2005

Utah State Tax Commission v. Eric Stevenson : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

UTAH STATE TAX COMMISSION,	)	
	)	
	)	
Appellant/Petitioner,	)	20050521
	)	Case No. ~~20030748~~-SC
	)	
vs.	)	
	)	Agency Decision No. 02-1472
	)	
ERIC STEVENSON,	)	
	)	
	)	
Appellee/Respondent.	)	

BRIEF OF APPELLANT/PETITIONER

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JURISDICTION

The Utah Court of Appeals issued its decision, Stevenson v. Utah State Tax Commission, 2005 UT App 179, 112 P.3d 1232, on April 14, 2005. (Attached as Addendum A.) This Court has jurisdiction to review the appellate ruling by certiorari pursuant to Utah Code Ann. § 78-2-2(3)(a), (e), and (5) (West 2004). By its Order of August 29, 2005, this Court granted the Commission's Petition for Writ of Certiorari upon the issues listed below.

STATEMENT OF ISSUES

1. Did the Court of Appeals correctly construe Utah Code Ann. § 59-1-302(7) as to "reckless disregard of obvious known or risks?"

STANDARD OF REVIEW

When exercising certiorari jurisdiction, the Utah Supreme Court reviews the decision of the Utah Court of Appeals for correctness. Utah v. Hansen, 2002 UT 125, ¶25, 63 P.3d 650, 660, (quoting Longley v. Leucadia Fin. Corp., 2000 UT 69, ¶13, 9 P.3d 762, 765.)

2. Did the Court of Appeals correctly construe Utah Code Ann. § 59-1-302(7) as to a "voluntary, conscious, and intentional decision to prefer other creditors over the state government?"

STANDARD OF REVIEW

When exercising certiorari jurisdiction, the Utah Supreme

Court reviews the decision of the Utah Court of Appeals for correctness. Hansen, 2002 UT 125, ¶25, 63 P.3d at 660, (quoting Longley, 2000 UT 69, ¶13, 9 P.3d at 765.)

3. Did the Court of Appeals employ the correct standard of review?

When exercising certiorari jurisdiction, the Utah Supreme Court reviews the decision of the Utah Court of Appeals for correctness. Hansen, 2002 UT 125, ¶25, 63 P.3d at 660, (quoting Longley, 2000 UT 69, ¶13, 9 P.3d at 765.) In addition, "[t]he correctness of the court of appeals' decision depends initially upon whether it applied the appropriate standard of review to the [Commission's] decision." Carrier v. Pro-Tech Restoration, 944 P.2d 346, 350 (Utah 1997). Under Utah Code Ann. § 59-1-610 (2000), the court of appeals should apply the substantial evidence standard in reviewing decisions of the Commission. The court gives deference to the Commission's findings of fact.

CONTROLLING PROVISIONS

The following controlling provisions are set forth in Addendum B: Utah Code Ann. § 59-1-302 (2000); Utah Code Ann. § 59-1-610(1)(a),(b) (West 2004); Utah Code Ann. § 59-10-406(6) (West 2004); 26 U.S.C. § 6672 (1989).

STATEMENT OF THE CASE

This case involves the Court exercising its discretionary review powers over three possible areas of error in a decision of

the Court of Appeals. On May 13, 2002, the Taxpayer Services Division of the Utah State Tax Commission ("Tax Commission" or "Commission") notified Eric Stevenson ("Stevenson") of a preliminary assessment of a personal non-payment penalty. (R. at 217.) A Statutory Notice of the assessment in the amount of $12,018.04 was sent on July 12, 2002. (R. at 217-18.) On August 9, 2002, Stevenson filed a Petition for Redetermination, requesting a hearing on this matter. (R. at 215-16.) On August 5, 2003, a formal hearing took place before the Commission regarding Stevenson's Petition. (R. at 3-9.) The Commission issued its Findings of Fact, Conclusions of Law, and Final Decision on August 18, 2003, which affirmed the Taxpayer Services Division's personal penalty assessment against Stevenson. (R. at 3-9.) Stevenson filed an appeal of this Final Decision on September 16, 2003. (R. at 2.)

A formal hearing was held on August 5, 2003 before the Commission. (R. at 3-9.) Stevenson contended that his failure to remit the withholding tax was not willful. (R. at 231-32) On August 18, 2003, the Commission issued its final decision upholding the assessment against Stevenson (attached as Addendum C), finding him to be a responsible party who willfully failed to pay Tower's withholding tax. Stevenson, 2005 UT App 179, ¶16, 112 P.3d at 1236. (Addendum C; R. at 3-9.)

Judicial Review of the Agency Decision

Stevenson appealed the Final Decision of the Commission to the Utah Court of Appeals. On April 14, 2005, the Utah Court of Appeals issued its opinion in which it reversed the Final Decision of the Commission and remanded the matter for proceedings consistent with that Opinion. Disagreeing with the Court of Appeals' decision, the Commission filed a Petition for Writ of Certiorari on June 14, 2005. This Court granted the Writ on August 29, 2005.

STATEMENT OF FACTS

Introduction: Tax Withholding

A corporation with employees must file quarterly withholding tax returns and pay the amount of calculated tax liability to the Utah State Tax Commission ("Commission"). See Utah Code Ann. § 59-10-406 (2000). Funds for this purpose are withheld by the corporation from the employees' paychecks. These are trust funds, pursuant to Utah Code Ann. § 59-10-406(6)(West 2004).

If a corporation fails to file the returns and pay the withholding tax liabilities and the corporation then becomes insolvent or unable to pay the tax, the Commission may assess personally any responsible parties in the corporation (e.g., officers, managers, or directors) for the amount of the withholding taxes left unpaid. This is known as a "personal penalty assessment."

Utah Code Ann. §§ 59-1-302 (2000) provides a test for determining who can be assessed a personal penalty. An individual must be a person with sufficient responsibility for collecting and paying the tax for the corporation:

> (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 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 Ann. §§ 59-1-302(2), (7)(a) and (b)(2000).

The Corporation

Tower Communications, Inc. ("Tower") was a Utah corporation organized in 1999 that was later dissolved on December 31, 2000. (R. at 226.) The corporation contracted to install cable and hardware for various communications businesses. Its stock was owned equally by three individuals: Brett N. Cherry, Ken Steckelberg, and Eric Stevenson. (R. at 3.) Steckelberg was president and was in day-to-day control. (R. at 4, 226, 228, 231, 237.)

Stevenson was Tower's Secretary/Treasurer. (R. at 227, 237.) He contemporaneously held another full-time job as a mortgage loan officer at Bank of Utah and was not involved in the day-to-day operations of Tower; however, Stevenson had the sole authority to sign checks for Tower. (R. at 227, 231, 238, 265.) Stevenson's responsibility at Tower was to manage and watch the money. (R. at 238.)

As Secretary/Treasurer, Stevenson signed withholding tax returns for the second and fourth quarters of 1999. (R. at 55-56.) Stevenson also signed the checks that paid the withholding taxes for 1999 and the first quarter of 2000. (R. at 55-56, 265-66.) In addition, Stevenson signed Tower's franchise and income tax returns for 2000 and 2001. (R. at 59, 80.)

Tower's Financial Difficulties

In late November 2000, Stevenson made an unannounced visit

to Tower's place of business to review the financial records. (R. at 228, 245-48.) During this review, he learned that Tower was delinquent in paying its withholding tax for the second, third, and fourth quarters of 2000. (R. at 228, 248.) Upon learning of the true financial status of Tower, Stevenson immediately closed the doors of the company, fired the president, Steckelberg, for mismanagement, demanded that Tower dissolve, and began the winding-up process. (R. at 228, 248-49.)

Payment from XO Communications

As part of the winding-up process, Stevenson determined that one of Tower's clients, XO Communications, owed Tower a substantial sum of money. (R. at 13-37, 247-52.) However, XO Communications could not pay Tower the money it owed because of other claims held by various suppliers and contractors. (R. at 13-37, 247-52.) In an effort to receive payment from XO Communications, Stevenson used personal funds to purchase these claims from the subcontractors and suppliers that were owed money by Tower for work completed on behalf of XO Communications. (R. at 230, 253-58.) Stevenson had these personal funds deposited in his attorney's trust account and directed that payments and releases be obtained from these suppliers and subcontractors. (R. at 18-37.) Upon the purchase of these subcontractor claims, XO Communications prepared a check for the amount it owed Tower, $83,211.41. (R. at 38, 230.)

Payment of Tower's Secured Debt Guaranteed by Stevenson

The Bank of Utah, Stevenson's employer, had a secured claim against Tower, with Stevenson as a personal guarantor on the claim. (R. at 230, 251.) In negotiating the payment to Tower by XO Communications, which payment would have satisfied in full the withholding taxes due from Tower, Stevenson orchestrated an agreement between Tower and XO Communications on November 15, 2001, that specified how XO Communication's payment was to be made. (R. at 39-42; see Addendum D.) Stevenson signed this agreement on behalf of Tower. (R. at 41-42.) Stevenson then directed that the XO Communications' check go directly to the Bank of Utah instead of to Tower or to any of Tower's other creditors. (R. at 39-42, 259-60.) The payment from XO Communications was used to satisfy the Bank of Utah's secured claim of December 7, 2001. (R. at 38, 260.)

