

18-2170
TAX TYPE: WITHHOLDING TAX
TAX YEAR: 01/01/17 – 12/31/17
DATE SIGNED 10/30/2019
COMMISSIONERS: M. CRAGUN, R. ROCKWELL, L. WALTERS
EXCUSED: J. VALENTINE

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER,	INITIAL HEARING ORDER
Petitioner,	Appeal No. 18-2170
v.	Account No. #####
AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,	Tax Type: Withholding Tax
Respondent.	Audit Period: 01/01/17 – 12/31/17
	Judge: Phan

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE FOR TAXPAYER, Payroll Manager,
TAXPAYER
For Respondent: REPRESENTATIVE FOR RESPONDENT-1, Assistant Attorney
General
REPRESENTATIVE FOR RESPONDENT-2, Deputy Director
Auditing Division
REPRESENTATIVE FOR RESPONDENT-3, Tax Audit Manager,
Compliance Section

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on July 18, 2019, for an Initial Hearing in accordance with Utah Code §59-1-502.5. The matter before the Commission is Petitioner's ("Taxpayer's") appeal of an audit deficiency of Utah withholding tax, penalties and interest. Respondent ("Division") had issued its Statutory Notice-Withholding Tax on November 5, 2018, which covered the audit period of 1/1/2017 to 12/31/2017. On that notice, the Division had indicated a tax deficiency of \$\$\$\$\$, penalties of \$\$\$\$\$ which included failure to electronically file W-2 penalties and late file and late payment penalties, as well as interest of \$\$\$\$\$. After receiving the audit notice and learning that there was a problem with the Utah

withholding, the Taxpayer's representative further reviewed the Taxpayer's records and discovered that there were additional Utah employees for which withholding had not been remitted to Utah and for which the W2's were not electronically filed. The Taxpayer voluntarily provided this information the Division. As a result the Division issued an Amended Statutory Notice on May 22, 2019, increasing the tax and penalties. At the hearing, the Taxpayer does not contest the tax amount or the interest, but is asking for waiver of the penalties. The amounts indicated on the Amended Statutory Notice for the audit period of 2017 are as follows:

	Tax	Penalties	Interest	Total as of Date of Notice ¹
2017	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

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 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

¹ Interest continues to accrue on any unpaid balance.

- (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 facts were not in dispute in this matter. The Taxpayer is a business with operations located in STATE-1. Prior to tax year 2017 the Taxpayer did not have any Utah withholding requirements because it did not have any employees that were Utah resident individuals. The Taxpayer's representative explained that all the business' operations are in STATE-1 and although all of the work for the Taxpayer takes place in STATE-1, some of the employees are residents for tax purposes of other states for which there are withholding requirements. Beginning in 2017, the Taxpayer had 1,300 employees and none were Utah resident individuals for income tax purposes so the Taxpayer had no Utah withholding requirements. The Taxpayer explained that the first Utah resident was employed by the Taxpayer in April 2017. By the end of 2017 the Taxpayer had eleven employees who were residents of Utah for tax purposes and Utah taxes had

been withheld from these employees' wages. The representative explained that this was a busy period for the Taxpayer as by the end of 2018 its number of employees had more than doubled to 3,000 and the Taxpayer had a number of other states where there were withholding requirements.

The Taxpayer's representative explained that it was very difficult to get all the accounts set up in the various states in 2017, so in April 2017 they had hired ADP, which is a professional payroll service to process its payroll and prepare the state withholding filings. It was the representative for the Taxpayer's proffer that ADP should have filed the withholding tax return and remitted the tax funds to the state of Utah, as well as submitted the W-2s electronically. The funds were withheld from the Utah employees. The Taxpayer's representative explained that because the Taxpayer was a STATE-1 company, they were not familiar with Utah filing laws or the other states' laws where they were required to file and they relied on ADP to comply with Utah and other states' laws. She explained that they began to realize there were issues with ADP, so they had terminated their contract with ADP in July 2018. She explained that it was after the Taxpayer had terminated the contract with ADP that she found out Utah had issued a tax lien for 2017, but also that the lien had later been released. The Division indicated at the hearing that all the W-2s have now been filed electronically and the missing return has also been filed.

As noted above, after the Division had issued the original audit, the Taxpayer did additional research and found that there were four additional employees where there was a Utah withholding requirement and she brought that to the Division's attention. The result of her bringing this information forward was an increased tax and penalty assessment. The failure to electronically file W-2s penalty increased from \$\$\$\$\$ to \$\$\$\$\$. The failure to timely file and failure to timely pay penalties increased from \$\$\$\$\$ to \$\$\$\$\$.

At the hearing the Division points out that under Utah Code §59-10-406 the Taxpayer was required to submit each Utah employee's W-2 electronically. Failure to do so resulted in the \$100 penalty being assessed under Utah Code §59-10-401(13) for each of the 11 Utah W-2s that should have been filed. The \$100 penalty per return, or Tier III penalty, was the result of the fact that the W-2s were not submitted electronically prior to June 1 of the year following the tax year at issue. This resulted in \$\$\$\$\$ in penalties in the Amended Audit. The Division also points out that the Withholding Tax returns themselves were filed late and the withholding tax was not timely paid, resulting in an additional 10% failure to timely file and 10% failure to timely pay penalty under Utah Code Sec. 59-1-401. These penalties totaled an additional \$\$\$\$\$. The Taxpayer did not dispute the tax amount or the interest. The Division pointed out at the hearing that the tax amount and interest is still owed and has not yet been paid.

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 requiring the online filing of W-2s is to protect the employees by helping combat fraud and identity theft. The penalty encourages employer compliance with this requirement. However, there is reasonable cause for waiver of some of the penalties. Under Utah Code §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” to 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, this was clearly a first time filing for the out of state Taxpayer and the Taxpayer has now filed the missing returns and submitted the W-2s electronically. The Taxpayer has not paid the tax, however.

Rule R861-1A-42(3)(i) provides another basis for reasonable cause is if the Taxpayer had relied on a “competent tax advisor.” The Taxpayer in this matter was an out of state business, had never had withholding filing requirements in Utah previously and was not familiar with Utah laws. The Taxpayer took the reasonable step of hiring a professional firm to do the filings and relied on that firm to comply with Utah law. The Taxpayer did not have a basis to doubt this tax advisor’s compliance until after all the penalties at issue were incurred. When the Taxpayer discovered that its tax advisor may have made some errors, the Taxpayer canceled its contract with the advisor.

Additionally there is reasonable cause to waive all of the additional penalties assessed in the amended audit over the amount of penalties in the original audit under Rule R861-1A-42(4) for equitable considerations. These additional penalties are the result of the Taxpayer submitting information that the Division had not found in its audit and to admit that it owed more Utah tax than what the Auditing Division had discovered.

Based on a combination of these three criteria, there is reasonable cause for waiver of the 10% failure to timely file penalty and the \$100 penalty per W-2 for failure to electronically file the W-2s. The failure to timely pay penalty should be upheld, except to the extent that penalty was increased in the Amended Audit. From the original audit notice the portion of the penalties that related to the failure to timely pay penalty appears to be \$\$\$\$\$. This was increased to \$\$\$\$\$ in the Amended Audit. The \$\$\$\$\$ penalty should be upheld.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing the Tax Commission finds there is reasonable cause for waiver of the failure to timely file penalties, the failure to electronically file the W-2 penalties and a portion of the failure to timely pay penalties. However, \$\$\$\$ of the failure to timely pay penalties is upheld. 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.