

APPEAL #: 23-56

TAX TYPE: REFUND REQUEST/ PASS THROUGH ENTITY SALT ELECTION

TAX YEAR: 2022

DATE SIGNED: 11/28/2023

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

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BEFORE THE UTAH STATE TAX COMMISSION

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<p>TAXPAYER,</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>INCOME TAX AND EDUCATION DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="text-align: center;">Respondent.</p>	<p style="text-align: center;"><b>INITIAL HEARING ORDER</b></p> <p>Appeal No. 23-56</p> <p>Account No: #####</p> <p>Tax Type: Refund Request/Pass Through Entity SALT Election</p> <p>Tax Year: 2022</p> <p>Judge: Phan</p>
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**Presiding:**

Jane Phan, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER'S REP-1, CPA  
TAXPAYER, Taxpayer

For Respondent: RESPONDENT'S REP-1, Assistant Attorney General  
RESPONDENT'S REP-2, Assistant Attorney General  
RESPONDENT'S REP-3, Director, Income Tax and Education Division  
RESPONDENT'S REP-4, Deputy Director, Income Tax and Education

Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on August 22, 2023 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. Petitioner ("Taxpayer") is appealing Respondent's ("Division's") denial to refund the Taxpayer a payment of \$\$\$\$\$, which the Taxpayer had paid pursuant to Utah Code Subsection 59-10-1403.2(2)(a). The Division had denied the Taxpayer's refund on DATE, on the grounds that an election to pay pursuant to Utah Code Subsection 59-10-1403.2(2)(a) is irrevocable and cannot be refunded.<sup>1</sup> The Taxpayer

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<sup>1</sup> Procedurally, this appeal may be atypical because there was no Statutory Notice denying the refund included in the file and instead only an email dated DATE from the Tax Commission's Technical Research Unit informing the Taxpayer that the payment could not be "cancelled." However, the Division did not

appealed the Division's decision to deny the refund on DATE.

APPLICABLE LAW

Utah Code §59-10-1045<sup>2</sup> as applicable during the 2022 tax year stated:

- (1) As used in this section, "taxed pass-through entity taxpayer" means a resident or nonresident individual who:
  - (a) has income attributed to the individual by a pass-through entity;
  - (b) receives the income described in Subsection (1)(a) after the pass-through entity pays the tax described in Subsection 59-10-1403.2(2); and
  - (c) adds the amount of tax paid on the income described in Subsection (1)(a) to adjusted gross income in accordance with Subsection 59-10-114(1)(i).
- (2)
  - (a) A taxed pass-through entity taxpayer may claim a nonrefundable tax credit for the taxes imposed under Subsection 59-10-1403.2(2).
  - (b) The tax credit is equal to the amount of the tax paid under Subsection 59-10-1403.2(2) by the pass-through entity on the income attributed to the taxed pass-through entity taxpayer.
- (3)
  - (a) A taxed pass-through entity taxpayer may carry forward the amount of the tax credit that exceeds the taxed pass-through entity's tax liability for a period that does not exceed the next five taxable years.
  - (b) A taxed pass-through entity taxpayer may not carry back the amount of the tax credit that exceeds the taxed pass-through entity's tax liability for the taxable year.

Utah Code Subsection 59-10-1403.2(2) was enacted as part of 2022 General Session H.B. 444, Income Tax Revisions, and given retrospective operation for a taxable year beginning on or after January 1, 2022. This subsection provided the following regarding nonrefundable tax credits for taxes paid by a pass-through entity as follows:

- (2)
  - (a) For each taxable year that begins on or after January 1, 2022, but begins on or before December 31, 2025, a pass-through entity that is not a disregarded pass-through entity may elect to pay a tax in an amount equal to:
    - (i) the percentage listed in Subsection 59-10-104(2); and
    - (ii) voluntary taxable income.

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argue that the appeal was improperly before the Commission and noted in its Response to Petition for Redetermination, dated DATE, the following, "On DATE, the Respondent contacted the Petitioner to discuss their situation. The Respondent determined that the plain language of the statute appears to indicate that the election is irrevocable and once made cannot be cancelled, even if made in error. On DATE, Respondent received Petitioner's Petition for Redetermination requesting a ruling from the Tax Commission that an election made in error not be treated as an irrevocable election."

