

07-0097  
Personal Non-Payment Penalty  
Signed 04/18/2007

BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER,	)		
	)	<b>ORDER</b>	
Petitioner,	)		
	)	Appeal No.	07-0097
v.	)		
	)	Case No.	#####
TAXPAYER SERVICES DIVISION	)		
OF THE UTAH STATE	)	Tax Type:	Personal Non-Payment Penalty
TAX COMMISSION,	)		
	)	Judge:	Chapman
Respondent.	)		

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**Presiding:**  
Kerry R. Chapman, Administrative Law Judge

**Appearances:**  
For Petitioner: PETITIONER  
PETITIONER REPRESENTATIVE, Representative  
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General  
RESPONDENT REPRESENTATIVE 2, from the Taxpayer Services Division  
RESPONDENT REPRESENTATIVE 3, from the Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5, on April 11, 2007.

At issue is the Petitioner's request to abate a portion of the personal non-payment penalty that Taxpayer Services Division (the "Division") imposed in a Statutory Notice dated January 4, 2007. The amount of the penalty totaled \$\$\$\$\$, which was the amount of unpaid sales tax, tourism tax, and withholding tax owed by COMPANY A ("COMPANY A") for periods beginning July 1, 2005 and ending March 31, 2006.

APPLICABLE LAW

Utah Code Ann. §59-1-302 provides for the imposition of a penalty for the nonpayment of certain taxes, as follows in pertinent part:

- (1) The provisions of this section apply to the following:

....

(c) a tax under Chapter 10, Part 4, Withholding of Tax;

(d) . . . a tax under Chapter 12, Sales and Use Tax;

....

(2) Any person required to collect, truthfully account for, and pay over any tax listed in Subsection (1) who willfully fails to collect the tax, fails to truthfully account for and pay over the tax, or attempts in any manner to evade or defeat any tax or the payment of the tax, shall be liable for a penalty equal to the total amount of the tax evaded, not collected, not accounted for, or not paid over. This penalty is in addition to other penalties provided by law.

....

(7) (a) In any hearing before the commission and in any judicial review of the hearing, the commission and the court shall consider any inference and evidence that a person has willfully failed to collect, truthfully account for, or pay over any tax listed in Subsection (1).

(b) It is prima facie evidence that a person has willfully failed to collect, truthfully account for, or pay over any of the taxes listed in Subsection (1) if the commission or a court finds that the person charged with the responsibility of collecting, accounting for, or paying over the taxes:

(i) made a voluntary, conscious, and intentional decision to prefer other creditors over the state government or utilize the tax money for personal purposes;

(ii) recklessly disregarded obvious or known risks, which resulted in the failure to collect, account for, or pay over the tax; or

(iii) failed to investigate or to correct mismanagement, having notice that the tax was not or is not being collected, accounted for, or paid over as provided by law.

(c) The commission or court need not find a bad motive or specific intent to defraud the government or deprive it of revenue to establish willfulness under this section.

....

#### DISCUSSION

The Petitioner was one of three partners who owned COMPANY A. The Petitioner admits that he was responsible for COMPANY A's taxes that accrued until the first week of September 2005, when his partners essentially removed him from the partnership and took away his authority to sign checks on behalf of the business. However, for periods after September 2005, the Petitioner denies having had the authority or the ability to collect, account for, or pay over the taxes owed by COMPANY A. For these reasons, the

Petitioner accepts responsibility for the \$\$\$\$ in tourism tax that the business owes for the 3<sup>rd</sup> Quarter of 2005 (July through September 2005). However, he denies being a responsible party for the remaining periods at issue and asks the Commission to abate the remainder of the assessment.

The Petitioner proffered the following facts. In July 2005, the Petitioner entered into a partnership to own and operate a bar, COMPANY A, with two other men, PARTNER 1 and PARTNER 2. All three partners were equal owners. PARTNER 1 and PARTNER 2 put up funds to start the business, and the Petitioner earned his share of the partnership by working in and operating the bar.

In September 2005, the Petitioner states that the other partners essentially removed him from any ownership interest. Although the Petitioner proffered a Novation Agreement that was dated September 2005 and signed by PARTNER 1, the other parties never signed the agreement. It was at this time, however, that the Petitioner claims that his partners removed his name from the business's bank accounts.

Nevertheless, the Petitioner continued to work at the bar until March 2006. He claims that after September 2005, he did not sign any checks on behalf of the business, never saw or filled out a tax return, and did not know the business had delinquent taxes until April 2006, when PARTNER 2 told him that there were tax problems. The Petitioner admits that while he worked at the business, he would "close the till" each night, would occasionally pay for deliveries out of the till, and would deliver the rent check to the landlord. He stated, however, that the rent checks were always signed either by PARTNER 1, by PARTNER 2, or by PARTNER 1's girlfriend, ( X ),<sup>1</sup> all of whom were authorized to sign checks for the periods that remain at issue.

The Division states that it had spoken to the Petitioner's former partners and both of them told it that the Petitioner was as much responsible as they for the business's delinquent taxes for all periods at issue.

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1 The Petitioner could not remember ( X )'s last name.

The Division also proffered that it had spoken to the business's landlord, who told them that the Petitioner would bring the rent. However, the Division admits that the landlord never told it if the Petitioner paid the rent by check or by some other means and, if by check, whether the Petitioner had signed it.

The Division also explained that after September 2005, the Petitioner once delivered a document and accompanying payment to the Workers Compensation Fund on behalf of the business. The Petitioner explained that PARTNER 1 and PARTNER 2 often had him run errands and that he delivered a document that one of them had filled out and a check that either PARTNER 1 or his girlfriend, ( X ), had signed.

The Division also proffered evidence that in February 2006, the Petitioner used COMPANY A's checking account to make a payment towards the business's delinquent taxes, even though the Petitioner claims that he did not have signatory authority on the account after September 2005. The Division's evidence shows that on February 15, 2006, the Petitioner telephoned in a payment of \$\$\$\$ for taxes that had accrued for the period July through September 2005. The Petitioner explained that ( X ), PARTNER 1's girlfriend, had come to him and asked him to call in the payment because she did not like to talk on the telephone. He also explained that ( X ) only spoke to the Tax Commission employee to give her the check information needed to make the payment.

The Commission notes that the Division employee who documented the February 15, 2006 telephone call indicated that she spoke to the Petitioner, but did not indicate that she spoke to ( X ). Nevertheless, given the Petitioner's proffered testimony, there is no information to refute the Petitioner's claims that he was removed from COMPANY A's bank accounts after September 2005. Accordingly, the Commission finds that after September 2005, the Petitioner was no longer a party responsible to collect, account for, or pay over the taxes that COMPANY A accrued.

DECISION AND ORDER

Based upon the foregoing, the Commission sustains the \$\$\$\$ in personal non-payment penalty associated with delinquent taxes that are due for periods prior to and including September 2005, but abates that portion of the penalty associated with delinquent taxes that are due for periods after September 2005. 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 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

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

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

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Kerry R. Chapman  
Administrative Law Judge

Appeal No. 07-0097

BY ORDER OF THE UTAH STATE TAX COMMISSION.

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

Pam Hendrickson  
Commission Chair

R. Bruce Johnson  
Commissioner

Marc B. Johnson  
Commissioner

D'Arcy Dixon Pignanelli  
Commissioner

**Notice:** If a Formal Hearing is not requested as discussed above, failure to pay any remaining balance resulting from this order within thirty (30) days from the date of this order may result in a late payment penalty.

*KRC/07-0097.int*