

APPEAL # 20-2145  
TAX TYPE: WAIVER REQUEST- INCOME TAX  
TAX YEAR: 2017-2018  
DATE SIGNED: 03/24/2022  
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. ROCKWELL, J. FRESQUES

---

BEFORE THE UTAH STATE TAX COMMISSION

---

TAXPAYER-1,  
Petitioner,

v.

TAXPAYER SERVICES DIVISION OF  
THE UTAH STATE TAX COMMISSION,  
Respondent.

**ORDER ON RESPONDENT'S  
MOTION TO DISMISS**

Appeal No. 20-2145

Account No: #####

Tax Type: Waiver Request--Income Tax

Tax Year: 2017-2018

Judge: Nielson-Larios

---

**Presiding:**

Aimee Nielson-Larios, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER'S REPRESENTATIVE-1, Petitioner's Representative

For Respondent: RESPONDENT'S REP-1, Taxpayer Services Division  
RESPONDENT'S REP-2, Taxpayer Services Division

I. STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on September 21, 2021, for a Hearing on Respondent's ("Division") Motion to Dismiss. The Division based its Motion to Dismiss on the contention that Petitioner's ("Taxpayer's") petition for redetermination was not timely filed.

II. APPLICABLE LAW

This Applicable Law Section is divided into the following subsections:

- A. Utah Code, Title 59, Chapter 1 Statutes
- B. Utah Code, Title 63G, Chapter 4, Administrative Procedures Act ("APA") Statutes
- C. Tax Commission Administrative Rules

**A. Utah Code, Title 59, Chapter 1 Statutes**

Utah Code Ann. § 59-1-401 details various penalties that may be imposed. At the end of that

section, § 59-1-401(14) provides the following:

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.

Interest is imposed in accordance with the next section, Utah Code Ann. § 59-1-402.

Utah Code Ann. § 59-1-501 addresses a person's appeal of a notice of deficiency and states the following in part:<sup>1</sup>

- (2) A person may file a request for agency action, petitioning the commission for redetermination of a deficiency.
- (3) Subject to Subsections (4) through (6), a person shall file the request for agency action described in Subsection (2):
  - (a) within a 30-day period after the date the commission mails a notice of deficiency to the person in accordance with Section 59-1-1405; or
  - (b) within a 90-day period after the date the commission mails a notice of deficiency to the person in accordance with Section 59-1-1405 if the notice of deficiency is addressed to a person outside the United States or the District of Columbia.
- (4) If the last day of a time period described in Subsection (3) is a Saturday, Sunday, or legal holiday, the last day for a person to file a request for agency action is the next day that is not a Saturday, Sunday, or legal holiday.
- (5) A person that mails a request for agency action shall mail the request for agency action in accordance with Section 59-1-1404.
- (6) For purposes of Subsection (3), a person is considered to have filed a request for agency action:
  - (a) if the person mails the request for agency action, on the date the person is considered to have mailed the request for agency action in accordance with

---

<sup>1</sup> According to Utah Code Ann. § 59-1-101(2), the applicable definition of "deficiency" is found in Utah Code Ann. § 59-1-1402, which states the following in § 59-1-1402(3):

"Deficiency" means:

- (a) the amount by which a tax, fee, or charge exceeds the difference between:
  - (i) the sum of:
    - (A) the amount shown as the tax, fee, or charge by a person on the person's return; and
    - (B) any amount previously assessed, or collected without assessment, as a deficiency; and
  - (ii) any amount previously abated, credited, refunded, or otherwise repaid with respect to that tax, fee, or charge; or
- (b) if a person does not show an amount as a tax, fee, or charge on the person's return, or if a person does not make a return, the amount by which the tax, fee, or charge exceeds:
  - (i) the amount previously assessed, or collected without assessment, as a deficiency; and
  - (ii) any amount previously abated, credited, refunded, or otherwise repaid with respect to that tax, fee, or charge.

- Section 59-1-1404; or
- (b) if the person delivers the request for agency action to the commission by a method other than mail, on the date the commission receives the request for agency action.
- (7) A person who has not previously filed a timely request for agency action in accordance with Subsection (3) may object to a final assessment issued by the commission by:
- (a) paying the tax, fee, or charge; and
  - (b) filing a claim for a refund as provided in Section 59-1-1410.

For a notice of deficiency, Utah Code Ann. § 59-1-1405 provides that “the commission shall mail a notice of deficiency to a person in accordance with Section 59-1-1404 . . .”

Utah Code Ann. § 59-1-1404 provides that certain notices required to be mailed under Utah Code, Title 59, Chapter 1, Part 14, are mailed to taxpayers’ last-known addresses, with § 59-1-1404(4) stating the following:

Subject to Subsection (5), if the commission is required to mail a notice to a person under this part, the commission shall mail the notice to the person at the person's last-known address as shown on the records of the commission.

Utah Code Ann. § 59-1-1410(7)-(9) apply to a person’s claim for a credit or refund of a liability.<sup>2</sup> Under Utah Code Ann. § 59-1-1410(7), “a person [who] overpays a liability” may request the Tax Commission to “credit the liability against any amount of liability the person owes,” with § 59-1-1410(7) stating the following:

If a person erroneously pays a liability, overpays a liability, pays a liability more than once, or the commission erroneously receives, collects, or computes a liability, the commission shall:

- (a) credit the liability against any amount of liability the person owes; and
- (b) refund any balance to:

---

<sup>2</sup> Utah Code Ann. § 59-1-1402(5) defines “liability” to include certain penalties and interest, with that subsection stating the following:

“Liability” means the following that a person is required to remit to the commission:

- (a) a tax, fee, or charge;
- (b) an addition to a tax, fee, or charge;
- (c) an administrative cost;
- (d) interest that accrues in accordance with Section 59-1-402; or
- (e) a penalty that accrues in accordance with Section 59-1-401.

