

19-722

TAX TYPE: INCOME TAX:

TAX YEAR: 2013 THRU 2017

DAE SIGNED: 9/8/2021

COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. ROCKWELL, J. FRESQUES

GUIDING DECISION

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BEFORE THE UTAH STATE TAX COMMISSION

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TAXPAYER-1 AND TAXPAYER-2,

Petitioners,

v.

AUDITING DIVISION OF THE UTAH STATE  
TAX COMMISSION,

Respondent.

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND FINAL DECISION**

Appeal No. 19-722

Account No: #####

Tax Type: Income Tax

Tax Years: 2013 through 2017

Judge: Phan

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**Presiding:**

Michael J. Cragun, Commissioner

Jane Phan, Administrative Law Judge

**Appearances:**

For Petitioner: TAXPAYER-1

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

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on July 13, 2021, in accordance with Utah Code §59-1-501 and §63G-4-201 et seq. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. On February 6, 2019, Respondent (“Division”) issued Statutory Notices of Audit Deficiency to Petitioners (“Taxpayers”) for tax years 2013 through 2017. Petitioners timely appealed the Statutory Notices. Prior to this Formal Hearing, the Taxpayers and the Division reached an agreement in regards to the tax portion of the deficiency and the penalties assessed with the audit. The only issue before the Tax Commission at this Formal Hearing was the Taxpayers’ request for waiver of the audit interest.

2. The amount of interest at issue for each year is the following:

Tax Year	Interest
2013	\$\$\$\$\$
2014	\$\$\$\$\$
2015	\$\$\$\$\$
2016	\$\$\$\$\$
2017	\$\$\$\$\$

The Taxpayers have paid the balance due and there is no amount outstanding. The Taxpayers are requesting a refund of the interest amounts that they have paid.

3. At the hearing, the Taxpayer testified he had been living in STATE-1 during the audit years and for years prior to the audit years, while his wife was a resident of Utah during the audit period and years prior to the audit period. He testified that it was a second marriage for both he and his wife and she had a home in Utah and was a Utah resident prior to their marriage, while he had a home in STATE-1 and had been living in STATE-1. In 2013, the Taxpayers were audited for tax years 2009 and 2010. The Taxpayer testified that he understood the audit issue to be whether he was also domiciled in Utah. He testified that he provided information and told the auditor that he never made any money in Utah, went through the audit process and the Division determined that he did not owe any money for those prior years.

4. Although this first audit was dealing with tax years 2009 and 2010, the Taxpayer pointed out that he spoke with the Division's auditor about this audit in 2013. The Taxpayer testified that during these conversations that occurred in 2013, the Division's auditor never told the Taxpayer about the new law that had been adopted and became effective beginning with tax year 2012. The Taxpayer explained that he was unaware of the law change. He continued to file returns as if he was not domiciled in Utah, which was apparently what the Division had concluded in his case for tax years 2009 and 2010.

5. In February 2019 the Division audited the Taxpayers for all of the tax years 2013 through 2017. The Division applied Utah Code Sec. 59-10-136, which had become effective beginning with tax year 2012. Based on Utah Code Sec. 59-10-136, the Division concluded that both Taxpayers were domiciled in Utah. Prior to this Formal Hearing, the parties reached a settlement agreement regarding the audit tax deficiency and audit penalties. As part of the agreement, the audit penalties were waived.

6. The Taxpayer argued at the hearing for waiver of the interest assessed for all of the 2013 to 2017 audit period. One of the arguments he offered for waiver was that the auditor with whom he had spoken back in 2013 regarding the audits for 2009 and 2010, should have told him about the new law back in 2013.

7. RESPONDENT-1, Auditing Division Director, testified at the Formal Hearing that there was not a Division policy or procedure in place that would have required the auditor to inform a taxpayer about a new law that was effective for a tax year not currently under audit. He also testified that there was no policy or procedure in place that would have prevented the auditor from informing a taxpayer about a new law that would be applicable for tax years that occurred after the audit. RESPONDENT-2, Income Tax Audit Manager, also testified at the Formal Hearing. RESPONDENT-2 testified that the Division did not start auditing domicile cases under the new domicile law until 2015 and 2016. He also testified the auditor would be focused on the tax year at issue in the audit and they would generally not give tax advice for years not under audit.

