

06-0780
Personal Penalty Assessment
Signed 05/22/2007

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Petitioner,)	AND FINAL DECISION
)	
v.)	Appeal No. 06-0780
)	Account No. #####
TAXPAYER SERVICES DIVISION OF)	
THE UTAH STATE TAX)	Tax Type: Personal Penalty Assessment
COMMISSION,)	
)	Judge: Phan
Respondent.)	

Presiding:

R. Bruce Johnson, Commissioner
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER
For Respondent: RESPONDENT REPRESENTATIVE, Assistant Attorney General

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on April 2, 2007. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The assessment in question is a personal penalty assessment, made against Petitioner for the unpaid withholding tax of COMPANY A.
2. The period in question is the second quarter of 2004.
3. The amount of the personal penalty assessment at issue is \$\$\$\$\$.
4. It was Petitioner's intent when he became involved in the COMPANY A, that he

would be a silent investor with no day-to-day involvement in the business. Petitioner had another business that required his full time employment. However, the Department of Commerce records listed Petitioner as the manager of the limited liability company.

5. Petitioner indicates that the other partner in the COMPANY A was PARTNER. He states that their arrangement was that PARTNER would handle all the day-to-day management and accounting duties of the business.

6. Sometime in approximately 2003 it became apparent that things at the COMPANY A were not going well. Petitioner then went over the books and concluded that PARTNER was not doing a good job as bookkeeper and suggested that PARTNER take the books to WITNESS 1 to get the records in order. Petitioner knew WITNESS 1 who worked at an office at the same location as the other business where Petitioner worked full time.

7. PARTNER did take the books to WITNESS 1 for a time during 2003, and WITNESS 1 did work on the books, payroll and accounting for the COMPANY A for a period of time. However, the arrangement between PARTNER and WITNESS 1 did not work out and PARTNER subsequently took the accounting work to WITNESS 2 at COMPANY B. This was an accounting firm of PARTNER'S choosing. The transfer to COMPANY B had taken place at least prior to July 20, 2004.

8. On July 20, 2004 there had been a meeting at the COMPANY B offices in CITY. Present were Petitioner, PARTNER, WITNESS 1 and an Internal Revenue Service Agent. The subject of the meeting was to discuss unpaid federal withholding taxes. The agent questioned the parties about their individual responsibilities with the COMPANY A.

9. Petitioner reports that the IRS agent concluded PARTNER was the person responsible for payment of the federal withholding tax during 2003 and periods in 2004. In fact, PARTNER may have

acknowledged some responsibility during the meeting with the IRS agent.

10. Petitioner had not been listed as a signor on the bank account, but did occasionally sign checks for the COMPANY A business when PARTNER would call the bank and authorize Petitioner's signatures.

11. Sometime in August 2004, Petitioner and PARTNER entered into an Agreement pursuant to which Petitioner would contribute \$\$\$\$ to retire debts of the business and then take over the responsibility for all of the bookkeeping, payroll accounts receivable and payable functions effective June 15, 2004. The date was not fully filled out on the Agreement as to when the parties had reached the agreement, other than it was August 2004. There is only one withholding tax period at issue in this matter, that of the second quarter of 2004, which would end June 30, 2004. The return would have been due at the end of July of 2004.

12. Petitioner indicates that despite the specific language of the Agreement, he did not have the books and accounts on June 15, 2004, that he received those sometime later after they had signed the Agreement. He saw that all subsequent returns were filed and indicates there were no issues since he took over the business in October of 2004.

13. Petitioner indicates that he had been unaware that the second quarter 2004 had not been filed until he was contacted by one of Respondent's agents in 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 Ann. §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 . . .
- (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.

CONCLUSIONS OF LAW

1. It is clear that Petitioner was a person responsible for seeing that the withholding taxes were collected and paid over to the State of Utah under Utah Code Sec. 59-1-302. In fact, he had signed an agreement indicating that he would be responsible for the bookkeeping, including payroll of the business effective June 15, 2004. This was prior to the end of the period and prior to when the payment was due. Additionally he was the manager of the limited liability company.

2. The next consideration in this matter is whether Petitioner, as a person responsible, “willfully” failed to account for and remit the withholding tax. Petitioner testified that he was unaware that the taxes for the period at issue had not been paid. If that is accurate, he did not make a conscious decision to pay another creditor over the State of Utah. However, he did know that there were financial problems with the

business. He also knew that there were issues with unpaid federal taxes. He would have been fully aware of this in June 2004 as he met with the Internal Revenue Service. He had signed an agreement taking over the payroll responsibilities effective prior to when these taxes were due. Payroll for the last two weeks in June were clearly his responsibility. Payroll returns due in July were also his responsibility.

3. It appears that Petitioner was negligent in not verifying exactly what PARTNER had and had not done when he took over the books and records. Moreover, had Petitioner been fully cognizant of the payroll implications, he would have been well-advised to take over payroll responsibilities at the end of the quarter and to specifically address the issue of responsibility for the payroll tax payment for the second quarter. The personal penalty, however, is not justified by ordinary negligence. It requires either a conscious decision to favor a creditor over the state, which we do not find here, or a reckless disregard for obvious or known risks. Petitioner clearly understood that he must verify that amounts were properly paid after he took control. He fulfilled that responsibility for all periods after the second quarter of 2004. During a “transition period” that was presumably somewhat chaotic, he failed to properly make a payment that related primarily to a period before he took control. This may have been negligence, but it does not arise to the level of a “reckless disregard” that would justify personal liability under Utah Code Ann. Sec. 59-1-302.

DECISION AND ORDER

The Commission considered and weighed all of the evidence presented and makes its findings of facts and conclusions of law. Based upon the foregoing, the Tax Commission abates the personal penalty assessment against Petitioner for the second quarter of 2004. It is so ordered.

DATED this ____ day of _____, 2007.

Jane Phan
Administrative Law Judge

Appeal No. 06-0780

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 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. §63-46b-13. 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 et seq. and 63-46b-13 et seq.

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