<sup>2</sup> This section, when adopted in 2022, had been numbered §59-10-1044, but was renumbered by the Utah Legislature to §59-10-1045.

- (b) A pass-through entity that elects to pay the tax in accordance with Subsection (2)(a) shall notify any final pass-through entity taxpayer of that election.
- (c) A pass-through entity that pays a tax described in Subsection (2)(a) shall provide to each pass-through entity taxpayer a statement that states the amount of tax paid on the income attributed to the pass-through entity taxpayer.
- (d) A payment of the tax described in Subsection (2)(a) on or before the last day of the taxable year is an irrevocable election to be subject to the tax for the taxable year.

Utah Code Subsection 59-10-1403.2(2) was amended in 2023 General Session H.B. 56, Tax Assessment Amendments, and given retrospective operation for a taxable year beginning on or after January 1, 2022, as follows:

(2)

- (a) For each taxable year that begins on or after January 1, 2022, but begins on or before December 31, 2025, a pass-through entity that is not a disregarded pass-through entity may elect to pay a tax in an amount equal to the product of:
  - (i) the percentage listed in Subsection 59-10-104(2); and
  - (ii) voluntary taxable income.
- (b) A pass-through entity that elects to pay the tax in accordance with Subsection (2)(a) shall notify any final pass-through entity taxpayer of that election.
- (c) A pass-through entity that pays a tax described in Subsection (2)(a) shall provide to each final pass-through entity taxpayer a statement that states:
  - (i) the amount of tax paid under Subsection (2)(a) on the income attributed to the final pass-through entity taxpayer; and
  - (ii) the amount of tax paid to another state by the pass-through entity on income:
    - (A) attributed to the final pass-through entity taxpayer; and
    - (B) that the commission determines is substantially similar to the tax under Subsection (2)(a).
- (d) A payment of the tax described in Subsection (2)(a) on or before the last day of the taxable year:
  - (i) is an irrevocable election to be subject to the tax for the taxable year; and
  - (ii) may not be refunded.

#### DISCUSSION

The issue presented to the Tax Commission in this hearing is whether a pass-through entity (“PTE”) state and local tax (“SALT”) payment for tax year 2022 made by the Taxpayer in error to the State of Utah instead of the State of STATE-1 could be canceled or refunded. This is a matter of first impression before the Tax Commission. The applicable statutory provisions were

enacted in the 2022 General Session of the Utah Legislature and made retrospective for a taxable year beginning on or after January 1, 2022. These provisions were revised in the 2023 General Session of the Utah Legislature, and were also given retrospective operation for a taxable year beginning on or after January 1, 2022. In its Prehearing Brief, the Division provided the following brief history on the PTE SALT election, which was not refuted or contested by the Taxpayer:<sup>3</sup>

In 2017 President Trump signed into law the Tax Cuts and Jobs Act which, among many other tax changes, capped individual tax filers' state and local tax (SALT) deductions at \$10,000 for married taxpayers who jointly filed federal returns. Many states, including Utah, modified their tax statutes to allow owners of pass-through entities to avoid the detrimental impact of the federal SALT cap where the pass-through entity makes an irrevocable election to pay state taxes at the entity level.

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Utah's SALT cap workaround is found in Utah Code Ann §59-10-1045 and §59-10-1403.2(2). HB444 created Utah Code §59-10-1044<sup>4</sup> and §59-10-1403.2(2) in 2022. HB444 became effective March 23, 2022 but contained a provision stating that the bill had retrospective operation for a taxable year beginning on or after January 1, 2022. In 2023 HB 56 amended §59-10-1403.2(2)(d) to add Subsection (d)(ii) which clarified that a SALT payment made pursuant to Subsection 1403.2(2) "may not be refunded." HB 56 became effective May 3, 2023 but specified in Section 8 that the change to Subsection 1403.2(2) would have retrospective operation for a taxable year beginning on or after January 1, 2022.

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The SALT cap workaround allows a pass-through entity (PTE) like TAXPAYER to elect to estimate and pay tax owed by its owners or shareholders (defined as pass-through entity taxpayers, or PTET) at the entity level. The PTE, by virtue of having paid the state tax, reports lower income totals on each PTET's K1. The PTET gains a federal tax benefit because he or she has less taxable income at the federal level.

