

Cite as Det. No. 15-0255, 35 WTD 436 (2016)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
))	No. 15-0255
))	
...)	Registration No. . . .
))	

RCW 82.32.145; RETAIL SALES TAX – LIMITED LIABILITY BUSINESS – COLLECTION OF UNPAID TRUST FUNDS. All responsible persons are liable for trust fund liability that became due during the period that he or she had the responsibility or duty to remit payment of the LLC’s taxes to the Department.

RCW 82.32.085: RETAIL SALES TAX – EFT TRANSFER – AUTHORIZATION OF TRANSFER OF FUNDS. The Department’s confirmation that it received a Taxpayer’s authorization to transfer funds does not constitute confirmation that the Department received the funds.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

Lewis, A.L.J. – Members of a now defunct limited liability company (“LLC”), that operated an automobile dealership, protest a trust fund accountability assessment (“TFAA”) against them, stating that the LLC effected a timely electronic funds transfer (“EFT”) of the tax due and owing. The Department of Revenue’s (the “Department’s”) bank received the transfer, but subsequently returned the transferred funds because the LLC’s bank swept the LLC’s account of funds. We conclude that [Member A] and [Member B] are responsible for the LLC’s collected and unremitted retail sales tax. We find that [Member C] is not.¹

ISSUES:

1. Are members of an LLC personally liable for collected but unremitted retail sales tax, under RCW 82.32.145, when the LLC effected a timely EFT payment of tax but a bank swept the funds preventing payment?
2. Are Taxpayers relieved of payment because the LLC paid the tax and the Department voluntarily returned the payment to the LLC’s bank?

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

FINDINGS OF FACT:

[Members A, B, and C] (“Taxpayers”), as members of a defunct LLC, appeal a TFAA. Taxpayers, a father, mother, and son, were members of an LLC that operated an automobile dealer business The business closed during June 2012. On July 7, 2012, the LLC submitted an authorization for the Department to make an EFT withdrawal on its [Bank A] account to transfer \$. . . to the Department, which represented payment of the LLC’s final return - June 2012.² The person authorizing payment was . . . , presumably an employee of the LLC.

According to a screen shot of the Department’s “Debit Payment Details,” on July 9, 2012, the Department’s account with [Bank B] was credited \$ On July 12, 2012, [Bank B] notified the Department that the \$. . . electronic payment was debited because the LLC’s account was frozen. At the time the transfer was effected, the LLC had over \$. . . in its bank account, which was more than enough to cover the amount transferred to the Department.

[Bank A] froze the account because it was aware that the LLC’s auto sales business had closed and that the LLC had a balance on a line of credit that it wished to satisfy. Subsequently, the Department’s Compliance Division sent [Bank A] a letter demanding that the bank turn over the trust funds that it had swept up when it cleaned out the LLC’s bank account. On November 1, 2012, [Bank A’s] lawyer wrote the Department advising that the bank would not be turning over any funds to the Department.

The June 2012 excise tax return remained unpaid. During August 2012, the Department assumed the unpaid June 2012 excise tax return amount into tax warrant # The warrant was issued August 17, 2012.³

On November 27, 2013, after the Department determined that there was no reasonable means of collecting the tax directly from the LLC, the Department issued a TFAA against Taxpayers [Member A, Member B, Member C, and John Doe]. Taxpayers disagreed with the issuance of the TFAA. On June 12, 2014, the Compliance Division held a conference with Taxpayers. On July 9, 2014, the Department sent Taxpayers’ lawyer notice that the TFAA was sustained. On August 11, 2014, Taxpayers filed a petition with the Appeals Division requesting cancellation of the TFAA. Taxpayers’ main argument was that the funds had been paid and deposited into the Department’s bank account. In so doing, the LLC had satisfied its obligation. Thus, there was no unpaid tax liability to assess against Taxpayers. Taxpayers stressed that they attempted to assist the Department in recovering from the bank the funds that had been “swept” from the LLC’s bank account by providing an “accounting” of the funds deposited into the account, which showed that the account contained collected trust funds.

Following the closure of the LLC, [Member C], a member of the LLC and one of the parties subject to the TFAA assessment, went through personal bankruptcy. On December 4, 2014, the Department received \$. . . from [Member C’s] bankruptcy, which it applied to the [tax warrant].