- (i) the person; or
- (ii)
  - (A) the person's assign;
  - (B) the person's personal representative;
  - (C) the person's successor; or
  - (D) a person similar to Subsections (7)(b)(ii)(A) through (C) as determined by the commission by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

Under Utah Code Ann. § 59-1-1410(8), the Tax Commission may not make a credit unless a taxpayer filed the claim within the specified time periods, with § 59-1-1410(8) stating the following in part:

- (8) (a) Except as provided in Subsection (8)(b) or Section 19-12-203, 59-7-522, 59-10-529, or 59-12-110, the commission may not make a credit or refund unless a person files a claim with the commission within the later of:
  - (i) three years from the due date of the return, including the period of any extension of time provided in statute for filing the return; or
  - (ii) two years from the date the tax was paid.

....

Under Utah Code Ann. § 59-1-1410(9), if “the [Tax Commission] denies a [taxpayer’s] claim for a credit,” the taxpayer may request redetermination of the denial in accordance with § 59-1-1410(9), which states the following:

If the commission denies a claim for a credit or refund, a person may request a redetermination of the denial by filing a petition or request for agency action with the commission:

- (a) (i) within a 30-day period after the day on which the commission mails a notice of denial for the claim for credit or refund; or
- (ii) within a 90-day period after the day on which the commission mails a notice of denial for the claim for credit or refund, if the notice is addressed to a person outside the United States or the District of Columbia; and
- (b) in accordance with:
  - (i) Section 59-1-501; and
  - (ii) Title 63G, Chapter 4, Administrative Procedures Act.

**B. Utah Code, Title 63G, Chapter 4, Administrative Procedures Act (“APA”) Statutes**

Title 63G, Chapter 4, titled “Administrative Procedures Act,” addresses in part the filing of petitions requesting agency action and the holding of the related adjudicative proceedings. Utah Code Ann. § 63G-4-103 describes “adjudicative proceeding” as “mean[ing] an agency action or proceeding

described in Section 63G-4-102.”

Utah Code Ann. § 63G-4-102 states the following in part:

- (1) Except as set forth in Subsection (2), and except as otherwise provided by a statute superseding provisions of this chapter by explicit reference to this chapter, the provisions of this chapter apply to every agency of the state and govern:
  - (a) state agency action that determines the legal rights, duties, privileges, immunities, or other legal interests of an identifiable person, including agency action to grant, deny, revoke, suspend, modify, annul, withdraw, or amend an authority, right, or license; and
  - (b) judicial review of the action.
- (2) **This chapter does not govern:**
  - ....
  - (b) the issuance of a notice of a deficiency in the payment of a tax, **the decision to waive a penalty or interest on taxes**, the imposition of and penalty or interest on taxes, or the issuance of a tax assessment, **except that this chapter governs an agency action commenced by a taxpayer or by another person authorized by law to contest the validity or correctness of the action;**
  - ....
  - (6) This chapter does not preclude an agency from enacting a rule affecting or governing an adjudicative proceeding or from following the rule, if the rule is enacted according to the procedures outlined in Title 63G, Chapter 3, Utah Administrative Rulemaking Act, and if the rule conforms to the requirements of this chapter.
  - ....
  - (9) Nothing in this chapter may be interpreted to restrict a presiding officer, for good cause shown, from lengthening or shortening a time period prescribed in this chapter, except the time period established for judicial review.
  - ....

(Emphasis added.)

Utah Code Ann. § 63G-4-201 addresses the commencement of adjudicative proceedings, as follows in part:

- (1) Except as otherwise permitted by Section 63G-4-502, all adjudicative proceedings shall be commenced by either:
  - (a) a notice of agency action, if proceedings are commenced by the agency; or
  - (b) a request for agency action, if proceedings are commenced by persons other than the agency.
- ....
- (3)

- (a) Where the law applicable to the agency permits persons other than the agency to initiate adjudicative proceedings, that person's request for agency action shall be in writing and signed by the person invoking the jurisdiction of the agency, or by that person's representative, and shall include:
  - (i) the names and addresses of all persons to whom a copy of the request for agency action is being sent;
  - (ii) the agency's file number or other reference number, if known;
  - (iii) the date that the request for agency action was mailed;
  - (iv) a statement of the legal authority and jurisdiction under which agency action is requested;
  - (v) a statement of the relief or action sought from the agency; and
  - (vi) a statement of the facts and reasons forming the basis for relief or agency action.
- (b) The person requesting agency action shall file the request with the agency and shall mail a copy to each person known to have a direct interest in the requested agency action.
- (c) An agency may, by rule, prescribe one or more forms eliciting the information required by Subsection (3)(a) to serve as the request for agency action when completed and filed by the person requesting agency action.
- (d) The presiding officer shall promptly review a request for agency action and shall:
  - (i) notify the requesting party in writing that the request is granted and that the adjudicative proceeding is completed;
  - (ii) notify the requesting party in writing that the request is denied and, if the proceeding is a formal adjudicative proceeding, that the party may request a hearing before the agency to challenge the denial; or
  - (iii) notify the requesting party that further proceedings are required to determine the agency's response to the request.
- (e) (i) Any notice required by Subsection (3)(d)(ii) shall contain the information required by Subsection 63G-4-203(1)(i) in addition to disclosure required by Subsection (3)(d)(ii).
  - (ii) The agency shall mail any notice required by Subsection (3)(d) to all parties, except that any notice required by Subsection (3)(d)(iii) may be published when publication is required by statute.
  - (iii) The notice required by Subsection (3)(d)(iii) shall:
    - (A) give the agency's file number or other reference number;
    - (B) give the name of the proceeding;
    - (C) designate whether the proceeding is one of a category to be conducted informally according to the provisions of rules enacted under Sections 63G-4-202 and 63G-4-203, with citation to the applicable rule authorizing that designation, or formally according to Sections 63G-4-204 through 63G-4-209;
    - (D) in the case of a formal adjudicative proceeding, and where respondent parties are known, state that a written response must be filed within 30 days of the date of the agency's notice if mailed, or within 30 days of the last publication date of the agency's notice, if published;