At the same time, the SALT cap workaround is revenue neutral to the state of Utah. The tax paid at the entity level is added back to the PTET's state taxable income. The PTET may claim a nonrefundable credit equal to the amount paid with a carry forward of up to 5 years for any unused portion of the credit.

It was the Taxpayer's position at the hearing that the PTE SALT payment had been made to the State of Utah inadvertently and in error, as it was supposed to have been paid to the State of STATE-1. The Taxpayer's accountant, who represented the Taxpayer at the hearing, agreed that the law provided that there was an irrevocable election and he agreed that was how the law should be interpreted, but it was his position that there was a difference between an irrevocable election

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<sup>3</sup> Respondent's Prehearing Brief, pgs.1-4.

<sup>4</sup> Renumbered to §59-10-1045 in 2023.

and an error. He also argued that he had informed the Tax Commission about the clerical error before the Tax Commission had received the payment and the Tax Commission could have canceled the payment before it had been fully processed.

The Taxpayer's accountant explained at the hearing the circumstances that led to the payment being sent to Utah instead of STATE-1. He stated that although the pass-through entity taxpayer TAXPAYER had lived in Utah, during 2021 he moved to STATE-1 and since that time all of his income has been earned in STATE-1. The Taxpayer's accountant had concluded that they should send a PTE SALT payment to STATE-1 on behalf of the Taxpayer in the amount of \$\$\$\$ for tax year 2022. The Taxpayer's accountant explained that his firm handled 45-50 clients for which PTE SALT payments were made and most were made to Utah, but he had a couple of clients where the payments went to STATE-1 and a couple of clients where the payments went to STATE-2. He stated that the clients always wanted the payments to be made during the week between Christmas and New Year's Day. The Taxpayer was a calendar year filer and the payment was due on or before the last day of the year.

The Taxpayer's accountant explained that he had a complete hip replacement surgery scheduled for DATE. Prior to being out for the surgery, he went through all of his S-corporation and partnership clients and created a spreadsheet for all the PTE SALT payments, so that an employee in his office could send them while he was out on medical leave. He had concluded that for the Taxpayer, the payment of \$\$\$\$ needed to be made to STATE-1. He stated that on his spreadsheet he had listed STATE-1 for the Taxpayer. He was then out of the office for surgery and on DATE, one of his employees made the PTE SALT payments. The employee, in error, sent the Taxpayer's payment to Utah at 11:40 a.m. on December 28, 2022. This employee also sent an email confirmation of the payment to the Taxpayer, TAXPAYER, at TIME. on DATE. The Taxpayer provided a copy of the email. This email stated "Here is confirmation of the PTE payment for Utah." The Taxpayer saw the confirmation and realized the payment went to the wrong state. The Taxpayer sent an email in response to his accountant's employee and copied his accountant at TIME. on DATE, stating, "Based on my conversation with PETITIONER'S REP-1, he recommended that we do not pay a UT payment and instead make the payment for STATE-1. PETITIONER'S REP-1, can you please confirm?"

The Taxpayer's accountant, upon receipt of this email, immediately tried to sort it out on the morning of DATE. He called the Utah State Tax Commission and spoke with TAX COMMISSION REP, of the Tax Commission's Technical Research Unit on the morning of DATE. He stated at first it was his understanding from that phone call that since the funds transfer had not yet gone through to the Tax Commission, it would be canceled by the Tax

Commission. He stated that he was asked to send an email requesting to have the transfer canceled, and he had sent the email to the Tax Commission at TIME. on DATE, stating that the payment was scheduled in error and he wanted to cancel the payment. The Taxpayer's accountant provided a copy of this email. He said because it was his understanding from this conversation with the Tax Commission employee that the Tax Commission would cancel the payment, he had relied on that information and did not think about contacting his own bank from which the transfer had been sent, to have the transfer stopped on his end. The Taxpayer's accountant stated that the payment was not processed through to the Tax Commission until the afternoon of DATE, which was not disputed by the Division. The Taxpayer's accountant stated that it was not until late in the day on DATE that the Tax Commission employee he had been speaking with told him via email that the Tax Commission would not cancel the payment. He provided a copy of the email, which was from TAX COMMISSION REP in the Technical Research Unit, and that email stated, "The payment or report cannot be canceled unfortunately. The cancellation window has expired." There was no explanation regarding when the "cancellation window" would have been open.