² The \$. . . payment represented \$. . . B&O tax and \$. . . state and local tax.

³ The warrant was filed in . . . County on August 29, 2012.

On June 9, 2015, the Appeals Division held an in-person hearing with the Taxpayers and their lawyer, At the hearing, Taxpayers' lawyer advanced a technical argument based on the UCC (RCW 62A.4A.210, RCW 62A.4A.209, and RCW 62A.4A.406) that the Department did actually receive the funds transferred and that the return of the funds to the LLC's bank was the Department's decision. The Department disputes that it ever received funds from the LLC.

ANALYSIS:

The first issue presented is whether the Department correctly issued and may collect the TFAA from Taxpayers. Retail sales tax is paid by the buyer to the seller and deemed to be held in trust, by the seller, until paid to the Department. RCW 82.08.050. RCW 82.32.145 authorizes the Department, under certain circumstances, to attempt to collect unpaid trust fund taxes by issuing a TFAA. RCW 82.32.145 states as follows:

Whenever the department has issued a warrant under RCW 82.32.210 for the collection of unpaid trust fund taxes from a limited liability business entity and that business entity has been terminated, dissolved, or abandoned, or is insolvent, the department may pursue collection of the entity's unpaid trust fund taxes, including penalties and interest on those taxes, against any or all of the responsible individuals. For purposes of this subsection, "insolvent" means the condition that results when the sum of the entity's debts exceeds the fair market value of its assets. The department may presume that an entity is insolvent if the entity refuses to disclose to the department the nature of its assets and liabilities.

Thus, under the provisions of RCW 82.32.145, the Department may pursue collection of unpaid trust fund taxes (including related penalties and interest) from a responsible party when certain requirements have been met:

- the entity has been terminated, dissolved, abandoned or is insolvent; and,
- the Department has issued a warrant against the LLC for collection of the unpaid funds.

In this case, Taxpayers disposed of the assets of the business and had the Secretary of State put the LLC on inactive status as of December 3, 2012. . . . The next question is whether any or all Taxpayers qualify as a responsible individual from whom the Department may collect the unremitted trust funds.

RCW 82.32.145 addresses collection of unpaid trust fund taxes by limited liability business entities. RCW 82.32.145(9)(g)(i) defines "responsible individual" to include:

[A]ny current or former officer, manager, member, partner, or trustee of a limited liability business entity with an unpaid tax warrant issued by the department.

The Secretary of State's website lists all Taxpayers as members of the LLC.⁴ Based on this fact alone, under RCW 82.32.145(9)(g)(i)'s definition of "responsible individual," all Taxpayers qualify as responsible individuals. In addition to the information acquired from the Secretary of

⁴ No member was designated as a managing member.

State's website, the Department presented additional facts regarding the responsibilities and activities of each Taxpayer. The facts presented by the Department included:

[MEMBER A]:

- Owned 51% of the LLC;
- Signator on LLC checking account;
- Line of Credit with [Bank A] with personal guarantee; and
- Owner listed with Employment Security Department.

[MEMBER B]:

- Owned 24% of the LLC;
- Signator on the LLC checking account;
- Personal guarantor on a promissory note for the LLC; and
- Signator as Secretary/Treasurer for LLC on the EFT excise tax payment authorization agreement form.

[MEMBER C]:

- Owned 25% of the LLC;
- Signator on the LLC checking account. . . .

During the in-person hearing, Taxpayers described the duties that each performed:

- [Member A] acted as chief executive officer ("CEO") making the major business decisions;
- [Member C] was in charge of purchasing and selling vehicles; and
- [Member B] assisted both [Members A and C] as needed.

Having determined that each Taxpayer is a "responsible individual", we next must apply RCW 82.32.145 to determine, which, if any, Taxpayers have individual tax liability. RCW 82.32.145 explains:

(3)(a) For a responsible individual who is the current or a former chief executive or chief financial officer, liability under this section applies regardless of fault or whether the individual was or should have been aware of the unpaid trust fund tax liability of the limited liability business entity.

