

19-2239

TAX TYPE: WITHHOLDING TAX

TAX YEAR: 01/01/18 – 12/31/18

DATE SIGNED: 5/27/2020

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

GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER'S,

Petitioner,

v.

AUDITING DIVISION OF THE UTAH
STATE TAX COMMISSION,

Respondent.

INITIAL HEARING ORDER

Appeal No. 19-2239

Account No. #####

Tax Type: Withholding Tax

Audit Period: 01/01/18 – 12/31/18

Judge: Phan

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER'S CO-OWNER, Co-Owner/CFO, TAXPAYER'S, By
Telephone

For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney
General
RESPONDENT, Compliance Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on March 10, 2020 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. The Respondent ("Division") issued a Statutory Notice-Withholding Tax audit on November 5, 2019, indicating a withholding tax deficiency in the amount of \$\$\$\$ and penalties totaling \$\$\$\$\$. The penalties included a \$\$\$\$ penalty for Petitioner's ("Taxpayer's") failure to electronically file sixteen W-2 forms for calendar year 2018. This penalty was calculated on the basis of \$\$\$\$ per W-2 that was not timely filed electronically. The Taxpayer had filed the W-2s more than thirty days late, but before June 1, 2019. In addition to the penalty for failure to timely file the W-2s, there was a \$\$\$\$ late file and late payment penalty. The Taxpayer has paid the amount of \$\$\$\$\$, intending

to pay the tax portion and did not dispute the tax. The Taxpayer filed the appeal to request waiver of the penalties.

APPLICABLE LAW

Starting with the 2015 tax year, employers are required to electronically file W-2 and/or 1099 forms for each employee in accordance with Utah Code Ann. §59-10-406(8), below in pertinent part:

- (a) Subject to Subsections (8)(b) and (c), the commission shall require an employer that issues the following forms for a taxable year to file the forms with the commission in an electronic format approved by the commission:
 - (i) a federal Form W-2;
 - (ii) a federal Form 1099 filed for purposes of withholding under Section 59-10-404; or
 - (iii) a federal form substantially similar to a form described in Subsection (8)(a)(i) or (ii) if designated by the commission in accordance with Subsection (8)(d).
- (b) An employer that is required to file a form with the commission in accordance with Subsection (8)(a) shall file the form on or before January 31.

An employer that fails to file the W-2 forms electronically as required, is subject to the following penalties under Utah Code Ann. §59-1-401, below in pertinent part:

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- (13) (a) Subject to Subsection (13)(b), an employer that is required to file a form with the commission in accordance with Subsection 59-10-406(8) is subject to a penalty described in Subsection (13)(b) if the employer:
 - (i) fails to file the form with the commission in an electronic format approved by the commission as required by Subsection 59-10-406(8);
 - (ii) fails to file the form on or before the due date provided in Subsection 59-10-406(8);
 - (iii) fails to provide accurate information on the form; or
 - (iv) fails to provide all of the information required by the Internal Revenue Service to be contained on the form.
 - (b) For purposes of Subsection (13)(a), the penalty is:
 - (i) \$\$\$\$per form, not to exceed \$75,000 in a calendar year, if the employer files the form in accordance with Subsection 59-10-406(8), more than 14 days after the due date provided in Subsection 59-10-406(8) but no later than 30 days after the due date provided in Subsection 59-10-406(8);
 - (ii) \$\$\$\$per form, not to exceed \$200,000 in a calendar year, if the employer files the form in accordance with Subsection 59-10-406(8), more than 30 days after the due date provided in Subsection 59-10-406(8) but on or before June 1; or

- (iii) \$100 per form, not to exceed \$500,000 in a calendar year, if the employer:
 - (A) files the form in accordance with Subsection 59-10-406(8) after June 1; or
 - (B) fails to file the form.

The Commission has been granted the discretion to waive these 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, as follows in pertinent part:

- (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 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...”

