

07-0236
Personal Penalty Assessment Withholding tax
Signed 08/27/2007

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,	ORDER
Petitioner,	Appeal No. 07-0236
vs.	
TAXPAYER SERVICES DIVISION, UTAH STATE TAX COMMISSION,	Tax Type: Personal Penalty Assessment Withholding tax
Respondent.	Tax Period: 10/2004 through 03/2005
	Account No. #####
	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 May 10, 2007. Petitioner is appealing a personal penalty assessment made against Petitioner for withholding tax of COMPANY A. The unpaid taxes were for the period from October 2004 through March of 2005. The total amount of the personal penalty assessment was \$\$\$\$\$. The date of the Statutory Notice issued in this matter was July 26, 2005.

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 October 1, 2004 through March 30, 2005. Petitioner argued that as CEO he was one of six people with check signing authority and occasionally signed checks, but that he had no information regarding the finances of the company and no authority to decide who was paid. His responsibilities were operations and sales.

WITNESS 1 submitted a declaration. She said she observed other executives of the company hold meetings when Petitioner was not present. She said Petitioner had nothing to do with the financial and accounting functions of the business.

WITNESS 1 prepared the payroll. She worked for WITNESS 2, the Comptroller, who was the head of the accounting department. WITNESS 1 said that WITNESS 2 received instructions from WITNESS 3, the CFO and Chairman of the Board, about what bills to pay. She said that Petitioner never told her what bills to pay.

WITNESS 1 also said she had orders from WITNESS 3 and WITNESS 2 not to allow Petitioner into WITNESS 2's office. She had a key to WITNESS 2's office. Petitioner did not.

In the late spring or early summer of 2005, WITNESS 1 learned taxes were not being paid. She asked WITNESS 2 what to do about them. WITNESS 2 said she would speak to WITNESS 3 about the taxes.

When WITNESS 1 received calls about taxes, she passed them on to WITNESS 2. She never passed on calls about taxes to Petitioner.

Petitioner said he was the only officer of the business to move to CITY, Utah. He said he was excluded from meetings. His functions were operations and sales. He said he was not involved in accounting matters.

Petitioner acknowledged signing some checks as a ministerial act. He said he never told WITNESS 1 what bills to pay. He had no knowledge of the financial affairs of the company and was not allowed in WITNESS 2's office. He learned later that WITNESS 1 had a key to WITNESS 2's office, but that she had been instructed to tell Petitioner she did not have a key.

Petitioner said WITNESS 4 did the billing. He said WITNESS 3 authorized federal tax payments. He said he had no knowledge of taxes or authority to make decisions regarding payments. He said he first learned of tax payment issues from the Commission in May of 2006.

Petitioner began with 51% of the stock in the company. By 2003 he had 11%.

WITNESS 4, Petitioner's mother, submitted a declaration. She said she was in charge of customer billing and reported to WITNESS 3, as did WITNESS 2 and WITNESS 1. WITNESS 4 reported customer sales figures and deposits. She said WITNESS 3 was totally in charge of the financial side of the business, giving all of the instructions and making all the decisions about what needed to be done. She said Petitioner never gave instructions on anything pertaining to financial matters.

Petitioner also submitted a letter from an attorney, WITNESS 5. The letter informed Petitioner that an IRS employee had recommended to his superiors that the Trust Fund Recovery Penalty not be assessed against Petitioner.

Respondent argued that Petitioner was the CEO and the only officer of the company in CITY. He had check signing authority and signed checks. Respondent said Petitioner did not ask questions about what was going on. Respondent argued Petitioner's failure to ask questions was reckless disregard. Though he received one call regarding taxes, he did no more than forward the information.

Petitioner has the burden of proof. WITNESS 1 and WITNESS 4 offered evidence corroborating Petitioner's assertion that he was not involved in financial matters. According to Petitioner and his witnesses, Petitioner had no control over financial decisions. WITNESS 3 made the financial decisions.

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. As CEO, 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 shows Petitioner did not make decisions to prefer other creditors over the State or to utilize the funds for personal purposes. He signed checks in the absence of the CFO. He did not decide to whom the checks were to be made out.

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.”

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 shows Petitioner received a call regarding taxes. He did not ask questions. He passed on the information. He had no more involvement.

Respondent argues this is sufficient to establish reckless disregard. The Commission disagrees. Petitioner was CEO and had authority to sign checks, but functioned as an employee responsible for operations and sales. He had no authority over financial affairs of the company or knowledge of them. When made aware of an issue regarding taxes, he passed it on.

DECISION AND ORDER

Based on the foregoing, the Commission abates the \$\$\$\$ personal penalty against Petitioner for the period of October 2004 through March 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

Appeal No. 06-0796

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

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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