

11-2611
PERSONAL PENALTY ASSESSEMENT
TAX YEARS: 2008 & 2009
SIGNED: 09-07-2012
COMMISSIONERS: M. JOHNSON, D. DIXON, M. CRAGUN
EXCUSED: R. JOHNSON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,

Petitioner,

v.

TAXPAYER SERVICES DIVISION OF THE
UTAH STATE TAX COMMISSION,

Respondent.

INITIAL HEARING ORDER

Appeal No. 11-2611

Tax Type: Personal Penalty Assessment

Tax Period (s): 03/08 – 10/09

Judge: Phan

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER, By Telephone

For Respondent: RESPONDENT REP.1, Assistant Attorney General
RESPONDENT REP. 2, 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 Sec. 59-1-502.5, on June 19, 2012. Petitioner (the “Taxpayer”) is appealing the personal nonpayment penalty assessment made for the unpaid sales and restaurant tax of COMPANY 1 The unpaid taxes were for periods from March 2008 through October 2009. The total amount of the personal nonpayment penalty was \$\$\$\$\$. The Statutory Notice of the penalty was issued on March 22, 2010.

APPLICABLE LAW

Utah Law provides for a personal penalty assessment for a company's unpaid sales tax liabilities. It is listed in Utah Code Sec. 59-1-302 and provides 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 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 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 know risks that 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 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

In issuing the assessment against the Taxpayer, Respondent (the “Division”) determined that the Taxpayer was a person responsible for collecting and paying over the tax pursuant to Utah Code Sec. 59-1-302, and argued that the personal nonpayment penalty was appropriate for sales and restaurant tax owed for the periods from March 2008 through October 2009. The Taxpayer argues that the penalty against her should be abated.

The Taxpayer represented that she was not an officer, director or owner of the COMPANY 1. She said this business was owned by her son and daughter-in-law PERSON 1 and PERSON 2. She explained that

she had retired from employment with another company for which she did accounts payable. She represented that she worked only as a part-time accounts payable employee for COMPANY 1 starting in 2007. She said her duties were limited to the accounts payable and filing returns. She acknowledges she signed on the checking account for the business and did sign many checks, but represents that it was her son who made the decisions on which creditors to pay at what time. She also acknowledged that she signed the tax returns for the business. She explained that she had tried to work with EMPLOYEE 1 of the Taxpayer Services Division when it came to her attention that these taxes were not being paid and was told that returns needed to be filed. She did prepare the returns for the business and signed them, but it was her contention that she was not in the position to see that payment was made. She said she was not told at that time that if she signed the returns she would be responsible for payment of the tax. The Taxpayer also stated that the business had filed for bankruptcy and that the unpaid sales taxes were included as part of the bankruptcy plan.

The Division did not provide evidence or testimony contradicting the Taxpayer's statements that she was not an owner, nor an officer or director of the business, or that she had decision making authority over which a creditor was paid. The Division pointed to Utah Code Sec. 59-1-302 which indicates that a person who is required to collect, truthfully account for and pay over a tax may be liable for a personal nonpayment penalty when the tax goes unpaid. It was the Division's contention that the Taxpayer was a person responsible because she signed all the checks that they had seen from the business. She also signed all the returns and was the bookkeeper for the business for 5 years.

If it was found that the Taxpayer was a person responsible for collecting, truthfully accounting for and paying over the tax, the Division argued that the evidence indicated that she had willfully failed to pay over the tax under the prima facie criteria set out at Utah Code Sec. 59-1-302(7)(b). That section provides that it is prima facie evidence that a person willfully failed to pay over a tax if: 1) they made a voluntary, conscious, intentional decision to prefer other creditors over the state; 2) recklessly disregarded obvious or known risks that resulted in the failure to pay; or 3) failed to investigate or correct mismanagement, having notice that the tax was not being paid.

The Division argued that under these criteria her actions would be considered willful failure to pay. The Division stated that she made a voluntary conscious or intentional decision to pay other creditors because she was the one signing the checks. The Division argued that it would be at least reckless disregard that the taxes were not being paid, as she should have known because she prepared and signed all the checks and also

that she was an experienced bookkeeper. The Division argued that there would have been failure to investigate that the taxes were not being paid. The Division did point out that under the bankruptcy plan there would be little money left to pay towards the past due tax balance.

As noted by the Division in order for the personal nonpayment penalty to be applied, the Commission must first determine that the Taxpayer was a person required to collect, truthfully account for and pay over a tax according to Utah Code Sec. 59-1-302(2)(a). On this point that Taxpayer made representations that she was not. She said she was not an owner, officer or director of the business and worked for the business only as a part-time accounts payable employee. The Division did not refute this. The Taxpayer said she did not make the decisions over which creditor got paid, that it was her son who made these decisions. The Division did not refute this either. The Division did argue that she was the bookkeeper, signed the checks and the returns, arguing that this would be sufficient under the statute. The Division is in error. Without some ownership interest, corporate position or actual decision making authority, the fact that she was a part time bookkeeper who signed checks and returns is not sufficient to make her a person required to collect and pay over the tax. As she was not a responsible party, the Commission need not look further at whether or not her actions constituted a willful failure to pay the tax under Utah Code Sec. 59-1-302(7).

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission abates the personal penalty against the Taxpayer for the period of March 2008 through October 2009. 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

Appeal No. 11-2611

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

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this _____ day of _____, 2012.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Michael Cragun
Commissioner