

04-0883
Personal Penalty Assessment
Signed 02/01/2005

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)		
	)	ORDER	
Petitioner,)		
	)	Appeal No.	04-0883
v.	)	Account Nos.	#####-1/#####-2
)		
TAXPAYER SERVICES DIVISION	)	Tax Type:	Personal Penalty Assessment
OF THE UTAH STATE TAX	)	Tax Year:	2002 and 2003
COMMISSION,)		
)		
Respondent.	)	Judge:	Robinson

Presiding:
R. Spencer Robinson, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER REPRESENTATIVE, Attorney at Law
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, 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 November 15, 2004. Petitioner was not present. PETITIONER REPRESENTATIVE proffered evidence on behalf of his client.

Petitioner was the founder and principle operating officer of COMPANY A. In May of 1993 he retired and left on a full-time mission for the Church of Jesus Christ of Latter-day Saints. His son, PETITIONER'S SON became Acting President. Petitioner ceased to be the President of the corporation in 1995. PETITIONER'S SON became President of the corporation in 1995.

Following Petitioner's departure as a missionary for his church in May of 1993, PETITIONER was not again active in the administration of the corporation, though he went to the office for an occasional meeting. Since completion of the mission beginning in May of 1993, Petitioner and his wife have served three

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other missions for their church, in CITY 1, STATE 1; CITY 2, STATE 2; and CITY 3, STATE 3, COUNTRY. They are currently serving as Church Service Missionaries at (X) in CITY 4, Utah.

Petitioner has continued to receive money from the corporation. He said this was based on a salary continuation agreement that served as his retirement. He received a W-2 for 2001 showing wages of \$\$\$\$\$. He also received a 1099-MISC showing non-employee compensation in the amount of \$\$\$\$\$, and a 1099-R showing a gross distribution of \$\$\$\$\$. He received a W-2 for 2002 showing wages of \$\$\$\$\$. Petitioner acknowledged receiving funds during early 2003.

Petitioner was on a signature card authorizing him to sign on the corporation's bank account in late 2001. Neither party offered evidence that Petitioner signed checks. PETITIONER REPRESENTATIVE said the check register was not available.

Petitioner was also listed as the registered agent for COMPANY A. as of October 19, 2001. The registration date is July 1, 1959. The entity number listed in Utah Department of Commerce records is #####-3.

Commerce records also show a COMPANY B. The entity type is DBA. The entity number is #####-4. The registered agent, as of November 13, 2001, is PETITIONER'S SON. This is also the registration date.

Petitioner learned that taxes were not being paid on or about January 15, 2003. PETITIONER'S SON telephoned Petitioner with that information.

Respondent provided an itemized Notice and Demand for Payment, dated May 11, 2004. It lists sale tax information relating to account #####-1 from May of 2002 through August of 2003. It also lists withholding tax information relating to account #####-2 from May of 2002 through September of 2003. After deducting credits, the total amount due as of May 11, 2004, was\$\$\$\$\$

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PETITIONER'S SON acknowledged liability and entered into an installment agreement with Respondent. He breached that agreement and filed for bankruptcy under Chapter 7 of the bankruptcy code. While he agrees he is liable, he has no assets. Petitioner has assets.

APPLICABLE LAW

§59-1-302(1)(a) and (c) state the section is applicable to withholding tax under Chapter 10, part 4, and local sales and use tax under Chapter 12, part 2. §59-1-302 (2) states,

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.

DECISION AND ORDER

Petitioner is not a person required to collect, truthfully account for, and pay over sales or withholding taxes for the Corporation. He ceased being President in May of 1995, seven years before there was a sales tax issue with account number #####-1, and a withholding tax issue with account number #####-2. The funds he received in 2001, 2002, and early 2003, were received as retirement, not compensation for services rendered.

Registered agents are persons designated to accept service of process. That he was listed as the registered agent for the Corporation in 2001 does not mean he had the power or duty to control financial matters for the Corporation.

In 2001, Petitioner was authorized to sign on the corporate account. When asked in the Personal Non-payment Penalty Assessment Preliminary Questionnaire what power and authority he had to make sure taxes were paid, he responded that PETITIONER'S SON and (X) were the persons authorized to do so. By implication, he did not.

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When asked which person or persons decided or controlled which office expenses would be paid ahead of taxes, he answered that PETITIONER'S SON and (X) did so. By implication, he did not.

He acknowledged that he, along with PETITIONER'S SON, (X), and (X), had authority to sign checks. There is no evidence he signed checks, or that he was asked to sign checks.

When asked what disbursements the corporation had made during his tenure, he responded that all normal business operating expenses had been made, but nothing out of the ordinary. He identified PETITIONER'S SON, (X), and (X) as the officers or employees who made the decisions regarding payments. By implication, he did not.

The evidence supports the conclusion that Petitioner was not actively involved in the business. He was not required to collect, account for, or pay the sales and withholding tax. He was not aware of the tax issues until January of 2003. He did not willfully fail to collect, account for, or pay the taxes. He has not attempted to evade or defeat payment of the taxes. He is not subject to a personal penalty assessment.

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 _____, 2005.

R. Spencer Robinson
Administrative Law Judge

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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 _____, 2005.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Palmer DePaulis
Commissioner

Marc B. Johnson
Commissioner

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