18-1672
TAX TYPE: WITHHOLDING TAX
TAX YEAR: 2017
DATE SIGNED: 04/02/2019
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. ROCKWELL
EXCUSED: L. WALTERS
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**INITIAL HEARING ORDER** Appeal No. 18-1672 Account No. ##### Tax Type: Withholding Tax Tax Year: 2017 Judge: Phan

Presiding:
Jane Phan, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE FOR TAXPAYER, CPA
For Respondent: REPRESENTATIVE FOR RESPONDENT-1, Assistant Attorney General
REPRESENTATIVE FOR RESPONDENT-2, Deputy Director Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on January 7, 2019 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. The Respondent ("Division") issued a Statutory Notice on August 31, 2018, indicating a deficiency of $$$$$ in withholding tax, a $$$$$ late file/late payment penalty, a $$$$$ failure to electronically file penalty and $$$$$ in interest[1] against Petitioner ("Taxpayer") for calendar year 2017. The late file/late payment penalty was issued because the Taxpayer had not filed the TC-941R or paid the tax by the due date, and the amount was a minimum $20 for late filing and $20 for late payment. The failure to electronically file penalty was calculated on the basis that the Taxpayer had issued three W-2s or

[1] Interest continues to accrue on any unpaid balance.

1099Rs, but had failed to file those electronically with the Tax Commission. This penalty is calculated on the basis of $100 per W-2. The Taxpayer timely appealed the Statutory Notice and the matter proceeded to the Initial Hearing.

APPLICABLE LAW

Starting with the 2015 tax year, employers are required to electronically file an annual reconciliation return under Utah Code Ann. §59-10-406(3), as follows:

> (a) Each employer shall file an annual return, in a form the commission prescribes, summarizing:
> (i) the total compensation paid;
> (ii) the federal income tax deducted and withheld; and
> (iii) the state tax deducted and withheld for each employee during the calendar year.
> (b) The return required by Subsection (3)(a) shall be filed with the commission:
> (i) in an electronic format approved by the commission; and
> (ii) on or before January 31 of the year following that for which the report is made.

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 annual reconciliation and the W-2 and/or 1099 forms as required, is subject to the following penalties under Utah Code Ann. §59-1-401, below in pertinent part:

> (2) (a) The due date for filing a return is:
> (i) if the person filing the return is not allowed by law an extension of time for filing the return, the day on which the return is due as provided by law; or
> (ii) if the person filing the return is allowed by law an extension of time for filing the return, the earlier of:

(A) the date the person files the return; or
(B) the last day of that extension of time as allowed by law.
(b) A penalty in the amount described in Subsection (2)(c) is imposed if a person files a return after the due date described in Subsection (2)(a).
(c) For purposes of Subsection (2)(b), the penalty is an amount equal to the greater of…
(ii) if the return described in Subsection (2)(b) is filed with respect to an activated tax, fee, or charge, beginning on the activation date for the tax, fee, or charge:
(A) $20; or
(B) (I) 2% of the unpaid activated tax, fee, or charge due on the return if the return is filed no later than five days after the due date described in Subsection (2)(a);
(II) 5% of the unpaid activated tax, fee, or charge due on the return if the return is filed more than five days after the due date but no later than 15 days after the due date described in Subsection (2)(a); or
(III) 10% of the unpaid activated tax, fee, or charge due on the return if the return is filed more than 15 days after the due date described in Subsection (2)(a)…

(3) (a) A person is subject to a penalty for failure to pay a tax, fee, or charge if:
(i) the person files a return on or before the due date for filing a return described in Subsection (2)(a), but fails to pay the tax, fee, or charge due on the return on or before that due date…
(b) For purposes of Subsection (3)(a), the penalty is an amount equal to the greater of…
(ii) if the failure to pay a tax, fee, or charge as described in Subsection (3)(a) with respect to an activated tax, fee, or charge, beginning on the activation date:
(A) $20; or
(B) (I) 2% of the unpaid activated tax, fee, or charge due on the return if the activated tax, fee, or charge due on the return is paid no later than five days after the due date for filing a return described in Subsection (2)(a);
(II) 5% of the unpaid activated tax, fee, or charge due on the return if the activated tax, fee, or charge due on the return is paid more than five days after the due date for filing a return described in Subsection (2)(a) but no later than 15 days after that due date; or
(III) 10% of the unpaid activated tax, fee, or charge due on the return if the activated tax, fee, or charge due on the return is paid more than 15 days after the due date for filing a return described in Subsection (2)(a)…

(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) $30 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) $60 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 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 in 2017 the Taxpayer had hired household help ("nannies") for the first time. She had employed three different nannies during the year. The representative stated that at year-end, she had never previously filed for household employees and she had done it incorrectly. She had issued three W-2s, one indicating $$$$$ in wages and $$$$$ in Utah withholding, one indicating $$$$$ in wages and $0 in Utah withholding and one indicating $$$$$ in wages and $$$$$ in withholding. The Taxpayer then did not pay the $$$$$ in withholding taxes on behalf of the two employees for whom she had listed withholding on their W-2s.

At the hearing, the Taxpayer's representative said after he looked at what she had filed, he had concluded the W-2s were incorrect and all three W-2s should have indicated $0 withholding. He asked that she be allowed to file the corrected W-2s claiming $0 withholding and that the penalties be waived. He also states that he objected to penalties being used for revenue raising purposes. The Taxpayer's representative, however, did not prepare and submit corrected W-2s, did not provide evidence to show that the W-2s issued were, in fact, in error, or prepare the TC-941R for the Commission to review. The Taxpayer provides no basis under which the Commission could accept corrected W-2s at this time, which are contrary to the returns and withholding amounts the employees had filed. There was no evidence to refute that the Taxpayer had issued three W-2s to employees, but had failed to file them electronically and had failed to pay the withholding amounts she had indicated on the W-2s.

The Division pointed out in this matter that they had found out about the withholding from the two employees who had claimed the withholding based on the W-2s the Taxpayer had issued when the employees filed Utah tax returns for 2017. The Division also points out that the history from when the requirement to file electronically was adopted indicated that the Utah Legislature also adopted the penalty to encourage employers to file electronically and did not distinguish small employers from large employers. It does not matter if there was only 1 employee or 300 employees; the employer is required to file the W-2s electronically. The Division also points out the Taxpayer has still not filed the TC-941R or paid the withholding tax. The Taxpayer's representative instead is claiming the W-2s were incorrect, but the employees have filed their own returns based on the W-2s they were provided by the Taxpayer.

After reviewing the information submitted by the parties in this matter, the Division has properly imposed the $100 per W-2 and late file and late payment penalties. The purpose of the statutory change requiring the online filing of W-2s is to help combat fraud and identity theft. Under 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 and Publication 17 to outline the circumstances the Commission may consider to be "reasonable cause" justifying a waiver of penalties. Rule R861-1A-42(3)(j) specifically provides a basis for waiver if "it is the first return required to be filed and the taxes were filed and paid within a reasonable time after the due date." In the present case, although this was a first time filing for the Taxpayer, the Taxpayer has still not electronically filed the W-2s or paid over the withholding she had reported on the W-2s. She has still not filed the TC-941R. The audit notifying the Taxpayer of these omissions had been issued on August 31, 2018. Although the Taxpayer's representative argues the W-2s were wrong, the Taxpayer has not filed amended W-2s or provided evidence that the originals were in error and the employees to whom the W-2s were issued relied on them when filing their own individual income tax returns. The Taxpayer has not shown reasonable cause under Utah Code Ann. §59-1-401(14) for waiver or reduction of the penalties. Furthermore, there is no basis to abate the tax and interest assessed in the audit.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the withholding tax audit deficiency as to the amount of withholding tax, interest and penalties issued against the Taxpayer for tax year 2017. 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 ___________________, 2019.

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.