
BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, v. TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	INITIAL HEARING ORDER Appeal No. 09-1692 Account No. ##### Tax Type: Personal Nonpayment Penalty Tax Periods: April 2005 – June 2007 Judge: Chapman
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Presiding:

Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER, Taxpayer
 PETITIONER REP, Witness
For Respondent: RESPONDENT REP 1, Assistant Attorney General
 RESPONDENT REP 2, from Taxpayer Services Division
 RESPONDENT REP 3, from Taxpayer Services Division
 RESPONDENT REP 4, from 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 June 16, 2009.

On March 17, 2009, Taxpayer Services Division (the “Division”) issued a Statutory Notice to Darin Toone (“Petitioner” or “taxpayer”), in which it imposed a personal nonpayment penalty upon him. The Division assessed the taxpayer a penalty of \$\$\$\$\$, which was the amount of delinquent sales and use taxes owed by COMPANY (COMPANY) between and including the 2nd Quarter of 2005 and the 2nd Quarter of 2007.

PETITIONER asserts that he was not responsible for the payment of taxes on behalf of COMPANY for most, if not all, the periods at issue. In addition, he asserts that in May 2008, COMPANY was

completely transferred to a new owner who became liable for all prior taxes owed by COMPANY. As a result, he believes that the Commission should reverse the Division's imposition of a personal nonpayment penalty for all periods. In the alternative, he asks that the Commission reduce the penalty to reflect the percentage of ownership he and his ex-wife had in the business, which was never more than 65%.

The Division asks the Commission to sustain the personal nonpayment penalty it has imposed on PETITIONER, asserting that he was responsible for paying COMPANY's sales and use taxes and that he willfully failed to do so for the periods at issue. The Division contends that, at the very least, PETITIONER failed to investigate or correct mismanagement that led to the taxes not being paid. As a result, the Division contends that PETITIONER is liable for the personal nonpayment penalty it imposed pursuant to Utah Code Ann. §59-1-302, regardless of whether other persons or entities are also liable for the same taxes.

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) This section applies to the following:

.....

(d) a tax under Chapter 12, Sales and Use Tax Act;

.....

(2) (a) A person required to collect, truthfully account for, and pay over a 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 the tax or the payment of the tax, is liable for a penalty equal to the total amount of the tax evaded, not collected, not accounted for, or not paid over.

(b) The penalty described in Subsection (2)(a) is in addition to other penalties provided by law.

.....

(7) (a) In a hearing before the commission and in a 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 a 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 a tax 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 that resulted in the failure to collect, truthfully 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 is not required to find a bad motive or specific intent to defraud the government or deprive the government of revenue to establish willfulness under this section.

....

DISCUSSION

Section 59-1-302(2) provides that a person shall be responsible for a personal nonpayment 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.” At issue is whether PETITIONER met these conditions and, as a result, is liable for a penalty equal to the taxes owed by COMPANY for the periods between and including the 2nd Quarter of 2005 and the 2nd Quarter of 2007.

In February 2005, PETITIONER took the necessary steps to create COMPANY, a limited liability company. At the time of its creation, PETITIONER REP, who was PETITIONER’s wife at that time, became a 65% owner of COMPANY, while PERSON A became a 35% owner. COMPANY, which provided medical spa services, such as laser hair removal and other treatments, began operations in June 2005.

When operations began in June 2005, PETITIONER handled all aspects of the business. PETITIONER opened the sales tax account for COMPANY, and along with PERSON A, was authorized to sign checks on behalf of COMPANY. At this time, PETITIONER REP was not authorized to sign checks. PETITIONER handled COMPANY's accounting functions until December 2005, when PERSON A wanted more control of the business and took over these functions. By May 2006, PERSON A was handling all of COMPANY's accounting functions and his ownership interest had increased from 35% to 40%, while PETITIONER REP's ownership interest had decreased from 65% to 60%. PETITIONER, however, remained COMPANY's general manager after PERSON A took over the accounting functions.

PETITIONER and PETITIONER REP began divorce proceedings around June 2006 and were divorced in April 2007. PETITIONER REP received her 60% ownership percentage of COMPANY in their divorce settlement. Both PETITIONER and PETITIONER REP stated that they could not remember exact dates relating to their participation in COMPANY, and, at times, they confused one year for another. However, it appears that PETITIONER still participated in running COMPANY throughout most of 2007. He stated that he continued to help run COMPANY after the divorce in order to help "straighten matters out" for PETITIONER REP.

When PETITIONER and PETITIONER REP began divorce proceedings around June 2006, she was added as the third person authorized to write checks on COMPANY's checking account. PERSON A, however, continued to sign the majority of the checks written to pay creditors. Also in June 2006, PETITIONER REP looked at the business's profit and loss sheets and discovered that COMPANY's sales and use taxes had never been paid or reported. At this time, she hired her own accountant who prepared sales and use tax returns for all prior periods. PETITIONER signed all of the sales and use tax returns, which were then remitted to the Tax Commission. However, no payment was remitted with the returns. PETITIONER and PETITIONER REP explained that the business never made money.

PETITIONER explained that when he was in charge of the bookkeeping, he did not file returns or pay sales tax liability because he didn't know how to do it and because he thought PERSON A would do it. PETITIONER also explained that once PERSON A assumed control of the accounting functions, he thought PERSON A would file returns and pay the sales tax liability. However, he admits that he never asked PERSON A any questions about these matters and never investigated them. PETITIONER signed all sales and use tax returns that were prepared when PETITIONER REP took over the accounting in June 2006. In fact, PETITIONER signed all of the sales and use tax returns for the periods between and including the 2nd Quarter of 2005 and the 2nd Quarter of 2007, which coincides with the quarters for which the Division assessed him a personal nonpayment penalty.

