

06-0753  
Personal Non-Payment Penalty  
Signed 04/23/2007

BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER,	)		
	)	<b>ORDER</b>	
Petitioner,	)		
	)	Appeal No.	06-0753
v.	)		
	)	Case No.	#####
TAXPAYER SERVICES DIVISION	)		
OF THE UTAH STATE	)	Tax Type:	Personal Non-Payment Penalty
TAX COMMISSION,	)		
	)	Judge:	Chapman
Respondent.	)		

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**Presiding:**  
Kerry R. Chapman, Administrative Law Judge

**Appearances:**  
For Petitioner: PETITIONER  
PETITIONER REPRESENTATIVE 1, Representative  
PETITIONER REPRESENTATIVE 2, Representative  
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 April 18, 2007.

At issue is the Petitioner's request to abate the personal non-payment penalty that Taxpayer Services Division (the "Division") imposed in a Statutory Notice dated April 10, 2006. The amount of the penalty totaled \$\$\$\$\$, which was the amount of unpaid sales tax owed by COMPANY A. ("COMPANY A") for periods beginning May 1, 2001 and ending February 29, 2004.

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) The provisions of this section apply to the following:

....

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

(d) . . . a tax under Chapter 12, Sales and Use 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 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

COMPANY A is a company that offers telecommunications services. The Petitioner co-founded COMPANY A in 1997 and was its president until he resigned in late September 2001. On October 19, 2001, the Petitioner formally signed an agreement in which he resigned his positions with the company and agreed to provide consulting services regarding one specific account. The Petitioner proffers that the company began buying his shares in the company at this time. On November 1, 2002, by which time the Petitioner had

ceased to perform consulting services for the company, the Petitioner sold his remaining shares to the company. For these reasons, the Petitioner contends that he was no longer in control of the company after the end of September 2001.

The Petitioner further states that neither he nor the company was aware that the company owed sales tax until the Commission conducted a sales tax audit for the periods at issue, which he believes was concluded in 2005 or 2006. Finally, the Petitioner states that after the audit assessment was issued, he was told that the company entered into a payment agreement to pay the taxes at issue and that the company is in compliance with its payment terms. For these reasons, the Petitioner asks the Commission to find that he is not a responsible party who failed to collect and pay the taxes at issue and, based on this finding, to abate the Division's assessment.

The Division confirms that the company has entered into an agreement to pay the taxes at issue and has no information to show that the company is not in compliance with its payment terms. Nevertheless, the Division states that it has been instructed to pursue collection from individuals associated with the company under such circumstances, even though a payment agreement with the company may be in place.

The Division concedes that after November 1, 2002, when the Petitioner sold the last of his stock, he was no longer responsible for the sales taxes at issue. However, the Division contends that until this date, PETITIONER'S involvement with the company was sufficient for him to be considered a responsible party, based on his ownership of stock and his position as a consultant.

At the hearing, the Division searched for information consulting a possible sales tax audit and determined that an audit for the periods at issue was initiated on May 4, 2004. It further discovered that a demand for payment of the taxes was issued to the company on January 27, 2006. Because the sales taxes at

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issue were not known until some time after the Commission began its audit in 2004, the Division stated that it no longer believes that the Petitioner is a responsible party who failed to collect and pay the taxes at issue. For this reason, the Division asks the Commission to abate its assessment and to grant the Petitioner's appeal.

DECISION AND ORDER

Based upon the foregoing, the Commission finds that the Petitioner is not liable for the personal non-payment penalty that the Division assessed. Accordingly, the Commission grants the Petitioner's appeal and abates the Division's personal non-payment penalty 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 \_\_\_\_\_, 2007.

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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 \_\_\_\_\_, 2007.

Pam Hendrickson  
Commission Chair

R. Bruce Johnson  
Commissioner

Marc B. Johnson  
Commissioner

D'Arcy Dixon Pignanelli  
Commissioner

**Notice:** If a Formal Hearing is not requested as discussed above, 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.

*KRC/06-0753.int*