- (E) if the adjudicative proceeding is to be formal, or if a hearing is to be held in an informal adjudicative proceeding, state the time and place of any scheduled hearing, the purpose for which the hearing is to be held, and that a party who fails to attend or participate in a scheduled and noticed hearing may be held in default;
  - (F) if the adjudicative proceeding is to be informal, and a hearing is required by statute or rule, or if a hearing is permitted by rule and may be requested by a party within the time prescribed by rule, state the parties' right to request a hearing and the time within which a hearing may be requested under the agency's rules; and
  - (G) give the name, title, mailing address, and telephone number of the presiding officer.
- (4) When initial agency determinations or actions are not governed by this chapter, but agency and judicial review of those initial determinations or actions are subject to the provisions of this chapter, the request for agency action seeking review must be filed with the agency within the time prescribed by the agency's rules.

Utah Code Ann. § 63G-4-302 addresses requests for reconsideration of agency's orders, providing the time limit for a party to request reconsideration, directing the agency to issue an order regarding reconsideration, and stating the effect if the agency does not issue an order regarding reconsideration, with § 63G-4-302 stating the following in part:

- (1) (a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63G-4-301 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.  
.....
- (3) (a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request.  
(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied.

**C. Tax Commission Administrative Rules**

Utah Admin. Code R861-1A-20 (1)-(2) addresses the timing of petitions for adjudicative action, stating the following:

- (1) Except as provided in Subsection (2), a petition for adjudicative action must be received in the commission offices no later than 30 days from the date of the action that creates the right to appeal. The petition is deemed to be timely if:

- (a) in the case of mailed or hand-delivered documents:
    - (i) the petition is received in the commission offices on or before the close of business of the last day of the 30-day period; or
    - (ii) the date of the postmark on the envelope or cover indicates that the petition was mailed on or before the last day of the 30-day period; or
  - (b) in the case of electronically-filed documents, the petition is received no later than midnight of the last day of the 30-day period.
  - (c) A petition for adjudicative action that is mailed but not received in the commission offices shall be considered timely filed if the sender complies with the provisions of Subsections 68-3-8.5(2)(b) and (c).
- (2) If a statute provides the period within which an appeal may be filed, a petition for adjudicative action is deemed to be timely if:
- (a) in the case of mailed or hand-delivered documents:
    - (i) the petition is received in the commission offices on or before the close of business of the last day of the time frame provided by statute; or
    - (ii) the date of the postmark on the envelope or cover indicates that the request was mailed on or before the last day of the time frame provided by statute; or
  - (b) in the case of electronically-filed documents, the petition is received no later than midnight of the last day of the time frame provided by statute.
  - (c) A petition for adjudicative action that is mailed but not received in the commission offices shall be considered timely filed if the sender complies with the provisions of Subsections 68-3-8.5(2)(b) and (c).

.....

Utah Admin. Code R861-1A-22(1) provides the following concerning the timing of a petition for adjudicative action:

- (1) Time for Petition. Unless otherwise provided by Utah statute, petitions for adjudicative actions shall be filed within the time frames specified in R861-1A-20. If the last day of the 30-day period falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next Tax Commission business day.

.....

Utah Admin. Code R861-1A-23(1) designates all adjudicative proceedings as being formal, with that subsection stating the following:

All matters shall be designated as formal proceedings and set for an initial hearing, a status conference, or a scheduling conference pursuant to R861-1A-26.

Utah Admin. Code R861-1A-26 provides procedures for formal adjudicative proceedings. For representation of parties, R861-1A-26(4) states the following:

Representation.

- (a) A party may pursue an appeal before the commission without assistance of legal counsel or other representation. However, a party may be represented by legal counsel or other representation at every stage of adjudication. Failure to obtain legal representation shall not be grounds for complaint at a later stage in the adjudicative proceeding or for relief on appeal from an order of the commission.
  - (i) An attorney licensed in a jurisdiction outside Utah may represent a taxpayer before the commission without being admitted pro hac vice in Utah.
  - (ii) For appeals concerning Utah corporate franchise and income taxes or Utah individual income taxes, legal counsel must file a power of attorney or the taxpayer must submit a signed petition for redetermination (Tax Commission form TC-738) on which the taxpayer has authorized legal counsel to represent him or her in the appeal. For all other appeals, legal counsel may, as an alternative, submit an entry of appearance.
  - (iii) Any representative other than legal counsel must submit a signed power of attorney authorizing the representative to act on the party's behalf and binding the party by the representative's action, unless the taxpayer submits a signed petition for redetermination (Tax Commission form TC-738) on which the taxpayer has authorized the representative to represent him or her in the appeal.
  - (iv) If a party is represented by legal counsel or other representation, all documents will be directed to the party's representative. Documents will be mailed to the representative's street or other address as shown in documents submitted by the representative. Documents may also be transmitted by facsimile number, e-mail address or other electronic means.
- (b) Any division of the commission named as party to the proceeding may be represented by the Attorney General's Office upon an attorney of that office submitting an entry of appearance.