The Taxpayer's accountant argued that there needed to be some type of accommodation for clerical errors in making the PTE SALT payments. It was his argument that asking to cancel a payment made in error was not the same thing as asking for a refund. He also argued that the Taxpayer had not made a voluntary election to make a payment to Utah, because the Taxpayer and the Taxpayer's accountant both intended that the payment be sent to STATE-1. He stated that after the Tax Commission employee informed him late in the afternoon of DATE that the Tax Commission would not cancel the payment, he started looking at Consumer Finance Regulations and stated that he could have canceled the payment within 30 minutes of the payment being received. The Taxpayer's accountant provided a copy of Consumer Finance Regulation § 1005.33. However, he stated at the hearing that he had not contacted his own bank about canceling the payment from that end because of what he understood from the Tax Commission employee over the telephone, that the Tax Commission could cancel the payment.

It was the Division's position that "[t]he Utah statute plainly and unambiguously states that the SALT election is irrevocable and the payment non-refundable." The Division pointed out that "the statute provides no exceptions."<sup>5</sup> In its Prehearing Brief, the Division argued that Utah Code Ann. § 59-10-1403.2(2)(a) provides that "for each taxable year that begins on or after January 1, 2022... a pass-through entity... may elect to pay a tax." The Division asserted that Subsection 59-10-1403.2(2)(d) further states that "[a] payment of the tax described in Subsection

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<sup>5</sup> Division's Prehearing Brief, pg. 2.

(2)(a) on or before the last day of the taxable year: (i) is an irrevocable election to be subject to the tax for the taxable year; and (ii) may not be refunded.”<sup>6</sup> The Division stated that Subsection 59-10-1403.2(2)(d) was revised in 2023, but made retrospective for a taxable year beginning on or after January 1, 2022.<sup>7</sup> The Division argued that the Utah Legislature knows the meaning of the words “irrevocable” and “may not be refunded,” and was familiar with the import of these terms and used them advisedly in crafting the SALT cap workaround. The Division argued that “[t]he Commission should assume “that the legislature used each term advisedly according to its ordinary and usually accepted meaning.”<sup>8</sup> There are no exceptions in the statute and the Commission should “presum[e] all omissions to be purposeful.”<sup>9</sup>

The Division also pointed out that the Taxpayer’s accounting office had done more than just submit a payment, they had logged into the Utah Taxpayer Access Point. They had filled out the SALT election payment form, which clearly stated it was a “Utah” form. The Division pointed out that before the payment could be finalized the person filing the form had to check a box, which explained the election was irrevocable and the person filing the form had to acknowledge, “I understand I am electing to report and pay tax on behalf of the individual(s) and this election is irrevocable.” The Division also explained that the Tax Commission had published online a SALT Report and Tax FAQ. The publication stated, in answer to the question, “Once the election has been made for a taxable year, is the election revocable?” “No, once a PTE has made the election by making a valid SALT tax payment, the election is irrevocable for the taxable year. This means that the PTE may not reduce the amount of the election or receive a refund of amounts paid.”<sup>10</sup> The Division also stated that the section of the Consumer Finance Regulations that the Taxpayer was referring to actually was in regards to compilation errors related to foreign exchange.

Upon review of the facts presented by the parties, it is clear to the Tax Commission that the Taxpayer’s SALT payment was paid to Utah due to a clerical error made by the Taxpayer’s accounting firm. The Taxpayer and his accountant had intended to make the payment to STATE-1. The facts also indicate the applicable law had been recently enacted in the 2022

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<sup>6</sup> Division’s Prehearing Brief, pgs. 4-5.

