

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER,

Petitioner,

v.

TAXPAYER SERVICES DIVISION OF  
THE UTAH STATE TAX COMMISSION,

Respondent.

**ORDER ON RESPONDENT'S  
MOTION TO DISMISS**

Appeal No. 18-2296

Account No. #####

Tax Type: Withholding Tax

Tax Year: 2015, 2016 and 2017

Judge: Marshall

**Presiding:**

Jan Marshall, Administrative Law Judge

**Appearances:**

For Petitioner: REPRESENTATIVES FOR TAXPAYER

For Respondent: REPRESENTATIVE FOR RESPONDENT  
RESPONDENT-1, Taxpayer Services  
RESPONDENT-2, Taxpayer Services

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on May 29, 2019 for a Hearing on Respondent's ("Division") Motion to Dismiss. The Division based its Motion to Dismiss on the contention that Petitioner's ("Taxpayer") Petition for Redetermination was not timely filed.

APPLICABLE LAW

Utah Code Ann. §59-1-401(14) provides that "[u]pon 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."

Administrative Rule R861-1A-42(1) provides that a taxpayer may request a waiver of penalties and/or interest if certain conditions are met, and further provides that a taxpayer may appeal the denial of a request for waiver, as follows in pertinent part:

(1) Procedure...

(d) If the request for waiver of penalty or interest is denied, the taxpayer has a right to appeal. Procedures for filing appeals are found in Title 63G, Chapter 4, Administrative Procedures Act, and commission rules.

Utah Code Ann. §63G-4-201(4) provides as follows:

When initial agency determinations or actions are not governed by this chapter, but agency and judicial review of those initial determinations or actions are subject to the provisions of this chapter, the request for agency action seeking review must be filed with the agency within the time prescribed by the agency's rules.

The filing deadline for an appeal is set forth 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.

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.

Utah Code Ann. §59-1-1404 sets forth mailing procedures, as follows:

- (1) As used in this section, "Section 7502, Internal Revenue Code" means:
  - (a) Section 7502, Internal Revenue Code, in effect for the taxable year; or
  - (b) a corresponding or comparable provision to Section 7502, Internal Revenue Code, as amended, redesignated, or reenacted.
- (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).
- (3) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the commission may make rules:
  - (a) describing or designating one or more delivery services the commission or a person may use to mail a document under this part if a delivery service the commission describes or specifies is consistent with the definition of "designated delivery service" in Section 7502, Internal Revenue Code; or
  - (b) providing procedures or requirements for determining the date a delivery service records or marks a document as having been received by the delivery service for delivery if those rules are consistent with Section 7502, Internal Revenue Code.
- (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.

- (5) In the case of a joint return filed by a husband and wife under Chapter 10, Individual Income Tax Act, if the commission is notified in writing by either spouse that separate residences have been established, the commission shall mail a duplicate of the joint notice to each spouse at each spouse's last-known address.

Utah Code Ann. §68-3-8.5 provides guidance on determining when a report or payment is considered filed or made, below:

- (1) As used in this section:
- (a) "Payment" means money required or authorized to be paid to the state or a political subdivision of the state.
  - (b) "Report" means a report, claim, tax return, statement, or other document required or authorized to be filed with the state or a political subdivision of the state.
  - (c) "Trigger report" means a report that, upon its receipt by a political subdivision of the state, triggers a responsibility on the part of the political subdivision to respond.
- (2) (a) Except as otherwise provided by statute:
- (i) a report, other than a trigger report, or a payment that is transmitted through the United States mail is considered to be filed or made and received by the state or political subdivision on the date shown by the post office cancellation mark stamped upon the envelope or other appropriate wrapper containing it; and
  - (ii) a trigger report that is transmitted through the United States mail is considered to be filed and received on the date shown by the post office cancellation mark stamped upon the envelope or other appropriate wrapper containing it, if the report is addressed to the attention of:
    - (A) the county clerk, for a county;
    - (B) the city recorder, for a city;
    - (C) the town clerk, for a town; or
    - (D) the clerk or comparable official of the political subdivision, for any other political subdivision of the state.
- (b) A report or payment that is mailed but not received by the state or political subdivision, or received but the cancellation mark is illegible, erroneous, or omitted, is considered to be filed or made and received on the date it was mailed if:
- (i) the sender establishes by competent evidence that the report or payment was deposited in the United States mail on or before the date for filing or paying; and
  - (ii) the sender files with the state or political subdivision a duplicate within 30 days after the state or political subdivision gives the sender written notification of nonreceipt of the report or payment.
- (c) If any report or payment is sent by United States mail, consistent with Subsection (2)(a), and is registered or certified:
- (i) a record authenticated by the United States post office of that registration or certification is considered to be competent evidence that the report or payment was delivered to the person or entity to which it was addressed; and
  - (ii) the date of registration or certification is considered to be the postmarked date.
- (3) If the date for filing a report or making a payment falls upon a Saturday, Sunday, or legal holiday, the filing or payment is considered to be timely if it is performed on the next business day.

### DISCUSSION

The Division issued a Waiver Decision Letter to the Taxpayer on November 20, 2018. The notice explains the appeals procedures, and instructs the taxpayer that if they disagree with the waiver decision, they must file a petition within 30 days of the date of the letter. The Commission received the Taxpayer's Petition for Redetermination on December 27, 2018. The Petition for Redetermination was postmarked December 21, 2018. The parties presented two issues at the hearing. The first issue is whether it was a violation of due process to not send a copy of the Waiver Decision Letter to the Taxpayer's representative. The second issue is whether the Taxpayer timely filed the Petition for Redetermination.

#### Notice to Representative

The Division's representative stated that it is uncontested that the Taxpayer received actual notice of the

waiver decision, that the question is whether the Division was required to send notice of that decision to REPRESENTATIVE-1 FOR TAXPAYER. The Division's representative stated that under Utah Code Ann. §59-1-1404(4), the Division is required to send notice to the last known address of a taxpayer. She stated that she is unaware of any law requiring notice to a Taxpayer's representative. The Division's representative stated that in *Alliant Tech.*, 2003 UT App. 374, the Court found that due process was not violated when notice was sent to the taxpayer, but not the taxpayer's counsel.

The Division's representative argued that without a power of attorney on file, the Division is unable to send notice to REPRESENTATIVE-1 FOR TAXPAYER. She also noted that Administrative Rule R861-1A-26(4) requires a Power of Attorney for certain tax types, though counsel may submit an entry of appearance in other matters. She stated that in this case, nothing was submitted authorizing the Division to send a copy of the Waiver Decision Letter to the Taxpayer's representative.

The Taxpayer's representative argued that the Division's motion to dismiss violates the Tax Commission's Value/Mission Statement. Specifically noting that clear, meaningful correspondence with customers is one of those values. The Taxpayer's representative noted that Rule R861-1A-26 excludes legal counsel from the requirement of filing a power of attorney. The Taxpayer's representative stated that he had been in communication with NAME-1 since June of 2018, and that the Taxpayer verbally authorized NAME-1 to speak with REPRESENTATIVE-1 FOR TAXPAYER at that time. The Taxpayer's representative argued that the verbal authorization is the equivalent of an appearance of counsel. He further argued that the letter that he submitted requesting the waiver of penalties should have been treated as an entry of appearance.