In June 2007, PETITIONER REP bought out PERSON A's interest in and became the sole owner of COMPANY. PETITIONER REP continued to have sales and use tax returns prepared and remitted to the Tax Commission, which she herself signed beginning with the return for the 3rd Quarter 2007. However, as with prior returns, no payments were remitted with the returns she signed either.

In February 2008, PETITIONER REP sold a 40% stake in COMPANY to PERSON B, who took over the accounting functions. PETITIONER REP proffered that PERSON B indicated that she would "clean up" everything. PETITIONER REP admitted that she never checked further to see whether returns were being filed and taxes were being paid. In May 2008, PETITIONER REP signed over complete ownership in COMPANY to PERSON B and had no further participation in the business.

Given these circumstances, the Commission must determine whether PETITIONER was a person who was required to "collect, truthfully account for, and pay over" COMPANY's sales and use taxes up to and including the 2nd Quarter of 2007 and whether he willfully failed to do so. PETITIONER created the business and opened a sales tax account for it. Initially, he was fully responsible for filing returns and paying COMPANY's sales and use taxes, yet failed to do so. He was COMPANY's general manager through, at

least, 2006 and continued to help operate the business through 2007. He had check signing authority for the business and signed all sales and use tax returns for all periods at issue. Based on these facts, the Commission finds that PETITIONER was a person responsible to collect, truthfully account for and pay over COMPANY's sales and use taxes for all periods for which he was assessed a personal nonpayment penalty.

In addition, PETITIONER failed to investigate whether PERSON A was filing returns and paying taxes when PERSON A took over these responsibilities. He could have looked at a profit and loss statement, as PETITIONER REP did, and seen that the taxes were not being paid. In addition, he signed the returns that were prepared for all periods up to and including the 2nd Quarter of 2007 and either must have known or should have known whether payments were remitted with the returns. The Commission finds that PETITIONER, at the very least, recklessly disregarded obvious or known risks that resulted in the failure to pay COMPANY's taxes or failed to investigate or to correct mismanagement upon having notice that the taxes were not being paid. Accordingly, the Commission finds that PETITIONER willfully failed to pay over taxes that he was required to pay over. For these reasons and in accordance with Section 59-1-302, the Commission sustains the Division's imposition of a personal nonpayment penalty to PETITIONER for all periods at issue.

The Commission rejects PETITIONER's argument that the penalty imposed by the Division should be reduced by PERSON A's percentage of ownership in the business. PETITIONER contends that for those periods during which PERSON A owned 35% of COMPANY, the Commission should reduce the Division's penalty assessment by 35%. Similarly, for those periods during which PERSON A owned 40% of the business, he contends that the Commission should reduce the Division's penalty assessment by 40%. However, a person with an ownership interest might not be liable for a penalty under Section 59-1-302, depending on his or her involvement in the entity that accrued the tax delinquency. Under Section 59-1-302, any and all persons who willfully fail to remit taxes that they are required to remit are liable for a penalty equal

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to the *total* delinquency, regardless of whether they owned any portion of the entity that accrued the delinquency.

The Commission also rejects PETITIONER's argument that only PERSON B, COMPANY's sole owner since May 2008, should be liable for COMPANY's delinquent taxes. He contends that PERSON B was aware of COMPANY's delinquent taxes when she became sole owner and, as a result, accepted full liability for the taxes at this time. Whether or not PERSON B is responsible for COMPANY's delinquent taxes, Section 59-1-302 provides that a person who failed to remit taxes that he or she was required to remit is responsible for a penalty equal to these taxes. The Commission has found PETITIONER to be such a person. Accordingly, whether or not Mr. Stoddard has incurred any tax liability relating to COMPANY has no bearing on whether PETITIONER is liable for the penalty at issue.

Another issue arose concerning a separate personal nonpayment penalty imposed on PETITIONER REP. The penalty imposed upon PETITIONER REP is the subject of a separate appeal before the Commission. PETITIONER asks the Commission to transfer and add the entirety of PETITIONER REP's penalty assessment to his own so that she is not liable for any of the penalty at issue in the other appeal. The Commission declines to do so because PETITIONER REP's penalty assessment relates to entirely different, subsequent periods than those periods for which PETITIONER's penalty was assessed. It is unclear whether PETITIONER is a party who was responsible to pay over COMPANY's taxes for the subsequent periods for which PETITIONER REP was assessed.

Lastly, a payment of \$\$\$\$ was made on COMPANY's account on April 1, 2009, subsequent to the Division issuing its Statutory Notice in this matter. Although few facts concerning the payment were known at the Initial Hearing, it is assumed that PERSON B made the payment as it occurred after she became sole owner of COMPANY. Because payments are credited to the most delinquent period, the Division states that the \$\$\$\$ payment has been credited to several of the periods relating to PETITIONER's penalty

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assessment. As a result, the Division states that the amount of the penalty it assessed to PETITIONER should be reduced by \$\$\$\$\$. PETITIONER, however, asks that the \$\$\$\$ payment be applied to PETITIONER REP's separate penalty instead of being applied to his own. The Division asserts that the Commission has authority to apply the \$\$\$\$ payment to PETITIONER REP's penalty instead of PETITIONER's penalty and that it does not object to PETITIONER's request. On this basis of PETITIONER's request and PETITIONER REP's agreement with it, the Commission orders the Division to apply the \$\$\$\$ payment to PETITIONER REP's penalty assessment instead of applying it to PETITIONER's. As a result, PETITIONER remains liable for the entire amount of personal nonpayment penalty imposed in the Division's Statutory Notice.

DECISION AND ORDER

Based upon the foregoing, the Commission sustains the \$\$\$\$ personal nonpayment penalty that the Division imposed on PETITIONER in its Statutory Notice. 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.

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 _____, 2009.

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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