

06-0795
Personal Non-Payment Penalty
Signed 02/21/2007

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)		
)	ORDER	
Petitioner,)		
)	Appeal No.	06-0795
v.)		
)	Account No.	#####
TAXPAYER SERVICES DIVISION)		
OF THE UTAH STATE)	Tax Type:	Personal Non-Payment Penalty
TAX COMMISSION,)		
)	Judge:	Chapman
Respondent.)		

Presiding:

Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, from the Taxpayer Services Division
RESPONDENT REPRESENTATIVE 3, 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 January 31, 2007.

On May 19, 2006, Taxpayer Services Division (the "Division") issued a Statutory Notice to the Petitioner, in which it imposed a personal non-payment penalty of \$\$\$\$ relating to withholding taxes owed by COMPANY A ("COMPANY A") for the 2nd period of 2004 (i.e., April 1, 2004 through June 30, 2004). The Division imposed the penalty on the Petitioner after determining that he was a party who was responsible to pay taxes owed by COMPANY A during the 2nd quarter of 2004 and that he willfully failed to do so.

Background Information Proffered by Petitioner. In 2001, the Petitioner and PARTNER purchased COMPANY A and placed their names on the bank signature card authorizing them to sign checks

on behalf of the business. At the time they purchased COMPANY A, the Petitioner owned 51% of the business and PARTNER owned the remaining 49%. By 2003, it appears that the Petitioner and PARTNER'S working relationship had become problematic. The Petitioner states that he turned all books over to PARTNER and his personal accountant in 2003, at which time PARTNER'S accountant's name was added to the bank signature card authorizing him to sign the business's checks, as well. However, the Petitioner soon discovered that PARTNER and his accountant were not paying the business's obligations. In October 2003, the Petitioner hired COMPANY B, a professional accounting firm, to handle the business's books. COMPANY B would have the Petitioner or PARTNER sign the checks it prepared to pay the business's bills, including its tax obligations.

In either the 2nd or 3rd quarter of 2004 (the Petitioner is unsure of the exact date), the Petitioner became concerned about COMPANY A's federal tax obligations and signed over a majority of his interest in the business to PARTNER in return for PARTNER paying the federal tax obligations. After this action, PARTNER owned 75% of the business and the Petitioner 25%. Upon so doing, the Petitioner verbally agreed that he would no longer sign any checks on behalf of COMPANY A. The Petitioner proffers that he last signed a check on behalf of COMPANY A during the 2nd quarter of 2004. However, his name was never removed from the bank signature card.

The Petitioner also explains that even after he signed over a majority interest in COMPANY A to PARTNER, PARTNER has refused to pay obligations owed by the business, including tax obligations. PARTNER has since liquidated the business. The Petitioner states that he tried to personally pay as many of the obligations as he could, but that the situation forced him to file for personal bankruptcy in September 2004. The Petitioner also states that he has already paid over \$\$\$\$\$ to the state in personal non-payment penalties issued by the Division in 2005 that relate to other amounts owed by COMPANY A. Because of his payment of

prior state obligations owed by COMPANY A and PARTNER'S refusal to pay the amounts due, the Petitioner asks the Commission to collect the amounts at issue in this appeal from PARTNER and not to hold him solely responsible for COMPANY A's debts. In addition, the Petitioner asks the Commission to overturn the personal non-payment penalty at issue in this appeal because he verbally agreed in the 2nd quarter of 2004 to longer sign checks of behalf of COMPANY A.

The Division states that due to confidentiality laws, it cannot inform the Petitioner if it is also trying to collect the amounts at issue from PARTNER. Regardless of PARTNER'S actions, however, the Division argues that the Petitioner was a person who was responsible to pay COMPANY A's 2nd quarter withholding tax because his name was on the bank signature card during this period, because he was a partner or shareholder of the business during this period, and because the Petitioner's verbal agreement not to sign checks does not absolve him of his responsibility to ensure that state tax obligations were paid. For these reasons, the Division asks the Commission to sustain its assessment of the personal non-payment penalty.

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:

 (b) a tax under Chapter 10, Part 4, Withholding of 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.

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DISCUSSION

The Commission understands the Petitioner's concern that he has been assessed another personal non-payment penalty for tax obligations owed by COMPANY A where he believes it would be fairer to collect the amount from his former business partner. However, the Commission must determine if the Division's assessment of the penalty to the Petitioner is authorized under Utah law. If so, the Commission must sustain the assessment and deny the Petitioner's appeal.

Section 59-1-302(2) provides that a person shall be responsible for a personal non-payment penalty if that person "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." Section 59-1-302(7) provides that it is prima facie evidence that a person has willfully failed to collect or pay the tax if that person "recklessly disregarded obvious or known risks, which resulted in the failure to collect, account for, or pay over the tax" or "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."

In this matter, the Commission finds that the Petitioner was a person who was responsible to account for and pay COMPANY A's tax obligations that accrued during the 2nd quarter of 2004 and that he failed to do so, even though he knew or should have known of the tax liability at issue. It appears that the Petitioner began to take steps to disassociate himself from the business in 2004. Nevertheless, the evidence and testimony show that he had known for a long period of time that the business's tax obligations were not being paid. It also shows that he was in a position of authority to see that the withholding taxes that accrued during the 2nd quarter of 2004 (and were due on or before July 31, 2004) were paid.

First, although the Petitioner states that he verbally agreed sometime in the 2nd or 3rd quarter of 2004 not to write checks on the behalf of COMPANY A and did not do so after the 2nd quarter, his name remained on the bank signature card that allowed him to write checks. Second, the Petitioner did not resign as CEO of COMPANY A and from all duties associated with the business until September 1, 2004 in a letter ("Exhibit I") that he sent to PARTNER and the Utah State Division of Corporations, among others. Accordingly, the Petitioner resigned after the 2nd quarter of 2004 and after the date that withholding taxes from that quarter were due.

Third, other documents show that he was still involved in COMPANY A's business affairs after the 2nd quarter of 2004. Exhibit E shows that on August 8, 2004, COMPANY B faxed the Petitioner a copy of COMPANY A's 2003 Balance Sheet, its 2003 federal income tax return (which had been prepared on June 25, 2004, but was unsigned), a Balance of its Payroll Liabilities, and a 2003 Profit and Loss Statement. Exhibit G is an agreement executed in August 2004 to restructure the ownership and management of the business and to assign PARTNER bookkeeping responsibilities as of June 15, 2004. Exhibit H is a separation agreement that was dated August 2004, but was not signed because PARTNER refused to sign it. These

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documents indicate that the Petitioner maintained significant authority at COMPANY A throughout the 2nd quarter of 2004 and until August 2004.

For these reasons, the Commission finds that the Division properly assessed the personal non-payment penalty at issue to the Petitioner. Accordingly, the Commission sustains the assessment.

DECISION AND ORDER

Based upon the foregoing, the Commission sustains the Division's assessment of the personal non-payment penalty at issue and denies the Petitioner's request to reverse it. 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.

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.

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