

06-0796
Personal Penalty Assessment
Signed 01/12/2007

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	
)	ORDER
Petitioner,)	
)	Appeal No. 06-0796
v.)	Account Nos. #####
)	
TAXPAYER SERVICES DIVISION)	Tax Type: Personal Penalty Assessment /
OF THE UTAH STATE TAX)	Withholding Tax
COMMISSION,)	
)	
Respondent.)	Judge: Robinson

Presiding:

R. Spencer Robinson, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER, *pro se*, via telephone
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General, via telephone
RESPONDENT REPRESENTATIVE 2, 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 August 29, 2006. Petitioner is appealing a personal penalty assessment made against Petitioner for withholding tax of COMPANY A. The unpaid taxes were for the period from April 2005 through July of 2005. The total amount of the personal penalty assessment was \$\$\$\$\$. The date of the Statutory Notice issued in this matter was May 2, 2006.

APPLICABLE LAW

59-10-402. Requirement of withholding.

(1) Each employer making payment of wages shall deduct and withhold from wages an amount to be determined by a commission rule which will, as closely as possible, pay the income tax imposed by this chapter.

59-10-406. Collection and payment of tax.

(1) (a) Each employer shall, on or before the last day of April, July, October, and January, pay to the commission the amount required to be deducted and withheld from wages paid to any employee during the preceding calendar quarter under this part.

59-1-302 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 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.

59-10-543. Burden of proof.

In any proceeding before the commission under this chapter, the burden of proof shall be upon the petitioner except for the following issues, as to which the burden of proof shall be upon the commission:

- (1) whether the petitioner has been guilty of fraud with intent to evade tax;
- (2) whether the petitioner is liable as the transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax; and
- (3) whether the petitioner is liable for any increase in a deficiency where such increase is asserted initially after a notice of deficiency was mailed and a petition under Title 59, Chapter 1, Part 5 is filed, unless such increase in deficiency is the result of a change or correction of federal taxable income required to be reported, and of which change or correction the commission had no notice at the time it mailed the notice of deficiency.

DISCUSSION

Respondent determined that Petitioner, as CEO, 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 April 1 through July 31, 2005. Petitioner argued that he had resigned his position as CEO in mid-April of 2005 and was not a responsible party. However, at the time of the hearing, Petitioner had no documents showing he resigned his position as CEO. He stated he was reassigned as General Manager. He said he accepted this reassignment in order to preserve his right to receive severance pay.

Petitioner submitted additional documents on September 14, 2006. In a letter accompanying the documents (copies of company checks signed in March and July of 2005 by other persons), Petitioner said when he resigned as CEO he requested his name be removed from all pertinent documents. He said (X) and (X) assured him this would be done. He said when he

learned it had not been done, he persisted in his request and received repeated assurances it would be done. He said it never was done. Though Petitioner apparently asked to be removed as CEO, no one acted on his requests. Petitioner remained CEO, at least as a matter of company records, if not in terms of responsibilities, during the audit period of April 1 through July 31, 2005. Neither party provided evidence from the Department of Commerce regarding Petitioner's status at the time of the audit.

Petitioner acknowledged having authority as CEO to sign checks as a back-up signer, and that he signed checks before he sought to resign as CEO. He said though he was a founder, owning 51% of the company, and CEO, he had no real power. He stated the first round of investment took his percentage of ownership to less than 20%, and that after several rounds of investment, he owned less than one percent of the company.

He said his area of responsibility was operations. He said (X), the CFO, had the checkbook, and that (X) was the Controller. He asserts he never had control over the company finances, nor did he have access to company records. He said he did not have the authority to hire or fire staff. He said he did not sign checks after he sought to resign as CEO.

Petitioner has the burden of proof. His post hearing letter states he learned the company was spending money received from CITY on other projects, rather than the CITY project. He said he was told investment dollars were coming in to cover the CITY expenses. This provided notice to Petitioner of some irregularity in the way the company was handling finances. It does not show he had knowledge of failure to pay withholding taxes.

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. Absent proof of his removal from

corporate records as CEO prior to the period in question, Petitioner is a responsible party. The question is whether the evidence establishes Petitioner “willfully failed to collect, truthfully account for, or pay over” the withholding taxes at issue in this case.

Willfulness may be established any one of three ways under 59-1-302 (b)(i-iii).

The first way set forth in the statute is evidence establishing Petitioner “made a voluntary, conscious, and intentional decision to prefer other creditors over the state government or utilize the tax money for personal purposes;”. The evidence in this case does not establish Petitioner made such a choice. At most, the evidence shows that, prior to the audit, he signed a few checks in the absence of the CFO.

The second way set forth in statute is evidence establishing Petitioner “recklessly disregarded obvious or known risks, which resulted in the failure to collect, account for, or pay over the tax.”

Petitioner had concerns about how the company was spending money provided by CITY on things not related to CITY’S project. He asked to resign as CEO, with removal of his name from pertinent records. His concerns about company finances may have been a factor in his decision to resign. However, the evidence is not sufficient to establish he “recklessly disregarded obvious or known risks, which resulted in the failure to collect, account for, or pay over the tax.”

The third way set forth in the statute is evidence establishing Petitioner “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.” The evidence does not show Petitioner had notice the tax was not being collected, accounted for, or paid over. Petitioner’s evidence, un-rebutted by the

Respondent, is that Petitioner had check signing authority by virtue of his position, but that he signed no checks after attempting to resign as CEO. He also said he signed only as back-up when the CFO was not available. He said the CFO had the checkbook, that Petitioner's responsibilities were in operations, and that he never had possession of corporate documents. The evidence does not establish Petitioner had notice the tax was not being collected, accounted for, or paid over.

DECISION AND ORDER

Based on the foregoing, the Commission abates the personal penalty against Petitioner for the period of April 1 through July 31, 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 _____, 2007.

R. Spencer Robinson
Administrative Law Judge

Appeal No. 06-0796

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

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