

Cite as Det. No. 02-0197, 22 WTD 186 (2003)

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. 02-0197
)	
...)	Registration No. . . .
)	Assessment No. . . .
)	Docket No. . . .

RULE 217; RCW 82.32.145: RETAIL SALES TAX – COLLECTED BUT UNREMITTED TAX – PERSONAL LIABILITY OF CORPORATE OFFICERS. Corporate officers are liable for collected but unremitted retail sales tax when they are aware that retail sales tax has been collected and willfully fail to pay it to the Department. Liability attaches at the time the tax is collected.

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.

NATURE OF ACTION:

Lewis , A.L.J. -- Taxpayers were corporate officers of a now defunct corporation. Taxpayers appeal a trust fund accountability assessment (“TFAA”), based on the Department’s allegation that Taxpayers’ activities resulted in not paying the Department of Revenue (“Department”) the collected retail sales tax. Based on the facts presented, we uphold the Department’s assessment in part.¹

ISSUE:

Are corporate officers personally liable for collected and unremitted retail sales tax when they have check signing authority and fail to pay collected retail sales tax to the Department?

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

FINDINGS OF FACT:

[Taxpayer-Husband] and [Taxpayer-Wife], along with [Individual-A] and [Individual-B], operated . . . (“Corporation”). Each individual was a corporate officer and director:

- [Taxpayer-Husband] was the corporation’s vice-president.
- [Taxpayer-Wife] was the corporation’s corporate secretary.
- [Individual-A] was the corporation’s president.
- [Individual-B] was the corporation’s treasurer.

The Corporation opened for business during June 1998. The business did not prosper. During 1999, the corporation had significant financial problems. The Corporation was unable to pay its creditors, including payment of tax to the Department. On October 13, 2000, the Department revoked Taxpayer’s Certificate of Registration, closing the business. At the time of the revocation, Taxpayer had made no tax payments since October 1999. The business is now defunct.

On September 19, 2001, the Department’s Compliance Division issued a \$. . . TFAA against all corporate officers and their marital communities for the collected and unpaid retail sales tax, interest, and penalties owed by the Corporation.² The TFAA was based on the tax, interest, and penalty due on the unpaid Q4/99 through October 2000 tax returns.³ The Department made the assessment, having found that Taxpayers were liable for the unremitted sales tax based on the following facts:

- Both [Taxpayer-Husband] and [Taxpayer-Wife] had complete access to the Corporation’s bank account until May 5, 2002.⁴
- Samples of the Corporation’s cancelled checks show that [Taxpayer-Husband] and [Taxpayer-Wife] exercised their check signing ability.⁵
- The Corporation’s Q1/99 and Q3/99 excise tax returns were signed by [Taxpayer-Wife].

² [Taxpayer-Husband] and [Taxpayer-Wife] are married and constitute a marital community. [Individual-A] and [Individual-B] are married and constitute a marital community.

³ The Compliance Division subsequently reissued the TFAA reflecting a \$. . . liability (\$. . . tax, \$. . . penalty, and \$. . . interest). The reduced TFAA amount reflects the Compliance Division’s reasoning that Taxpayers were only liable for tax collected up until the time they resigned from the corporation during April 2000.

⁴ The Compliance Division submitted copies of a bank signature card and “Corporate Authorization Resolution” (dated May 27, 1998) obtained from the Corporation’s bank, The signature card was changed May 5, 2000 to reflect the resignation of the [Taxpayers] as of April 27, 2000.

⁵ The Compliance Division provided sample copies of four cancelled checks showing [Taxpayer-Husband] signed checks in October 1999 and March 2000 and that [Taxpayer-Wife] signed checks in October 1999 and February 2000.

- According to the Compliance Division's notes, [Taxpayer-Wife] spoke to Department employees at least three times about excise tax matters:
 - On March 24, 1999, [Taxpayer-Wife] told a Compliance officer that she "will be mailing returns and check this Friday."
 - On April 13, 2000, [Taxpayer-Wife] telephoned a Compliance officer. The Compliance officer's notes state that "[Taxpayer-Wife] called. Q4/99 is \$. . . plus late fee and Q1/00 is \$ They had sufficient funds to pay all taxes except the sales and federal 941s. She will check with her bank regarding a loan and call again April 17."
 - On April 17, 2000, [Taxpayer-Wife] telephoned the Compliance officer again. The Compliance officer's notes state that "[Taxpayer-Wife] called, states that she spoke with their bank, and their bank has approved a loan. She hopes to have everything cleared up by the end of the week and will call at that time regardless."
- The April 27, 2000 resignation letter from [Taxpayer-Husband] and [Taxpayer-Wife] to [Individual-A], president of the Corporation, admitted that they had taken money from the corporation to "reimburse" earlier monetary contributions. The letter stated:

. . . , you apparently believe that one or both of us have improperly taken money from the corporation. Nothing could be further from the truth. [Taxpayer-Husband] has contributed cash from time to time to enable the corporation to acquire sufficient inventory to satisfy customers' demands. We have complete records of all such contributions. [Taxpayer-Husband] was reimbursed for some of the contributions, but not all. Apparently, these reimbursements are what you claim to be wrongful withdrawals.