8. Secondly, the Taxpayer had asked that the interest be refunded to him because of the time it took the Division to issue its audits against him. The Taxpayer's argument was that he was treated unfairly or inequitably because the Division had waited so long, until 2019, to audit him for tax years going all the way back to 2013 through 2017. The Taxpayer stated at the Formal Hearing that if there were other taxpayers who were told about the new law or other taxpayers who were audited before that time frame, he felt he should be entitled to equal protection of the law or the same treatment. The Taxpayer argued this was a constitutional issue based on equal protection provisions. The Taxpayers had requested discovery from the Division prior to the Formal Hearing to support this claim. Regarding this discovery, the Taxpayers filed a Motion to Compel on September 28, 2020. A hearing on the Motion to Compel was held on December 15, 2020, and the Tax Commission issued its Order Denying Petitioners' Motion to Compel on December 31, 2020. That Order is incorporated herein. That decision did point out some information was provided but denied the Taxpayers' request for some statistical information, because it was not available and would have to be compiled by the Divisions. In the Order Denying Petitioners' Motion to Compel, the Tax Commission found as follows:

After reviewing the information submitted by the parties, and, in fact, that the Division has admitted to much of the information in the Requests for Admission and Interrogatories, the Taxpayers' Motion to Compel in regards to the remaining information is denied based on Rule 26(b) of the Utah Rules of Civil Procedure as it fails on the basis of the proportionality test. Rule 26(b)(1) provides "Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below." The stand[ard]s of proportionality are set out at Rule 26(b)(2) and requiring the Division to compile statistics that are not readily available and would cost significant time and manpower to configure searches through all income tax audits does not meet the proportionality test in this matter.

9. At the hearing, the Taxpayer argued regarding his interpretation of the standard of proportionality referenced in the Motion to Compel proceeding. He argued that even if it was only a small dollar matter to the Tax Commission, for the Taxpayer it was a significant issue.

10. However, at the hearing the Taxpayer called as a witness RESPONDENT-1, Auditing Division Director. RESPONDENT-1 testified that if a return has not been filed there is no statute of limitations for issuing an audit and the Division can then audit at any time. The Taxpayer had wanted information to show that other persons had been audited in a shorter period of time from the tax year to the date of the audit. The Taxpayer referred to his audit having taken six years, which appears to be a reference from the tax year for the first audit year (2013) to the year the audit was issued, which was in 2019. RESPONDENT-1 acknowledged in his testimony at the Formal Hearing that it was probable that other persons were audited prior to the time period the Taxpayer described above.

#### APPLICABLE LAW

The Commission has been granted the discretion to waive penalties and interest. Utah Code Ann. §59-1-401(14) provides, “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:

- (1) 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.
- (2) 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...
  - (k) Bank Error...
  - (l) Compliance History...
  - (m) Employee Embezzlement...
  - (n) Recent Tax Law Change...
- (4) Other Considerations for Determining Reasonable Cause.
  - (a) The commission allows for equitable considerations 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) If the error is caught and corrected by the taxpayer;
    - (iii) 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 a 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 Ann. §59-1-1417 provides, “[i]n a proceeding before the commission, the burden of proof is on the petitioner...”

#### CONCLUSIONS OF LAW

1. At this hearing the Taxpayer argued that the interest should be waived based on a violation of the equal protection clause, a reference to the Fourteenth Amendment. He argued that if the Division had audited other taxpayers sooner than the time period it took the Division to notify him or if the Division had notified anyone else of the law change<sup>1</sup> during that time period, but not him, that he did not receive equal protection under the law. His point was that the longer it took the Division to issue its audit to the Taxpayer, the more interest accrued. The Taxpayer was concerned about trying to prove that other persons had been audited within a shorter time period than he had, so had requested the statistical information, which had been denied on the basis of proportionality. In addition, at the hearing, the Taxpayer argued the concept of spoliation should apply. However, these evidentiary issues are no longer relevant because the Division did admit at the hearing that it was probable that the Division had audited other persons in a shorter period of time than they had the Taxpayers. Regardless, RESPONDENT-1 pointed out that if a Utah return is not filed, there is no statute of limitations and the Division may audit that account at any time.<sup>2</sup> Furthermore, the Commission does not have jurisdiction to address the Taxpayer’s constitutional arguments. The Utah Supreme Court held in *State Tax Commission v. Wright*, 596 P.2d 634 (Utah 1979), “[a]lthough the Tax Commission must of necessity interpret the taxing statutes and make determinations as to their applicability, it has been stated that ‘it is not for the tax commission to determine questions of legality or constitutionality of legislative enactments...’” (citing *Shea v. State Tax Commission*, 120 P.2d 274 (Utah 1941)). See also *Nebeker v. State Tax Comm’n*, 34 P.3d 180 (Utah 2001).

2. Utah Code Ann. §59-1-401(14) gives the Commission authority to waive penalties or interest upon a showing of reasonable cause. Administrative Rule R861-1A-42 sets out what is considered

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<sup>1</sup> In this hearing the parties’ use of the term “notified” appeared to be used in the context of the Tax Commission specifically issuing an audit or reaching out to a taxpayer that was a nonfiling taxpayer. The Tax Commission did notify taxpayers of the law change beginning in 2012 with changes to the individual income tax instruction booklets.

<sup>2</sup> The Division is referring to Utah Code Subsection 59-1-1410(3) which states, “The Commission may assess a tax, fee, or charge or commence a proceeding for the collection of a tax, fee, or charge at any time if: (a) a person: . . . (ii) fails to file a return . . .”

to be reasonable cause for waiver of penalties and what is reasonable cause for waiver of interest. The criteria is different for each. Rule R861-1A-42(2) provides, “[t]o 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.” The Division argued at this Formal Hearing that the Tax Commission is bound by its own rule regarding interest. Therefore, in order for the Tax Commission to waive the interest the Taxpayer must show that the Tax Commission or a Tax Commission employee gave the Taxpayers erroneous information or took inappropriate action. The Division argued that as long as the Division issued its audit within the statute of limitations parameters, the time it takes to issue an audit is not Tax Commission error, which is a position that the Tax Commission has upheld in prior decisions. The Taxpayer argued that the auditor that he had spoken with in 2013 should have told him about the law change. The evidence presented at this Formal Hearing indicates that there was no procedural or policy requirement to do so and the auditor would have been focused on the law applicable during the period under audit, which was the law in effect in 2009 and 2010, prior to the law change. The auditor did not give the Taxpayer erroneous information and the Commission finds that no inappropriate action was taken by the Tax Commission or a Tax Commission employee in this matter. Furthermore, the Commission notes that the imposition of interest is not to punish taxpayers. Rather, it is to compensate the state for the time value of money.

3 The Taxpayer also argued that a recent law change was a basis for waiver under the rule. However, Administrative Rule R861-1A-42 does make it clear that there are different grounds for waiver of penalties than there are for waiver of interest. Reasonable cause for waiver of interest is set out at Administrative Rule R861-1A-42(1), which specifically states, “Grounds for waiving interest are more stringent than for penalty.” Administrative Rule R861-1A-42(2) addresses grounds for waiver of penalties and lists a recent law change as reasonable cause for waiver of the penalty; it is not reasonable cause for waiver of interest. Any audit penalties issued in this appeal have already been waived.

After reviewing the evidence submitted at this hearing and the applicable law in this matter, the Taxpayers have not shown reasonable cause pursuant to Administrative Rule R861-1A-42(1) for waiver of interest and the Taxpayers’ appeal should be denied.

Jane Phan  
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission denies the Taxpayers’ request for a waiver of interest for the years at issue. It is so ordered.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2021.

Appeal No. 19-722

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.