

06-1377
PERSONAL NON-PAYMENT PENALTY
TAX YEAR: 2005
SIGNED: 03-17-2008
COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, D. DIXON
ABSENT: M. JOHNSON

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,

Petitioner,

v.

TAXPAYER SERVICES DIVISION
OF THE UTAH STATE
TAX COMMISSION,

Respondent.

INITIAL HEARING ORDER

Appeal No. 06-1377

Account No. #####

Tax Type: Personal Non-Payment Penalty

Tax Periods: 07/01/05 – 09/30/05

Judge: Chapman

Presiding:

Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER

For Respondent: RESPONDENT REP. 1, Assistant Attorney General
RESPONDENT REP. 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 January 8, 2008.

On October 6, 2006, Taxpayer Services Division (the "Division") issued a Statutory Notice to the Petitioner, in which it imposed a personal non-payment penalty in the amount of \$\$\$\$\$, which was the amount of delinquent sales and use, transient room, tourism, and withholding taxes owed by COMPANY A dba COMPANY B ("COMPANY B") at that time. The assessment concerned taxes owed by COMPANY B for the first three quarters of 2005 and the first two quarters of 2006.

Between the date the Statutory Notice was issued and the date the Initial Hearing was held, most of the delinquent taxes at issue had been paid, either by COMPANY B or by a new owner who bought the COMPANY B (“Hotel”) in 2007 from COMPANY B. As of the hearing date, the only part of the assessment that remains unpaid is \$\$\$\$ in sales and use taxes that COMPANY B owes for the period July 1, 2005 through September 30, 2005 (i.e., 3rd Quarter of 2005).

The Division asks the Commission to sustain its imposition of a personal non-payment penalty to the Petitioner in the amount of \$\$\$\$\$, asserting that the Petitioner was responsible for paying COMPANY B’s sales and use taxes and that he willfully failed to do so. The Petitioner, however, claims that he never had the authority to pay COMPANY B’s sales and use tax liabilities and asks the Commission to overturn the assessment.

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 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.

....

DISCUSSION

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 “made a voluntary, conscious, and intentional decision to prefer other creditors . . . or utilize the tax money for personal purposes,” “recklessly disregarded obvious or known risks, which resulted in the failure to collect . . .or pay over the tax,” or “failed to investigate or to correct mismanagement, having notice that the tax was not . . . being . . .paid.”

The Petitioner proffers he was President and on the Board of Directors of COMPANY B from November 2003 to July 2007, when COMPANY B sold the Hotel to another party. He also states that his primary duties consisted of finding new partners and capital for the company to renovate the Hotel. The Petitioner proffers that he was not a shareholder of COMPANY B. He states that a PERSON A either owned COMPANY B in its entirety or that he owned a majority of the corporation.

The Petitioner admits that he was also responsible to prepare COMPANY B's sales and use tax returns for each quarter and that he was authorized to sign COMPANY B's checks. However, he also claims that he could only sign checks that PERSON A gave approval to be "cut" and that he was not authorized to cut and sign checks on his own. The Petitioner states that he could request a check and if PERSON A agreed for it to be cut, he could then "pick it up" and sign it. The Petitioner states that he would prepare COMPANY B's tax returns, then ask PERSON A to authorize a check to pay the amounts due. He states that PERSON A would often tell him that the business was not generating enough revenue to pay the tax liabilities, then decline to have a check cut to pay them. The Petitioner also proffers that, on other occasions, PERSON A would "cover" the tax liabilities, including delinquent amounts, out of his personal funds.

The Petitioner also states that he believes PERSON A testified in another hearing at the Tax Commission that he, and not the Petitioner, was responsible for COMPANY B's tax liabilities and that he was the only one who could have a check cut on COMPANY B's accounts. However, the Commission could find no record of another hearing concerning COMPANY B at which PERSON A appeared.¹

The Division proffers that it has evidence showing that the Petitioner signed a 2004 check on COMPANY B's account that was sent to the Commission to pay COMPANY B's tax liability for a specific period. The Petitioner claims that he would have signed and remitted the check only after PERSON A gave approval for it to be cut. The Division also proffers that it has a bank document signed by the Petitioner showing that he set up a business account for COMPANY B. The Petitioner claims that either additional pages of the document exist or a similar document signed by PERSON A exists because he would never have opened an account for COMPANY B without PERSON A's participation.

¹ The Commission was able to locate the sales tax license revocation appeal concerning COMPANY B, which the Division mentioned at the Initial hearing. However, that appeal was settled without a hearing being held.

Based on the Petitioner's positions as President and a Director of COMPANY B, his check signing authority, and his participation on the documents described above, the Division asserts that the Petitioner was a person required to collect and remit COMPANY B's sales and use taxes and that he willfully failed to do so. The Division also contends that because of the Petitioner's positions in COMPANY B, the fact that PERSON A had sole authority to decide which checks were cut does not alleviate the Petitioner's authority and his responsibilities.

The Commission acknowledges that a person who serves as president of a corporation and has check signing authority would, generally, be a person who is liable for the payment of taxes. Nevertheless, the Commission considers the circumstances of this case to be unique. The Petitioner proffers that he had no authority to have checks from COMPANY B's account "cut" and, as a result, had no authority to decide whether COMPANY B's liabilities would be paid. Under these circumstances, the Commission finds that the Petitioner did not willfully fail to pay COMPANY B's tax liabilities, regardless of his title. For these reasons, the Commission finds that in accordance with Section 59-1-302, the Petitioner was not a party who was responsible to pay COMPANY B's sales and use tax, yet willfully failed to do so. Accordingly, the Commission overturns the Division's assessment.

DECISION AND ORDER

Based upon the foregoing, the Commission grants the Petitioner's appeal and overturns 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

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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 _____, 2008.

Kerry R. Chapman
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 _____, 2008.

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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