On November 30, 2001, Taxpayers filed a petition protesting the TFAA. Taxpayers maintain they should have no responsibility for trust funds payable to the Department after their resignation as corporate officers during April 2000. They support their claim by providing the following documents:

- [Taxpayer-Wife's] April 27, 2000 letter of resignation stating that she resigned as "Secretary and as a Director of [Corporation] . . . , effective immediately."
- [Taxpayer-Husband's] April 27, 2000 letter of resignation stating that he resigned as "Vice-President and as a Director of [Corporation] . . . , effective immediately."
- A written statement by the Corporation's bookkeeper stating that on April 3, 2000, the Corporation's president took actions designed to exclude [Taxpayer-Husband] and [Taxpayer-Wife] from the business. The bookkeeper states that the president, to further that goal: 1) changed the password for the security alarm system for the office; 2) changed the password on [Taxpayer-Husband's] computer; 3) removed all checks and checkbooks from

the company; 4) sent notices to all vendors and other parties that [Taxpayer-Husband] and [Taxpayer-Wife] did not have authority to act on behalf of the Corporation, and, 5) cleared [Taxpayer-Husband's] desk of all important information regarding the Corporation's operation.

- Taxpayers supplied a copy of a letter sent by the Corporation's president to vendors. The April 20, 2000 letter stated:

As of 20 April 2000, [Taxpayer-Husband] and [Taxpayer-Wife] no longer have the authority to place orders or charge goods and/or services on behalf of [Corporation].

ANALYSIS:

In general, a corporate employee or officer is not liable for a corporate debt. An exception to this general rule is created by RCW 82.32.145, which imposes personal liability on certain individuals when retail sales tax has been collected, but the tax is not remitted by the corporation. RCW 82.32.145(1) states:

Upon termination, dissolution, or abandonment of a corporate or limited liability company business, any officer or other person having control or supervision of retail sales tax funds collected and held in trust under RCW 82.08.050, or who is charged with the responsibility for the filing of returns or the payment of retail sales tax funds collected and held in trust under RCW 82.08.050, shall be personally liable for any unpaid taxes and interest and penalties on those taxes, if such officer or other person willfully fails to pay or to cause to be paid any taxes due from the corporation pursuant to chapter 82.08 RCW. For the purposes of this section, any retail sales taxes that have been paid but not collected shall be deductible from the retail sales taxes collected but not paid.

The first inquiry is whether Taxpayers were responsible persons. [WAC 458-20-217(8)(a)] Rule 217(8)(a) defines responsible person as:

A responsible person is any officer, member, manager, or other person having control or supervision of retail sales tax funds collected and held in trust or who has the responsibility for filing returns or paying the collected retail sales tax.

(i) A responsible person may have "control and supervision" of collected retail sales tax or the responsibility to report the tax under corporate bylaws, job description, or other proper delegation of authority. The delegation of authority may be established by written documentation or by conduct.

(ii) A responsible person must have significant but not necessarily exclusive control or supervision of the trust funds. Neither a sales clerk who only collects the tax from the customer nor an employee who only deposits the funds in the bank has significant supervision or control of the retail sales tax. An employee who has the

responsibility to collect, account for, and deposit trust funds does have significant supervision or control of the tax.

(iii) A person is not required to be a corporate officer or have a proprietary interest in the business to be a responsible person.

(iv) A member of the board of directors, a shareholder, or an officer may have trust fund liability if that person has the authority and discretion to determine which corporate debts should be paid and approves the payment of corporate debts out of the collected retail sales trust funds.

Under RCW 82.32.145, trust fund accountability liability is not limited to only the officer or person with primary responsibility or supervision. Rather, the liability is imposed upon “any officer **or** other person having control **or** supervision of retail sales tax funds collected and held in trust under RCW 82.08.050.” (Bolding added.)

Here, Taxpayers were corporate officers. Presumptively, as vice-president and secretary, both had power to collect, account, and deposit the corporate revenue and to make payment of the retail sales tax to the Department. From documents presented, we know that both officers had check writing authority and that [Taxpayer-Wife] signed tax returns and spoke to representatives from the Department about tax matters. Based on the facts presented, we find that Taxpayers were responsible persons.

