

06-0015
PERSONAL PENALTY ASSESSMENT
TAX YEAR: 2004
SIGNED: 03-30-09
COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, M. JOHNSON, D. DIXON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, v. TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION Appeal No. 06-0015 Account No. #####-1 Tax Type: Personal Non-Payment Penalty Tax Periods: July and August 2004 Judge: Chapman
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Presiding:

Marc B. Johnson, Commissioner
Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP 1, Attorney
 PETITIONER, Petitioner
 PETITIONER REP 2, Witness
For Respondent: RESPONDENT REP 1, Assistant Attorney General
 RESPONDENT REP 2, from Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on February 18, 2009.

Before addressing the underlying issue, the Commission will first address the failure of PERSON A to attend and testify at the Formal Hearing, even though PETITIONER REP 1, counsel for PETITIONER (“Petitioner” or “taxpayer”), executed and delivered a subpoena to PERSON A’s counsel on February 11, 2009. On February 17, 2009, the day before the Formal Hearing, PERSON A’s counsel faxed a

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Motion to Quash Subpoena (“Motion to Quash”) to PETITIONER REP 1 after 5:00 p.m. The Commission also received a faxed copy of the Motion to Quash after 5: 00 p.m. that day. At the Formal Hearing, PETITIONER agreed for the hearing to be held without PERSON A being present to testify. Accordingly, the Commission will issue concurrently with the Final Decision in this matter an Order on Subpoena finding that the Motion to Quash is now moot.

Because PERSON A failed to appear and testify, PETITIONER’s counsel contends that the Commission should sanction PERSON A and impose one of the following remedies: 1) hold PERSON A in contempt and impose on PERSON A the personal non-payment penalty that the Division has currently imposed on PETITIONER; or 2) find that any of PERSON A’s written statements entered into evidence may not be used to controvert testimony offered by witnesses who are present to testify at the Formal Hearing. The Commission chooses to impose the second penalty. Accordingly, any written statements of PERSON A entered into evidence will not be used to controvert testimony offered by witnesses who testified at the Formal Hearing.

On February 27, 2009, the Petitioner submitted a July 30, 2004 Order that was issued by the Utah Fifth District Court for the Commission to consider in addition to the evidence it submitted at the Formal Hearing. On March 17, 2009, the Petitioner submitted an Option for Purchase of Corporate Stock dated September 18, 1996, in which PETITIONER sold and granted to COMPANY A the right and option to purchase shares of common capital stock of COMPANY B¹ Based upon the evidence and testimony presented by the parties, the Tax Commission hereby makes its:

¹ This document has no impact on the Commission’s decision. As a result, the Commission issues its Final Decision in this matter without the Division having an opportunity to respond to this document. The Commission will not consider any other post-hearing submissions from the Petitioner that may arrive after the deadline set at the Formal Hearing.

FINDINGS OF FACT

1. At issue is a personal non-payment penalty imposed under Title 59, Chapter 1, Part 3 of the Utah Code.
2. The periods at issue are the months of July 2004 and August 2004.
3. On December 10, 2005, Auditing Division (“Division”) issued a Statutory Notice to PETITIONER, in which it imposed a personal non-payment penalty in the amount of \$\$\$\$\$. Exhibit R-2. The penalty relates to sales and use taxes and withholding taxes owed by COMPANY B dba COMPANY C (“COMPANY C”), as follows:

<u>Tax Type</u>	<u>Account Number</u>	<u>Period</u>	<u>Tax Due</u>
Sales and Use	#####-2	July 2004	\$\$\$\$\$
Withholding	#####-3	August 2004	\$\$\$\$\$
			<u>\$\$\$\$\$</u>

4. In his Petitioner for Redetermination, PETITIONER indicated that the taxes at issue in the personal non-payment penalty assessment “appear to have accrued as a result of transactions for which PERSON A is responsible. As a result, any taxes owed are not [the] sole responsibilities of PETITIONER.” PETITIONER testified at the hearing that he no longer believes that he should be held responsible for any of the taxes at issue.
5. PETITIONER REP 2 testified on behalf of PETITIONER. PETITIONER REP 2 stated that he was employed as a salesman at the COMPANY C from 2000 through approximately October 2004. He testified that he observed how the business operated and that PERSON A controlled the “economics” of the business, while PETITIONER controlled the day-to-day business and acted as the sales manager.

6. PETITIONER REP 2 also testified that PERSON A held the title to the vehicles sold by the COMPANY C through COMPANY A an entity that PERSON A also owned. PETITIONER REP 2 explained that in the car industry, a vehicle is often “floored” by a third party who holds title to the vehicle until it is sold and funds are available to pay the title holder for the vehicle. PETITIONER REP 2 testified that PERSON A kept track of all information involving the payments for vehicles sold at the COMPANY C and that he believed PERSON A took care of all of the business’s bills, as well.