Utah Admin. Code R861-1A-42 provides requirements for waivers of penalties and interest, with R861-1A-42(1) stating the following:

Procedure.

- (a) A taxpayer may request a waiver of penalties or interest for reasonable cause under Section 59-1-401 if the following conditions are met:
  - (i) the taxpayer provides a signed statement, with appropriate supporting documentation, requesting a waiver;
  - (ii) the total tax owed for the period has been paid;
  - (iii) the tax liability is based on a return the taxpayer filed with the commission, and not on an estimate provided by the taxpayer or the commission;
  - (iv) the taxpayer has not previously received a waiver review for the same period; and

- (v) the taxpayer demonstrates that there is reasonable cause for waiver of the penalty or interest.
- (b) Upon receipt of a waiver request, the commission shall:
  - (i) review the request;
  - (ii) notify the taxpayer if additional documentation is needed to consider the waiver request; and
  - (iii) review the account history for prior waiver requests, taxpayer deficiencies, and historical support for the reason given.
- (c) Each request for waiver is judged on its individual merits.
- (d) If the request for waiver of penalty or interest is denied, the taxpayer has a right to appeal. Procedures for filing appeals are found in Title 63G, Chapter 4, Administrative Procedures Act, and commission rules.
- (e) If a taxpayer first requests a waiver of penalties or interest in an appeal to the commission, the taxpayer is not required to meet Subsections (1)(a)(i) through (iv).

### III. DISCUSSION

This Discussion Section is divided into the following subsections:

- A. Facts presented.
- B. The Taxpayer has not shown an error in the issuance of the Waiver Decision.
- C. The Taxpayer has not met the 30-day time frame allowed by Administrative Rule R861-1A-20(1) for filing a timely appeal of the Waiver Decision.
- D. The Waiver Decision does not satisfy due process under the particular facts of this appeal when that decision was mailed to an address outside of the United States while only 30-days were allowed to file a timely appeal and the Taxpayer did not actually, timely receive the notice.
- E. This Order does not rule on the issue of whether § 63G-4-102(9) can apply to extend the filing deadlines for appeal requests of waiver decisions.

The parties' arguments and the Order's analyses can be found in Subsections B.-E. This Order concludes that the Tax Commission has jurisdiction to hear the Taxpayer's appeal; thus, the Division's motion to dismiss is denied.

#### **A. Facts presented.**

The Division explained the following facts. On DATE, the Division received by email the Taxpayer's request for a waiver of penalties and interest for the 2017 and 2018 tax years. Neither party provided a copy of this DATE email. On DATE, the Division began reviewing the Taxpayer's request.

On DATE, the Division issued its Waiver Decision by mail to the Taxpayer at his last-known address, consistent with § 59-1-1404(4). That last-known address was in COUNTRY-1. As stated on the Waiver Decision, the Division waived \$\$\$\$ in penalties but not the interest. The Waiver Decision also requested that the Taxpayer make a payment of \$\$\$\$.<sup>3</sup> The Waiver Decision stated that DATE, was the deadline for the Taxpayer to file a timely appeal of the Waiver Decision. On DATE, the Taxpayer filed his petition for redetermination of the Waiver Decision by email.

The Taxpayer's representative explained the following additional facts. By DATE, the Taxpayer's representative had not seen a copy of the Waiver Decision, so he called the Division about it. Next, NAME-1 of the Division emailed a copy of the decision to the Taxpayer's representative. The Taxpayer did not receive the Waiver Decision by mail at his residence in COUNTRY-1 because he was in the United States due to the COVID-19 pandemic. The Taxpayer did not receive a copy of the Waiver Decision until after DATE.

**B. The Taxpayer has not shown an error in the issuance of the Waiver Decision.**

For the issuance of the Waiver Decision on DATE, the Division asserted that the information in the Tax Commission's file only indicated the COUNTRY-1 address, to which the Waiver Decision was mailed. The Division said that, in general, waiver decisions only go to the taxpayers at their last-known addresses because waiver decisions contain sensitive information. They are not mailed to taxpayers' representatives even if a TC-737 Power of Attorney and Declaration of Representative form is on file. The Division asserted that if the Division were to mail waiver decisions to taxpayers' representatives, the Division could issue waiver decisions to unauthorized people. The Division asserted that Utah Admin. Code R861-1A-23 and R861-1A-26 do not apply to the issuance of waiver decisions because the process for issuing waiver decisions is not an adjudication. Instead, R861-1A-23 and R861-1A-26 apply to the Tax Commission's appeals process. The Division asserted that R861-1A-26(4)(a) did not require the Tax Commission to issue the Taxpayer's Waiver Decision to his representative because there was no adjudicative proceeding at that time. Additionally, the Division also commented that the Division did not have a TC-737 Power of Attorney on file for the Taxpayer before the Waiver Decision was issued.

