

06-0268
Personal Penalty Assessment
Signed 09/15/2006

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)		
	)	ORDER	
Petitioner,)		
	)	Appeal No.	06-0268
v.	)	Account Nos.	#####-1, #####-2
)		
TAXPAYER SERVICES DIVISION OF	)	Tax Type:	Personal Penalty
THE UTAH STATE TAX	)		Withholding
COMMISSION,	)	Judge:	Phan
)		
Respondent.)		

Presiding:
Jane Phan, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, Supervisor
RESPONDENT REPRESENTATIVE 3, Tax Compliance Agent

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 June 29, 2006. Petitioner is appealing a personal penalty assessment made against Petitioner for the unpaid sales and withholding tax of COMPANY. The unpaid taxes were for the period from January through September of 2005. The total amount of the personal penalty assessment was \$\$\$\$\$. The date of the Statutory Notice issued in this matter was March 2, 2006.

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 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.

. . .

(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 pursuant to Utah Code Sec. 59-1-302, and argued that the personal penalty was appropriate for the period from January 1 through September 2005. Petitioner argued that he was not the party responsible for paying the tax, that the responsible parties were PARTNER 1 and PARTNER 2.

COMPANY, was incorporated in on June 20, 2001. At the time of incorporation and continued through at least March 10, 2006, Petitioner was an officer and director of the corporation and was one of the incorporators. However, according to Petitioner's proffers at the Initial Hearing he performed the installation of the electronic equipment in the field. He was not primarily at the office location and he did not handle the book keeping or accounting functions. He states that he did not sign checks on the bank account and that he was not even aware of some of the business accounts. He indicates that the bidding of the projects and all the financial matters of the business were handled by the two other principals of the business PARTNER 1 and PARTNER 2. PARTNER 1 and PARTNER 2 were married.

Petitioner asserts that he was not aware of the financial problems with the company. He indicates that PARTNER 2 performed most of the bookkeeping functions and that she worked from home much of the time. She accounted for the deposits and wrote checks to pay vendors. Petitioner indicates that he did not sign checks and did not have access to the financial books and records of the business.

He argues that he did not know the taxes were not being paid until it was too late to do anything. Petitioner indicates that in April 2005 he learned that a child support payment that had been withheld had not been paid to the Office of Recovery Service. However, it was later paid so he thought it was just an oversight. He also learned about some charges made on the company's credit card by PARTNER 1 that were obviously not businesses charges. When he asked PARTNER 1 about it, PARTNER 1 refused to answer.

Appeal No. 06-0268

He indicated that PARTNER 1 had disappeared for while and PARTNER 2 would not tell him where he was. He finally learned from another source that PARTNER 1 was at a rehab clinic.

Petitioner states that in July he started to become aware that some of the vendors had not been paid and there were some financial problems. For instances there was an instance when a facsimile of check was sent to get a vendor to release material. There was also an instance where an employee who should have been covered under the business plan found out that his health insurance had been canceled for lack of payment. Petitioner maintains that it was not until September or October of 2005 that he learned taxes had not been paid.

Upon review of the facts presented at the hearing and noting that Respondent did not significantly refute Petitioner's contention that he was not aware of the unpaid taxes or the financial condition of the business until July or later in 2005, the facts do not support assessment for the entire period at issue, but only for the third quarter of 2005. The statute states that the personal penalty be assessed when a person who is a responsible party "willfully" fails to collect or pay over the tax. Petitioner is a responsible party. However, the term "willfully" would require some knowledge that the taxes were not being paid or that the person recklessly disregarded obvious or know risks, which resulted in the failure to collect, account for, or pay over the tax. See Utah Code Sec. 59-1-302 (7)(b). As Petitioner started becoming aware of unpaid vendors and other financial problems with the company these are obvious or known risks that taxes may also not be paid. As an officer, director and one of the principals, Petitioner has the responsibility to investigate and make sure that the taxes were paid.

DECISION AND ORDER

Based on the foregoing, the Commission sustains the personal penalty against Petitioner for the period of July 1, 2005 through September 30, 2005. The personal penalty is abated for the period from January 1,

Appeal No. 06-0268

2005 through June 30, 2005. 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

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

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