

05-0414
Personal Penalty
Signed 08/29/2006

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	
)	ORDER
Petitioner,)	
)	Appeal No. 05-0414
v.)	Account Nos. ##### & #####
)	
TAXPAYER SERVICES DIVISION OF)	Tax Type: Personal Penalty
THE UTAH STATE TAX)	Sales/Withholding/Waste Tire
COMMISSION,)	
)	
Respondent.)	Judge: Jensen

Presiding:
Clinton Jensen, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER REPRESENTATIVE, of the COMPANY A
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
 RESPONDENT REPRESENTATIVE 2, Taxpayer Services Division
 RESPONDENT REPRESENTATIVE 3, 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 Sec. 59-1-502.5, on February 9, 2006. Petitioner is appealing a personal penalty assessment made against Petitioner for the unpaid sales, withholding, and waste tire taxes for COMPANY B. The total amount of the personal penalty assessment was \$\$\$\$\$. The date of the Statutory Notice issued in this matter was March 14, 2005. Although the Statutory Notice the Division provided to the Petitioner included detail regarding several quarterly tax periods from July 2002 to September 2004, only three of the periods had remaining balances for which the Division seeks Personal Assessments in this action. The quarters with remaining balances that form the \$\$\$\$\$ remaining balance as of March 14, 2005 include Sales Taxes for July 2004 through September 2004, Waste Tire Taxes for July 2004 through September 2004, and Withholding

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Taxes from April 2004 through June 2004. This action is a separate assessment from a previous assessment against the same taxpayer.

APPLICABLE LAW

Utah Law provides for a personal penalty assessment for a company's unpaid sales and withholding tax liabilities. It is listed in Utah Code Sec. 59-1-302 (2005) and provides in pertinent part:

(1) This section applies to the following:

* * *

- (c) a tax under Chapter 10, Part 4, Withholding of Tax;
- (d) (i) except as provided in Subsection (1)(d)(ii), a tax under Chapter 12, 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.

(3) (a) If the commission determines in accordance with Subsection (2) that a person is liable for the penalty, the commission shall notify the taxpayer of the proposed penalty.

(b) The notice of proposed penalty shall:

- (i) set forth the basis of the assessment;
- and
- (ii) be mailed by certified mail to the person's last-known address.

(4) Upon receipt of the notice of proposed penalty, the person against whom the penalty is proposed may:

- (a) pay the amount of the proposed penalty at the place and time stated in the notice; or
- (b) proceed in accordance with the review procedures of Subsection (5).

(5) Any person against whom a penalty has been proposed in accordance with Subsections (2) and (3) may contest the proposed penalty by filing a petition for an adjudicative proceeding with the commission.

(6) If the commission determines that the collection of the penalty is in jeopardy, nothing in this section may prevent the immediate collection of the penalty in accordance with the procedures and requirements for emergency proceedings in Title 63, Chapter 46b, Administrative Procedures Act.

(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.

(d) (i) If the commission determines that a person is liable for the penalty under Subsection (2), the commission shall assess the penalty and give notice and demand for payment.

(ii) The notice and demand for payment described in Subsection (7)(d)(i) shall be mailed by certified mail to the person's last-known address.

Utah Code Sec. 19-6-808 provides that the administration, collection, and enforcement provisions of the Sales and Use Tax Act, including the above-cited penalty provisions, are applicable to those who are required to remit fees to the Tax Commission for waste tire disposal.

DISCUSSION

Appeal No. 05-0940

At the hearing in this matter, the parties agreed that the Petitioner was the person responsible to make financial decisions and payments by COMPANY B. The parties likewise agreed that the Petitioner's failure to remit necessary tax money was a result of a downturn in business while a major traffic artery near his business was under construction. The Petitioner indicated that a bankruptcy filing was imminent and the parties suggested that the Commission delay action so that the parties could deal with this assessment in the bankruptcy court. To date, the Commission is not aware of any bankruptcy filing. Accordingly, there is no reason to delay enforcement of a personal penalty at this time.

DECISION AND ORDER

Based on the foregoing, the personal penalty assessment against Petitioner for Sales Taxes for July 2004 through September 2004, Waste Tire Taxes for July 2004 through September 2004, and Withholding Taxes from April 2004 through June 2004 is hereby sustained. 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 _____, 2006.

Clinton Jensen
Administrative Law Judge

Appeal No. 05-0940

Appeal No. 05-0940

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 _____, 2006.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

CDJ/05-0414.ppen