

Cite as 10 WTD 319 (1990).

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u>
<u>N</u>		
For Correction of Assessment of)	
)	No. 90-325
)	
. . .)	NOT REGISTERED
)	
)	
)	

[1] **RULE 217 & RCW 82.32.145:** SALES TAX -- CORPORATE OFFICER'S LIABILITY -- WILLFUL FAILURE TO PAY. The act by a corporate president of knowingly signing and authorizing three or four checks per month for payment of obligations other than delinquent or current retail sales tax liabilities constitutes the willful failure to pay retail sales taxes held in trust.

[2] **RULE 217 & RCW 82.32.145:** SALES TAX -- CORPORATE OFFICER'S LIABILITY -- CONTROL OR SUPERVISION. A corporate president that assumes the duties of the treasurer as the person primarily responsible for the collection and disposition of all funds, including retail sales taxes, is a person with significant control or supervision of the retail sales tax funds, notwithstanding the fact that the president may have hired a manager to perform the actual ministerial duties.

[3] **RULE 217 & RCW 82.32.145:** SALES TAX -- CORPORATE OFFICER'S LIABILITY -- RESPONSIBILITY FOR FILING RETURNS. A corporate president who files the corporation's initial application for registration, and also signs one tax return is a person "charged with the responsibility for the filing of returns or the payment of retail sales tax collected and held in trust" within the meaning of RCW 82.32.145.

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:

A corporate officer protests assessment of personal liability for retail sales taxes collected by his corporation but not remitted to the State.

DATE OF HEARING: July 13, 1990

TAXPAYER REPRESENTED BY: . . .
 . . .

FACTS:

Okimoto, A.L.J., -- . . . (hereinafter referred to as President) is the President and a 50% co-owner of . . . (hereinafter referred to as [Corp.]). . . . (hereinafter referred to as Treasurer) owned the remaining 50% and was also the corporate treasurer. When [Corp.] was first incorporated in . . . 1986, President testified at the hearing that they both agreed that Treasurer was to manage the . . . store and that President would primarily be available for advice, counseling and the use of his reputation in the . . . business. President explained that he had other stores that would occupy the majority of his time. Nonetheless, President completed the corporation's Certificate of Registration with the Department of Revenue on . . . and also signed the [Corp.]'s . . . state excise tax return.

The new venture soon began experiencing financial problems. Because [Corp.] was delinquent in filing and paying B&O and retail sales taxes for the periods Q1/87, 4/87, 5/87, & 6/87 the Department issued Warrant No. [1] covering those periods [in August 1987] Warrant No. [2] supplanting Warrant No. [1] and covering the additional periods of 7/87, 8/87, & 9/87 was issued [in November 1987]. Warrant No. [3] covering the periods 10/87 through 2/88 was issued [in April 1988]. The severe financial problems forced [Corp.] to file for protection from creditors under Chapter 11 Bankruptcy Laws [in July 1988]. Warrant No. [4] covering the periods 6/88 through [July 1988] was issued [in September 1988].

Approximately in September of 1988, Treasurer resigned as Treasurer/Manager of [Corp.], signed over all interest in the

corporation to President, and left the State of Washington. President then assumed the duties of corporate treasurer in addition to those of president and began to actively participate in and control the management of [Corp.]. At that time President hired [Mr. X] to perform the day to day management of the company and the bookkeeping duties, which included signing checks and filing state excise tax returns.

[In June 1989, Corp.] ceased doing business and the bankruptcy petition was converted to Chapter 7

Subsequently, the Department issued Warrant No. [5] which covered [further delinquent periods].

[In October 1989] the Department sent President a notice informing him that the Department was holding him personally responsible for retail sales tax, interest and penalties collected by [Corp.] but not remitted to the Department under the provisions of RCW 82.32.145.

A conference with the Regional Compliance Supervisor concerning this issue was held [in November 1989]. Based on the following factors, the Supervisor found President personally liable for retail sales taxes collected but not remitted.

- 1) President had check writing authority in the accounts where the retail sales tax funds were held.
- 2) President in fact exercised that authority.
- 3) President had authority to bind the corporation in lease agreements.
- 4) President had the ability and authority to determine whether retail sales tax was remitted to the Department.