---

<sup>3</sup> As of DATE, the total balance owing for the 2017 and 2018 tax years was \$\$\$\$\$, which approximately equaled the interest assessed for the 2017 and 2018 tax years. The difference between the balance and the interest was approximately \$\$\$\$\$ and was likely for collection activity fees, according to the Division.

R861-1A-26(4)(a) requires a power of attorney or a taxpayer-signed TC-738 petition for redetermination authorizing a representative before a representative can represent a taxpayer in an adjudicative proceeding.

The Taxpayer's representative disagreed with the Division concerning the issuance of the Waiver Decision. He asserted that the Division should have issued a copy of the Waiver Decision to him, as the Taxpayer's representative. He explained that he sent the initial abatement request of DATE, to the Division and that the request stated he represented the Taxpayer and was an attorney and CPA. He said he also sent a power of attorney with that request. He contended that Utah Admin. Code R861-1A-23 applies to waiver decisions and that R861-1A-23 and R861-1A-26(4)(a) required the Division to send him a copy of the Waiver Decision. He asserted that the Division had enough information to mail him a copy of the Waiver Decision.

This Order concludes that Utah Admin. Code R861-1A-23 and R861-1A-26 do not apply to the issuance of waiver decisions. R861-1A-23 and R861-1A-26 apply to adjudicative proceedings before the Tax Commission. The issuances of waiver decisions are not adjudicative proceedings under the APA; rather, Utah Code Ann. § 63G-4-102(2)(b) specifically states that "This chapter [which is the APA] does not govern: . . . the issuance of . . . the decision to waive a penalty or interest on taxes . . ." Because the issuance of waiver decisions are not adjudicative proceedings, R861-1A-23 and R861-1A-26 cannot apply to require the Division to issue the Waiver Decision to the Taxpayer's representative.<sup>4</sup>

The Division applied § 59-1-1404 to the Waiver Decision, mailing that decision to the taxpayer's last-known address. No Utah Code section requires a waiver decision to be mailed to a taxpayer's representative. Additionally, Utah Admin. Code R861-1A-42(1) contains procedures for waiver requests and those procedures do not require the Division to mail Waiver Decisions to taxpayers' representatives, either. The Waiver Decision was mailed in accordance with the Utah Code and applicable administrative rules. The Taxpayer has not shown that the Division was required to mail the Waiver Decision to the Taxpayer's representative.

---

<sup>4</sup> The Taxpayer's adjudicative proceedings began with the Taxpayer's filing of a request for redetermination of the Waiver Decision. This is consistent with § 63G-4-102(2)(b) which states, "This chapter does not govern: . . . (b) the issuance of . . . the decision to waive a penalty or interest on taxes . . . , **except** that this chapter governs an agency action commenced by a taxpayer or by another person authorized by law to contest the validity or correctness of the action" (emphasis added).

Appeal No. 20-2145

The above conclusion is consistent with the “Order on Respondent’s Motion to Dismiss” of Appeal No. 18-2296, an unrelated appeal.<sup>5</sup> In that order, the Commission addressed whether the Taxpayer Services Division’s waiver decision met due process when the Division did not mail a copy of that decision to the taxpayer’s representative. The Commission found that the Division’s waiver decision met due process even though the Division did not mail a copy to the taxpayer’s representative.<sup>6</sup> In Appeal No. 18-2296, the taxpayer’s representative may have submitted the initial waiver request on behalf of the taxpayer but the taxpayer failed to provide the Division with a Form TC-737, designating the taxpayer’s representative as his representative. Similarly to the taxpayer in Appeal No. 18-2296, the Taxpayer in this Appeal No. 20-2145 has not shown that he submitted a Form TC-737 before the Division issued its Waiver Decision to the Taxpayer.

The order on motion for Appeal No. 18-2296, discussed a prior Commission decision titled “Order Denying Motion to Dismiss” for Appeal No. 18-1770.<sup>7</sup> For Appeal No. 18-1770, the Commission addressed whether the notice of deficiency for that appeal met due process when the Auditing Division did not mail a copy of that decision to the taxpayer’s representative. The Commission found that the notice of deficiency did not meet due process for that appeal. In Appeal No. 18-1770, the taxpayer had filed a Form TC-737, and the Commission analyzed the language of that form. The Commission found that the language of Form TC-737 suggested the taxpayer was authorizing his representative to receive a copy of the notice of deficiency and that the language did not clearly state a notice of deficiency would be mailed to the taxpayer, instead of the representative, when issued. The importance of the language of a written power of attorney can also be seen in footnote 1 of the order for Appeal No. 18-1770. In that footnote, the Commission explained why the Commission did not reach the same conclusion in Appeal No. 18-1770 as the Commission had in Appeal No. 17-1206, with the Commission stating the following in part in footnote 1:

[T]he decision in Appeal No. 17-1206 does not contain enough information to show whether the language of the power of attorney document at issue in that case is the same

---

<sup>5</sup> A redacted copy of the “Order on Respondent’s Motion to Dismiss of Appeal No. 18-2296 is currently available at <https://tax.utah.gov/commission/decision/18-2296.pdf>. In general, redacted copies of selected, prior Commission decisions are available at <https://tax.utah.gov/commission-office/decisions>.

<sup>6</sup> The order for Appeal No. 18-2296 denied the Taxpayer Services Division’s motion to dismiss after finding that the taxpayer timely filed his petition. Thus, the motion was denied for a reason unrelated to the fact that a copy of the waiver decision was not mailed to the taxpayer’s representative.