Under the requirements of Rule 217(8)(b), in order for a responsible person to be held personally liable for collected and unpaid retail sales tax:

- (i) The tax must be the liability of a corporate or limited liability business;
- (ii) The corporation or limited liability company must be terminated, dissolved, or abandoned;
- (iii) The failure to pay must be willful; and
- (iv) The department must not have a reasonable means of collecting the tax from the corporation.

In this case, it is undisputed that the tax was the liability of a corporation, the corporation is defunct, and there is no reasonable means to collect it from the corporate entity. Thus, whether Taxpayers are liable for the TFAA depends on whether the third element of Rule 217(8)(b) has been satisfied.

Element Three. Did Taxpayers willfully fail to pay or to cause to be paid the retail sales tax collected?

Rule 217(8)(c) defines a “willful failure to pay” to mean that:

. . . the failure was an intentional, conscious, and voluntary course of action. An intent to defraud or a bad motive is not required. For example, using collected retail sales tax to pay other corporate obligations is a willful failure to pay the trust funds to the state.

Consistent with that definition, we find that the third element has been satisfied. Both Taxpayers knew that the retail sales tax trust funds being collected were being paid to others and not remitted to the Department. This course of conduct is evidenced by the Taxpayers' letter of resignation that stated "[t]he Department of Revenue must be paid (approx. \$. . .)." This statement demonstrates that Taxpayers knew that money was owed the Department and must be paid. [Taxpayer-Wife's] conversations with the Department's Compliance Division regarding delinquent taxes prove she was aware that the retail sales tax was not being paid to the Department.

Rule 217(8)(c)(ii) provides that the failure to pay the tax will not be considered willful if the failure to pay the trust funds was due to circumstances beyond the control of the taxpayer. We are not persuaded by Taxpayers' allegation that the Corporation's President alone determined which creditors to pay. To the contrary, the information available supports a finding that up until their departure Taxpayers not only had access to the Corporation's funds, but made disbursements to their own advantage. The April 27, 2000 letter to the Corporation's President admitted that they had withdrawn funds from the Corporation to "reimburse" themselves for earlier contributions. The letter shows Taxpayers had control of the Corporation's money and chose to pay themselves before the Department, even if they were paying themselves with trust funds that belonged to the State. We conclude that the Taxpayers willfully (as defined in Rule 217(8)(c)) failed to remit retail sales tax collected by the Corporation.

Taxpayers argue that, even if found to be liable for the unremitted sales tax, they should be released from tax liability from January through April 2000, based on their reasoning that they had no control over the trust funds once they left the Corporation.⁶ We disagree. Taxpayers cannot avoid responsibility for collected retail sales tax collected simply by leaving the Corporation prior to the payment date. The trigger for trust fund liability is that the retail sales tax was collected, not the due date of the tax. When Taxpayers left the Corporation, they knew that the Corporation was delinquent in its payment of taxes to the Department. Even when Taxpayers resigned as directors of the Corporation they wrote the President stating:

There are some critical issues which need to be taken care of immediately. Among them are: ... The Department of Revenue tax must be paid (approx. \$. . .) as well as the previous quarter IRS Form 941 (approx. \$. . .).

Thus, Taxpayers knew the tax was owed for the January through April 2000 periods and had authority to write checks until May 5, 2000. As responsible corporate officers, with the knowledge that the trust funds might not be paid to the Department, Taxpayers should have insured that the trust funds collected were remitted to the Department before their departure.

⁶ The Q1/00 tax return was due April 30, 2000, and the April 2000 tax return and payment were due no later than May 25, 2000. The tax liability for these two periods includes that retail sales tax that was collected from January through April 2000.

We conclude that both corporate officers are responsible for the collected and unremitted retail sales tax and willfully failed this responsibility. [Rule] 217(6)(e) states: “There may be more than one person liable under this statute if the requirements as to each are present.” Neither the statute nor Rule 217 limits the liability to a single individual or a pro rata share. Rather, responsible persons are “personally liable for any unpaid taxes and interest and penalties on those taxes.” Det. No. 00-143, 20 WTD 170 (2000). Thus, both [Taxpayer-Husband] and [Taxpayer-Wife] have been correctly named on the TFAA.⁷

DISPOSITION:

Taxpayer's petition is denied.

Dated this 27th day of November, 2002.

⁷ All corporate officer, including [Individual A] and [Individual-B] were named on the TFAA. Because [Individual A and Individual B] are not included in this appeal, their liability will not be addressed.