving a copy of the Statutory Notice that the Division issued. Furthermore, the “receive and inspect my confidential tax information” suggests that the taxpayer was authorizing REPRESENTATIVE FOR TAXPAYER to receive and inspect a notice of deficiency that might subsequently be issued.

The Commission is not aware of any Utah court case that specifically addresses whether the Tax Commission is required to send a notice of deficiency to a taxpayer’s designated representative. However, in *Alliant Techsystem, Inc. v. Tax Comm’n*, 2003 UT App. 374, 80 P.3d 582 (Utah App. 2003), the Utah Court of Appeals did address whether a county board of equalization (“Board”) was required to send notices of its decisions to a property owner’s counsel (who was the property owner’s designated representative). In that case, the Board sent notices of its decisions to the property owner, but not to the



property owner's counsel. Several months after the Board issued these decisions, the property owner filed appeals of these decisions to the Tax Commission.

The Board subsequently filed a Motion to Dismiss for lack of jurisdiction on the basis that the appeals had not been filed within 30 days of the Board's decisions, and the Commission granted the motion. The property owner then appealed the Commission's decision to the Utah Court of Appeals, which sustained the Commission's decision because "the Board had no legal obligation to notify" the property owner's counsel; the application form on which the property owner designated its representative was for representation purposes and not for notice purposes (the form clearly stated "All Notices of Decision will be mailed to the Owner of Record when issued"); and the property owner never requested for a "courtesy copy" of the Board's decisions to be mailed to its representative, even though the Board's administrative rules provided that a property owner could make such a request.

In the instant case, the Commission is not aware of any statute that requires the Tax Commission to send a copy of a notice of deficiency to a taxpayer's designated representative. However, the Form TC-737 that the taxpayer submitted does not clearly state that a notice of deficiency will be mailed to the taxpayer (instead of the taxpayer's representative) when issued. As a result, the circumstances of this case are distinguishable from those in *Alliant Techsystem*. When this is considered in concert with the language found on the Form TC-737 (which, for reasons previously discussed, suggests that the taxpayer was authorizing REPRESENTATIVE FOR TAXPAYER to receive a copy of a notice of deficiency), the Commission finds that the taxpayer was deprived of its due process where the Division did not mail a

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copy of its Statutory Notice to REPRESENTATIVE FOR TAXPAYER.<sup>1</sup> Accordingly, the Commission should deny the Division's Motion to Dismiss and schedule the matter for further proceedings.

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Kerry R. Chapman  
Administrative Law Judge

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<sup>1</sup> The Commission is aware that in *USTC Appeal No. 17-1206* (Order on Respondent's Motion to Dismiss Oct. 10, 2017), it found that a different taxpayer was not deprived of his due process where the Division did not mail a copy of a notice of deficiency to that taxpayer's designated representative. However, the decision in *Appeal No. 17-1206* does not contain enough information to show whether the language of the power of attorney document at issue in that case is the same as the language of the Form TC-737 that is at issue in the instant matter. As a result, the Commission does not find that *Appeal No. 17-1206* is controlling in the instant matter. Redacted versions of *Appeal No. 17-1206* and other selected decisions can be viewed on the Commission's website at <https://tax.utah.gov/commission-office/decisions>.

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DECISION AND ORDER

Based on the foregoing, the Utah State Tax Commission denies the Division's Motion to Dismiss. As a result, the matter will be scheduled for further proceedings, notice of which will be mailed separately. It is so ordered.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2019.

John L. Valentine  
Commission Chair

Michael J. Cragun  
Commissioner

Rebecca L. Rockwell  
Commissioner

Lawrence C. Walters  
Commissioner