

06-1658
Personal Non-Payment Penalty
Signed 04/23/2007

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)		
)	ORDER	
Petitioner,)		
)	Appeal No.	06-1658
v.)		
)	Case 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
PETITIONER REPRESENTATIVE 1
PETITIONER REPRESENTATIVE 2
PETITIONER REPRESENTATIVE 3
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 17, 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 November 22, 2006. The amount of the penalty totaled \$\$\$\$\$, which was the amount of unpaid withholding tax owed by COMPANY A ("COMPANY A") for periods beginning April 1, 2005 and ending September 30, 2005 (2nd and 3rd quarters of 2005).

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

The Petitioner is a professor at a community college who was asked to help form a company that would provide low-cost dental care to the local Hispanic community. The Petitioner was one of five

investors who formed COMPANY A in February 2005 for this purpose. PARTNER, the dentist who performed the dental services, owned 75% of the company, while the Petitioner owned 3% of the company. Although the Petitioner was an officer of the company and had signed the withholding tax application along with PARTNER, the Petitioner explains that he never had check signing authority for the company, did not know that the withholding taxes had not been paid, and had been forcibly bought out by the other members in May 2005.

On behalf of the Petitioner, PETITIONER REPRESENTATIVE 1 proffered that he was hired to prepare the withholding tax returns for the periods at issue. He would give PARTNER the completed returns along with checks made payable to the Tax Commission and had assumed that PARTNER signed them and mailed them to the Commission. Until PETITIONER contacted him, PETITIONER REPRESENTATIVE 1 proffered that he was unaware that PARTNER had not submitted the returns or checks. PETITIONER REPRESENTATIVE 2, who performed other accounting services for COMPANY A, proffered that she informed PETITIONER in April 2005 that PARTNER was expending company funds for personal reasons. PETITIONER proffered that upon calling a meeting with all members to discuss this issue, he was forced out of the company. PETITIONER REPRESENTATIVE 3 proffered that PARTNER left Utah with money he had invested in a different company with PARTNER. Given these circumstances, the Petitioner believes that he has shown that he was not a party responsible to pay or account for the withholding taxes owed by COMPANY A and asks the Commission to abate the personal non-payment penalty.

The Division admitted that it had little information about the Petitioner's involvement with COMPANY A and hoped to use the initial hearing as a discovery process. The Division also proffered that it had in its possession a check that someone had signed on the COMPANY A account and hoped to determine if the Petitioner had signed it. PETITIONER and the others who were present confirmed that the signature on

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the check was the signature of PARTNER. Upon hearing the testimony that the Petitioner and the others proffered, the Division asked the Commission to abate its assessment and grant the Petitioner's appeal.

DECISION AND ORDER

Based upon the foregoing, the Commission abates the personal non-payment penalty that the Division imposed upon the Petitioner and grants the Petitioner's appeal. 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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