DISCUSSION

The Taxpayer’s representative explained that the Taxpayer is not a Utah Company, but for a period of several years had a small office in Utah with Utah employees. The Taxpayer also has employees in other states. He explained that they had a payroll person, not located in Utah, who was supposed to be taking care of these filings. He had assumed they were taken care of. It was his contention that the penalties were excessive to the point that people would think about not doing any business in Utah. When he discovered that the payment that the Taxpayer had made to the account for the tax portion had actually been applied first toward the penalties, he argued that it was improper and tantamount to theft. However, he did not present whatever documentation he had sent with the payment to designate how the Taxpayer intended the payment to be applied. The Division responded that payments are applied in that manner.¹

The representative for the Division explained that the purpose of the statutory change requiring the online filing of W-2s at Utah Code Ann. §59-10-406(8), was to protect employees by helping to combat fraud and identity theft.² Along with the electronic filing requirement, the tiered penalties were imposed under Utah Code §59-1-401(13) to encourage compliance. The penalties increase the later the employer submits the W-2s electronically. Under Utah Code Subsection 59-1-401(13)(b) if the forms are submitted after fourteen-days from the January 31 due date but no later than thirty-days after the due date, the penalty is \$\$\$\$ per late form. If the form is filed more than thirty-days after the due date but before June 1, the penalty is increased to \$\$\$\$ per late form. If the form is filed after June 1, the penalty is increased to

¹ Although the Taxpayer seemed to feel the Division’s action was improper, payments are applied in this manner pursuant to Utah Admin. Rule R861-1A-18(A), which states, “Remittances received by the commission shall be applied first to penalty, then interest, and then to tax for the filing period and account designated by the taxpayer.”

² The Division cites to Utah State Tax Commission Initial Hearing Order, Appeal No. 18-2170 (10/30/2019). These and other prior Tax Commission decisions are available for review in a redacted format at tax.utah.gov/commission-office/decisions.

\$\$\$\$ per missing form. In this matter, the Taxpayer filed the forms electronically more than thirty-days after the due date, but prior to June 1 and the penalty was the \$\$\$\$ per form. There were also 10% late payment and 10% late filing penalties assessed with the audit that totaled \$\$\$\$\$. The Division explained that the Taxpayer had made some quarterly payments but had not filed quarterly returns.

The Division points out that pursuant to Utah Code Ann. §59-1-401(14) the Commission may waive or reduce penalties if reasonable cause is shown. The Commission has promulgated Administrative Rule R861-1A-42 to outline the circumstances the Commission may consider to be “reasonable cause” justifying a waiver or reduction of penalties. The Division points out, however, that one of the factors that is considered in waiving penalties is the account history of the Taxpayer. The Division’s representative points out that this Taxpayer has had a history of noncompliance with late filing and failure to submit W-2s electronically for each tax year from 2015 through 2018. The Division had audited the Taxpayer each year and assessed penalties for failure to file the W-2s electronically for each year. The Division points out that in this appeal of the 2018 audit, the Taxpayer did not provide any basis for waiver of penalties that is listed under Administrative Rule R861-1A-42. The Division points out that ignorance of the law is not a basis for waiver of these penalties, citing Administrative Rule R861-1A-42((4)(c)).

After reviewing the facts and the law in this matter, the Taxpayer is arguing that the penalties are too high and not reasonable. This is not a basis for waiver of penalties under Rule R861-1A-42. In this case, there had been three prior audits for the three years immediately preceding the 2018 year at issue, in which the Division had imposed penalties. These audits would have informed the Taxpayer that there was an electronic filing requirement and it would not be unreasonable to assume that the audits should have brought the matter to the Taxpayer’s attention to correct its procedures. However, the audits did not and the problem kept occurring. The 2018 tax year is the fourth year in a row that the Taxpayer has made the same type of errors. All penalties should be upheld in this matter.



Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission finds that there is not reasonable cause to waive or reduce the audit penalties assessed against the Taxpayer in the 2018 withholding tax audit. The Tax Commission denies the Taxpayer's appeal. 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

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

DATED this _____ day of _____, 2020.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Rebecca L. Rockwell
Commissioner

Lawrence C. Walters
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.