President has appealed that decision.

TAXPAYER'S EXCEPTIONS:

President argues in his petition:

I feel this correction should be granted because [Treasurer], co-owner of [Corp.], had full control of the check book and [President] did not, therefore, [Treasurer] is and should be held responsible for these penalties. There is also proof of fraud in regards to [Corp.].

At the hearing, President further explained that from July . . . until Treasurer left in September . . . , Treasurer had full managerial control of [Corp.] which included being responsible for signing and issuing checks. Although President concedes that he had check signing authority, he testified that he spent the majority of his time at the [other] store, and actually signed only about two or three checks per month when Treasurer was unavailable. President testified that Treasurer signed 99% of the checks. Although President acknowledged that as of . . . (the date that Treasurer abandoned the company) he assumed the duties of corporate treasurer, he contends that the actual check writing and tax filing responsibilities remained in the newly hired manager, [Mr. X]. President stated that during this time he often reminded [Mr. X] to pay state taxes, but that [Mr. X] chose to pay other creditors instead.

ISSUES:

1. Where a corporate president knowingly signs and authorizes two or three checks per month in payment for obligations other than the payment of known delinquent and current retail sales taxes, does such authorization constitute the willful failure to pay retail sales taxes held in trust under RCW 82.32.145?
2. If a corporate president assumes the duties of the treasurer as the person primarily responsible for the collection and disposition of all funds, including retail sales taxes, but hires a manager to perform the actual ministerial duties is the president a person with significant control or supervision of the retail sales tax funds within the meaning of RCW 82.32.145?
3. If a corporate president files the corporation's initial application for registration, and signs one tax return, is he a person "charged with the responsibility for the filing of returns or the payment of retail sales tax collected and held in trust" within the meaning of RCW 82.32.145?

DISCUSSION:

[1] RCW 82.32.145 imposes personal liability for retail sales taxes collected but not remitted to the state on corporate officers or other persons upon termination of the business. It states in part:

- (1) Upon termination, dissolution, or abandonment of a corporate 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 wilfully 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.

For purposes of this subsection "wilfully fails to pay or to cause to be paid" means that the failure was the result of an intentional, conscious, and voluntary course of action.

(2) The officer or other person shall be liable only for taxes collected which became due during the period he or she had the control, supervision, responsibility, or duty to act for the corporation described in subsection (1) of this section, plus interest and penalties on those taxes.

WAC 458-20-217 (Rule 217) is the lawfully promulgated rule implementing the above statute and has the same force and effect unless declared invalid by the judgment of a court of record not appealed from. It states in part:

(6) TRUST FUND ACCOUNTABILITY FOR RETAIL SALES TAX.

(d) REQUIREMENTS FOR ASSESSMENT: Before the department may assess trust fund accountability for retail sales tax held in trust, the statute requires that the underlying retail sales tax liability be that of a corporation. Second, there must also be a termination, dissolution or abandonment of the corporation. Third, the person against whom personal liability is sought willfully failed to pay or to cause to be paid retail sales tax collected and held in trust. Fourth, the person against whom personal liability is sought is a person who has control or supervision over the trust funds or is responsible for reporting or remitting the retail sales tax. Finally, [5] there must be no reasonable means to collect the tax directly from the corporation. (Brackets ours.)

In applying the above statute and rule to President's case, it appears that requirements 1,2, and 5 have been met, and that the primary area of dispute lies in requirement 3 and 4.

Requirement 3 is that President must have "willfully failed to pay or cause to be paid retail sales tax collected and held in trust." Rule 217 defines this to be:

(g) WILLFULLY FAILS TO PAY OR TO CAUSE TO BE PAID: The statute defines the term "willfully fails to pay or to cause to be paid" as an intentional, conscious and voluntary course of action. The failure to pay over such tax must be the result of a willful failure to pay or to cause to be paid to the state any retail sales tax COLLECTED on retail sales by the corporation as opposed to retail sales tax due on the corporation's consumable items.