<sup>7</sup> A redacted copy of the “Order Denying Motion to Dismiss” for Appeal No. 18-1770 is currently available at <https://tax.utah.gov/commission/decision/18-1770.pdf>. See also footnote 5.

Appeal No. 20-2145

as the language of the Form TC-737 that is at issue in the instant matter. As a result, the Commission does not find that Appeal No. 17-1206 is controlling in the instant matter.

Unlike the taxpayer in Appeal No. 18-1770, the Taxpayer for this Appeal No. 20-2145 has not shown that he submitted a Form TC-737 before the Division issued its Waiver Decision to the Taxpayer. Thus, this order cannot analyze the language of a Form TC-737 or any other written power of attorney to determine if due process was violated when the Division did not mail a copy of its Waiver Decision to the Taxpayer's representative.

In conclusion, the fact that the Division did not mail a copy of the Waiver Decision to the Taxpayer's representative does not show a violation of due process for this appeal.

**C. The Taxpayer has not met the 30-day time frame allowed by Administrative Rule R861-1A-20(1) for filing a timely appeal of the Waiver Decision.**

The Division asserted that for the Commission to have jurisdiction over this appeal, the Taxpayer must have filed his petition for redetermination within 30 days from the date of the Waiver Decision. The Waiver Decision was dated DATE, and stated that the Taxpayer had until DATE, to file his appeal. The Division explained that the 30-day requirement is based on Utah Admin. Code R861-1A-20(1).

In response to the Judge's questions, the Division explained that it did not view the Taxpayer's petition to involve a claim for a credit or refund. The Division said there has been no overpayment or denied refund. The Division explained that under the Utah Code, a request for a waiver of penalties and/or interest is different from a request for a credit or refund. The Division explained that the granting of a waiver would not result in a credit.

In response to the Division's position on jurisdiction, the Taxpayer's representative asserted that the filing of a request for reconsideration within 30 days was not a jurisdictional requirement. Instead, the 30-day deadline was a deadline the agency created in accordance with the APA. The Taxpayer's representative asserted that the Commission has authority under § 63G-4-102(9) to extend the deadline for filing a timely appeal of a waiver decision "for good cause shown."

After considering the parties' information and arguments, the Taxpayer has not met the 30-day time frame for filing a timely appeal of a waiver decision, as explained below.

The Taxpayer made a request for a waiver of penalties and interest, for which he received the Waiver Decision; the Taxpayer did not simultaneously make another type of request, such as a claim for a

credit or refund. More specifically, on DATE, the Division received the Taxpayer's emailed request for a waiver of penalties and interest for the 2017 and 2018 tax years. Neither party provided a copy of this DATE. The Division treated the DATE email as a request for a waiver of penalties and interest in accordance with § 59-1-401(14). On DATE, the Division issued its Waiver Decision denying the Taxpayer's request. No information presented shows that the Taxpayer made a type of request other than a waiver request in accordance with § 59-1-401(14). Therefore, only the appeal rights for a waiver decision issued by the Division can apply to the Taxpayer's situation.<sup>8</sup>

A taxpayer's appeal rights are in accordance with the type of Tax Commission decision that the taxpayer receives. The appeal rights for the Division's waiver decisions are found in Utah Admin. Code R861-1A-42(1)(d), which states the following:

If the request for waiver of penalty or interest is denied, the taxpayer has a right to appeal. Procedures for filing appeals are found in Title 63G, Chapter 4, Administrative Procedures Act, and commission rules.

For the Division's waiver decisions, the Utah Code does not directly state the time period for filing a timely appeal. Instead, that time period is governed by the APA statutes. Utah Code § 63G-4-201(4) of APA requires that an appeal of a waiver decision issued by the Division "be filed . . . within the time prescribed by the agency's rules." The Tax Commission's administrative rules that address the time periods for filing timely appeals include R861-1A-22(1) and R861-1A-20(1)-(2). R861-1A-22(1) references R861-1A-20. R861-1A-20(2) provides the period for filing a timely appeal when the Utah Code directly states that time period. R861-1A-20(1) provides the period for filing a timely appeal when the Utah Code does not directly state that time period. Because the Utah Code does not directly state the time period for filing a timely appeal of a waiver decision issued by the Division, R861-1A-20(1) applies to those waiver decisions. Under R861-1A-20(1), a taxpayer has 30 days from the date of a waiver decision issued by the Division to file an appeal with the Office of the Commission of that waiver decision.

The 30-day requirement for filing an appeal is set by a combination of statute and rule and is a jurisdictional requirement. The Division issued the Waiver Decision on DATE. The Commission received the Taxpayer's petition for redetermination on DATE, by email. This DATE date is beyond the 30-day

---

<sup>8</sup> Thus, the appeal rights for a denied claim for a credit or refund, found in § 59-1-1410(9), cannot apply to this appeal.

deadline provided in Utah Admin. Code R861-1A-20(1). Under R861-1A-20(1), a petition for redetermination must be received in the commission offices, or postmarked, no later than 30 days from the date of the statutory notice. The Commission has found in previous cases that this language is not discretionary; the Tax Commission does not have statutory authority to waive or extend the 30-day filing period for “good cause.”<sup>9</sup> The Taxpayer’s appeal should be dismissed absent extraordinary circumstances that interfered with the Taxpayer’s due process rights.

**D. The Waiver Decision does not satisfy due process under the particular facts of this appeal when that decision was mailed to an address outside of the United States while only 30-days were allowed to file a timely appeal and the Taxpayer did not actually, timely receive the notice.**

Due process can still be violated even when an agency has mailed a notice in accordance with a statute. This subsection addresses whether the Waiver Decision satisfies due process under the particular facts of this appeal.

