

05-1504
Personal Penalty Assessment
Signed 07/05/2006

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)		
)	ORDER	
Petitioner,)		
v.)	Appeal No.	05-1504
)	Account Nos.	#####
)		
TAXPAYER SERVICES DIVISION OF)	Tax Type:	Personal Penalty
THE UTAH STATE TAX)		Sales/Withholding/Transient Rm
COMMISSION,)	Judge:	Phan
)		
Respondent.)		

Presiding:
Jane Phan, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER
For Respondent: RESPONDENT REPRESENTATIVE 1, Taxpayer Services Division
RESPONDENT REPRESENTATIVE 2, Agent, 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 May 31, 2006. Petitioner is appealing a personal penalty assessment made against Petitioner for the unpaid sales, withholding, transient room and tourist fund taxes for COMPANY. The unpaid taxes were for the period from July 1, 2004 through September 30, 2004. The total amount of the personal penalty assessment was \$\$\$\$\$. The date of the Statutory Notice issued in this matter was September 20, 2005.

APPLICABLE LAW

Utah Law provides for a personal penalty assessment for a company's unpaid withholding tax liabilities. It is listed in Utah Code Sec. 59-1-302 (2004) and provides in pertinent part:

(1) The provision of this section apply to the following taxes in this title: (a) a tax under Chapter 10, Part 4, Withholding of Tax; . . . (c) a tax under Chapter 12, Part 2, Local Sales and Use Tax Act; (d) a tax under Chapter 12, Part 3, Transient Room Tax; . . . (g) a tax under Chapter 12, Part 6 Tourism, Recreation, Cultural, and Convention Facilities Tax; . . .

(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.

DISCUSSION

In this matter Respondent determined that Petitioner was a person responsible for collecting and paying over the tax based on the factors that Petitioner was an officer, director, and shareholder of the corporation when the corporation was first organized and was authorized to sign on the business checking account.

Petitioner admits in a letter to the Appeals Division, dated October 9, 2005, that he is a party responsible for collecting and remitting the taxes at issue, but argues that he is not the only responsible party. However, at the hearing, Petitioner argued that he should not be held liable for the tax. Petitioner's position would make him a "person required to collect, truthfully account for, and pay over" the tax under Utah Code Sec. 59-1-302 (2) (2004). The issue is whether Petitioner meets the criteria for willfulness at Utah Code Sec. 59-1-302 (2) (2004). There has been one Utah appellate decision that considered this issue. The Court of Appeals of Utah defined "willfulness" as "more than negligence." *Stevenson v. Tax Commission*, 2005 UT App 179. However, that decision was appealed to the Utah Supreme Court and the decision is still pending, and the facts in that case are distinguishable from the appeal in this matter.

In *Stevenson* the Petitioner had sole authority to sign checks for the company and processed all company payments. *Id.* The company failed to pay taxes for three quarters during one year, and the Petitioner did not have actual notice of the delinquency until after the period in question, although he should have. *Id.*

The Petitioner in this case argues that he was a silent partner in the business, did not run the club, and did not collect, account for or deposit the receipts. He was only on the first bank account and not the other accounts. He was taken off the first bank account within a few months of starting the corporation and prior to the period at issue. Petitioner indicates that there were others who controlled all the money and who were responsible for paying the taxes.

Petitioner did not have sufficient control over the financial aspects of the business to cause the tax to be paid. Petitioner's actions fail to meet the criteria for willfulness.

The facts in this matter indicate that regardless of whether Petitioner is a party responsible for collecting and remitting the taxes at issue, he did not willfully fail to collect and remit the taxes at issue.

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DECISION AND ORDER

Based on the foregoing, the personal penalty assessment against Petitioner for the period July 1, 2004 through September 31, 2004 is hereby not 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.

Jane Phan
Administrative Law Judge