7. PETITIONER REP 2 testified that PERSON A’s involvement with and the duties he performed for the COMPANY C remained unchanged until around May 2004, when a lawsuit arose between PETITIONER and PERSON A and PETITIONER obtained a restraining order to prevent PERSON A from entering the business.

8. PETITIONER testified on his own behalf. He testified that he was a successful car salesman in STATE 1 when PERSON A approached him to go into business together at the COMPANY C dealership. PETITIONER testified that he owned no more than one-third of the dealership, while PERSON A and PERSON A’s son-in-law owned the remaining interest. PETITIONER explained, however, that he never received any stock certificates from PERSON A as evidence of his ownership interest in the business.

9. Around the beginning of 2003, PERSON A sold the business to PETITIONER. However, PETITIONER testified that he never took title to the business.

10. On December 31, 2002, PERSON A signed a letter addressed to the Utah Department of Commerce, in which he disclosed that he was resigning his position in the COMPANY C and that he was no longer responsible for any liabilities or any other business activities of the COMPANY C, effective January 1, 2003. Exhibit P-1. However, as explained earlier, PERSON A’s statements in this document will not be used to controvert the testimony of the witnesses who did testify.

11. PETITIONER explained that even after the sale of the business to him, PERSON A remained the “boss” of COMPANY C until May 2004. Until that time, PERSON A paid all bills either with checks that he signed himself or with checks that he had prepared for PETITIONER to sign. PETITIONER also testified that PERSON A solely decided how the business would operate and that PERSON A could have severed their business relationship had PETITIONER contested PERSON A’s actions or written a check that PERSON A did not approve.

12. PETITIONER testified that he filed a lawsuit against PERSON A in May 2004 because he suspected PERSON A was depriving him of profits that the business should have been earning. Once the lawsuit was filed, PERSON A withdrew all financing and flooring of vehicles that was necessary for the business to continue operating. PETITIONER testified that after May 2004, he began to “wind down” the business. He testified that he continued to sell the vehicles that remained at the business and that he collected sales tax on each vehicle that was sold to a final consumer.

13. PETITIONER testified that most of the money received from the sale of vehicles after May 2004 went to PERSON A pursuant to a July 30, 2004 Order issued by the Utah Fifth District Court (“Court Order”). Petitioner’s Post-Hearing Exhibit. In the Court Order, COMPANY C was ordered to write a check to COMPANY A, “for the total amount floored, including flooring plus the agreed interest” for each vehicle floored by COMPANY A that the COMPANY C had sold on or after May 1, 2004.

14. PETITIONER testified that he thought he was required under the Court Order to remit all proceeds he received from the sale of a vehicle to PERSON A, with the exception of sales commissions. For this reason, he submitted the remaining proceeds, including the sales tax collected, to PERSON A.

15. The Division submitted a copy of the COMPANY C sales and use tax return that was filed for the July 2004 period on August 30, 2004. The return, which shows \$\$\$\$ of sales and use tax liability, was signed by PETITIONER. Exhibit R-1.

16. For the Division, RESPONDENT REP 2 testified that PETITIONER remitted COMPANY C's sales and use tax returns for the May, June and August 2004 tax periods. PETITIONER testified that he thought he had paid all taxes owed by the COMPANY C after May 2004. He specifically testified that he borrowed money on his home to pay the sales tax liability due for the August 2004 period. RESPONDENT REP 2 also testified that PETITIONER had remitted withholding tax returns for the May, June and July 2004 tax periods and that the amounts due on these returns had been paid.

17. PETITIONER asks the Commission to hold PERSON A responsible for the taxes at issue. He explains that PERSON A has deceived others besides himself and states that a court should bring PERSON A to justice. He further explained that his business relationship with PERSON A has led to his losing his home and the ability to support his family and that his health has deteriorated due to the ongoing litigation and his financial losses.

APPLICABLE LAW

Utah Code Ann. §59-1-302 provides for the imposition of a penalty for the nonpayment of certain taxes, as follows in pertinent part:

(1) This section applies to the following:

....

(c) a tax under Chapter 10, Part 4, Withholding of Tax;

(d) . . . 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.

....

(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.

....

DISCUSSION

The taxes at issue arose in July and August 2004, several months after PETITIONER filed a lawsuit against PERSON A and obtained a restraining order to bar PERSON A from the COMPANY C business. The evidence and testimony shows that PETITIONER was running the COMPANY C after May 2004. Furthermore, the evidence and testimony shows that PETITIONER was responsible to account for and pay over the COMPANY C's sales and use tax liability for the July 2004 period and its withholding tax liability for the August 2004 period. In fact, PETITIONER filed and paid COMPANY C's sales and use taxes for the May, June and August 2004 periods and its withholding taxes for the May, June and July 2004 periods.

