

05-1401
Personal Penalty Assessment
Signed 03/06/2006

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	
)	ORDER
Petitioner,)	
)	Appeal No. 05-1401
v.)	
)	ID No. #####
TAXPAYER SERVICES DIVISION)	Account Nos. #####-1 & #####-2
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

For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
 RESPONDENT REPRESENTATIVE 2, 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 January 26, 2006.

On August 24, 2005, Taxpayer Services Division (“Division”) issued the Petitioner a Statutory Notice in which it assessed a personal non-payment penalty in the amount of \$\$\$\$\$ for delinquent taxes owed by COMPANY A (“COMPANY A”). The penalty assessed was equal to the amount of delinquent withholding tax and sales tax owed by COMPANY A for periods in 2004. The Division states that it assessed the personal penalty at issue to PETITIONER because he was president and a shareholder of COMPANY A. The Division proffers as evidence a December 13,

2002 letter that it received from PARTNER 1, which PETITIONER signed in the capacity as President of COMPANY A.

PETITIONER believes that he should not be held liable for the personal non-payment penalty because he had no association with COMPANY A during 2004, the period in which the delinquencies occurred. PETITIONER provides the following information concerning the history of COMPANY A and his participation in the business. He states that the COMPANY A began business on December 1, 2002 and is in the business of retail (X) sales and a (X), having had its “grand opening” in April 2003. PETITIONER further states that, initially, he was to become president of the company and receive an ownership interest in it to compensate him for his knowledge of the (X) business, but that the company was never incorporated and he never received an ownership interest. PETITIONER explains that the December 13, 2002 letter proffered by the Division was written to designate preliminary ownership interests and never reflected the ownership interests of the company that actually occurred.

PETITIONER proffers that ownership shares in the company were never dispersed. In early 2003, told the owners that he was would be leaving to take another job. On March 1, 2003, he took at full-time job as regional sales manager with COMPANY B (“COMPANY B”), where he remains employed. From March 1, 2003 through July 1, 2003, he worked approximately 20 hours a week as a consultant for COMPANY A advising them on the purchase, display and pricing of products, in addition to working his full-time job with COMPANY B. PETITIONER states that he received his last paycheck from COMPANY A in July 2003 and was never compensated for an ownership interest because such an interest never materialized. As evidence to show that he was not

been involved with COMPANY A when the 2004 delinquencies occurred, PETITIONER proffers statements from two persons who have dealings with COMPANY A, both of whom state that PETITIONER has had no association or responsibilities with COMPANY A after the summer of 2003.

PETITIONER also believes that he should not be held liable for the personal non-payment penalty because his duties never extended to collecting, accounting for, or paying Utah state taxes or deciding which of COMPANY A's liabilities would be paid. PETITIONER explains that while he was associated with COMPANY A, the two persons who had authority to sign checks were PARTNER 1 and PARTNER 2, partners who had invested money to start the business. PETITIONER states that he did not have such authority.

Furthermore, PETITIONER states that only PARTNER 1 and (X) of the (X), who was an accountant, made decisions concerning which business liabilities were paid. Although PETITIONER attended weekly meetings with the partners until May 2003, he states that his only duties involved giving advice on the marketing aspects of purchasing and selling (X). He states that at these meetings, the attendees would discuss if the business had enough money to purchase the inventory he suggested for purchase, but that they did not discuss whether to pay one creditor over another creditor. He further states that he and (X) rarely attended the same meetings. For these reasons, he contends that even for that period when he was associated with COMPANY A, he was never a person who was responsible to collect, account for, or pay the business's withholding and sales taxes.

The Division acknowledges that the COMPANY A never incorporated and states that the Department of Commerce has no record of such a company. However, the Division believes that the Commission should sustain its assessment because PETITIONER did not submit any written documents from COMPANY A or persons directly involved in operating COMPANY A stating that PETITIONER ended his association with the business after the summer of 2003. The Division states that it has already held PARTNER 1 and (X) liable for COMPANY A's unpaid taxes.