The Taxpayer's representative argued that the instant case is distinguishable from *Alliant Tech.* He stated that the Court in *Alliant Tech* found that notice must be reasonably calculated to apprise interested parties. The Taxpayer's representative maintains that he was an interested party who should have been notified. He argued that the Court in *Alliant Tech* misapplied prior case law. The Taxpayer's representative stated that the Court in *Alliant Tech* dismissed prior case law, finding those cases inapplicable. He stated that prior case law found that if an interested party can be identified or is readily identifiable, that person is entitled to actual, not constructive notice. The Taxpayer's representative stated that subsequently, the Court found in *Jordan v. Jensen*, 391 P.3 183 (2017) that the limitation period is stopped when there is a failure of due process, and that an interested party failing to get notice is a failure of due process. It is the Taxpayer's position that REPRESENTATIVE-1 FOR TAXPAYER is an "interested party" who should have received notice.

The Taxpayer's representative argued that R861-1A-26(4) specifically applies to "other than legal counsel" and notes that Subsection (4)(a)(iv) provides that if an individual is represented by counsel, documents are required to be sent to counsel as well as the individual.

In rebuttal, the Division's representative argued that the Taxpayer's position is potentially putting Tax Commission employees at risk of disclosing confidential information. She argued that if the conversation between the Taxpayer's representative and a Tax Commission employee or a request being submitted on letterhead are to be construed as an appearance of counsel, that puts the Division in a difficult position to determine what is or is not an appearance of counsel. The Division's representative stated that Tax Commission employees deal with confidential/sensitive information, and argued that clear rules for the Division as to who they are and are not supposed to send information to is important. She noted that criminal penalties can be imposed for disclosing confidential information under Utah Code Ann. §59-1-403 and §59-1-404. She stated that R861-1A-26 is for formal adjudicative proceedings only. She stated without a pending appeal, the Division requires a power of attorney to send information to anyone other than the taxpayer. The Division's representative noted that there was no statement in the October 16, 2016 waiver request letter that could be construed as an entry of appearance, nor did it contain a request to send the response to REPRESENTATIVE-1 FOR TAXPAYER. She noted that it is the general practice of the Division that if a taxpayer is on the telephone, they can give verbal permission for the Division employee to discuss tax issues with a representative who is also on that phone call. The Division's representative argued that practice does not constitute a power of attorney or entry of appearance for any purpose other than that specific telephone call.

As noted by the Division, in *Alliant Tech*, the Court of Appeals found that a county board of equalization was not required to send notices of its decisions to a property owner's counsel, even though counsel was the property owner's designated representative. In that case, the board of equalization sent notices of its decisions to the property owner, but not the property owner's counsel. The board of equalization form stated that all notices of decision would be mailed to the owner of record, but allowed for mailing a courtesy copy to a representative if a taxpayer affirmatively made such a request. Several months after the board of equalization issued the decisions, the property owner filed appeals of those decisions to the Tax Commission. The board of equalization filed motions to dismiss on the ground that the appeal was not filed within 30 days of the board of equalization decision. The Commission granted the motion. The property owner then appealed that decision, and the Court of Appeals sustained the Commission's decision finding the board of equalization had no legal obligation to notify the taxpayer's counsel. In this case, the Division mailed the Waiver Decision Letter to the Taxpayer at the Taxpayer's last known address, as required under Utah Code Ann. §59-1-1404. The Taxpayer has not cited to any legal obligation the Division had to notify REPRESENTATIVE-1 FOR TAXPAYER, nor is the Commission aware of any statute that would have required it to do so.

The Commission recently addressed a similar issue in Appeal No. 18-1770.<sup>[1]</sup> That appeal involved an audit assessment, where the Auditing Division mailed the statutory audit notice to the taxpayer, but not to the taxpayer's representative. The Commission determined that the taxpayer was deprived of due process because the Auditing Division did not send a copy of the notice to the Taxpayer's representative. In Appeal No. 18-1770, the taxpayer had previously provided the Division with a form TC-737 (Power of Attorney and Declaration of Representative), designating its representative for the specific tax and periods at issue. The Commission found the Taxpayer was deprived of due process because Form TC-737 did not clearly state that a notice would be mailed to a taxpayer, rather than the taxpayer's representative. In the instant case, the Taxpayer failed to provide the Division with a Form TC-737, designating REPRESENTATIVE-1 FOR TAXPAYER as its representative.