For example, if the treasurer knows that the retail sales tax must be remitted to the state on the twenty-fifth day of the following month, but rather than holding the funds for payment on the twenty-fifth, uses such funds to pay for any other obligation such as the payroll or additional inventory, such act is an intentional, conscious and voluntary course of action. If there are insufficient funds on the twenty-fifth day of the following month to pay over to the state, the treasurer will have willfully failed to pay or to cause to be paid retail sales tax held in trust.

In President's case, [Corp.] had outstanding warrants for unpaid retail sales taxes covering periods as early as January As corporate president and fifty percent shareholder of the corporation, we find it difficult to believe that President could have been unaware of these outstanding tax liabilities. Despite these known tax liabilities, however, President continued to sign and authorize two to three checks per month for payment of obligations other than delinquent or current retail sales tax liabilities. Such acts were intentional, conscious and voluntary and accordingly, we find that President willfully failed to pay or caused to be paid retail sales taxes held in trust within the meaning of RCW 82.32.145.

[2] Requirement 4 is that President must be a person who either (i) has control or supervision of retail sales tax funds collected and held in trust under RCW 82.08.050 or (ii)

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. Rule 217 defines "Control or supervision of the collection of retail sales tax" to mean:

the person who has the power and responsibility under corporate bylaws, job description or other proper delegation of authority (as established by written documentation or through a course of conduct) to collect, account and deposit the corporate revenue and to make payment of the retail sales tax to the department of revenue.

Article III; Section 3 of [Corp.]'s bylaws describes the powers and duties of its corporate treasurer as follows:

... (d) Treasurer. Subject to the decision and control of the board of directors, the treasurer shall have the custody, control, and disposition of the funds and securities of the corporation and shall account for the same...

Applying the above statute and rules, it is clear that during the period after September . . ., when President assumed the duties of corporate treasurer in addition to President, he was the primary person responsible for custody, control, and disposition of all funds, including the retail sales tax collected. This is true, notwithstanding the fact that he may have hired a manager to perform the actual ministerial duties.

Article III; Section 3 of [Corp.]'s bylaws describes the powers and duties of its corporate president as follows:

(a) President. The president shall be the chief executive officer of the corporation and, subject to the direction and control of the board of directors, shall have general charge and supervision over its property, business, and affairs.

Although the bylaws do not impose primary responsibility or supervision for the collection of sales tax upon the president, they clearly impose upon him the general responsibility and supervision for all of the corporation's property, business, and affairs, which includes the collection and disposition of retail sales taxes. RCW 82.32.145 does not limit trust fund liability to only the officer or person with primary responsibility or supervision, but imposes it 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, ..., if such officer or other person wilfully fails to pay or to cause to be paid any taxes due from the corporation pursuant to chapter 82.08 RCW. (Emphasis ours.)

Accordingly, we find that President supervised the collection of retail sales taxes within the meaning of RCW 82.32.145 and is therefore personally responsible for the remittance of the taxes. We believe that this broad reading of RCW 82.32.145 is mandated by the Legislative history of its passage.¹

[3] Even assuming arguendo, that President did not satisfy requirement 4(i), we believe that his activity would nevertheless meet the requirement of 4(ii) which attaches the trust fund personal liability upon a person who "is charged with the responsibility for the filing of returns or the payment of retail sales tax collected and held in trust." We note from the file that President filed the initial application for Certificate of Registration with the Department of Revenue, dated . . . and that he signed and filed the . . . state excise tax return. Again, although President may not have had the primary responsibility for filing tax returns and payment of retail sales tax collected, these acts clearly showed that President was a person charged with the responsibility and authority to file tax returns or the payment of retail sales tax collected and in fact did so.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 24th day of August 1990.

¹RCW 82.32.145 was enacted in Substitute House Bill 198 during 1987 regular session of the Washington State Legislature. This bill was part of a package of Department of Revenue request legislation. The Final Legislative Report for the Fiftieth Washington State Legislature 1987 Regular and Special Sessions contains the following bill summary. "Procedures for collecting unremitted sales taxes owing from businesses are altered. In the event of a termination of a business, any officer or individual having a proprietary interest in the corporation will be personally liable for state and local sales tax funds that have not been remitted to the state within ten days of the business termination date."