<sup>7</sup> Prior to the 2023 revision, the 2022 version of Utah Code §59-10-1403.2(2) (d) provided “(d) A payment of the tax described in Subsection (2)(a) on or before the last day of the taxable year is an irrevocable election to be subject to the tax for the taxable year.” After the 2023 revision, which was made retrospective to January 1, 2022, Utah Code Ann. § 59-10-1403.2(2)(d) stated, “A payment of the tax described in Subsection (2)(a) on or before the last day of the taxable year: (i) is an irrevocable election to be subject to the tax for the taxable year; and (ii) may not be refunded.” In this matter, the payment was made “on or before the last day of the taxable year.”

<sup>8</sup> *Citing State v. Thurman*, 508 P.3d 128, ¶18 (Utah 2022).

<sup>9</sup> Division’s Prehearing Brief, pg. 6.

<sup>10</sup> Division’s Exhibit 3. It is not clear when this was published on the Tax Commission’s website.

General Session. By December 2022, the Division had implemented a tax form for taxpayers to make the PTE SALT payments on the Utah Taxpayer Access Point and specifically added an acknowledgment to the form that the person filling out the form had to check before the form could be processed. This acknowledgment said, “I understand I am electing to report and pay tax on behalf of the individual(s) and this election is irrevocable.” Regardless, the Taxpayer’s accountant’s employee missed the notation on the spreadsheet that this payment needed to go to STATE-1, filled out the Utah form, checked this box acknowledging it was irrevocable and sent the payment to Utah. The Commission notes that most of the PTE SALT payments on the spreadsheet were to be made to Utah. The Taxpayer’s accountant immediately requested that the Tax Commission cancel the payment prior to the payment being received by the Tax Commission, by both telephone calls and an email. The Taxpayer’s accountant understood from the initial conversation with the Tax Commission employee on the morning of DATE that the Tax Commission would cancel the payment<sup>11</sup> and he had relied on that information, which contributed to his not contacting his own bank to have the payment stopped or cancelled from that end.<sup>12</sup>

The Commission considers these facts in conjunction with the applicable law. The Utah Legislature clearly stated in the 2022 version of Subsection 59-10-1403.2(2)(d) that a payment “on or before the last day of the taxable year is an irrevocable election to be subject to the tax for the taxable year.” In 2023, the Utah Legislature added the further clarification to Subsection 59-10-1403.2(2)(d) that the payment was “an irrevocable election to be subject to the tax for the taxable year” and “may not be refunded.” The Legislature made this provision retrospective for a taxable year beginning on or after January 1, 2022.

The Taxpayer’s argument, however, was that the Tax Commission could have canceled the payment as a payment made in error, when the Taxpayer’s accountant contacted the Tax Commission via telephone and email on the morning of December 29, 2022, prior to the payment having been processed through to the Tax Commission. Furthermore, because the Taxpayer’s accountant understood from his first conversations with the Tax Commission employee on the morning of DATE that the Tax Commission would cancel the payment as it was initiated in error, he did not take other actions that might have been available to him at that time to stop or cancel the payment from his own bank. The Commission recognizes that the Tax Commission employee was dealing with a new law that had first been implemented for tax year 2022 and the first PTE

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<sup>11</sup> Since the SALT election law had just been enacted in the 2022 General Session, this was a new issue in December 2022.

<sup>12</sup> Despite that the Division had pointed out the Consumer Finance Regulation argued by the Taxpayer did not apply in this situation, it is not clear to the Tax Commission that had the Taxpayer’s accountant contacted his bank the morning of DATE, the bank could not have canceled the payment as made in error.

SALT payments would have been paid in December 2022. However, the information presented in this matter indicates that: the Taxpayer's accountant was given advice by a Tax Commission employee on the morning of DATE that the Tax Commission would cancel the payment; the Taxpayer's accountant had relied on this advice to his detriment; and the advice contributed to the Taxpayer's accountant not taking other actions that could have canceled or stopped the payment. On the limited basis of these facts and circumstances, the Commission should issue the refund as requested by the Taxpayer.

Jane Phan  
Administrative Law Judge

**DECISION AND ORDER**

Based on the foregoing, the Tax Commission orders the Division to issue the refund of the \$\$\$\$\$ payment at issue as requested by the Taxpayer. 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 \_\_\_\_\_, 2023.

John L. Valentine  
Commission Chair

Michael J. Cragun  
Commissioner

Rebecca L. Rockwell  
Commissioner

Jennifer N. Fresques  
Commissioner