The particular facts for this appeal include the following. On DATE, the Taxpayer’s representative emailed the Tax Commission the request for a waiver of penalties and interest. On DATE, the Division issued its Waiver Decision by mail to the Taxpayer’s last-known address, consistent with § 59-1-1404(4). That last-known address was in COUNTRY-1. No additional copies of the Waiver Decision were issued to the Taxpayer or to his representative on DATE, nor were any additional copies required to be issued by statute or by administrative rule. The Waiver Decision stated that DATE, was the deadline for the Taxpayer to file a timely appeal of the Waiver Decision. The Taxpayer did not actually receive a copy of that Waiver Decision by DATE; he was in the United States because of the COVID-19 pandemic. By DATE, the Taxpayer’s representative had not seen a copy of the Waiver Decision, so he called the Division and obtained a copy by email. On DATE, the Taxpayer filed his petition for redetermination of the Waiver Decision by email. DATE, is 83 days after the Waiver Decision was issued on DATE.

The Utah Court of Appeals in *Alliant Techsystem, Inc. v. Tax Commission*, 80 P.3d 582, 585; 2003 UT App 374 (Utah App. 2003) provided the following applicable law for notices and due process:

---

<sup>9</sup> See Utah State Tax Commission Order Granting Motion to Dismiss, Appeal No. 08-0714 (11/13/2008) (currently available at <https://tax.utah.gov/commission/decision/08-0714.pdf>). This decision and other prior Tax Commission decisions are available in redacted format at <https://tax.utah.gov/commission-office/decision>.

¶ 12 The due process clauses of the United States and Utah Constitutions provide that no person shall be deprived of "life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 7; Utah Const. art. 1, § 7. In interpreting the due process clause, the United States Supreme Court noted that **to satisfy due process, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."** *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). . . .

(Emphasis added.) The Utah Court of Appeals in *Labor Comm'n v. Price*, 460 P.3d 137, 143 (Utah App. 2020) quotes the *Mullane* decision's language emphasized in the quotation above and provides further direction as follows in part:

¶ 19 . . . . "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). And as our supreme court has noted, "sufficiency of 'notice' for due process purposes is more limited in administrative matters than in other areas of the law." *Anderson*, 839 P.2d at 825 (quoting *Worrall v. Ogden City Fire Dep't*, 616 P.2d 598, 602 (Utah 1980) (Hall, J., dissenting)). Thus, **"notice must be reasonably calculated under all the circumstances to give interested parties an opportunity to protect their interests. Under this standard, the proper inquiry focuses on whether the agency acted reasonably in selecting means likely to inform persons affected, not whether each affected person actually received notice."** *Id.* (cleaned up); see also *State v. King*, 199 Or. App. 278, 111 P.3d 1146, 1147 (2005) ("In general, due process under the Fourteenth Amendment is a flexible concept that calls for such procedural protections as the particular situation demands." (cleaned up)); *Withrow v. Schou*, 13 S.W.3d 37, 40 (Tex. App. 1999) ("As to Constitutional concerns, actual notice is not and has never been the standard for determining whether due process has been afforded a litigant. Rather, due process only requires notice, reasonably calculated under the circumstances, to be given."). . . .

(Emphasis added.)<sup>10</sup>

---

<sup>10</sup> In the above quotation, the Utah Court of Appeals in *Price* cited an *Anderson* decision. The Utah Court of The Utah Court of Appeals in *Price* explained the *Anderson* decision as follows:

In *Anderson v. Public Service Commission*, 839 P.2d 822 (Utah 1992), the Motor Carrier Act required that service of process be made by certified mail. *Id.* at 825. The Public Service Commission (PSC) complied and sent notice of a proposed order to Anderson via certified mail. *Id.* When the proposed order was returned, Anderson argued that the PSC had a duty to take additional steps to ensure that he received notice. *Id.* Our supreme court disagreed and held that

As analyzed below, the Waiver Decision was not reasonably calculated under the circumstances to apprise the Taxpayer of the pendency of the action and afford him an opportunity to present his objections.

The Taxpayer's circumstances include the facts that the only copy of the notice was mailed to the Taxpayer's last-known address which was outside of the United States and the Taxpayer was only allowed 30 days to respond. Utah Administrative Rule R861-1A-20(1) provides a 30-day time frame regardless of whether the Division mails a Waiver Decision to an address outside the United States.

A review of the U.S. Postal Services' website shows that delivery of mail addressed to people outside of the United States takes much longer than mail delivered within the United States. The delivery speed of domestic first-class mail is 1-5 business days. *See* <https://www.usps.com/ship/mail-shipping-services.htm>. The delivery speed of international first-class mail is much longer. According to USPS.COM, the US Postal Service provides First-Class Mail International for which delivery speed "varies by destination." <https://www.usps.com/international/mail-shipping-services.htm>. The costlier Priority Mail International takes 6-10 business days for major markets, but the actual number of days may vary based on origin, destination, and custom delays. *Id.* Thus, international mail takes significantly more time to be delivered and its delivery speed can vary greatly.

