

08-2260
PERSONAL PENALTY ASSESSMENT
SIGNED 08-31-2009

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,

Petitioner,

vs.

TAXPAYER SERVICES DIVISION OF THE
UTAH STATE TAX COMMISSION,

Respondent.

INITIAL HEARING ORDER

Appeal No. 08-2260

Account No. #####

Tax Type: Sales Tax /
Personal Penalty Assessment

Judge: Jensen

Presiding:

Clinton Jensen, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER

For Respondent: RESPONDENT REP 1, Assistant Utah Attorney General
RESPONDENT REP 2, from the Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on June 11, 2009 for an Initial Hearing in accordance with Utah Code Sec. 59-1-502.5. On September 29, 2008, the Taxpayer Services Division of the Utah State Tax Commission ("Division") sent a letter to PETITIONER ("Taxpayer") indicating that the Taxpayer owed a personal penalty for unpaid sales taxes for COMPANY ("Company"). The unpaid taxes were for the period from December 2006 to December 2007. The total amount of the personal penalty assessment was \$\$\$\$\$.¹

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 (2007) and provides in pertinent part:

(1) This section applies to the following: taxes in this title: . . . a tax under Chapter 12, Sales and Use Tax Act;

¹ This amount may have been reduced by payments credited after the date of the Division's notice.

(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

In this matter the Division determined that the Taxpayer was a person responsible for collecting and paying over tax on the basis of Taxpayer's status as a member in the Company's LLC, and on the basis of testimony that five other members indicated that Taxpayer had management authority for the Company.

Taxpayer argued that his role in starting the Company was limited because the Company did not do any business until FRANCHISE ("Franchise") started operating the Company's store in December 2006. Taxpayer indicated that Franchise personnel sent him letters and emails indicating that it was going to take over operations of Company and that Taxpayer would have no management control of Company. However, as of the date of the hearing in this matter, Taxpayer had no copies of those documents. Likewise, Taxpayer did not present any witnesses to rebut the evidence presented by the Division indicating Taxpayer's control of the Company.

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The facts in this matter indicate that Taxpayer is a party responsible for collecting and remitting the taxes at issue. He had a member interest in the Company and had the authority to see that the Company paid the taxes as well as the responsibility to make sure this would happen. He may not be the only person responsible for the tax under the personal penalty statute, but he is one of the responsible parties.

DECISION AND ORDER

Based on the foregoing, the personal penalty assessment against Taxpayer for the period December 2006 through December 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

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

DATED this _____ day of _____, 2009.

Clinton Jensen
Administrative Law Judge

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BY ORDER OF THE UTAH STATE TAX COMMISSION.

DATED this _____ day of _____, 2009.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

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