The Commission Renders A Personal Penalty Assessment

Tower became insolvent and failed to pay many of its creditors. At the time of Tower's dissolution at the end of 2000, it had failed to pay withholding tax for the second, third, and fourth quarters of 2000. (R. at 3, 26, 248.) The amount owed in withholding tax returns for these periods, which were eventually filed, was $12,018.04. This amount was never paid to the Commission. (R. at 38-42, 43-47, 233.) In May 2002, the Commission notified Stevenson of a preliminary assessment of a

personal non-payment penalty for his failure to pay Tower's withholding tax, (R. at 43.), at which time the procedural history of this case commenced.

ARGUMENT

I. THE COURT OF APPEALS INCORRECTLY USED FEDERAL CASE LAW INSTEAD OF APPLYING THE DISTINCT STATUTORY DEFINITION OF "RECKLESS DISREGARD OF OBVIOUS OR KNOWN RISKS" PROVIDED BY UTAH CODE ANN. § 59-1-302(7).

A. The Threshold of "Willfulness" Is Defined in Utah Code Ann. § 59-1-302(2), Which Differs From the Federal Standard Under 26 U.S.C. § 6672.

This Court should reverse the decision of the Court of Appeals to correct the mistake made by that court when it failed to differentiate 26 U.S.C. § 6672 from Utah Code Ann. § 59-1-302 (7)(b).[1] The Utah Legislature defined willful conduct in the context of the personal penalty assessment by enacting the following provision:

> Any person required to collect, truthfully account for, and pay ov er 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.

Utah Code Ann. § 59-1-302(2) (2000) (emphasis added). A direct comparison of this state statute and the comparable federal

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[1] The Utah Legislature amended § 59-1-302 in 2003 and 2004. The amendments were not substantive, because they only changed numbering and format. Therefore, the applicable language to the facts and time frame in this case will be the law as of 2000.

statute, 26 U.S.C. § 6672, us given in Addendum E.

This section sets forth the conduct which subjects an individual to the personal penalty assessment. The Legislature set forth the factual tests for determining whether a person's conduct is "willful" in subsection 7. A personal penalty is assessed if "a person has willfully failed to collect, truthfully account for, or pay over any of the taxes" owed the state. Utah Code Ann. § 59-1-302(7)(b) (2000) (emphasis added). Under this subsection, actions that constitute "reckless disregard of obvious or known risks" may constitute willfulness sufficient to subject the party to the personal penalty assessment. The analysis will begin with a summary of the court's decision followed by an argument of the court's error.

In Stevenson, the Court of Appeals observed that while "n[o] Utah case law has yet defined 'willfulness' for tax purposes, . . . federal cases interpreting 26 U.S.C. § 6672 apply a similar standard, and provide some insight." 2005 UT App 179, ¶15, 112 P.3d at 1235. The Court of Appeals used federal case law to conclude that the Commission erred in determining that Stevenson's actions had been "reckless" in violation of Utah law. Id. at ¶17, 112 P.3d at 1236.

Using the decisions of two federal courts as guidance, the court determined that Stevenson's actions were "negligent" and not "willful." Id. The court reached this conclusion by

determining that since Stevenson did not have day-to-day control over Tower, he was entitled to "actual notice" of Tower's tax deficiency. The court said such notice may take the form of a history of failing to pay taxes. Id., (citing Hammon v. United States, 21 Cl. Ct. 14 (1990)). Without actual notice, the court said that the mere failure to pay "withholding taxes for three quarters [was] not sufficient to present an obvious risk of nonpayment." Id., (citing In re Macognone, 253 B.R. 99, 102 (M.D. Fla. 2000)).

The court determined that since Stevenson was unaware of any history of Tower failing to pay its taxes, Stevenson did not receive notice of Tower's tax deficiency. Therefore, the mere failure to pay its taxes did not constitute a risk of nonpayment, notwithstanding the fact that Stevenson alone wrote all checks on behalf of Tower. Id. Stevenson's actions were "merely negligent," not "willful;" so, the court concluded,"the Commission had not provided prima facie that Stevenson reckless disregarded known or obvious risks of nonpayment." Id.

The court erred by disregarding the threshold willfulness definition expressly set forth in Utah Code Ann. § 59-1-302(2). It concluded that Stevenson had not "recklessly disregarded known or obvious risks." It relied on federal cases that ignore the explicit language of the Utah statute. Under Utah law,

[i]t is prima facie evidence that a person has willfully

> failed to collect, truthfully account for, or pay over any of the taxes . . . if the commission . . . finds that the person charged with the responsibility of collecting, accounting for, or paying over the taxes:
> . . .
> (ii) recklessly disregarded obvious or known risks, which resulted in the failure to collect, account for, or pay over the tax.

Utah Code Ann. § 59-1-302(7)(b)(ii) (2000) (emphasis added).

In contrast to the Utah statute, 26 U.S.C. § 6672 is silent on the same question of what constitutes willfulness. What constitutes willfulness under federal law has only been defined through the courts; the federal courts have not stated if these criteria constitute a prima facie case, as does the Utah statute. See Stevenson, 2005 UT App 179 n.1, 112 P.3d at 1235 n.1 (citing Cook v. United States, 52 Fed. Cl. 62, 69 (2002)). The Legislature clearly defined conduct to impose a personal penalty assessment. It also refused to adopt the federal defenses used by the Court of Appeals. See Stevenson, 2005 UT App 179, ¶17, 112 P.3d at 1236 (concluding that Stevenson's "negligent" actions did not subject him to the personal penalty assessment).

When the Court of Appeals adopted the analysis of federal courts in interpreting the Utah personal penalty assessment, the court incorporated the defense of negligence and ignored plain Utah statutory language which are not part of the federal statute. This Court should reverse the decision of the court below because the Stevenson decision conflicts with the statutory

definition of willfulness.

B. The Court of Appeals' Reliance on Federal Interpretations of "Willfulness" Is Erroneous Because of a Lack of Uniformity on What Constitutes Willfulness Under the Federal Personal Penalty Assessment in 26 U.S.C. § 6672.

In the alternative, if this Court rejects the Utah statutory definition of willfulness for reversing the Court of Appeals, this Court should still reverse the Court of Appeals because Stevenson has not acted in a manner sufficient to qualify for relief under the federal defense of "reasonable cause."

In its conclusion, the Court of Appeals agreed with Stevenson's assertion that even if the Commission determined that his actions had been willful, the statute and case law are silent on what actually constitutes "prima facie evidence." Stevenson, 2005 UT App 179, ¶24, 112 P.3d at 1238. Because of this silence, the court agreed to adopt a "reasonable cause" defense articulated by the Tenth Circuit. Id. at ¶25, 112 P.3d at 1238 (quoting Finley v. United States, 123 F.3d 1342, 1348 (10th Cir. 1997). Using the Tenth Circuit standard which the court adopted, a "reasonable cause" defense against the personal penalty assessment exists only if "'(1) the taxpayer has made reasonable efforts to protect the [withholding tax] trust funds, but (2) those efforts have been frustrated by circumstances outside the taxpayer's control.'" Id. (quoting Finley, 123 F.3d at 1348.) Since the Commission did not "specifically consider" reasonable

cause in Stevenson's actions, the court concluded that such a defense could exist. Id.

This conclusion was incorrect. Not only does the court ignore the fact that the specific Utah statute is silent on this matter, but it also ignores the fact that there is no uniformity among federal courts as to the existence of the reasonable cause defense in the first place. Although the Tenth Circuit recognizes the existence of a reasonable cause defense in Finley, even that court qualified its application, limiting the defense to efforts "that have been frustrated by circumstances outside the taxpayer's control." 123 F.3d at 1348. There is no indication here that such circumstances existed.

Moreover, other courts have refused to follow the Tenth Circuit's approach. In a fact pattern similar to this case, one court said no reasonable cause defense existed for a responsible person who knew that taxes were due but paid other creditors instead of the government. Newsome v. United States, 431 F.2d 742, 747 (5th Cir. 1970). Another court suggested that the "reasonable cause" defense existed only in theory (surmising that in practice, an officer of a company would not have the defense). Bowen v. United States, 836 F.2d 965, 968 (5th Cir. 1988) (emphasis added.)[2]

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[2] Some federal circuits use a "reasonable cause" defense, but the circumstances in which it does apply are extremely narrow. See Logal v. United States, 195 F.3d 229, 233 (5th Cir.

These cases were in existence when the Legislature amended this section, but the Legislature declined to create a reasonable cause defense under Utah law. There is ambiguity and a lack of adoption of a uniform standard by the federal courts. By relying upon such federal reasoning, the court has failed to apply Utah law. Consequently, the Court of Appeals' reliance on federal case law to create this defense is misplaced, and this Court should reverse the court's action on that matter.

C. The Court of Appeals' Failure to Defer to the Factual Findings of the Commission and Resulted in a Decision at Odds With the Statutory Scheme Outlined in Utah Code Ann. § 59-1-302(7).

This Court should reversed the decision of the Court of Appeals because the court failed to apply the facts of this case to the statutory scheme outlined in Utah Code Ann. § 59-1-302(7). Under this section, prima facie evidence of a person's failure to collect, truthfully account for, or pay taxes due exists if "a

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1999) (holding "that the reasonable cause defense to a § 6672 action is exceedingly limited"); Thosteson v. United States, 331 F.3d 1294, 1301 (11th Cir. 2003) (noting that the court has "consistently held that the reasonable cause defense to a § 6672 action is extremely limited")(emphasis added); Brewery, Inc. v. United States, 33 F.3d 589 (6th Cir. 1994), (holding that a personal penalty assessment was upheld because taxes are held as trust funds of the government, and use of those funds to pay other creditors cannot constitute "reasonable cause" for limiting penalties). (For a discussion of tax funds as trust funds, see Argument III, infra at 23-25.) But see East Wind Industries, Inc. v. United States, 196 F.3d 499 (3d Cir. 1999) (holding that financial difficulties may be a factor to consider when determining whether a reasonable cause defense exists).

responsible party . . . recklessly disregarded obvious or known risks, which resulted in the failure to collect, account for, or pay over the tax." Utah Code Ann. § 59-1-302(7)(b)(ii)(2000).

The facts of this case bear repeating here. Stevenson conceded he is a responsible person. Stevenson, 2005 UT App 179, ¶8, 112 P.3d at 1234. In its Final Decision, the Commission determined that Stevenson had "recklessly disregarded obvious risks that resulted in the failure to pay over the tax." (R. at 7.) Under Utah Code Ann. § 59-1-302(7), a personal penalty may be assessed against a responsible person if that person has "recklessly disregarded obvious risks that resulted in the failure to pay over the tax."

In spite of these facts, the court still concluded Stevenson had been "negligent," not "reckless." Stevenson, 2005 UT App 179, at ¶17, 112 P.3d at 1236. First, the court observed that "Stevenson did not have actual notice of Tower's tax deficiency until some time around November 2000." Id. Without actual notice, the court reasoned, "[payment of] withholding taxes for three quarters is not sufficient to present an obvious risk of non payment to a responsible party who is not directly involved in the accounting and disbursing of taxes." Id. Second, according to the court, the fact that the withholding taxes had been paid in 1999 did not give Stevenson any reason to believe that taxes would not be paid in 2000. It seized upon the

reasoning in this relatively obscure bankruptcy case to support its creation of a defense.

The Commission, however, weighed the evidence and found as a matter of fact that, given Petitioner had sole check-signing authority for Tower, if he was not signing checks to pay tax owed, no one else was. (R. at 4.) Since Stephenson had signed checks and tax returns in 1999, he knew, or should have known, that fact. (R. at 7.) Moreover, the fact that Steckelberg, the corporate partner in charge of day-to-day operations, had declared bankruptcy twice--a fact known to Stevenson--was an obvious risk that should have compelled better oversight on the part of Stevenson. (R. at 285.) Given these facts which were before the Commission, the court erred in ignoring the considered facts and concluding that Stevenson was merely negligent and not reckless. The Court should reverse the court's decision for its failure to consider the factual basis for the Commission's Order.

II. THIS COURT SHOULD REVERSE THE OPINION OF THE COURT OF APPEALS BECAUSE THE COURT OF APPEALS ERRONEOUSLY CONSTRUED UTAH CODE ANN. § 59-1-302(7) IN DETERMINING WHETHER STEVENSON PREFERRED OTHER CREDITORS OVER THE STATE GOVERNMENT.

As articulated above, supra at 10-12, the same arguments surrounding willfulness and reckless disregard also apply when determining whether Stevenson preferred other creditors over the Tax Commission in handling the tax dollars he held as trust funds. As with the standard of what constitutes reckless

disregard of obvious or known risks, Utah law also provides a definite standard on how to determine what constitutes a prima facie case for willfulness which the federal statute does not. Under Utah law,

> [i]t is prima facie evidence that a person has willfully failed to collect, truthfully account for, or pay over any of the taxes . . . if the commission . . . 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 . . .

Utah Code Ann. § 59-1-302(7)(b)(i) (2000) (emphasis added). This Court should reverse the opinion of the Court of Appeals because the Court of Appeals erroneously construed Utah Code Ann. § 59-1-302(7)(b) in determining that Stevenson did not voluntarily, consciously, or intentionally prefer other creditors over the Tax Commission in satisfying Tower's debts and obligations. In analyzing Stevenson's actions, the court determined that he had not violated this provision of Utah law. This determination was in error and should be corrected by this Court.

Stevenson's decision to prefer other creditors over the state government deals with his actions surrounding the release of XO Communications's $83,211 payment to Tower. As recounted above, Stevenson used personal funds to extinguish the claims of Tower's subcontractors in order to facilitate the release of the

money owed to Tower. When this check was issued, Tower, with Stevenson signing the agreement on behalf of Tower, agreed that the check would go directly to the Bank of Utah, not to the corporation or to the State. (R. at 38-42.)

The Court of Appeals relied on Sorenson v. United States, 521 F.2d 325 (9th Cir. 1975), to determine that Stevenson's actions to use personal funds to extinguish Tower's obligations did not make Stevenson a responsible person. Under Sorenson, "funds placed at the disposition of a company become corporate funds regardless of their source, be it a bank or an owner of th company." Stevenson, 2005 UT App 179, ¶22, 112 P.3d at 1237.

The court's analysis that Stevenson's actions did not violate Utah Code Ann. § 59-1-302(7) was erroneous in two ways. First, the line the Court of Appeals drew to distinguish the facts of Sorenson and this case is too fine, and results in a distinction without difference. The court incorrectly distinguishes Stevenson from Sorenson because in Sorenson, the officer allegedly had greater financial oversight than Stevenson had over Tower. Stevenson, 2005 UT App 179, ¶22, 112 P.3d at 1237. But Stevenson did have authority that subjects him to greater liability than the Court of Appeals recognized. As in Sorenson, Stevenson used personal funds to satisfy the payment of Tower liabilities. Then, through Stevenson's actions as the force behind the company since he was the only officer acting for

it, Tower received a substantial payment from one of its clients.

After taking charge of the company, Stevenson entered into contracts on Tower's behalf. He personally intervened and orchestrated XO Communications's payment owed to Tower. See Addendum D. He signed a contract on behalf of Tower--the terms of which specified that payment should go to Tower. But then, he personally directed that the payment go to Bank of Utah, one of Tower's secured creditors, on a claim Stevenson had personally guaranteed. Id. This action demonstrates that Stevenson, by signing, had sufficient capacity to act on Tower's behalf, contrary to the conclusion of the Court of Appeals.

The second analytical misstep deals with the Court of Appeals' conclusion that the Tax Commission could not assess a personal penalty against Stevenson because the Commission failed to "present evidence that the Bank of Utah declined to exercise its right to the XO funds and that Stevenson was free to apply a portion of the fund to pay Tower's tax obligation." Stevenson, 2005 UT App 179, ¶23, 112 P.3d at 1237. No such action by a creditor is needed, according to Utah Code Ann. § 59-1-302(7), to find an officer liable.

Moreover, The Court of Appeals ignored the fact that these tax payments were "trust funds" of the State. Under Utah Code Ann. § 59-10-406(6)(2000), the Commission had a lien against the assets of Tower for taxes owed but not paid to the state:

> (6) Each employer who deducts and withholds any amount under this part shall hold the amount in trust for the state of Utah for the payment of it to the commission in the manner and at the time provided for in this part. So long as any delinquency continues, the state of Utah shall have a lien to secure the payment of any amount withheld . . . upon all the assets of the employer and all the property owned or used by the employer in the conduct of his business. This lien shall be prior to any lien or any kind, including existing liens for taxes. (Emphasis added.)

"Trust funds" are always property of the state. They are never permitted to be used for any purpose other than for taxes. If and when those funds are spent out of trust by the custodian, the statute above creates a priority lien on all assets or property used or owned by the employer.[3]

The Court of Appeals erroneously extrapolates federal case law to excuse Stephenson's use of personal funds for corporate purposes, and the XO account receivable for paying the bank. As the officer in control of the company at the time, all of those funds were at least doubly encumbered to both the state of Utah and the Bank of Utah. The Court required the Commission to show evidence that the bank gave up its claim to all funds before

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[3] There were no facts in the record to resolve a priority dispute between the State and the Bank of Utah, and that is not necessary in resolving this issue. But this Court has previously looked at the withholding tax lien priority statute in A.C. Financial, Inc. v. Salt Lake County, 948 P.2d 771 (Utah 1997); Phillips Petroleum Co. v. Wagstaff 450 P.2d 100 (Utah 1969); and Union Central Life Insurance Co. v. Black, 247 P. 486 (Utah 1926). All that is important here is to show that the State also had a valid lien at the time of the payments orchestrated by Stevenson.

Stephenson would be liable. This was in error, however, because those funds used for company purposes were already liened to the Commission.

Although there is no evidence that other officers of the Bank of Utah knew about Tower's tax obligations and had no notice of such, Stevenson did. He knew that Tower owed the Commission, but instead of paying the taxes owed, he intervened on behalf of his employer, the Bank of Utah, to direct XO Communication's payment to the bank instead of Tower or the State. Stevenson's own actions foreclose him from claiming a reasonable cause defense for his actions. This Court should reverse the Court of Appeals.

III. THIS COURT SHOULD CORRECT THE DECISION BELOW BY APPLYING THE DEFERENTIAL "SUBSTANTIAL EVIDENCE" STANDARD OF REVIEW TO THE COMMISSION'S FINDINGS OF FACT, REQUIRED BY UTAH CODE ANN. § 59-1-610.

This Court should reverse the Court of Appeals' decision because the Court of Appeals disregarded the "substantial evidence" standard applicable to its judicial review of the Tax Commission's findings of fact. The Supreme Court reviews the decision of the Utah Court of Appeals for correctness pursuant to its grant of certiorari. Hansen, 2002 UT 125, ¶25, 63 P.3d at 660, (quoting Longley, 2000 UT 69, ¶13, 9 P.3d at 765). In this case, the "[t]he correctness of the court of appeals' decision depends initially upon whether it applied the appropriate

standard of review to the [Commission's] decision." Carrier, 944 P.2d at 350.

The appropriate standard of review that the court should have applied in reviewing this case below appears in Utah Code Ann. § 59-1-610. Under subsection (1)(a), the Court of Appeals "shall grant the commission deference concerning its written findings of fact, applying a substantial evidence standard of review" when it reviews "formal adjudicative proceedings before the commission." See Yeargin, Inc. v. Auditing Division, 2001 UT 11, ¶11, 20 P.3d 287, 291. In applying a substantial evidence standard, "the court of appeals must uphold those findings of fact that are supported by substantial evidence, or 'that quantum and quality of relevant evidence which is adequate to convince a reasonable mind to support a conclusion.'" Id. (quoting Schmidt v. Utah State Tax Commission, 1999 UT 48, ¶7, 980 P.2d 690, 692).

The Court of Appeals erred by ignoring several key factual findings made by the Tax Commission that would not support the Court's decision. The Court of Appeals did not defer to the Tax Commission, notwithstanding the substantial evidence presented at the Commission hearing and in the record that unequivocally met the prima facie criteria. The evidence of Stevenson's failure to investigate mismanagement, alone, is sufficient to sustain the Commission.

Stevenson signed corporate tax returns for the second and

fourth quarters for 1999. (R. at 55-56.) Stevenson signed checks paying withholding taxes for the second and fourth quarter tax returns for 1999. (R. at 55-56, 265-66). Stevenson signed all checks for all tax payments prior to, and including, the first quarter of 2000. (R. at 266). No checks were tendered, nor returns filed, for the second, third, and fourth quarters of 2000. (R. at 266-67.) Stevenson met Steckelberg once or twice a month during 1999 and 2000. (R. at 242.) Stevenson knew Steckelberg had previously filed bankruptcy and did not have check-signing authority. (R. at 3-5.)

The Commission made these findings which would fit all three prongs of the prima facie case of willfulness; by statute the Commission was entitled to deference. By failing to give proper deference to these factual findings, the court failed to satisfy Utah Code Ann. § 59-1-610, which require the court to give deference to the factual findings of the Commission. As a factual matter, Stevenson was made aware of the financial difficulties experienced by Tower. Stevenson used his own funds to secure the releases against Tower so that it could receive payment of a large sum from XO Communications, one of its debtors. However, instead of directing Tower's accounts receivable directly to Tower for disbursal to Tower's creditors, Stevenson orchestrated the payment of XO Communication's payment directly to the Bank of Utah instead of to Tower itself.

In bypassing Tower, Stevenson preferred one creditor, the Bank of Utah, over the State, in spite of the Commission's superior claim to Tower's funds. This orchestration shows that Stevenson violated Utah Code Ann. § 59-1-302(7). The decision of the Court of Appeals should be reversed since it failed to pay proper deference the Commission's findings.

CONCLUSION

For the foregoing reasons, the Commission respectfully asks the Court to reverse the decision of the Utah Court of Appeals.

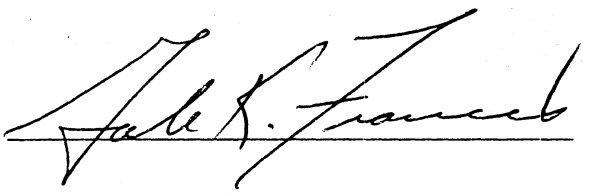
DATED this 25th day of October, 2005.

GALE K. FRANCIS
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of October, 2005, I caused two (2) copies of the foregoing UTAH STATE TAX COMMISSION'S PETITION FOR WRIT OF CERTIORARI to be mailed, postage prepaid, to:

NOEL S HYDE
5926 SOUTH FASHION POINTE DR SUITE 200-D
SOUTH OGDEN UT 84403-4713



ADDENDUM A

IN THE UTAH COURT OF APPEALS

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Eric Stevenson, Petitioner, v. Tax Commission, Taxpayer Services Division, Respondent.	OPINION (For Official Publication) Case No. 20030748-CA F I L E D (April 14, 2005) 2005 UT App 179

Original Proceeding in this Court

Attorneys: Noel S. Hyde, Ogden, for Petitioner
Mark L. Shurtleff and Gale K. Francis, Salt Lake City, for Respondent

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Before Judges Billings, Bench, and Jackson.

JACKSON, Judge:

¶1 Eric Stevenson appeals the Utah Tax Commission's (Commission) personal penalty assessment for failure to collect, truthfully account for, and pay the withholding taxes owed by Tower Communications, Inc. (Tower) for the second, third, and fourth quarters of 2000 under Utah Code section 59-1-302. See Utah Code § 59-1-302(2) (1994). We reverse and remand.

BACKGROUND

¶2 In 1999 Stevenson, Brett N. Cherry, and Ken Steckelberg organized Tower as equal partners, with Steckelberg acting as president and Stevenson as secretary/treasurer. Steckelberg was in charge of day-to-day operations of the company, while Stevenson processed all company payments and had sole authority to sign checks on the company's behalf.

¶3 Stevenson also worked full-time as a loan officer at the Bank of Utah and would only visit Tower's offices about once a month. To accomplish his duties with Tower, he relied on a bookkeeper to organize Tower's finances and prepare checks for

him to sign. At least on some occasions, Stevenson would sign these checks without reviewing invoices or company records.

¶4 Stevenson would occasionally inquire to Steckelberg about the finances of the company. Steckelberg assured him all was well; however, beginning with the second quarter of 2000, the bookkeeper did not present Stevenson with checks for Tower's withholding taxes. The problem continued for the third and fourth quarter. The bookkeeper never prepared checks for these taxes, and Stevenson apparently never noticed.

¶5 Third parties alerted Stevenson to problems within the company, and he confronted Steckelberg sometime in November 2000. Unsatisfied with Steckelberg's assurances, Stevenson had an accountant review Tower's records and discovered that, among other financial problems, the withholding taxes had not been paid. Stevenson took immediate action, dissolving the business and terminating Steckelberg's employment with Cherry's help.

¶6 At the time, Tower owed Stevenson's employer, Bank of Utah, a considerable amount of money on a loan secured by Tower's accounts receivable and other assets. To pay off this loan, Stevenson arranged to collect Tower's largest receivable from XO Communications, which owed Tower approximately $83,000. Payment of this amount had been impeded by the claims of several subcontractors and suppliers whom Tower had not yet paid. To remedy the problem, Stevenson provided about $16,000 of his personal funds to buy the claims of the subcontractors and suppliers, and thereby obligate XO Communications to pay off its account to Tower. Stevenson entered into an agreement with XO Communications on November 15, 2001 to have this amount paid directly to the Bank of Utah. XO transferred this money to the bank on December 7, 2001, and it was used to pay off the loan. None of the money was used to pay Tower's delinquent withholding taxes.

¶7 On July 12, 2002, the Commission notified Stevenson that a personal penalty of $12,018.04 had been assessed against him for Tower's unpaid withholding taxes. Stevenson requested a hearing, which was held on August 5, 2003, and thirteen days later, the Administrative Law Judge (ALJ) for the Commission issued her determination that Stevenson (1) was a party responsible for payment and (2) had willfully failed to pay Tower's withholding taxes under Utah Code section 59-1-302(2).

ISSUES AND STANDARD OF REVIEW

¶8 On appeal, Stevenson concedes that he is a party responsible for payment of the taxes but contests the

Commission's conclusion that his failure to pay was willful. Specifically, he claims the Commission has failed to provide prima facie evidence of willfulness under Utah Code section 59-1-302(7)(b), and even if it has, he urges us to adopt the "reasonable cause" defense to nonpayment articulated by the Tenth Circuit's en banc decision in Finley v. United States, 123 F.3d 1342, 1347-48 (1997). Both of these issues are questions of first impression for Utah courts.

¶9 The standard of review for tax cases is defined by statute. We must "grant the [C]ommission deference concerning its written findings of fact, applying a substantial evidence standard on review" and "grant the [C]ommission no deference concerning its conclusions of law, applying a correction of error standard, unless there is an explicit grant of discretion contained in a statute at issue." Utah Code Ann. § 59-1-610(1)(a)-(b) (2004).

¶10 Because Stevenson does not challenge the ALJ's written findings of fact, we need only determine whether our review of the ALJ's willfulness determination presents a question of fact or a question of law. The Commission argues that the willfulness determination presents a question of fact, citing to the Tenth Circuit's treatment of the similar willfulness standard used in federal tax law. See Bradshaw v. United States, 83 F.3d 1175, 1183 (10th Cir. 1995) (noting that "[o]ur prior decisions have . . . treated [the issue of willfulness] as an issue of fact"). We disagree with this characterization and conclude, as does the Tenth Circuit in its more recent cases, that the issue of willfulness in tax cases presents a mixed question of law and fact. See Finley, 123 F.3d at 1348 (en banc) (recognizing that established factual paradigms may be used to "identify willful conduct as a matter of law" but that taxpayers should be allowed a "delimited opportunity to demonstrate to a jury there was reasonable cause sufficient to excuse failure to pay the withholding taxes").

¶11 As discussed in the next section, Utah Code section 59-1-302(7)(b) permits the Commission to present prima facie evidence of willfulness by demonstrating that the responsible party "recklessly disregarded obvious or known risks" of nonpayment or "made a voluntary, conscious, and intentional decision to prefer other creditors over the state government." Utah Code Ann. § 59-1-302(7)(b)(i)-(ii). We conclude that the question of whether the Commission has presented prima facie evidence is a question of law, see Sheikh v. Department of Pub. Safety, 904 P.2d 1103, 1105 (Utah Ct. App. 1995) ("Whether a party has failed to establish a prima facie case is a question of law."), which we review for correctness, see Utah Code Ann. § 59-1-610(1)(b). Because the ALJ did not frame its ruling in terms of prima facie evidence, we will treat its conclusions with regard to

Stevenson's recklessness and preference as a ruling on the Commission's prima facie evidence.

¶12 Once prima facie evidence is presented, the taxpayer assumes the burden of disproving willfulness. This is a factual question, which we review for "substantial evidence." Id. § 59-1-610(1)(a).

ANALYSIS

I. Statutory Framework

¶13 By law, employers are required to pay quarterly withholding taxes one month after each quarter ends. See id. § 59-10-406(1)(a) (2000). When a business fails to pay withholding taxes, the Commission may assess a personal penalty for all such outstanding taxes against persons in the business who are responsible for paying the taxes but willfully fail to do so:

> Any person required to collect, truthfully account for, and pay over any [withholding] tax . . . 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 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.

Id. § 59-1-302(2).

¶14 In determining whether a responsible person has willfully failed to pay the tax, the ALJ or the reviewing court "shall consider any inference and evidence that a person has willfully failed to collect, truthfully account for, or pay over any [withholding] tax." Id. § 59-1-302(7)(a). But, the "court need not find a bad motive or specific intent to defraud the government or deprive it of revenue to establish willfulness." Id. § 59-1-302(7)(c). Under the statute, "[i]t is prima facie evidence that a person has willfully failed to collect, truthfully account for, or pay over any [withholding] taxes . . . if the commission or a court finds that the person charged with the responsibility for collecting, accounting for, or paying over the taxes" did any of the following:

> (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.

Id. § 59-1-302(7)(b).

¶15 No Utah caselaw has yet defined "willfulness" for tax purposes, but federal cases interpreting 26 U.S.C. section 6672 apply a similar standard[1] and provide some insight. Under the federal law, "'[m]ere negligence'" is insufficient to prove willfulness, but by the same token, "'it is not necessary that there be present an intent to defraud or to deprive the [government] of the taxes due, nor need bad motives or wicked design be proved in order to constitute willfulness.'" Cook v. United States, 52 Fed. Cl. 62, 69 (2002) (citation omitted); see also Denbo v. United States, 988 F.2d 1029, 1033 (10th Cir. 1993) ("[N]egligence does not give rise to section 6673 liability.").

II. The Commission's Prima Facie Evidence of Willfulness

¶16 The ALJ concluded that Stevenson had willfully failed to pay Tower's withholding taxes for two reasons. First, he demonstrated a "reckless disregard of an obvious risk that withholding taxes were not being paid" because, as secretary/treasurer with sole authority to sign checks, he should

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1. Much like Utah Code section 59-1-302(2), 26 U.S.C. section 6672 (a) provides that

> [a]ny person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, . . . shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

26 U.S.C. § 6672(a) (2000). Also like the Utah statute, federal courts have held that willfulness may be shown by proving that the taxpayer either (1) made a voluntary preference to another creditor or (2) recklessly disregarded a known or obvious risk of nonpayment. See, e.g., Cook v. United States, 52 Fed. Cl. 62, 69 (2002).

have been aware that the company had not paid taxes for the quarters in question. Second, the ALJ also concluded that Stevenson had "made a voluntary, conscious, and intentional decision to prefer the Bank of Utah over the state of Utah when he was able to obtain payment on [XO Communication's] obligation to Tower."

A. Recklessness

¶17 Stevenson first argues that the ALJ erred in its determination of recklessness. He claims that, although he failed to personally assure that the withholding taxes were being paid, his omission amounts to mere negligence, not recklessness. We agree. Given the ALJ's factual finding that Stevenson did not have actual notice of Tower's tax deficiency until some time around November 2000, the Commission must prove that he ignored an "obvious risk" of nonpayment. Generally, for a risk of nonpayment to be obvious, the company must have had a history of failing to pay taxes that would place the responsible party on notice. See, e.g., Hammon v. United States, 21 Cl. Ct. 14 (1990) (determining taxpayer was reckless when he knew of company's tax deficiencies for prior years and failed to institute safeguards to assure payment). But, absent actual notice, the fact that a company has not paid withholding taxes for three quarters is not sufficient to present an obvious risk of nonpayment to a responsible party who is not directly involved in the accounting and disbursement of taxes. See In re Macagnone, 253 B.R. 99, 102 (M.D. Fla. 2000) (determining that "[t]he three quarters in question were the first delinquencies in the life of [the company]" and that, "[w]hile it is true that [the responsible party] did not inquire about the status of the taxes, it is clear . . . that his failure to do so, absent a history of delinquency, does not equal reckless disregard"). We therefore conclude that the Commission has not provided prima facie evidence that Stevenson recklessly disregarded known or obvious risks of nonpayment.

B. Preference to Other Creditors

¶18 Next, Stevenson challenges the ALJ's determination that he preferred the Bank of Utah over the state of Utah when he paid Tower's accounts receivable to the bank. Again, looking to federal law for guidance, we agree that a person has voluntarily and intentionally preferred other creditors over the government if he or she paid other creditors while he (1) "had actual knowledge of the specific tax delinquency for which the penalty was assessed" and (2) had "unencumbered funds available to pay the taxes at the time the taxes came due." Ghandour v. United States, 36 Fed. Cl. 53, 62 (1996) (emphasis omitted). Here, the first prong is met because Stevenson paid certain of Tower's

creditors after he had actual knowledge that Tower had failed to pay withholding taxes. Whether the second prong is met depends on whether the funds Stevenson used were "unencumbered" at the time and could have been applied to the tax deficiency.

¶19 Federal courts have not agreed upon a uniform definition of "encumbered" in this context, but we rely on the definition offered in Honey v. United States, 963 F.2d 1083, 1090 (8th Cir. 1992):

> Funds are encumbered only where the taxpayer is legally obligated to use the funds for a purpose other than satisfying the preexisting employment tax liability and if that legal obligation is superior to the interest of the [government] in the funds.

see also United States v. Kim, 111 F.3d 1351, 1359 (7th Cir. 1997) (adopting Honey definition); In re Premo, 116 B.R. 515, 535 (Bankr. E.D. Mich. 1990) (adopting similar definition). However, "the fact that funds are subject to a security interest does not itself warrant a finding that the funds are 'encumbered.'" In re Premo, 116 B.R. at 536. Rather, funds only become encumbered once a secured creditor restricts the company's use of the funds or otherwise intervenes to prevent payment of taxes. See Honey, 963 P.2d at 1091-92 (determining funds were unencumbered when secured creditor had the option under the security agreement to restrict payment of secured funds, but did not exercise the option); In re Premo, 116 B.R. at 536 (determining funds were encumbered when secured creditor asserted control of accounts and only allowed payments for payroll and minimal operating expenses).

¶20 Stevenson testified that Tower had no money in its account when he discovered the tax deficiency. But the Commission argues that Stevenson had two sources of unencumbered funds available at the time and that he used both to pay creditors in preference to the government.

1. Personal Funds

¶21 First, the Commission argues that the $16,000 of Stevenson's personal funds he used to purchase subcontractor claims against Tower were unencumbered corporate funds because Stevenson had control over them and spent them to release the XO receivable for Tower's benefit. The Commission relies on Sorenson v. United States, 521 F.2d 325 (9th Cir. 1975), for the proposition that personal funds used for business ends are transformed into unencumbered business funds for tax purposes. In Sorenson, the owner of a failing business "loaned" his personal funds to the

business to pay net wages to employees. See id. at 327. The court held that these funds were "funds of the corporation" because they were "deposited to the corporate account" and used for corporate purposes, namely, "the payment of corporate obligations." Id. The court then determined that the funds were unencumbered because Sorenson controlled them and could have easily applied them to the withholding taxes for the wages he paid. See id.

¶22 We agree with the central holding of Sorenson, that funds placed at the disposition of a company become corporate funds regardless of their source, be it a bank or an owner of the company. We also agree that Stevenson's personal funds were used to benefit Tower by extinguishing the claims of subcontractors against it and facilitating XO's payment of its outstanding account. However, we cannot conclude that Stevenson had the same type of control over these funds that Sorenson exercised. The court in Sorenson noted that Sorenson had both "the duty and responsibility" to assure that withholding taxes were paid and therefore had the discretion to "prorate such funds as [were] available between the Government and the employees." Id. at 327-29 (explaining that for every $100 Sorenson paid in wages, only $10 would be withheld, leaving employees with a claim, including interest, against the company for $11.11). Stevenson did not have a comparable responsibility to oversee the payment of wages or withholdings and, because his personal funds were used solely to facilitate payment of the XO account, we cannot impose on him an obligation to prorate some of those funds to the government. These funds were therefore not available to pay Tower's withholding taxes, and we deem them encumbered for purposes of our analysis.

2. XO Communications Account Receivable

¶23 Second, the Commission seems to presume that the $80,000 paid by XO was unencumbered without presenting evidence of the fact. The record indicates that the Bank of Utah had a secured interest in all of Tower's accounts receivable, including the XO accounts, but does not indicate to what degree the bank asserted its interest or sought to control the use of the funds. There is some evidence that the bank may have been aggressive about collecting; Stevenson testified that the Bank of Utah was "probably pushing more than anyone in terms of getting paid and that made a very precarious [situation] since I was an officer of the bank." Nonetheless, the extent of the Bank of Utah's efforts remains unknown. In order to present prima facie evidence that Stevenson preferred the Bank of Utah over the state, the Commission has the burden to present further evidence that the XO funds were unencumbered. In other words, the Commission must present evidence that the Bank of Utah declined to exercise its

right to the XO funds and that Stevenson was free to apply a portion of the fund to pay Tower's tax obligation.

CONCLUSION

¶24 In sum, the Commission has failed to present prima facie evidence that Stevenson willfully failed to pay Tower's withholding taxes, and we therefore reverse the ALJ's ruling. But, because we have defined the term "unencumbered funds" as an issue of first impression and because the record does not clearly address the issue, we remand the case to allow the Commission to present evidence that the XO funds were unencumbered. If proven, such a showing presents prima facie evidence of willfulness, see Utah Code Ann. § 59-1-302(7)(b), and the ALJ[2] may presume Stevenson's nonpayment was willful unless Stevenson presents rebuttal evidence. See Black's Law Dictionary 579 (7th ed. 1999) (defining prima facie evidence as "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced"); Child v. Gonda, 972 P.2d 425, 432 (Utah 1998) ("[P]rima facie evidence is 'that quantum of evidence that suffices for proof of a particular fact until the fact is contradicted by other evidence. . . .'" (citation and alteration omitted)).

¶25 Because the type of evidence Stevenson must present to rebut the Commission's prima facie evidence is not defined by the statute or by Utah caselaw, Stevenson urges us to adopt the "reasonable cause" standard defined by the Tenth Circuit's en banc decision in Finley v. United States, 123 F.3d 1342, 1348 (1997). We agree that two aspects of that case are applicable here. First, we agree with the Tenth Circuit that, unless the Commission presents unrebutted prima facie evidence, the determination of willfulness is to be decided as a question of fact. See id. at 1346, 1348 (holding it essential that a taxpayer be allowed "to meaningfully distinguish his case before a jury based on the relative degree of willfulness or the presence of extenuating circumstances"). Second, we agree that a taxpayer may rebut evidence of willfulness by proving "reasonable cause," namely, that "(1) the taxpayer has made reasonable efforts to protect the [withholding tax] trust funds, but (2) those efforts have been frustrated by circumstances outside the taxpayer's control." Id. at 1348. Proof of "reasonable cause"

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2. Of course, the same procedure would apply in a district court proceeding. District courts "have jurisdiction to review by trial de novo all decisions issued by the [tax] commission . . . resulting from formal adjudicative proceedings." Utah Code Ann. § 59-1-601(1) (2004).

was not specifically considered in the ALJ's ruling, but we conclude that it could, if proven, provide a defense to prima facie evidence of willfulness.

¶26 Accordingly, we reverse and remand for proceedings consistent with this opinion.

Norman H. Jackson, Judge

¶27 WE CONCUR:

Judith M. Billings,
Presiding Judge

Russell W. Bench,
Associate Presiding Judge

ADDENDUM B

Utah Code Ann. § 59-1-302 (2000)

§ 59-1-302 (2000). Penalty for nonpayment of sales, use, withholding, or fuels taxes -- Jeopardy proceedings.

(1) The provisions of this section apply to the following taxes in this title:

(a) state and local sales and use tax under Chapter 12, Parts 1 and 2;

(b) transient room tax under Chapter 12, Part 3;

(c) resort communities tax under Chapter 12, Part 4;

(d) public transit tax under Chapter 12, Part 5;

(e) tourism, recreation, cultural, and convention facilities tax under Chapter 12, Part 6;

(f) motor fuel, clean fuel, special fuel, and aviation fuel taxes under Chapter 13, Parts 2, 3, and 4; and

(g) withholding tax under Chapter 10, Part 4.

(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.

(3) (a) If the commission determines in accordance with Subsection (2) that a person is liable for the penalty, the commission shall notify the taxpayer of the proposed penalty.

(b) The notice of proposed penalty shall:

(i) set forth the basis of the assessment; and

(ii) be mailed by registered mail, postage prepaid, to the person's last-known address.

(4) Upon receipt of the notice of proposed penalty, the person against whom the penalty is proposed may:

(a) pay the amount of the proposed penalty at the place and time stated in the notice; or

(b) proceed in accordance with the review procedures of Subsection (5).

(5) Any person against whom a penalty has been proposed in accordance with Subsections (2) and (3) may contest the proposed penalty by filing a petition for an adjudicative proceeding with the commission.

(6) If the commission determines that the collection of the penalty is in jeopardy, nothing in this

section may prevent the immediate collection of the penalty in accordance with the procedures and requirements for emergency proceedings in Title 63, Chapter 46b, Administrative Procedures Act.

(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 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.

(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.

(d) If the commission determines that a person is liable for the penalty under Subsection (2), the commission shall assess the penalty and give notice and demand for payment. The notice and demand for payment shall be mailed by registered mail, postage prepaid, to the person's last-known address.

Utah Code Ann. §59-10-406 (West 2004)

§ 59-10-406 Collection and payment of tax

(6) Each employer who deducts and withholds any amount under this part shall hold the amount in trust for the state of Utah for the payment of it to the commission in the manner and at the time provided for in this part. So long as any delinquency continues, the state of Utah shall have a lien to secure the payment of any amounts withheld, and not remitted as provided under this section, upon all of the assets of the employer and all property owned or used by the employer in the conduct of his business, including stock-in-trade, business fixtures, and equipment. This lien shall be prior to any lien of any kind, including existing liens for taxes.

Utah Code Ann. § 59-1-610 (West 2004)

§ 59-1-610. Standard of review of appellate court

(1) When reviewing formal adjudicative proceedings commenced before the commission, the Court of Appeals or Supreme Court shall:

(a) grant the commission deference concerning its written findings of fact, applying a substantial evidence standard on review; and

(b) grant the commission no deference concerning its conclusions of law, applying a correction of error standard, unless there is an explicit grant of discretion contained in a statute at issue before the appellate court.

(2) This section supercedes Section 63-46b-16 pertaining to judicial review of formal adjudicative proceedings.

26 U.S.C.A. § 6672 (2000)

§ 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax.

(a) General rule.--Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 or part II of subchapter A of chapter 68 for any offense to which this section is applicable.

(b) Preliminary notice requirement.--

(1) In general.--No penalty shall be imposed under subsection (a) unless the Secretary notifies the taxpayer in writing by mail to an address as determined under section 6212(b) or in person that the taxpayer shall be subject to an assessment of such penalty.

(2) Timing of notice.--The mailing of the notice described in paragraph (1) (or, in the case of such a notice delivered in person, such delivery) shall precede any notice and demand of any penalty under subsection (a) by at least 60 days.

(3) Statute of limitations.--If a notice described in paragraph (1) with respect to any penalty is mailed or delivered in person before the expiration of the period provided by section 6501 for the assessment of such penalty (determined without regard to this paragraph), the period provided by such section for the assessment of such penalty shall not expire before the later of--

(A) the date 90 days after the date on which such notice was mailed or delivered in person, or

(B) if there is a timely protest of the proposed assessment, the date 30 days after the Secretary makes a final administrative determination with respect to such protest.

(4) Exception for jeopardy.--This subsection shall not apply if the Secretary finds that the collection of the penalty is in jeopardy.

(c) Extension of period of collection where bond is filed.--

(1) In general.--If, within 30 days after the day on which notice and demand of any penalty under subsection (a) is made against any person, such person--

(A) pays an amount which is not less than the minimum amount required to commence a proceeding in court with respect to his liability for such penalty,

(B) files a claim for refund of the amount so paid, and

(C) furnishes a bond which meets the requirements of paragraph (3), no levy or proceeding in court for the collection of the remainder of such penalty shall be

made, begun, or prosecuted until a final resolution of a proceeding begun as provided in paragraph (2). Notwithstanding the provisions of section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court. Nothing in this paragraph shall be construed to prohibit any counterclaim for the remainder of such penalty in a proceeding begun as provided in paragraph (2).

(2) Suit must be brought to determine liability for penalty.--If, within 30 days after the day on which his claim for refund with respect to any penalty under subsection (a) is denied, the person described in paragraph (1) fails to begin a proceeding in the appropriate United States district court (or in the Court of Claims) for the determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the 30-day period referred to in this paragraph.

(3) Bond.--The bond referred to in paragraph (1) shall be in such form and with such sureties as the Secretary may by regulations prescribe and shall be in an amount equal to 1 1/2 times the amount of excess of the penalty assessed over the payment described in paragraph (1).

(4) Suspension of running of period of limitations on collection.--The running of the period of limitations provided in section 6502 on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

(5) Jeopardy collection.--If the Secretary makes a finding that the collection of the penalty is in jeopardy, nothing in this subsection shall prevent the immediate collection of such penalty.

(d) Right of contribution where more than 1 person liable for penalty.--If more than 1 person is liable for the penalty under subsection (a) with respect to any tax, each person who paid such penalty shall be entitled to recover from other persons who are liable for such penalty an amount equal to the excess of the amount paid by such person over such person's proportionate share of the penalty. Any claim for such a recovery may be made only in a proceeding which is separate from, and is not joined or consolidated with--

(1) an action for collection of such penalty brought by the United States, or

(2) a proceeding in which the United States files a counterclaim or third-party complaint for the collection of such penalty.

(e) Exception for voluntary board members of tax-exempt organizations.--No penalty shall be imposed by subsection (a) on any unpaid, volunteer member of any board of trustees or directors of an organization exempt from tax under subtitle A if such member--

(1) is solely serving in an honorary capacity,

(2) does not participate in the day-to-day or financial operations of the organization, and

(3) does not have actual knowledge of the failure on which such penalty is imposed. The preceding sentence shall not apply if it results in no person being liable for the penalty imposed by subsection (a).

ADDENDUM C

BEFORE THE UTAH STATE TAX COMMISSION

ERIC STEVENSON, Petitioner, v. TAXPAYER SERVICES DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	) **FINDINGS OF FACT,**) **CONCLUSIONS OF LAW,**) **AND FINAL DECISION**)) Appeal No. 02-1472)) Account No. Z33950)) Tax Type: Personal Penalty)) Judge: Phan	

Presiding:
Palmer DePaulis, Commissioner
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner:	Noel S. Hyde, Counsel for Petitioner Eric Stevenson
For Respondent:	Gale K. Francis, Assistant Attorney General Stan Allen, Assistant Director, Taxpayer Services Division Karen McPherson, Tax Compliance Agent

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on August 5, 2003. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The assessment in question is a personal penalty assessment, made against Petitioner for the unpaid quarterly withholding taxes of Tower Communications, Inc., a Utah corporation in which Petitioner was both part owner and officer.
2. The periods at issue are the second, third, and fourth quarters of 2000.
3. In 1999, Petitioner, organized Tower Communications, Inc. ("Tower"), with Brett N. Cherry ("Cherry"), and Ken Steckelberg ("Steckelberg"). Each organizer was issued a one-third ownership in Tower. Petitioner retained his one-third ownership until Tower was closed.
4. Throughout Tower's existence, Petitioner held the position of Secretary/Treasurer. In addition, Petitioner was

the sole authorized signer on the company's checking account. As such, Petitioner was ultimately responsible for processing all company payments. Tower's bookkeeper would prepare all checks and bring them to Petitioner for his signature. Petitioner acknowledges that he signed checks for Tower without reviewing invoices or company records.

5. The bookkeeper had not prepared and submitted to Petitioner, for his signature, checks for the withholding tax payments for the three quarters at issue. Petitioner claims that even so he was unaware that the taxes had not been paid. However, Petitioner was the only person who could sign a check for payment of the taxes.
6. During the period at issue Petitioner worked full time at the Bank of Utah as a loan officer and his office was not at the same location as Tower's place of business. Petitioner did visit Tower's offices, approximately once per month during the period at issue.
7. Steckelberg held the position of President and managed the day-to-day operations of Tower.
8. Petitioner would occasionally ask Steckelberg about the finances of Tower and during the period at issue was told that everything was fine. He became concerned when he heard of problems from third parties and he asked Steckelberg for more specific information sometime around November 2000. He was not satisfied with Steckelberg's answers at this point so he went to Tower's office and had an accountant review the financial records of the business. At that point he learned of the tax deficiency as well as other financial problems. Petitioner and Cherry then dissolved the business and terminated Steckelberg.
9. Quarterly withholding taxes were properly filed and paid by Tower in 1999 and the first quarter of 2000. However, beginning with the second quarter of 2000, Tower ceased filing its quarterly returns or paying the withholding tax.
10. In an effort to see that the Bank of Utah loan was paid, Petitioner spent $15,000 of his own funds to recover the largest outstanding account receivable owed to Tower. This receivable was from Nextlink. Nextlink owed Tower more than $80,000 but would not pay because Tower had not paid several subcontractors working on the project. Because this posed a financial risk for Nextlink, Nextlink was unwilling to pay Tower until the

subcontractors' claims were resolved. Using the $15,000, Petitioner personally purchased the claims of the subcontractors, which held potential lien rights against Tower. Once Petitioner acquired the claims of the subcontractors and released Nextlink, Nextlink paid the amount owed to Tower, although it apparently went directly to the Bank of Utah to satisfy that line of credit. The Bank of Utah line of credit was secured by the accounts receivable.

11. In October of 2001, all of Tower's quarterly withholding tax forms for 2000 were filed, but remained unpaid. Petitioner was later assessed the personal penalty for the total amount of the company's unpaid withholding tax liabilities.

APPLICABLE LAW

Utah Law provides for a personal penalty assessment for a company's unpaid withholding tax liabilities. It is listed in Utah Code Ann. §59-1-302 and provides in pertinent part:

> (1) The provision of this section apply to the following taxes in this title: . . .(g) withholding tax . . .
> (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.

CONCLUSIONS OF LAW

Petitioner was a person responsible for paying over the withholding tax and willfully failed to pay over the withholding tax such that the personal penalty was properly assessed pursuant to Utah Code Ann. §59-1-302 for the three quarters at issue.

DECISION AND ORDER

The facts in this matter were not significantly in dispute. The Commission considered and weighed all of the evidence presented and made its findings based thereon.

The statute imposing this penalty, Utah Code Ann. §59-1-302, provides for the penalty against: 1) any person required to collect, truthfully account for, and pay over any tax; and that person 2) 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.

Thus, first the Commission must consider whether Petitioner is a person responsible for the collecting, accounting or paying over the tax. Petitioner was an owner of the business, as well as an officer and director. In addition Petitioner was clearly responsible for paying over the tax as he was the only person in the business that had the authority to sign the check for the tax payment or for any other expenses. Clearly he was in a position of financial responsibility in the business and is a responsible person required to account for and pay over the tax for purposes of the statute.

As the Commission determines that Petitioner is a responsible party for purposes of Utah Code Ann. Sec. 59-1-302 (2) the Commission turns to the second question of whether Petitioner willfully failed to pay over the tax to the Tax Commission. The statute at 59-1-302(7) provides three scenarios, of which only one need be met, where it is prima facie evidence that a person has willfully failed to collect, truthfully account for, or pay over any of the taxes. The scenarios that are relevant in this matter or as follows: (i) a "responsible" party who made a voluntary, conscious, and intentional decision to prefer other creditors over the state government or utilize the tax money for personal purposes; or (ii) a responsible party who recklessly disregarded obvious or know risks, which resulted in the failure to collect, account for, or pay over the tax. Upon review of the facts in this case, Petitioner's actions were prima facie willful pursuant to

Utah Code Ann. Sec. 59-1-302(7).

The Commission finds that Petitioner recklessly disregarded obvious risks that resulted in the failure to pay over the tax. As noted above Petitioner was the only person in the business who was authorized to sign checks on the business bank account and clearly he had authority to review all financial documents pertaining to the business. This is not a case where one business partner signed checks for payment of taxes, but unbeknownst to him they were held back by another partner and not mailed to the taxing agency. In this case checks were not presented to Petitioner for his signature and Petitioner did not sign checks for withholding tax payment for the period at issue. Petitioner knew he was the only one authorized to sign checks on the account, so he knew that if he was not signing the checks taxes were not being paid. Petitioner claims he did not realize that the taxes were not being paid. However, Petitioner's failure to realize that withholding taxes were not being paid over a span of three quarters, demonstrated a willful failure to fulfill that responsibility considering the circumstances in this matter. Again, as an officer of the company and the sole signer on Tower's checks, Petitioner had a duty to investigate the situation as it developed and attempt to correct the problem. Rather than fulfill this duty, Petitioner recklessly chose to remain unaware of the problem. Such reckless disregard of an obvious risk that withholding taxes were not being paid demonstrated Petitioner's willful failure to pay over Tower's withholding taxes.