The Utah Legislature recognized the importance of allowing more time for taxpayers to respond to two types of appealable notices other than Waiver Decisions when the Tax Commission mails those notices to taxpayers' last-known addresses outside of the United States. The first type of notice is for the Tax Commission's denial of a taxpayer's claim for a credit or refund of a liability. That notice must be mailed to a person's last-known address in accordance with § 59-1-1404(4). For that type of notice, the Utah Legislature connected the length of time to file a timely appeal with the mailing address to which the notice was mailed. For a notice addressed to a person within the United States or District of Columbia, the person has a 30-day time frame to file a timely appeal in accordance with § 59-1-1410(9)(a)(i). For a notice addressed to a person outside the United States or District of Columbia, the person has a 90-day

---

the Motor Carrier Act "makes no reference to any sort of personal service or actual notice requirement. The most burdensome form of service articulated is certified mail.

*Price*, 460 P.3d at 142, ¶17.

time frame to file a timely appeal in accordance with § 59-1-1410(9)(a)(ii). The second type of notice is the Tax Commission's notice of deficiency. That notice must be mailed to a person's last-known address in accordance with § 59-1-1405 and § 59-1-1404(4). *See* § 59-1-501(3) and § 59-1-1405. For that type of notice, the Utah Legislature connected the length of time to file a timely appeal with the mailing address to which the notice is mailed. For a notice addressed to a person within the United States or District of Columbia, the person has a 30-day time frame to file a timely appeal in accordance with § 59-1-501(3)(a). For a notice addressed to a person outside the United States or the District of Columbia, the person has a 90-day time frame to file a timely appeal in accordance with § 59-1-501(3)(b). For appealable notices issued by the Tax Commission, the Utah Legislature has recognized the importance of the circumstance of where the notice is being mailed, whether to a last-known address inside or outside of the United States. Unlike Utah Code sections discussed above, Utah Administrative Rule R861-1A-20(1) makes no change to the generally applicable 30-day time frame regardless of whether the Division mails an appealable waiver decision to a last-known address outside the United States.

Additional facts for this appeal include that the Taxpayer and his representative did not actually receive a copy of the Division's Waiver Decision within the 30-day period. The Taxpayer's representative actively pursued obtaining a copy of the Waiver Decision from the Division after the Waiver Decision was not received, and the Taxpayer still filed his appeal within 90 days of the date the Waiver Decision was issued.

Overall, the Division's mailing of the Waiver Decision to the Taxpayer's last-known address outside of the United States while allowing only 30-days to file a timely appeal, along with the lack of the Taxpayer's actual, timely receipt of the notice, and the representative's actively pursuing a copy of the Waiver Decision from the Division after the Waiver Decision was not received show that the Waiver Decision does not satisfy due process under the particular facts of this appeal.

**E. This Order does not rule on the issue of whether § 63G-4-102(9) can apply to extend the filing deadlines for appeal requests of waiver decisions.**

The Taxpayer's representative asked the Commission to apply Utah Code Ann. § 63G-4-102(9) to extend the deadline for filing a timely appeal. The Taxpayer's representative asserted that § 63G-4-102(9) provides agencies with authority to extend any deadline established by the APA except the time period

established for judicial review. Thus, according to the Taxpayer's representative, the Tax Commission had authority to extend its own 30-day deadline for filing a timely appeal of a waiver decision.

The Taxpayer's representative cited three cases to support his position. These cases addressed the 20-day time frame provided in § 63G-4-302(3)(b), under which, "[i]f the agency . . . does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied." These cases show that if the Tax Commission issues an order on a request for reconsideration after the 20 days provided in § 63G-4-302(3)(b), the taxpayer's request for reconsideration would not be deemed denied in accordance with § 63G-4-302(3)(b).

The Judge asked about the language found in § 63G-4-102(9), which allows extensions of "a time period **prescribed by this chapter** [which is the APA]" (emphasis added). The time frame for filing an appeal of a waiver decision is not directly stated in the APA. The Taxpayer's representative explained that the APA incorporates agencies' rules. The Taxpayer's representative asserted that because the APA provides for the Tax Commission's administrative rules to establish the time periods, those time periods found in the Tax Commission's rules are "prescribed by this chapter [which is the APA]" and, thus, § 63G-4-102(9) applies, granting discretion to the Tax Commission to extend the filing deadline.

The Taxpayer's representative next asserted that "good cause" existed for the Commission to extend the deadline in accordance with § 63G-4-102(9). First, the COVID-19 pandemic kept the Taxpayer in the United States and away from his COUNTRY-1 residence because of both travel restrictions and the high transmission rates of the COVID-19 virus, thereby preventing him from timely receiving the Waiver Decision by mail. Second, according to the Taxpayer's representative, the Division failed to send a copy of the Waiver Decision to the Taxpayer's representative, as required by R861-1A-26(4)(a)(iv).<sup>11</sup>

This Order does not address whether § 63G-4-102(9) applies to this appeal. Because this Order has found the Division's Waiver Decision does not satisfy due process under the particular facts of this appeal, determinations about § 63G-4-102(9) are unnecessary.

Aimee Nielson-Larios  
Administrative Law Judge

---

<sup>11</sup> This Order disagrees with the Taxpayer about the issuance of the Waiver Decision; the Waiver Decision was correctly issued. As explained in Subsection III.B. of this order, R861-1A-26 does not apply to the issuance of waiver decisions.

IV. ORDER

Based on the foregoing, the Division's Motion to Dismiss is denied. This matter will be scheduled for a Telephone Status Conference. It is so ordered.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2022.

John L. Valentine  
Commission Chair

Michael J. Cragun  
Commissioner

Rebecca L. Rockwell  
Commissioner

Jennifer N. Fresques  
Commissioner