

05-0339
Personal Penalty Assessment
Signed 07/05/2005

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	INITIAL HEARING ORDER
)	AND ORDER DENYING
Petitioner,)	MOTION TO DISMISS
)	
v.)	Appeal No. 05-0339
)	
TAXPAYER SERVICES DIVISION)	Account Nos. #####, #####
OF THE UTAH STATE)	Tax Type: Personal Non-Payment Penalty
TAX COMMISSION,)	
)	Judge: Chapman
Respondent.)	

Presiding:

Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER (by telephone)

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 June 29, 2005.

At the initial hearing, the Division made an oral Motion to Dismiss the matter on the basis that the Petitioner submitted his appeal more than 30 days after the issuance of the Statutory Notice and, as a result, the Commission does not have jurisdiction over the matter. Because the motion was made without advance notice, the Petitioner was not given an opportunity to gather evidence to show that he responded within the statutory deadline and the Commission did not have

Appeal No. 05-0339

an opportunity to schedule the hearing in a room with the recording capability required for a hearing on a Motion to Dismiss. For these reasons, the Commission denies the Division's Motion to Dismiss at this time. However, the Petitioner may file a written Motion to Dismiss in the future, if it wishes, in order that the Petitioner and the Commission both have adequate notice for hearing purposes.

Concerning the Initial Hearing held on the underlying issue, the Division asserts that COMPANY ("COMPANY") has failed to pay Utah sales and use tax and withholding tax in accordance with Utah law in the amount of \$\$\$\$\$, as of January 28, 2005. The Division further asserts that PETITIONER is the president of COMPANY and the person responsible to remit COMPANY'S tax payments and that he paid other COMPANY creditors with the state trust funds that COMPANY had collected. PETITIONER admits that these assertions are true.

On this basis, the Division issued a personal non-payment penalty against the Petitioner on January 28, 2005. Furthermore, the Division filed a lien against PETITIONER personally for the amount of the assessment on March 4, 2005, asserting that such a filing is proper if a taxpayer so assessed does not appeal the Division's assessment within 30 days of its issuance.

PETITIONER asks that the Commission reverse the Division's assessment and remove the lien against him because he is unable to obtain loans to operate his business with the lien in place. He states that he will be in a better position to pay the delinquent taxes if the lien is removed so that he can get a loan and operate his business.

APPLICABLE LAW

Utah Code Ann. §59-1-302 provides as follows:

- (1) The provisions of this section apply to the following taxes in this title:
 - (a) a tax under Chapter 10, Part 4, Withholding of Tax;
 - (b) a tax under Chapter 12, Part 1, Tax Collection;
 - (c) a tax under Chapter 12, Part 2, Local Sales and Use Tax Act;

.....
- (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.

DISCUSSION

The purpose of this hearing is to determine whether the personal non-payment penalty was legally imposed; i.e., whether the Division assessed the penalty in accordance with Utah state law. Section 59-1-302(2) authorizes the Commission to impose a personal non-payment penalty against any person required to collect, truthfully account for, and pay over sales and use tax and withholding tax who willfully fails to do so. There is no dispute that PETITIONER is the person required to collect, truthfully account for, and pay over the sales and use tax collected and the income tax withheld by COMPANY and that he willfully used these taxes to pay other creditors instead of remitting them to the state. Accordingly, the Division assessed the personal non-payment penalty at issue in accordance with Utah state law.

Furthermore, because the Commission sustains the personal non-payment penalty at issue, it appears that the lien filed against PETITIONER on March 4, 2005 is authorized under UCA §59-1-302.1. Accordingly, the Commission has no cause to reverse any action taken by the Division

Appeal No. 05-0339

in this matter, based on the evidence and testimony proffered at the Initial Hearing. As a result, the Commission sustains the assessment at issue and denies the Petitioner's appeal.

At the hearing, the Division described its policy concerning the assessment of personal non-payment penalties, stating that it often allows a person 90 days to pay the delinquent tax prior to assessing him or her personally for the tax. In this case, PETITIONER agrees that he was offered such an arrangement in January 2005, but states that he could not agree to the proposal because his business generates the majority of its income in the summer months and because the Division would not submit the arrangements to him in writing prior to him agreeing to accept them. While the Commission is authorized to determine whether the assessment of a personal non-payment penalty is legal, it is not authorized to waive such a penalty under the circumstances present.

DECISION AND ORDER

Based upon the foregoing, the Commission denies the Division's oral Motion to Dismiss. However, the Commission sustains the Division's assessment of the personal non-payment penalty at issue and denies the Petitioner's request to reverse it. 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

Appeal No. 05-0339

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.

Kerry R. Chapman
Administrative Law Judge

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

KRC/05-0339.int