

Cite as Det. No. 96-217R, 18 WTD 106 (1999)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>F I N A L</u>
Assessment of)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 96-217R
)	
...)	Notice of Individual Liability
)	for Corporate Indebtedness
)	

[1] RULE 217; RCW 82.32.145: PERSONAL LIABILITY FOR CORPORATION'S UNREMITTED SALES TAX – CORPORATE OFFICER – DUTIES. A corporation secretary, who does not have the responsibility to manage the corporation, does not have the authority or responsibility to decide which bills should be paid or to pay bills, and does not have either the authority to receive money, prepare or file tax returns, and who does not assume such duties as a matter of practice, cannot be held personally liable for the corporation's failure to remit sales tax.

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:

An individual seeks reconsideration of a determination affirming a tax assessment issued against her in her personal capacity for the unpaid retail sales tax liability of a corporation of which she was an officer.¹

FACTS:

Gray, A.L.J. (as successor to Breen, A.L.J.) -- The Department of Revenue (Department) Appeals Division issued Det. No. 96-217 on November 21, 1996. That determination affirmed a tax assessment issued against the taxpayer in her personal capacity for the collected, but unremitted, retail sales tax liability of the corporation of which the taxpayer held the position of

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

secretary. The taxpayer timely filed for reconsideration under WAC 458-20-100(5) on December 13, 1996.

The facts in Det. No. 96-217 will not be repeated here. They are incorporated by reference. Additionally, we note the following pertinent facts contained in the taxpayer's petition for reconsideration. First, the corporate by-laws set forth the duties of the secretary:

The Secretary, personally or with the assistance of others, shall keep records of the proceedings of the directors and shareholders; attest all certificates of stock in the name of the corporation; keep the corporate seal, if any, and affix the same to certificates of stock and other documents; keep a record of the issuance of certificates of stocks and the transfers of the same and perform such other duties as the Board of Directors may from time to time designate.

The taxpayer claims that she did not acquire other duties and particularly never had responsibility over the money or finances of the corporation. In contrast, the by-laws describe the treasurer's duties as "[having] the care and custody, and the responsibility for all funds . . . of the corporation." The taxpayer said, in her petition for reconsideration:

Starting in [sic] May 17 [1994], the business and operation structure was very clear. [Individual No. 1] was president of the corporation and assumed primary responsibility to oversee all operations, revenues, and expenditures. [Individual No. 2] continued as treasurer with corporate responsibility for all revenues. [Individual No. 3] was accountant and assumed responsibility to receive all information on the income, expenses and tax reporting. [Individual No. 4] assumed responsibility on a daily basis as a check-and-balance for receiving or confirming revenues, expenditures, invoices, tax information, etc. [Individual No. 5] as the on-site manager responsible for receiving cash, paying bills, etc. I continued solely as secretary responsible for writing minutes of meetings.

. . .

I had no corporate duty or authority to receive money, prepare or file tax returns, or pay bills including taxes. Nor did I in fact ever receive any of the revenues, make any deposits, receive copies of invoices or bills, file any tax reports or pay any bills. I did not have access to the check register and never had access to the revenues receipts or tax reports of the corporation. As secretary and shareholder, it was not part of my responsibility.

My name was placed on the signature card for writing checks in case of emergencies. I did not even have access to the check register, or know specifically who had possession of the check register, revenue invoices or bills.

The Board of Directors never authorized or directed that I ever exercise or act to write any checks. Therefore, I never did.

I did not have control or supervision at any time over the revenues of the corporation, I did not have access or authority whatsoever in that regard.

Although not expressly stated, the taxpayer argues that the Department erred in Det. No. 96-217 in concluding that she willfully failed to pay, or to cause to be paid, be retail sales tax collected and held in trust, and that she was a person who had control or supervision over the trust funds or was responsible for reporting or remitting the retail sales tax.

ISSUES:

1. Did the taxpayer willfully fail to pay, or to cause to be paid, retail sales tax collected by the corporation and held in trust?
2. Was the taxpayer a person who had control or supervision over the trust funds or was she responsible for reporting or remitting the retail sales tax?

DISCUSSION:

Det. No. 96-217 cites RCW 82.32.145, the statute that effectively pierces the corporate veil and imposes personal liability on corporate officers (if all statutory conditions are satisfied) for collected, but unremitted, retail sales tax, and WAC 458-20-217, the Department's administrative rule that informs how the Department shall administer RCW 82.32.145. The text will not be repeated here.

Det. No. 96-217 concluded that the taxpayer was aware of the unpaid tax, contrary to her claims that she was not aware of the unpaid tax, because she prepared and signed the corporate minutes, some of which reflect discussion at the Board of Directors' meetings of unpaid state tax. Awareness of unpaid tax liability, without more, is not an element of RCW 82.32.145. Det. No. 96-217 also states, without support, that "as evidenced by her authority to sign checks on behalf of the corporation, the taxpayer was in a position to decide what bills should or should not be paid." There is no evidence to support that conclusion. The corporate secretary generally does not have the authority or responsibility to decide which bills should be paid, and under the facts presented here, no evidence has been put forth to show otherwise. One would generally expect such decisions to be made by the treasurer and/or the president (and, in the absence of the president, the vice-president). As noted in Det. No. 93-114, 13 WTD 249 (1993):

It appears that D.R., at least as of April 1991, only wrote and in some instances signed checks as directed by others. Since "willful failure" is a necessary element under the statute to establish liability, and because there is no evidence that D.R. "intentionally, consciously and voluntarily" failed to pay the sales tax or caused the sales tax not to be paid, this element is missing with regard to D.R., and therefore D.R. is not personally liable for the corporate debt.

Det. No. 96-217 also states that the secretary “had the legal responsibility for the management of the corporation, and one of the obligations of a corporate taxpayer is the remittance of collected sales tax to the Department.” This conclusion is also unsupported by the evidence presented. The responsibility for management of the corporation generally falls upon the corporate president. See, Det. No. 93-114, 13 WTD 249 (1993).

We conclude that the available evidence does not establish that the taxpayer “willfully failed to pay the taxes or cause the taxes to be paid to the Department.” Since a necessary element of this form of vicarious liability has failed, we conclude that the taxpayer is not liable in her personal capacity for the collected, but unremitted, retail sales tax of the corporation. Because we conclude that this necessary element has not been established, it is unnecessary to examine the remaining claims of the taxpayer.

DECISION AND DISPOSITION:

The petition is granted.

Dated this 24th day of July, 1998.