(b) For any other responsible individual, liability under this section applies only if he or she willfully fails to pay or to cause to be paid to the department the trust fund taxes due from the limited liability business entity.

(4)(a) Except as provided in this subsection (4)(a), a responsible individual who is the current or a former chief executive or chief financial officer is liable under this section only for trust fund tax liability accrued during the period that he or she was the chief executive or chief financial officer. However, if the responsible individual had the responsibility or duty to remit payment of the limited liability business entity's trust fund taxes to the department

during any period of time that the person was not the chief executive or chief financial officer, that individual is also liable for trust fund tax liability that became due during the period that he or she had the duty to remit payment of the limited liability business entity's taxes to the department but was not the chief executive or chief financial officer.

(b) All other responsible individuals are liable under this section only for trust fund tax liability that became due during the period he or she had the responsibility or duty to remit payment of the limited liability business entity's taxes to the department.

(5) Persons described in subsection (3)(b) of this section are exempt from liability under this section in situations where nonpayment of the limited liability business entity's trust fund taxes is due to reasons beyond their control as determined by the department by rule.

Thus, to the extent a “responsible individual” was also a current or former chief executive or chief financial officer of the limited liability business entity, the person is liable regardless of fault or whether the individual was or should have been aware of the liability. RCW 82.32.145(3)(a).

RCW 82.32.145(9)(a) defines “chief Executive ” to mean:

The president of a corporation; or for other entities or organizations other than corporations or if a corporation does not have a president as one of its officers, the highest ranking executive manager or administrator in charge of the management of the company or organization.

RCW 82.32.145(9)(b) defined “chief financial officer” to mean:

The treasurer of a corporation; or for entities or organizations other than corporations or if a corporation does not have a treasurer as one of its officers, the highest senior manager who is responsible for overseeing the financial activities of the entire company or organization.

[Member A] not only meets the statutory definition of chief executive, but also acknowledges that was his role. As both chief executive and a “responsible individual,” he is strictly liable for the unpaid trust fund taxes. Accordingly, we sustain the TFAA with respect to [Member A].

We do not challenge [Member B’s] description of her duties as helping-out when and where needed. We do, however, challenge her denial of serving as a chief executive or chief financial officer of the defunct LLC. By the fact that she signed as Secretary/Treasurer for LLC on the EFT excise tax payment authorization agreement form filed with the Department, we conclude that she served as a chief financial officer. As chief financial officer, [Member B] incurred strict liability for unremitted tax for the periods she functioned as Secretary/Treasurer for LLC. RCW 82.32.145(4)(a).

We will also note that even if we had concluded that she did not have strict liability for the tax as a chief financial officer, she would be liable as a member of the marital community comprised of

herself and [Member A].⁵ Generally, except for the separate property of each spouse acquired prior to marriage and the separate property acquired by either spouse after marriage, all other property acquired during marriage by either husband or wife or both is community property. Similarly, a debt incurred by either spouse during marriage is presumed to be a community debt. E.g. *Fies v. Storey*, 37 Wn.2d 105, 221 P.2d 1031 (1950); *Oregon Improvement Co. v. Sagmeister*, 4 Wash. 710, 30 P. 1058 (1892); *National Bank of Commerce v. Green*, 1 Wn.App. 713, 463 P.2d 187 (1969). Det. No. 88-159, 5 WTD 217 (1988).

Either spouse as manager of the community personal property is empowered to subject the community property to community debts by his/her sole act or signature. Such acts after marriage are presumed for the benefit of the marital community and presumptively a community obligation. *Fies v. Storey*, supra. The burden is upon one who claims that property acquired after marriage is separate property to establish such claim *Rustad v. Rustad*, 61 Wn.2d 176, 377 P.2d 414 (1963), by clear and convincing evidence. *Dizard & Getty v. Damson*, 63 Wn.2d 526, 387 P.2d 964 (1964); *Beyers v. Moore*, 45 Wn.2d 68, 272 P.2d 626 (1954); *Meng v. Security State Bank*, 16 Wn.2d 215, 133 P.2d 293 (1943).

