

08-0327

PERSONAL NON-PAYMENT

TAX YEARS: 2006, 2007

SIGNED: 11-13-2008

COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, M. JOHNSON

EXCUSED: D. DIXON

GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,

Petitioner,

v.

TAXPAYER SERVICES DIVISION OF THE
UTAH STATE TAX COMMISSION,

Respondent.

INITIAL HEARING ORDER

Appeal No. 08-0327

Tax Type: Personal Penalty Assessment
Sales, Tourist, Withholding

Tax Period: 10/06-9/07

Judge: Phan

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER
PETITIONER'S SPOUSE
For Respondent: RESPONDENT REP. 1, Assistant Attorney General
RESPONDENT REP. 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 September 9, 2008. Petitioner is appealing a personal penalty assessment made against him for the unpaid sales, tourist fund and withholding tax of COMPANY A, dba COMPANY B. The unpaid taxes were for periods from October 2006 through September 2007. The total amount of the personal penalty assessment was \$\$\$\$\$. The Statutory Notice of the deficiency was issued on February 4, 2008, and was timely appealed by Petitioner. The matter then proceeded to the Initial Hearing.

APPLICABLE LAW

Utah Law provides for a personal penalty assessment for a company's unpaid withholding tax liabilities. It is listed in Utah Code Sec. 59-1-302 and 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 know 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

In this matter Respondent determined that Petitioner was a person responsible for collecting and paying over the tax of COMPANY A pursuant to Utah Code Sec. 59-1-302, and argued that the personal penalty was appropriate for the period indicated above. Petitioner argued that he was not the party responsible for paying the tax, that the responsible party was PETITIONER'S SPOUSE. PETITIONER'S SPOUSE attended the hearing and acknowledged that the tax was her responsibility. She and Petitioner are married.

Petitioner and PETITIONER'S SPOUSE opened the COMPANY B in November 2006. PETITIONER'S SPOUSE had formed the corporation COMPANY A and she was the 100% owner of the corporation, shareholder, president and only director. The corporation owned the restaurant. According to the information presented by Petitioner and PETITIONER'S SPOUSE, which was largely un refuted by the Division, it was PETITIONER'S SPOUSE who performed the accounting functions, prepared tax filings, payroll and determined which bills should be paid.

Petitioner managed the operation side of the restaurant and was present in the restaurant on a day-to-day basis. He would make cash deposits in the event there were any and he was a signor on the business bank account. When asked at the hearing, he stated he did not sign checks and there was no evidence that he preferred some creditors over the state. He indicated that generally the customers paid with credit cards and those amounts would be directly deposited into the business's account. During the period the business was open, he was aware that taxes were unpaid. He did receive some pay from the business as an employee, two paychecks during 2006, but none in 2007. PETITIONER'S SPOUSE indicated that she never received any pay for the work that she performed for the business.

PETITIONER'S SPOUSE indicated that the Internal Revenue Service had made a determination regarding federal withholding taxes that she was the responsible party and not Petitioner for federal tax purposes. PETITIONER'S SPOUSE also stated that she had claimed the tax deficiency as a debt that she owed on a bankruptcy filing.

Appeal No. 08-0327

The Division did provide the information that Petitioner had owned a previous business which had closed down and for which he was the responsible party. The Division also pointed out that the sales, tourism and withholding taxes were trust fund taxes. The restaurant collected them from the customers and employees and the funds belonged to the state. They should not have been used for other business expenses.

Upon review of the information provided, it is clear that Petitioner was aware the taxes were not paid. He has acknowledged the fact. The law, at Utah Code Sec. 59-1-302(2) provides a penalty on “any person required to collect, truthfully account for, and pay over any tax” when that person “willfully fails to . . . pay over the tax.” As a manager of the business, signor on the bank account and the one who made sure that the taxes were collected from the customers, the Commission would consider that he was a “person required to collect,” and pay over the tax. However, considering whether he willfully failed to pay the tax, although he was aware that the taxes were not being paid, from the information provided, he did not have the authority to decide who was paid or direct where the funds went and, therefore, there was no willful failure to pay the tax.

DECISION AND ORDER

Based on the foregoing, the Commission abates the personal penalty against Petitioner for the period of October 2006 through September 2007. 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. 08-0327

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2008.

Jane Phan, 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

JKP/08-0327.int