Furthermore, the Division argues that because PETITIONER signed the December 13, 2002 letter that it proffers as evidence, he acted as the company's president for purposes of paying taxes and is liable for taxes incurred by the business because its licenses were issued in the name of COMPANY A. Although the Division acknowledges that PETITIONER did not sign the application for COMPANY A's licenses, it argues that he should nevertheless remain liable for any taxes incurred by the business because his signature on the December 13, 2002 letter constitutes a "willful" action that recklessly disregards the risks associated with the business incurring delinquencies on tax accounts opened under this name.

APPLICABLE LAW

The Commission is authorized to impose a personal non-payment penalty under Utah Code Ann. §59-1-302, as follows in pertinent part:

- (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.

...

(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 know 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.

UCA §16-10a-203(1) provides that a corporation exists, as follows:

(1) A corporation is incorporated, and its corporate existence begins, when the articles of incorporation are filed by the [Division of Corporations and Commercial Code at the Department of Commerce], unless a delayed effective date is specified pursuant to Subsection 16-10a-123(2), in which case the incorporation is effective, and the corporate existence begins, on the delayed effective date, unless a certificate of withdrawal is filed prior to the delayed effective date.

Furthermore, UCA §16-10a-204 provides that “[a]ll persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this chapter, are jointly and severally liable for all liabilities created while so acting.”

DISCUSSION

At issue is whether the personal non-payment penalty may be imposed under the circumstances in this matter, given the testimony and evidence proffered at the Initial Hearing. Subsection 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. Subsection 59-1-302(7) provides that “[i]t 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” has acted in any one of three listed scenarios.

From the evidence and testimony proffered at the Initial Hearing, the Commission finds that the Petitioner was no longer associated with COMPANY A after the summer of 2003. The business’s delinquent taxes for which the Petitioner was assessed the personal non-payment penalty accrued in 2004. Accordingly, the Petitioner had no association with the business during that period when the delinquent taxes for which he was assessed penalty accrued.

Furthermore, from the evidence and testimony proffered at the Initial Hearing, the Commission finds that the Petitioner has not a person who had the responsibility to collect, account for, or pay over the taxes owed by COMPANY A. Pursuant to Section 16-10a-203(1), COMPANY A was never considered a corporation under Utah law. Although the investors and PETITIONER

anticipated, at one time, that the business would be incorporated with PETITIONER serving as its president, these plans never materialized. From the testimony proffered by PETITIONER, it appears the business was a partnership that was controlled by persons other than PETITIONER and that these other persons, not PETITIONER, had the responsibility to collect, account for, and pay over the business's sales and withholding taxes.

Other than the December 13, 2002 document that PETITIONER signed as President of a non-existing corporation, there is no evidence or testimony that would link him to a position of control or ownership with the business that owes the delinquent taxes. The Division argues that this action "recklessly disregarded obvious or known risks, which resulted in the failure to collect, account for, or pay over the tax[,]" pursuant to Subsection 59-1-302(7)(b)(ii). Had PETITIONER applied for the sales tax license under the guise of being president of the non-existing corporation, perhaps the Commission would consider his actions sufficient to find him responsible for the business's delinquent taxes under this subsection. However, the Division confirms that PETITIONER did not apply for any business licenses for COMPANY A.

For these reasons and based on the evidence and testimony proffered at the Initial Hearing, the Commission finds that PETITIONER was not a person who had authority or the responsibility to collect, account for, or pay the sales and withholding tax that COMPANY A accrued in 2004. Furthermore, Commission finds that the act of signing the December 13, 2002 letter as President of COMPANY A in anticipation of an incorporation that never occurred is

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insufficient on its own to impose the personal non-payment penalty pursuant to Section 59-1-302, given PETITIONER'S subsequent relationship with and duties performed for the business.

DECISION AND ORDER

Based upon the foregoing, the Commission finds that the Petitioner is not liable for the personal non-payment penalty at issue. Accordingly, the Commission grants the Petitioner's appeal and abates the Division's assessment. 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

Kerry R. Chapman
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 _____, 2006.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Palmer DePaulis
Commissioner

Marc B. Johnson
Commissioner

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