Here [Member B] is the spouse of [Member A]. They operated the LLC together. [Member B] benefited from the operation of the LLC. The heart of the concept of community property is just that: the labors of either or both spouses for the benefit of the community. As the court stated in *Dizard & Getty v. Damson*, 63 Wn.2d 526, 387 P.2d 964 (1964):

It is inconceivable that respondent may authorize the husband to carry on the community business, create a potential source of assets, ultimately share in these assets, and yet be immune from the claims of creditors who contribute to the accumulations, if any.

The question to be answered is whether an obligation incurred by the husband is a community debt is whether or not the transaction was intended for the benefit of the community or expectation of benefit to the community. *Fies v. Storey*, supra. The presumption that the husband is presumed to be acting for the benefit of the community is rebuttable, and may only be overcome by evidence showing otherwise. *Household Finance Corp. v. Corby*, 61 Wash. 2d 184, 377 P.2d 441 (1963). Det. No. 88-159, 5 WTD 217 (1988). [Member B] has offered no evidence that the community debt that [Member A] incurred was not intended for the benefit of the community. Accordingly, we find that [Member B] has liability for the tax debt incurred by [Member A].

We have concluded that [Member C] is a responsible person based on his being a member of the defunct LLC. Nothing has been presented to sustain a conclusion that [Member C] acted as either chief executive or chief financial officer of the defunct LLC. Therefore, we cannot and do not find him strictly liable for the assessment under the provisions of RCW 82.32.145(3)(a). The question is whether [Member C] is responsible under the provisions of RCW 82.32.145(3)(b) and (4)(b), which imposes trust fund liability for [trust fund taxes]:

⁵ It should be noted that although she would be liable as a member of the marital community, her separate property, if any, could not be attached.

[That the person willfully fails to pay or to cause to be paid to the department . . . from the limited liability business entity. . . .]

[And] that became due during the period he or she had the responsibility or duty to remit payment of the limited liability business entity's taxes to the department.

At issue here, is only one month of unpaid tax – June 2012. The Department has not presented [sufficient] evidence to contradict [Member C's] statement that he was responsible for buying and selling vehicles, not maintaining business records or paying taxes. Accordingly, we conclude that even though [Member C] is a responsible person, he is not . . . liable for payment of the unpaid tax.

The final issue raised is whether the Department is precluded from collecting the assessment because the LLC paid the [sales taxes it collected in June 2012] and the Department voluntarily agreed to return the payment to the LLC's bank.

In general, RCW 82.32.085 requires taxpayers to remit tax to the Department using an EFT. Payment by EFT is a multiple step process. First, the taxpayer must be registered with the Department. Included in the registration process is Taxpayer providing the name and account of the bank from which funds will be transferred to make the payment. The taxpayer online completes a form that authorizes the Department to request transfer of funds from the taxpayer's designated bank account to the Department's bank account. Once Taxpayer completes the online form and sends it to the Department, it receives a confirmation of the amount and time that the transfer was authorized. The Department then sends a request to the taxpayer's bank to transfer the designated amount of funds to the Department's bank. If, for whatever reason, there are insufficient funds in the taxpayer's account to cover the transfer, no transfer is made.

In the case at issue, the LLC submitted a timely request to the Department, which authorized transfer of \$. . . from the LLC's bank account to the Department's bank account. The Department issued the LLC a confirmation that it received the LLC's authorization to transfer funds to pay the tax owing. At the time of the authorization, the LLC's account contained sufficient funds to honor the amount of the transfer of funds that the Department would request. The problem was that prior to the transfer of funds from the LLC's bank account to the Department's bank account, LLC's bank swept the LLC's bank account removing the funds so that when the Department's request went to the bank to transfer funds there were no funds to transfer.

. . .

In this case, the revolving line of credit Taxpayers had with Columbia bank authorized sweeping the account. Taxpayer was aware that such an occurrence might happen. [Because a lack of willfulness is only a defense for responsible individuals who are not a current or former chief executive or chief financial officer, we do not make a willfulness finding in this case. As we held above, Members A and B are liable for the TFAA.]

DECISION AND DISPOSITION

Taxpayers' petition is granted and denied in part. We find that [Member C] does not have liability for the unpaid trust funds. We find that [Members A and B] have strict liability for the trust funds and related interest and penalties.

Dated this 23rd day of September, 2015.