The personal penalty assessment against Petitioner was appropriate on the basis of his reckless disregard of obvious risks alone. Moreover, Petitioner made a voluntary, conscious, and intentional decision to prefer the Bank of Utah over the state of Utah when he was able to obtain payment on Nextlink's obligation to Tower.

Based upon the foregoing, the Tax Commission finds that the personal penalty assessment against Petitioner for unpaid withholding taxes for the period of the second through fourth quarters of 2000 is proper. It is so ordered.

DATED this 18th day of August, 2003.

Jane Phan
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION:

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

DATED this 18th day of August 2003.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

STATE TAX COMMISSION SEAL STATE OF UTAH

Palmer DePaulis
Commissioner

Marc B. Johnson
Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63-46b-13. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §§59-1-601 and 63-46b-13 et. seq.

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Utah State Tax Commission

USTC - Appeal

Certificate of Mailing

Eric Stevenson vs Taxpayer Services Division **02-1472**

Dee Talbot Respondent

Director of Taxpayer Services
210 North 1950 West
Salt Lake City, UT 84134

Eric Stevenson Petitioner

167 W 5600 S
Washington Terrace, UT 84405

Gale Francis Attorney for Respondent

160 East 300 South, 5th Floor
Salt Lake City, UT 84144

Noel S Hyde Attorney for Petitioner

5926 S Fashion Pointe Dr Ste 200-D
South Ogden, UT 84403

**** *CERTIFICATION* ****

I hereby certify that I mailed a copy of the foregoing document addressed to each of the above named parties.

8/18/03
Date

Carolyn Leeper
Signature

ADDENDUM D

XO NATIONAL DISBU[illegible]
111 EAST BROADWA[illegible] SUITE 1000
SALT LAKE CITY, UT 84111
801-983-4550

64-1278/611

DATE 07-DEC-01

AMOUNT ********$83,211.41

T0001-
Docum

PAY Eighty-Three Thousand Two Hundred Eleven Dollars And 41 Cents*****

TWO SIGNATURES REQUIRED FOR AMOUNTS OVER $500,000

Wayne M Ashberger

TO THE ORDER OF
BANK OF UTAH FOR THE BENEFIT OF TOW
2605 WASHINGTON BLVD
OGDEN, UT 84401

VOID AFTER 90 DAYS

⑈2000086626⑈ ⑆061112788⑆ 3299983199⑈

ap inc 800-733 4277

KO Communications, Inc. 801-983-4550

DATE: 07-DEC-01 **VENDOR NAME:** BANK OF UTAH FOR THE BENEFIT OF TOW **No. 2000086626**

INVOICE NO.	INVOICE DATE	DESCRIPTION	DISCOUNT AMOUNT	NET AMOUNT
0001NA	14-MAR-01	FIBER INSTALLATION (LEGAL ISSUE	0.00	35,506.65
0001N	13-OCT-01	FIBER INSTALLATION (LEGAL ISSUE	0.00	42,950.03
0002N	27-OCT-01	FIBER INSTALLATION (LEGAL ISSUE	0.00	4,754.73
			0.00	$83,211.41

F-7

AGREEMENT AND FINAL WAIVER, RELEASE AND DISCHARGE

This AGREEMENT AND FINAL WAIVER, RELEASE AND DISCHARGE is made this 15 day of Nov, 2001, by and between Tower Communications ("Tower"), Eric Stevenson ("Stevenson"), Brett Cherry ("Cherry") and XO Utah, Inc., formerly known as NEXTLINK UTAH ("XO").

RECITALS

A. In September 2000, XO and Tower entered into an agreement under which Tower was to provide construction related services to XO in connection with the construction of certain fiber optic lines, a project known as the "DLJ Direct" Project ("Project"), located in Sandy, Utah.

B. The Project was finished in approximately October 2000.

C. Eric Stevenson ("Stevenson") and Brett Cherry ("Cherry") are shareholders of Tower.

D. Stevenson has acquired by assignment from the subcontractors on the Project certain rights held by the subcontractors in connection with the Project ("Assigned Rights").

NOW, THEREFORE, in consideration of the promises and the mutual covenants and agreements set forth herein, Tower, Stevenson, Cherry and XO, intending to be legally bound, agree as follows:

1. XO agrees to pay Tower $83, 211.41 within 10 (ten) days of the execution of this Agreement. Such amount shall be paid by check made out Bank of Utah for the benefit of Tower Communications.

2. Contemporaneous upon execution of this Agreement, Tower agrees to provide XO with a release in a form satisfactory to XO from the Bank of Utah approving payment by XO to Tower hereunder and releasing any claims the Bank of Utah might have against XO with respect to the Project and payments related to the Project. XO's duty to pay Tower pursuant to paragraph 1 is contingent upon Tower's providing such release.

3. Tower, for itself, its officers, agents, successors and assigns and anyone claiming through or under it, hereby waives, releases and forever discharges XO and all present and future owners of the Project and their respective parent companies, affiliates, subsidiaries, successors, assigns, agents, employees, lenders and sureties (hereinafter "Releasees") of and from all causes of action, suits, debts, accounts, bonds, contracts, promises, damages, liens, encumbrances, judgments, claims and demands whatsoever, in law or equity, known or unknown, accrued or unaccrued, which Tower ever had, now has or might hereafter have against Releasees jointly or separately, in any way connected with, related to or arising out of the aforesaid relationship and

contract and/or the performing and/or furnishing of any work, labor, services, materials and/or equipment for the Project.

4. Stevenson and Cherry, for themselves, their successors and assigns and anyone claiming through or under them, hereby waive, release and forever discharge XO and all present and future owners of the Project and their respective parent companies, affiliates, subsidiaries, successors, assigns, agents, employees, lenders and sureties (hereinafter "Releasees") of and from all causes of action, suits, debts, accounts, bonds, contracts, promises, damages, liens, encumbrances, judgments, claims and demands whatsoever, in law or equity, known or unknown, accrued or unaccrued, including the Assigned Rights, which Stevenson and Cherry ever had, now have or might hereafter have against Releasees jointly or separately, in any way connected with, related to or arising out of the aforesaid relationship and contract and/or the performing and/or furnishing of any work, labor, services, materials and/or equipment for the Project.

5. Tower, Stevenson and Cherry hereby certify and warrant that all work, labor, services, materials, wages and/or equipment engaged, used and/or contracted for by them in connection with the Project have been paid in full and that Tower, Stevenson and Cherry will hold the aforesaid Releasees harmless against all Mechanics and/or Materialmen's liens, claims, demands, damages, costs or other liens or encumbrances, including claims pursuant to Utah Code Ann. §§ 38-1-5, et seq. and 14-2-1, et seq., in any way connected with, related to or arising out of any claim for compensation by any other party for work, labor, services, materials, and/or equipment incorporated into, performed or furnished for the aforesaid Project and any premises connected thereto by Tower, Stevenson and Cherry, or any of their subcontractors, materialmen or suppliers.

6. Should any part, term or provision of this Agreement be decided or declared by the Courts to be, or otherwise found to be illegal or in conflict with any laws of the State of Utah, or the United States, or otherwise be rendered unenforceable, or ineffectual, the validity of the remaining parts, terms, portions or provisions shall be deemed severable and shall not be affected thereby, providing such remaining parts, terms, portions or provisions can be construed in substance to constitute the agreement the Parties intended to enter into in the first instance.

7. Each party represents and warrants that no other person or entity has, or has had, an interest in the claims, demands, obligations or causes of action referred to in this Agreement, except as otherwise set forth herein; that each party has the sole right and exclusive authority to execute this Agreement and receive the sums specified in it; and that neither party has sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations or causes of action referred to in this Agreement.

8. This Agreement contains the entire agreement of the parties relating to the subject matter hereof, and supersedes all prior agreements and understanding with respect to such subject matter. The parties have made no agreements, representations, or warranties relating to the subject matter of this Agreement which are not set forth herein.

9. This Agreement shall be construed in accordance with the laws of the State of Utah, notwithstanding the operation of any conflict or choice of law statutes or decisional law to the contrary.

10. In the event legal action is necessary to enforce the terms of this Agreement, the prevailing party in such action shall be entitled to recover, in addition to any other remedy, its attorney's fees and costs incurred in prosecuting such action .

This FINAL WAIVER, RELEASE AND DISCHARGE has been executed this 15 day of November, 2001.

Tower Construction, Inc.

By: Eric C. Stevenson
Its: Secretary

Eric Stevenson

Brett Cherry

Brett Cherry

#105957 v1

XO Utah, Inc.

By: _____

Its: Area Vice President

ADDENDUM E

STATUTORY COMPARISON TABLE

Utah Code Ann. § 59-1-302(2)	26 U.S.C § 6672(A)
(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.	(a) General Rule - Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.
Utah Code Ann. § 59-1-302(7)(b) (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 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 colleted, accounted for, or paid over as provided by law.	No Comparable Federal Statute