

09-3535

PERSONAL PENALTY

TAX YEARS: 2007-2009

SIGNED: 07-19-2011

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

EXCUSED: M. JOHNSON

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,

Petitioner,

vs.

TAXPAYER SERVICES DIVISION OF THE
UTAH STATE TAX COMMISSION,

Respondent.

INITIAL HEARING ORDER

Appeal No. 09-3535

Account No. #####

Tax Type: Personal Penalty

Judge: Jensen

Presiding:

Clinton Jensen, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER, 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

member in the Company and on the basis of information that he was also an 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, PERSON 1 (“PERSON 1”) approached him, asking that he and a company for which he was a founding partner, COMPANY 2 (“COMPANY 2”) help fund and manage the affairs of the Company. The Taxpayer indicated that neither he nor others associated with COMPANY 2 had time to devote to running the Company. Nevertheless, the Taxpayer 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. COMPANY 2 had the right to appoint two of the five managers; PERSON 1 had the right to appoint the other three.

The Company’s primary business was manufacturing (WORDS REMOVED) products for the residential housing market. 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, the Taxpayer informed PERSON 1 that the company should be sold to cover liabilities. PERSON 1 suggested that the Company terminate PERSON 2 and that PERSON 1 assume responsibility for day to day operations. In the second week of July 2008, the Company made those changes. As of July 2008, the Taxpayer indicated that he did not have the authority to force the Company out of business or into liquidation. He tried to force BANK, one of the Company’s creditors, to take these actions. On August 27, 2008, the Taxpayer met with representatives of BANK to see if it would exercise its rights to protect collateral, including inventory and accounts receivable. BANK representatives indicated that they would not take this action without the consent of PERSON 1, the Company’s majority owner.

The facts in this matter indicate that the Taxpayer was a relative latecomer to the Company. Even after he invested money and saw to it that a person he considered responsible worked with the Company, he neither had a majority position nor the ability to mandate policy for the Company. That he attempted, but was unsuccessful in, forcing liquidation of Company assets to satisfy creditors underscores his lack of control of the Company. Although knowledge that there may be issues with withholding and sales tax payments can trigger a duty to make inquiry, the Taxpayer’s short time with the Company coupled with his demonstrated lack of control of Company affairs indicates that he is not responsible for a personal penalty in this action.

Appeal No. 09-3535

Clinton Jensen
Administrative Law Judge

DECISION AND ORDER

On the basis of the foregoing, the Commission abates the personal penalty assessment against the Taxpayer for the period from October 1, 2007 through July 15, 2008 for sales tax and January 1, 2007 to July 15, 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 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:

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