The Taxpayer's representative has argued that he is an "interested party" who would be entitled to notice. An "interested party" is generally one who has a recognizable stake (and therefore standing) in a matter. *See* Black's Law Dictionary, Ninth Edition. REPRESENTATIVE-1 FOR TAXPAYER does not have a private interest in this matter. The Commission notes this finding is consistent with other administrative proceedings in Utah. In Case No. 09-0812, *Johnson v. Big Lots*, before the Appeals Board of the Utah Labor Commission, the Appeals Board rejected an argument that counsel should have been sent notice, finding that counsel was not an "interested party" to the claim.

Based on the foregoing, the Commission finds that the Taxpayer was not deprived of due process. It is not contested that the Taxpayer received actual notice of the Waiver Decision Letter. There was no legal obligation on the part of the Division to issue a copy of the Waiver Decision Letter to REPRESENTATIVE-1 FOR TAXPAYER. While he may have submitted the initial waiver request on behalf of the Taxpayer, there was no Form TC-737 on file.

#### Timely Filing

The Division's representative stated that Administrative Rule R861-1A-22 provides that a petition for adjudicative action must be filed within the time frames specified in Rule R861-1A-20. She stated that Rule 20 provides that a petition must be filed within 30-days of the action that created the right to appeal, unless otherwise provided in statute. The Division's representative stated that in this case, there is no relevant statutory provision, so the due date is within 30 days. She stated that the Taxpayer's Petition for Redetermination was postmarked on December 21, 2018, which is one day after the 30-day period to file expired. The Division's representative noted that in Appeal No. 16-1445<sup>[2]</sup>, the Commission dismissed a petition because it was one day late, noting that whether an appeal is timely filed is a jurisdictional issue, and the deadline cannot be extended for good cause.

The Taxpayer's representative argued that the Petition was timely mailed. He stated that Rule R861-1A-20 adopts Utah Code Ann. §68-3-8.5. The Taxpayer's representative argued that the statute trumps the rule, and the statute provides in Subsection (2)(b) that a report or payment is considered to be filed, made or received on the date it was mailed if the sender establishes by competent evidence that the report or payment was deposited in the

United States mail on or before the date for filing or paying. The Taxpayer's representative provided affidavits of NAME-2 and NAME-3 in support of his contention that the Petition for Redetermination was timely mailed. The affidavits indicate that NAME-2 had his friend, NAME-3, drive him to the U.S. Post Office in CITY on DATE, 2018 at approximately 5:00 p.m. to mail the Petition for Redetermination. The Taxpayer's representative argued that the affidavits are "competent evidence" that the Petition for Redetermination was timely filed.

NAME-2 was present at the Hearing on Motion. He testified that he dropped the Petition for Redetermination in the slot at the CITY Post Office. NAME-2 stated that the slot indicated the last pick up time was 5:30. He stated that the Post Office was still open when he went in to drop off the Petition for Redetermination.

In rebuttal, the Division's representative argued that Utah Code Ann. §68-3-8.5 is only applicable in the event that a petition is mailed but not received in the Commission offices. She argued that because the Commission received the Taxpayer's Petition for Redetermination, Utah Code Ann. §68-3-8.5 is inapplicable. The Division's representative further argued that all relevant statutes and administrative rules refer to the "postmark," which should be controlling in this case.

Administrative Rule R861-1A-42(d) provides a taxpayer may appeal a denial of a waiver request by following the procedures found in Title 63G, Chapter 4 of the Utah Code, and Tax Commission rules. Utah Code Ann. §63G-4-201(4) provides that when an individual appeals an action, such as a waiver decision, the individual must appeal the action within the time prescribed by the agency's rules. Administrative Rule R861-1A-22 provides that unless otherwise provided by statute, petitions for adjudicative actions shall be filed within the time frame specified in R861-1A-20. Rule R861-1A-20 states that a petition for adjudicative action must be received in the commission offices not later than 30 days from the date of the action that creates the right to appeal. Further, Subsection (a)(ii) of Rule R861-1A-20 provides that a petition is deemed to be timely if the date of the postmark on the envelope indicates the petition was mailed on or before the last day of the 30 day period.

In this case, the Division issued its Waiver Decision Letter, which created the right to appeal, on November 20, 2018. The Commission received the Taxpayer's Petition for Redetermination on December 27, 2018, though it was postmarked December 21, 2018. The postmark is beyond the 30-day filing deadline allowed under Rule R861-1A-20. Subsection (1)(c) of Rule R861-1A-20 provides that if a petition for adjudicative action is mailed but not received, it shall be considered timely if the sender complies with the provisions of Subsections 68-3-8.5(2) (b) and (c). The Taxpayer has argued that it should be allowed to show "competent evidence" that the Petition for Redetermination was mailed on the due date under Utah Code Ann. §68-3-8.5. Under Subsection (1)(c) of Rule R861-1A-20, Utah Code Ann. §68-3-8.5 is considered only if a petition for adjudicative action is mailed but not received in the Commission offices, which is not the circumstance in the instant case.

However, the Commission has previously considered the application of Utah Code Ann. §68-3-8.5, when a Petition for Redetermination was received after the due date for a timely filing. In Appeal No. 12-2785,<sup>[3]</sup> the Petition for Redetermination was required to be filed by November 5, 2012, and the Commission received it on November 8, 2012. However, the postmark was completely illegible, and the Division's representative acknowledged it was basing its motion on the date the Petition was received. The taxpayer in Appeal No. 12-2785 testified that the Petition was mailed on the November 5, 2012 due date. The Commission determined, "[t]he taxpayer's testimony and other factors may be considered to establish the date that the petition had been mailed." The Commission determined that with the nearness to the due date that the Petition was received, and the Taxpayer's testimony, the weight of the evidence was in support of the Taxpayer, and denied the motion to dismiss.

In this case, the postmark is legible, and the envelope was postmarked a day after the due date for the Petition for Redetermination to be considered timely. The Taxpayer's representative has argued that the postmark was "erroneous" under Utah Code Ann. §68-3-8.5(2)(b). The Taxpayer provided affidavits of both NAME-2 and NAME-3 that state that NAME-3 drove NAME-2 to the CITY Post Office on

December 20, 2018 at approximately 5:00 p.m. NAME-2 was present at the hearing and stated that the post office was still open, and he placed the envelope in the drop box. This is clear and specific information from both NAME-2, and his friend, of the timely mailing of the Petition. The postmark on the envelope appears to be a hand-cancelled stamp, rather than an electronic cancellation. Further, the postmark indicated that it was issued in CITY-1, when the testimony of NAME-2 and his friend was that the Petition was mailed from the CITY Post Office. This supports a finding that the postmark was erroneous, and that NAME-2 did mail the Petition on December 20, 2018. The Commission notes that this could have been avoided had NAME-2 handed the envelope to a postal worker and asked them to hand-cancel the stamp on the date he took the Petition to the post office, or by sending the Petition via certified mail.

Jan Marshall  
Administrative Law Judge

ORDER

Based on the foregoing, the Commission denies the Division's Motion to Dismiss. This matter will be set for further proceedings on the underlying waiver request. 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

**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.

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<sup>[1]</sup> Prior Commission decisions are available at [tax.utah.gov/commission-office/decisions](http://tax.utah.gov/commission-office/decisions).

<sup>[2]</sup> Prior Commission decisions are available at [tax.utah.gov/commission-office/decisions](http://tax.utah.gov/commission-office/decisions).

<sup>[3]</sup> Prior Commission decisions are available online at [tax.utah.gov/commission-office/decisions](http://tax.utah.gov/commission-office/decisions).