

05-0981
Personal Penalty Assessment
Signed 04/10/2006

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)		
)	ORDER	
Petitioner,)		
)	Appeal No.	05-0981
v.)	Account No.	#####
)		
TAXPAYER SERVICES DIVISION)		
OF THE UTAH STATE TAX)	Tax Type:	Withholding Tax
COMMISSION,)		Personal Penalty
)		
Respondent.)	Judge:	R. Spencer Robinson

Presiding:

R. Spencer Robinson, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER, *pro se*, via telephone
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 Ann. 59-1-502.5, on October 13, 2005. On June 9, 2005, Respondent sent a statutory notice to Petitioner demanding payment of \$\$\$\$ as a personal non-payment penalty. Petitioner filed a timely appeal. At issue was Petitioner's request for a waiver of the personal non-payment penalty assessed by the Taxpayer Services Division.

Petitioner, a resident of STATE, was one of three primary owners of COMPANY. He was also the registered agent and secretary to the corporation. The company did high-speed scanning of title documents and converted them to the Adobe file format.

In response to a preliminary questionnaire, Petitioner stated he first learned taxes were not being paid on April 28, 2005, through a letter sent by the State of Utah. He said he did not maintain corporate records. He did not have custody of the records or cancelled checks. He said he had no power or authority to make sure taxes were paid. He said PARTNER decided which expenses would be paid ahead of taxes. He said PARTNER was the person authorized to sign checks for the corporation. He said he did not have knowledge regarding disbursements made by the corporation. He said those decisions were made by PARTNER. Respondent did not contest this testimony.

PARTNER ran the business from Utah. He was also President of the corporation. He was the majority shareholder. PARTNER was responsible for the day-to-day operation of the business.

PARTNER filed for bankruptcy in April of 2005. The corporation ceased doing business in May of 2005.

The company's filing problems began in the third quarter of 2003. They continued through the time the company ceased doing business. The total tax liability is \$\$\$\$\$. This does not include penalties or interest.

APPLICABLE LAW

§59-1-302. Penalty for nonpayment of certain taxes -- Jeopardy proceedings.

(1) This section applies to the following:

- (a) a tax under Title 10, Chapter 1, Part 3, Municipal Energy Sales and Use Tax Act;
- (b) a tax under Title 10, Chapter 1, Part 4, Municipal Telecommunications License Tax Act;
- (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; and

- (ii) notwithstanding Subsection (1)(d)(i), this section does not apply to Chapter 12, Part 9, Sales Tax Refund for Qualified Emergency Food Agencies;
 - (e) a tax under Chapter 13, Part 2, Motor Fuel;
 - (f) a tax under Chapter 13, Part 3, Special Fuel; and
 - (g) a tax under Chapter 13, Part 4, Aviation Fuel.
- (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.

DECISION AND ORDER

Based on the evidence, Petitioner first learned of the deficiencies on April 28, 2005. He had no day-to-day involvement in the business. He did not have authority to make decisions regarding expenditures. He did not have authority to sign checks. He did not have custody of records that might have shown there was a deficiency.

Utah Code Ann. §59-1-302 (2) requires the conduct of a person held liable for the penalty be willful. The facts before the Commission do not establish Petitioner acted willfully. Therefore, Petitioner is not liable for the payment of the penalty.

The Commission hereby grants Petitioner's request for a waiver of the personal non-payment penalty assessed by the Taxpayer Services Division. It is so ordered.

This decision does not limit either 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. A party disagreeing with this decision must request a Formal Hearing on its behalf to preserve its right to a Formal Hearing. Requests filed by an opposing party do not preserve the

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non-requesting party's right to a Formal Hearing. Requests for a Formal Hearing must include the appeal number, the opposing party's name and address, and shall be mailed to the address listed below:

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.

R. Spencer Robinson
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 _____, 2006.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Palmer DePaulis
Commissioner

Marc B. Johnson
Commissioner

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