For these reasons, the Commission finds that PETITIONER was clearly responsible for the payment of COMPANY C's tax liabilities after May 2004. Because PETITIONER failed to remit the taxes at

issue, the Commission finds that PETITIONER is a party who is liable for the personal non-payment penalty imposed under Section 59-1-302(2).

It is clear from the evidence and testimony submitted at the Formal Hearing that PERSON A was a responsible party until at least May 2004. The Petitioner argues that the Court Order requiring PETITIONER to write PERSON A a check “for the total amount floored, including flooring plus the agreed interest” for all sales after May 2004 makes PERSON A solely responsible for the taxes that PETITIONER collected from the COMPANY C’s customers and remitted to PERSON A after May 2004. The Commission, however, does not believe that this Court Order absolved PETITIONER of his duty to remit the taxes owed by the COMPANY C during the period when he, and not PERSON A, was running the business. The Court Order does not specifically require PETITIONER to remit to PERSON A the sales and use taxes that COMPANY C collected from its customers. The Commission also notes that PETITIONER did not remit all proceeds to PERSON A, as he withheld sales commissions from proceeds to pay the salespersons.

PETITIONER believes that the Commission should take this opportunity to sanction PERSON A and impose the penalty on PERSON A instead of imposing it on him. The Commission is sympathetic to PETITIONER’S situation. However, the evidence and testimony show that PETITIONER was responsible for COMPANY C’s taxes for the June and August 2004 periods at issue. Regardless of whether another person was also responsible for COMPANY C’s taxes for these periods, PETITIONER is liable for the personal non-payment penalty imposed by the Division. Section 59-1-302 imposes the penalty on “any person” who is responsible for the taxes, not on the person who may be “most” responsible for the taxes.

The taxpayer points out that UCA §59-1-1309 authorizes the Commission to “waive, reduce, or compromise a penalty imposed by this part” and asks the Commission to apply the statute and waive the personal non-payment penalty at issue. The Commission notes that Section 59-1-1309 and the waiver

authorized under it only apply to penalties imposed under Title 59, Chapter 1, Part 13 of the Utah Code, which concerns “reportable transactions.” The personal non-payment penalty at issue in this appeal was imposed under Title 59, Chapter 1, Part 3 of the Utah Code, and there exists no waiver provision for penalties imposed under Part 3. Accordingly, the Legislature has not granted the Commission the authority to waive or reduce a personal non-payment penalty.

PETITIONER also asks the Commission to reduce the personal non-payment penalty because he did not own 100% of the COMPANY C. Ownership interest is not the determinative factor to show whether a person is responsible for the payment of a business’s tax liabilities. A person with no ownership interest in a business may, depending on the circumstances, be responsible for all taxes owed by that business. As a result, the Commission denies the taxpayer’s request to reduce the personal non-payment penalty based on ownership interest.

Lastly, PETITIONER claims that COMPANY C did not owe any withholding tax for the August 2004 period. The Division asserts that the amount of withholding tax shown due for the August 2004 relates to a penalty imposed to COMPANY C for not reconciling its 2004 withholding taxes. The purpose of this hearing, however, is not to determine whether the tax amounts shown due by COMPANY C are correct. The purpose is to determine whether PETITIONER was responsible to report and pay the taxes and, as a result, is liable for a personal non-payment penalty. Other actions are available for COMPANY C to contest its tax liability. However, even if the amount of the tax liability were at issue, the Commission finds that the taxpayer has not shown the amount of the withholding tax liability for August 2004 to be incorrect.

CONCLUSIONS OF LAW

1. For the July 2004 and August 2004 periods, PETITIONER was a person who was responsible to collect, report and pay the sales and use taxes and withholding taxes owed by the COMPANY C.

2. PETITIONER failed to remit the COMPANY C's sales and use tax liability for the July 2004 period and its withholding tax liability for the August 2004 period. As a result, the Commission finds that PETITIONER is liable for the personal non-payment penalty imposed by the Division.

DECISION AND ORDER

Based upon the foregoing, the Commission denies PETITIONER' appeal and sustains the Division's personal non-payment penalty assessment in its entirety. It is so ordered.

DATED this _____ day of _____, 2009.

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 _____, 2009.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Appeal No. 06-0015

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

NOTICE OF APPEAL RIGHTS: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §§59-1-601 and 63G-4-401 et seq. Failure to pay any remaining balance resulting from this order within thirty (30) days from the date of this order may result in a late payment penalty. Payment arrangements and offers in compromise may be discussed with Taxpayer Services Division at (801)297-7703.

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