

09-1695
PERSONAL PENALTY ASSESSMENT
SIGNED 06-25-09

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, v. TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	INITIAL HEARING ORDER Appeal No. 09-1695 Account No. ##### Tax Type: Personal Nonpayment Penalty Tax Periods: July 2007 – March 2008 Judge: Chapman
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Presiding:

Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP, Representative
 PETITIONER, Taxpayer
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 PETITIONER (“Petitioner” or “taxpayer”), in which it imposed a personal nonpayment penalty upon her. The Division assessed the taxpayer a penalty of \$\$\$\$\$, which is the amount of delinquent sales and use taxes owed by COMPANY (COMPANY) for the last two quarters of 2007 and the first quarter of 2008.

PETITIONER asserts that she should not be liable for any taxes owed by COMPANY, including the taxes owed for the periods at issue. She 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, she

believes that the Commission should reverse the Division's imposition of a personal nonpayment penalty for all periods. In the alternative, she suggests that the Commission reduce the penalty to reflect the percentage of ownership she had in the business, which decreased from 100% to 60% in February 2008.

The Division asks the Commission to sustain the personal nonpayment penalty it has imposed on PETITIONER, asserting that she was responsible for paying COMPANY's sales and use taxes and that she 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 last two quarters of 2007 and the first quarter of 2008.

In February 2005, PETITIONER REP took the necessary steps to create COMPANY, a limited liability company. At the time of its creation, PETITIONER, who was PETITIONER REP’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 REP handled all aspects of the business. PETITIONER REP 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 was not authorized to sign checks. PETITIONER REP handled COMPANY's accounting functions until December 2005, when Mr. 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's ownership interest had decreased from 65% to 60%. PETITIONER REP, however, remained COMPANY's general manager after PERSON A took over the accounting functions.

PETITIONER REP and PETITIONER began divorce proceedings around June 2006 and were divorced in April 2007. PETITIONER received her 60% ownership percentage of COMPANY in their divorce settlement. Both PETITIONER REP and PETITIONER 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 REP 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.

When PETITIONER REP and PETITIONER 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 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 REP 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 REP and PETITIONER explained that the business never made money.

In June 2007, PETITIONER bought out PERSON A's interest in and became the sole owner of COMPANY. PETITIONER REP had signed the sales and use tax returns that were prepared for all periods up to and including the 2nd Quarter of 2007. However, PETITIONER signed the returns that were prepared for the last two quarters of 2007 and the first quarter of 2008, which coincides with the periods for which she assessed the personal nonpayment penalty at issue. However, as with prior returns that PETITIONER REP signed, no payments were remitted with the returns that PETITIONER signed either.

In February 2008, PETITIONER sold a 40% stake in COMPANY to PERSON B, who took over the accounting functions. PETITIONER proffered that PERSON B indicated that she would "clean up" everything. PETITIONER admitted that she never checked further to see whether returns were being filed and taxes were being paid. In May 2008, PETITIONER 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 for the last two quarters of 2007 and the first quarter of 2008 and whether she willfully failed to do so. For the first two quarters at issue and for a portion of the third, PETITIONER was the sole owner of COMPANY. She was also authorized to write checks on COMPANY's checking account. She was responsible for having the sales and use tax returns prepared for the last two quarters of 2007 before PERSON B took over this responsibility in February 2008. In addition, she remained a majority owner and continued to work at COMPANY after PERSON B purchased a minority interest in February 2008. Lastly, PETITIONER signed the sales and use tax returns that were remitted for all three periods at issue. She did not relinquish her ownership interest in COMPANY until sometime in May 2008, after the sales and use tax return was due for the first quarter of 2008. Based on these facts, the Commission finds that PETITIONER was a person

Appeal No. 09-1695

responsible to collect, truthfully account for and pay over COMPANY's sales and use taxes for the three periods at issue.

PETITIONER signed the sales and use returns for the last two quarters of 2007 that were prepared and remitted by an accounting firm that she had hired. PETITIONER had knowledge that payments had not been remitted for periods for which her ex-husband had signed the sales and use tax returns. It seems likely that she knew that payments were not remitted with the returns she signed, as well. At the very least, she failed to investigate and determine whether payment was remitted, having known that payments had not been made in the past. Furthermore, PETITIONER REP admitted that she did not investigate whether PERSON B remitted payment with the return that PETITIONER signed for the first quarter of 2008. 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 for all periods at issue. Accordingly, the Commission finds that PETITIONER willfully failed to pay over taxes that she 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 the three periods at issue.

The Commission rejects PETITIONER's argument that the penalty imposed by the Division should be reduced by PERSON B's percentage of ownership in the business. PETITIONER contends that for a portion the first quarter of 2008 when PERSON B owned 40% of COMPANY, 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 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. PETITIONER 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 PERSON B 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 REP asks the Commission to transfer and add the entirety of PETITIONER'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's penalty assessment relates to entirely different, subsequent periods than those periods for which PETITIONER REP's penalty was assessed. It is unclear whether PETITIONER REP is a party who was responsible to pay over COMPANY's taxes for the subsequent periods for which PETITIONER was assessed.

Lastly, a payment of \$\$\$\$ was made on COMPANY's account on April 1, 2009. 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 REP's penalty assessment. As a result, the Division states that the amount of the penalty it assessed to PETITIONER REP should be reduced by \$\$\$\$\$, but that the payment would have no affect on the amount of PETITIONER's penalty. PETITIONER REP, however, asks that the \$\$\$\$ payment

Appeal No. 09-1695

be applied to PETITIONER's penalty instead of being applied to his own, separate penalty. The Division asserts that the Commission has the authority to apply the \$\$\$\$ payment to PETITIONER's penalty instead of PETITIONER REP's penalty and that it does not object to PETITIONER REP's request. On this basis of PETITIONER REP's request and PETITIONER's agreement with it, the Commission orders the Division to apply the \$\$\$\$ payment to PETITIONER's penalty assessment instead of applying it to PETITIONER REP's. As a result, PETITIONER's penalty assessment is reduced by \$\$\$\$.

DECISION AND ORDER

Based upon the foregoing, the Commission sustains the personal nonpayment penalty imposed on PETITIONER for all three periods at issue, except that the Commission orders the Division to reduce the amount of the penalty by \$\$\$\$\$. 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

Appeal No. 09-1695

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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