

09-3302

PERSONAL PENALTY ASSESSMENT

TAX YEARS: 2007-2008

SIGNED: 07-19-2011

COMMISSIONERS: R. JOHNSON, D. DIXON, M. CRAGUN

EXCUSED: M. JOHNSON

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER,</p> <p style="padding-left: 40px;">Petitioner,</p> <p>vs.</p> <p>TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="padding-left: 40px;">Respondent.</p>	<p>INITIAL HEARING ORDER</p> <p>Appeal No. 09-3302</p> <p>Account No. #####</p> <p>Tax Type: Personal Penalty</p> <p>Judge: Jensen</p>
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Presiding:

Clinton Jensen, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER, Taxpayer, appearing by telephone
PETITIONER REP., for the Taxpayer

For Respondent: RESPONDENT REP. 1, for the Division
RESPONDENT REP. 2, for the Division
RESPONDENT REP. 3, Assistant Attorney General

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing on October 21, 2010 in accordance with Utah Code Sec. 59-1-502.5. Petitioner (the "Taxpayer") is appealing a personal penalty assessment by the Taxpayer Services Division (the "Division") for the unpaid sales and withholding taxes for COMPANY (the "Company"). The unpaid taxes were for the period from October 1, 2007 through March 31, 2009 for sales tax and January 1, 2007 to December 31, 2008 for withholding tax. The total amount of the personal penalty assessment was \$\$\$\$\$. The date of the Statutory Notice issued in this matter was September 10, 2009.

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 . . . a tax under Chapter 10, Part 4, Withholding of Tax [and] a tax under Chapter 12, Part 2, Local 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.

Utah law provides that in actions before the Commission, the burden of proof is generally on the petitioner. Utah Code Ann. §59-1-1417 (2010) provides as follows:

In a proceeding before the commission, the burden of proof is on the petitioner except for determining the following, in which the burden of proof is on the commission:

(1) whether the petitioner committed fraud with intent to evade a tax, fee, or charge;

(2) whether the petitioner is obligated as the transferee of property of the person that originally owes a liability or a preceding transferee, but not to show that the person that originally owes a liability is obligated for the liability; and

(3) whether the petitioner is liable for an increase in a deficiency if the increase is asserted initially after a notice of deficiency is mailed in accordance with Section 59-1-1405 and a petition under Part 5, Petitions for Redetermination of Deficiencies, is filed, unless the increase in the deficiency is the result of a change or correction of federal taxable income:

(a) required to be reported; and

(b) of which the commission has no notice at the time the commission mails the notice of deficiency.

DISCUSSION

In this matter the Division determined that the Taxpayer was a person responsible for collecting and paying over the tax based on information from the Utah Department of Commerce listing the Taxpayer as a

manager in the Company and on the basis of information that he was also a majority owner in the Company. The Taxpayer argues that he was not the person responsible for seeing that the tax was paid as he was not the person running the business and not responsible for the day-to-day operations.

The Taxpayer indicated that in August or September 2007, he approached PERSON 1 (“PERSON 1”), asking that PERSON 1 and a company for which he was a founding partner, COMPANY B, LLC (“COMPANY B”) help fund and manage the affairs of the Company. PERSON 1 indicated that neither he nor others associated with COMPANY B had time to devote to running the Company. Nevertheless, PERSON 1 agreed to put funds into the Company if the Company would hire PERSON 2 (“PERSON 2”) as the Company’s Chief Executive Officer. The parties reached agreement and PERSON 2 assumed duties as the Company’s CEO in February 2008. Beginning April 7, 2008, a five-member board of managers oversaw the Company’s operations. The Taxpayer had the right to appoint three of the five managers; COMPANY B had the right to appoint the other two.

The Company’s primary business was (WORDS REMOVED). Early 2008 was a difficult time for contractors and suppliers to the residential housing market. The Company lost money, faltered in its obligations, and borrowed heavily to stay in business. In July 2008, PERSON 1 informed the Taxpayer that the company should be sold to cover liabilities. The Taxpayer suggested that the Company terminate PERSON 2 and that the Taxpayer assume responsibility for day to day operations. In July 2008, the Company made those changes. As of July 2008, PERSON 1 indicated that he did not have the authority to force the Company out of business or into liquidation. He tried to force FINANCIAL INSTITUTION, one of the Company’s creditors, to take these actions. On August 27, 2008, PERSON 1 met with representatives of FINANCIAL INSTITUTION to see if it would exercise its rights to protect collateral, including inventory and accounts receivable. FINANCIAL INSTITUTION representatives indicated that they would not take this action without the consent of the Taxpayer.

Utah Code Sec. 59-1-302 provides for the imposition of a personal penalty equal to the amount of unpaid tax for any person responsible for payment of withholding and sales taxes if the person “willfully” fails to collect and pay the tax. However, “[t]he 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 [Section 59-1-302].” Utah Code Sec. 59-1-302(7)(c). Rather, it is sufficient evidence to impose a personal penalty if the Commission finds that the person responsible to collect and pay tax : “(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.” Utah Code Sec. 59-1-302(7)(b). Because the three subsections of Utah Code Sec. 59-1-302(7)(b) are joined with an “or” connector, satisfying any one of the three requirements will result in the imposition of a personal penalty.

Applying these statutes, the Taxpayer knew that the Company was experiencing or could experience cash flow shortfalls as early as August or September 2007. That the Company needed an influx of cash at that time is at least part of what prompted the Taxpayer to seek additional investment. Knowledge of these cash flow problems prompted a duty under Section 59-1-302 to consider whether sales and withholding taxes were being forwarded to the state as the Company collected them. The Taxpayer disregarded those risks, choosing to not attend all of the meetings of the company and not making inquiry regarding the payment of outstanding withholding tax liabilities. The Taxpayer was in a position to know whether taxes were being collected and withheld and forwarded to the state. At all times from January 1, 2007 to March 31, 2009, he had the authority to control the financial operations of the Company. That he did not exercise that control in light of known risks satisfies the statutory requirement of “recklessly disregarded obvious or know risks” under Section 59-1-302. That disregard of obvious and known risks “resulted in the failure to collect, account for, or pay over the tax” at issue. The facts in this matter indicate that the Taxpayer is a party responsible for collecting and remitting the taxes at issue. On that basis, he is a responsible person under Utah Code Sec. 59-1-302 and is liable for a personal penalty assessment as assessed by the Division. The Taxpayer may not be the only person responsible for the tax under the personal penalty statute, but is one of the responsible parties.

Clinton Jensen
Administrative Law Judge

DECISION AND ORDER

On the basis of the foregoing, the Commission sustains the personal penalty assessment against the Taxpayer for the period from October 1, 2007 through March 31, 2009 for sales tax and January 1, 2007 to December 31, 2008 for withholding tax. 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

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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 Taxpayer's name, address, and appeal number:

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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 _____, 2011.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner