

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. 99-024
)	
...)	Registration No. ...
)	Warrant Nos. ..., ...& ...
)	
)	

- [1] RULE 217; RCW 82.32.130: RETAIL SALES TAX -- TRUST FUND ACCOUNTABILITY -- CONTROL OR SUPERVISION -- BANK AUTHORIZATION. A corporate president, who signed a bank authorization allowing others to write checks on the corporate bank account during a period when the corporation collected, but failed to remit sales taxes, had control over whether sales taxes collected and deposited in the account would be paid.
- [2] RULE 217; RCW 82.32.130:RETAIL SALES TAX -- TRUST FUND ACCOUNTABILITY -- WILLFUL. A corporate president, who determined what creditors would be paid from a bank account in which sales taxes had been deposited, willfully failed to pay sales taxes held in trust.
- [3] RULE 217; RCW 82.32.130: RETAIL SALES TAX -- TRUST FUND ACCOUNTABILITY -- CIRCUMSTANCES BEYOND CONTROL -- EMBEZZLEMENT -- PROOF. A corporate president, who alleged he failed to pay sales taxes held in trust because of embezzlement, must document the criminal act with a police report, cancelled checks, or other evidence.

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:

The president of a defunct corporation protests his personal liability for sales tax the corporation failed to remit. ¹

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

FACTS:

M. Pree, A.L.J. -- . . . (taxpayer) was a corporation that installed drywall in Washington. It charged retail sales tax on its services, but failed to remit the tax collected from the charges for the period from July, 1996 through September, 1997.² The Department of Revenue (Department) revoked the taxpayer's license on September 24, 1997.

The Department's Compliance Division determined the taxpayer was defunct and without assets.³ On May 18, 1998, the Compliance Division notified the taxpayer's former president and principal shareholder, . . . (the president), that he was personally liable for the unpaid retail sales tax, interest and penalties.

The president appealed the personal liability, contending the requirements for the assessment were not met. The president asserts he was not the person in control or responsible for payment, as established by course of conduct. Further, the president states he did not willfully fail to pay the taxes, nor cause them not to be paid. The president argues the circumstances surrounding the failure to pay the taxes were beyond his control.

According to the president, he and his wife, also an officer and principal shareholder, sold the taxpayer to two individuals (successors) in February, 1996. They failed to document the sale as well as their removal as officers. The president and his wife left the state, but continued to receive payments for their equity interests. The successors took over the business and began writing the taxpayer's checks.

However, they failed to pay taxes to the Department as well as meet their obligations for several other agencies. The president's wife returned to deal with the taxpayer's various delinquencies. Later the president returned to finish several jobs undertaken by the taxpayer.

It appears the agreement to sell the business was oral, as well as the delegation of authority to pay taxes and conduct other corporate business of the taxpayer. The successors did file the annual reports with the Secretary of State designating themselves as vice president and treasurer, but continued to name the president and his wife as the president and secretary, respectively. All four continued to be authorized to sign checks drawn on the taxpayer's account. In fact on April 16, 1997, the president signed a signature card at a second bank, which authorized him, as well as his wife, and one successor, the vice president, to sign the corporate checks.

The president also alleged the successors illegally embezzled funds of the corporation, but the sheriff's office considered it a civil matter. The president failed to document the claim with a police report, cancelled checks, or other evidence.

² The total taxes, including business and occupation taxes, totaled \$ The sales tax, plus interest and penalties on the sales tax, totaled \$

³ The fact that the corporation was defunct and inactive is undisputed.

The Compliance Division also notes the president continued to be named as the principal for the taxpayer's contractor's bond through 1998. According to the Department of Labor and Industries, the president was also named as the primary person responsible for renewing taxpayer's annual contractor's license, with his wife listed as a responsible party. Sales taxes at issue were deposited into the account at the second bank, where the president on April 16, 1997 authorized himself, his wife, and the vice president, a successor, to sign checks drawing on the account. However, during the periods at issue, most of the checks appear to be signed by the successors. Finally, the Compliance Division notes the president purchased and used corporate vehicles, commingling his personal assets with those of the corporation.

The Compliance Division recognizes that the president was not the only party responsible for remitting the sales taxes collected to the Department. The other officers were also responsible. However, the Compliance Division states this does not diminish the president's role as the primary authority in the control and operation of the taxpayer.

ISSUES:

The president raised three issues we will address:

1. Was the president the person responsible for payment?
2. Did the president willfully fail to pay the taxes, or cause them not to be paid?
3. Were the circumstances surrounding the failure to pay the taxes beyond the president's control?

DISCUSSION:

Businesses, such as the taxpayer, making retail sales, are required to collect retail sales tax, hold it in trust, and remit it to the Department. RCW 82.08.050. Taxpayers failing to remit retail sales tax to the state become personally liable. *Id.* If the tax is not paid on time, penalties and interest are imposed. *See* RCW 82.32.090 and RCW 82.32.050.

Under RCW 82.32.130, upon termination or abandonment of a corporation, any officer having control or supervision of sales tax held in trust, but not remitted to the Department under RCW 82.08.050, becomes liable for the sales tax plus interest and penalties on the sales tax. The failure to pay the sales tax must be willful and not due to circumstances beyond the control of the officer. WAC 458-20-217 (Rule 217).

[1] Subsection (6)(i) of Rule 217 defines "control or supervision of the collection of retail sales tax":

"Control or supervision shall 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. The term means significant rather than exclusive control or supervision. Thus, the term shall not mean the sales clerk who actually collects the funds from the customer or the person whose only responsibility is to take control of the funds and deposit the same into the bank, but it shall include the treasurer of the corporation if it is that person's responsibility to assure that the revenue is collected from the cash registers, tills or similar collection devices and that the amounts are deposited into the corporate account. It may also include the bookkeeper if the bookkeeper has the responsibility to collect, account and deposit the corporate revenue. In both examples, it is the treasurer or bookkeeper who have the significant control or supervision.

(ii) "Responsibility for the filing of returns or the payment of the retail sales tax collected and held in trust" shall mean the person who has the authority and discretion to file state excise tax returns and to determine which corporate debts should be paid. The person who signs the state excise tax returns or signs checks on behalf of or for the corporation may be a responsible party if that person also has the authority and discretion to determine which corporate debts should be paid. If the corporate account requires the signature of more than one person, then all such signatories may be a responsible party for trust fund accountability purposes. A member of the board of directors, a shareholder or an officer may also become a responsible party if the director, shareholder or officer actually approves the payment of corporate debts whereby the result of such approval is to pay the trust funds to someone other than the department of revenue.

In the midst of the period in question, the president approved who could access the sales tax in the bank account by signing the bank authorization and signature card. As stated in Det. No. 90-319, 10 WTD 319 (1990):

It is also clear that the Taxpayer had the power to approve payment of corporate debts from the operating account. The result of approving checks for payment of payroll, rent, and other expenses was to pay the trust funds to someone other than the Department.

The Taxpayer's liability did not stop when he turned the keys over to the bank. Under the rule, it is the corporate "authority" or "power" that is determinative, not the exercise of that authority and power. The fact that he allowed someone else to exercise that power does not relieve him of liability under the law.

Generally corporate bylaws do not impose primary responsibility or supervision for the collection of sales tax upon the president, but 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”.

The president had the authority to control the collection of retail sales tax. His course of conduct, including his signing of the bank authorization, established he had authority during the period in question. He determined what would be paid, who would make the payment, and from which bank account. The president was a person responsible for payment of the sales taxes.

[2] The president also asserts he did not willfully fail to pay the taxes. Subsection (6)(g) of Rule 217 provides in part:

(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 Det. No. 95-059, 15 WTD 130 (1995), we said:

The taxpayer stated during the hearing that Corporation ceased maintaining a separate account for the retail sales tax while he was president of Corporation. This clearly shows that the taxpayer had knowledge of the tax obligations of Corporation. Further, Corporation had a history of delinquent payment of its state tax obligations even when a separate account was maintained. The taxpayer admitted using the collected retail sales tax to pay other obligations of Corporation. These facts demonstrate the "willfulness" contemplated by RCW 82.32.145 and Rule 217. Det. No. 93-114, 13 WTD 249 (1993).

Here the taxpayer was aware tax was due, and returned to try to straighten out the tax problem as well as other problems with customers, creditors, and agencies. Ultimately, he was not successful, but it is clear that for a period of time he had the control discussed above and willfully determined what would be paid, who would make the payment, and from which bank account.

[3] Finally, the president contends the failure to pay the taxes was due to circumstances beyond his control. Subsection (6)(h) of Rule 217 provides:

(h) CIRCUMSTANCES BEYOND THE CONTROL: Any person, who shall otherwise meet the requirements for personal liability, shall not be personally liable if the failure to pay or to cause to be paid is the result of circumstances beyond the control of such person and that person has exercised good faith in collecting and attempting to hold the funds in trust. The following examples are provided for illustrative purposes only and they do not, in any way, limit the scope of the circumstances which may be beyond the control of the person against whom liability is sought. Each case will be determined in accordance with its particular facts and circumstances.

(i) Immediately prior to timely payment of the retail sales tax, unknown to the person against whom personal liability is sought, the Internal Revenue Service levies and seizes the money. Such occurrence is beyond the control of the person against whom personal liability is sought.

(ii) Immediately prior to timely payment of the retail sales tax, unknown to the person against whom personal liability is sought, the person learns that the business is the victim of an embezzler, the criminal act of which has been reported and duly documented by the local law enforcement authority. Such occurrence is beyond the control of the person against whom personal liability is sought.

(iii) Immediately prior to timely payment of the retail sales tax, unknown to the person against whom personal liability is sought, the bank in which the retail sales tax has been deposited exercises a right of offset and removes the money from the taxpayer's control. Such occurrence is beyond the control of the person against whom personal liability is sought.

(iv) Prior to the date for timely payment of the retail sales tax, the person against whom personal liability is sought agrees to a judgment against the corporation and allows the judgment creditor to garnish the funds held in trust and become a preferred creditor over the state. Such occurrence lacks good faith and is not beyond the control of the person against whom personal liability is sought.

The president alleges embezzlement discussed in (ii), but has failed to document it with a copy of a report to the local authorities. The president acknowledges the police reviewed the taxpayer's situation, but did not find a crime.

We have addressed the circumstance of selling a corporation, only to have the purchaser fail to meet its tax obligations. In Det. No. 94-090, 14 WTD 244, 249-250 (1994), we stated:

[5] Lastly, the taxpayer asserts the fact that the buyer of his company did not pay the delinquent sales taxes in accordance with the sale agreement is a circumstance beyond the taxpayer's control such that he should be relieved of liability under RCW 82.32.145(3). Again, intent to pay timely is the key. The taxpayer did have complete control over timely payment and failed to make it. Furthermore, the taxpayer did not exercise good faith in collecting and holding the sales tax funds in trust. See Rule 217(6)(h). The buyer's non-payment did not affect timely payment. It is not a circumstance which relieves the taxpayer of his individual liability.

[6] While it is unfortunate that the buyer did not live up to his agreement to pay the delinquent tax, it is important to notice that the Department was not a party to that agreement. It is not bound by that agreement. It is free to pursue whichever party it is authorized by law to pursue. Based on RCW 82.32.145, the taxpayer is such a party. The fact that the buyer may have breached its contract with the taxpayer's company is a matter between those two parties. The Department is not required to suffer a loss as the result of the buyer's nonfeasance.

The president did not lose the right to control the taxpayer when he left the state. In fact, he returned and, with his wife, retook control of the failing corporation. She collected revenue and paid bills. He finished jobs. They did not use any receipts or other remaining assets to pay the delinquent taxes. These circumstances do not exonerate the president.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

Dated this 9th of February, 1999.